

Adalah's Review

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Introduction

The Editors

Law and violence are often understood to be opposites. The rule of law is conceived of as constituting an orderly alternative to violence. In abandoning this dichotomous depiction of law and violence, legal scholar Robert Cover describes how law manages to work its lethal will while distancing itself from its violent deeds.¹ Violence, others argue, provides the method for establishing legal order, the means through which law works, and the reason for having law.²

This volume of *Adalah's Review* addresses this relationship between law and violence, and attends mainly, but not exclusively, to law's relationship to state violence. The questions that concern the authors in this issue are: How does law conceive of violence and authority? How does law relate, conceptualize, regulate, and punish certain forms of violence that threaten legal order? What forms of state violence are made legal and authorized by law? How does law draw the boundary between criminal violence and legal violence? Does law acknowledge its violent characteristics? And finally, what are the consequences of law's relationship to violence on questions of citizenship?

This issue was conceptualized in early 2001, after the eruption of al-Aqsa Intifada in the 1967- Occupied Palestinian Territories and in Israel, in an attempt to address these questions. Given the limited literature available on the Intifada in Israel, we decided to take state violence and its relationship to law during this period as our point of departure. At the same time, we chose to situate these forms of violence historically and connect them with state violence in the Occupied Territories. Meanwhile, during the course of

production of this journal, state violence in the Occupied Territories severely escalated. As of this writing, we have witnessed the military re-occupation of all Palestinian towns, the massive firing of heavy weaponry from the ground and from the air, targeted political assassinations, destruction of houses and fields resulting in the displacement of thousands of families, operations in the refugee camps and Palestinian towns resulting in the killing and injury of hundreds, the rounding up and interrogation of all men and boys and their massive arrests, the total closures and curfews, and the imprisonment of people in their homes taken over by the Israeli army. The offensive in the Jenin refugee camp, the siege of the Church of the Nativity in Bethelhem, the imprisonment of President Yasser Arafat in his compound in Ramallah, the total devastation of the Old City of Nablus, and the destruction of Palestinian Authority institutions and civil society organizations are specific events that testify to this escalation of state violence. The overwhelming continuous Israeli violence in the Occupied Territories and the changing nature of it requires another volume in order to analyze these wide-ranging forms of state violence and their relationship with law.

This volume maintains as its starting point the Intifada in Israel, during which the State employed violent means to suppress the political protests of its Palestinian citizens. State violence culminated in the deaths of 13 Palestinian citizens, the injury of hundreds, and the arrests of over 1,000 people. Some of these political protests developed into acts of insurgency, which took mainly the form of stone-throwing and the burning of tires to prevent



the police from entering certain Palestinian areas in Israel. Israeli law and legal actors were active participants in the employment and/or the evaluation of these forms of violence.

The Intifada in Israel erupted on 1 October 2000, three days after al-Aqsa Intifada broke out in the Occupied Territories. The Intifada in Israel was to be renamed as the “October Events,” or “Habatt October” (October Uprising), among other reasons that this introduction addresses, to distinguish it from al-Aqsa Intifada in the Occupied Territories.

On 28 September 2000, Ariel Sharon, then Likud Party leader and Member of Knesset (MK), surrounded by scores of soldiers, visited the Muslim religious compound of al-Haram al-Sharif. To Palestinians and many others in the international community, Sharon’s visit to this holy site was extremely provocative. The next day, Israeli security forces opened fire on demonstrators at al-Aqsa Mosque (located in al-Haram al-Sharif) who were protesting Sharon’s visit. Following these events, violent clashes erupted in the Occupied Territories, resulting in the death and injury of dozens of Palestinians during the first days.

On 30 September 2000, the High Follow-up Committee for the Arab Citizens in Israel called for a general strike by Palestinian citizens in Israel to express their solidarity with Palestinians in the Occupied Territories. From 1-3 October 2000, Palestinian citizens of Israel, in massive numbers, staged demonstrations in scores of Palestinian towns and villages throughout the country. On 1 October 2000, the demonstrators were met by Israeli security forces, and the protests developed into riots. In these areas, Palestinian citizen

demonstrators threw stones at the Israeli police, who opened fire on them using tear gas, rubber-coated steel bullets and live ammunition. On this day, the Israeli police killed two Palestinian citizens, and the news of their deaths led thousands of others to engage in intense acts of insurgency against the security forces on 2 and 3 October 2000. During these three days, the Israeli police killed 11 Palestinian citizens and wounded hundreds more.

During Yom Kippur weekend (8-9 October 2000), immediately after an attack on a Jewish holy site in the West Bank and the kidnapping of three Israeli soldiers by Hezbollah, Israeli Jews participated in anti-Palestinian riots, targeting people, properties, and mosques in various towns in Israel. Among the worst events was an attack on the Eastern neighborhood in Nazareth by hundreds of Israeli youth from neighboring Natserat Illit (a Jewish settlement neighboring Nazareth). The youth from Natserat Illit threw stones at Palestinian-owned cars and houses and set some of them on fire, vandalized and looted Palestinian shops and restaurants, and shouted “Death to Arabs.” As a result of the clashes in Nazareth, another two Palestinian citizens were killed by the police.

In October 2000, the police arrested more than 1,000 people for Intifada-related acts, about two-thirds of whom were Palestinian citizens and the remaining, Israeli Jewish citizens. By mid-October, the demonstrations and riots in Israel had ended, but arrests of Palestinian citizens continued. During October and November, Palestinian citizens comprised over 80% of those criminally indicted and detained without bond until the end

of trial.³ A national network of over 100 Palestinian lawyers represented the detainees on a voluntary basis throughout the criminal detention process.⁴

These events, namely, the killing of 13 Palestinian citizens by the police and the injury of hundreds more; the massive number of demonstrations in so many locations throughout the country; the sweeping arrests of Palestinian citizens; and the Israeli Jewish anti-Palestinian riots were a significant episode that seemingly reshaped the relationship between the state and the Palestinian minority. This episode, however, was not unique, aberrant or exceptional. In recent years only, police have used excessive violence against Palestinian citizen protestors, employing means not used against Israeli Jewish demonstrators. For example, in April 1998, violent clashes between Palestinian citizens and the police took place in Umm al-Sahali, following the court-ordered demolition of Palestinian homes in Israel. In September 1998, police in Umm al-Fahem clashed for three days with Palestinian citizen demonstrators, who were protesting against the expropriation of Arab-owned farmland for use by the army as a military training area. Hundreds of Palestinian citizens, including students, were injured by tear gas, rubber-coated steel bullets, and live ammunition, after police stormed the high school in Umm al-Fahem. Tens of Palestinian citizen demonstrators were also injured in Lod in June 1999 and during student protests in March and April 2000, due to police violence.⁵

Accordingly, this issue of *Adalah's Review* also convenes essays that address other forms of violence against Palestinians in Israel outside the scope of the Intifada. Convening these essays is

meant to escape an event-centered depiction of the Intifada protests and the state's response. An event-centered depiction would approach state violence during the Intifada as a sequence of violent acts, either politically expedient or improper, detached from the flow of other events. This in turn would allow for these specific events to be evaluated and possibly dismissed or condemned.⁶ State violence against Palestinian citizens would be narrowed down to the month of October 2000 to allow the investigation of its lawfulness. By including articles that discuss other aspects of violence against Palestinians in Israel, we attempt to situate the violence that occurred at this time in the longer history of violence against Palestinian citizens without reducing the Intifada to this history. In other words, we are hoping to capture these events in Israel as an integral unit of a larger structure without losing sight of the ruptures that events can generate, the different reasons for the various episodes of violence, and their diverse dimensions and characteristics.

The renaming of the Intifada in Israel as the "October events" has other consequences. It not only detaches the events of October from other events involving state violence against Palestinian citizens, it also removes them from the Intifada in the Occupied Territories. State violence in the West Bank and Gaza, which continues to this day, has lost its bounded and fixed characteristics. The continuing state violence in the West Bank and Gaza has resulted in countless deaths. The impossibility of establishing the definite number of the dead testifies to the transformation of this episode of state violence into a structure of daily life that can no longer be isolated from the flow of



other events. Redefining the Intifada and separating its two spatial components - Israel and the Occupied Territories - was necessary in order to distinguish between an event that ceased to be and an event that came to dominate the structure of daily life.

Recognizing that the “October events” in Israel have been confined both temporally and spatially, this volume of *Adalah's Review* resituates them in the longer history of violence against Palestinians and in the broader context of al-Aqsa Intifada. The essays in this volume attempt to offer an understanding of the ways in which law, in different historical and political settings, exists in relationship to violence. Together, however, they also shed light on the structural and pervasive dimensions of state violence and law's treatment of such violence.

The *Review* opens with an essay by Rina Rosenberg entitled “On the Collective Criminalization of Political Protestors.” In this essay, Rosenberg traces the process of collective criminalization of Palestinian citizen protestors detained during October and November 2000. Rosenberg analyzes the legal mechanisms by which criminalization was made possible, and argues that law's denial of police violence is a necessary measure in transforming political protestors into disorderly criminals. Rosenberg further argues that instead of treating Palestinian citizen protestors as individual criminals - one of the basic assumptions of criminal law - police, prosecutors and judges emphasized the collective characteristics of their actions and attended to the political nature of the insurgencies.

The “October 2000” events in Israel resulted in

the establishment of an official Commission of Inquiry, the mandate of which is to investigate the clashes between the security forces and Arab and Jewish citizens beginning on 29 September 2000 and culminating in the deaths and injury of Israeli citizens.⁷ In her “Law's Conceptions of State Violence,” Samera Esmeir discusses the ways in which the Commission conceptualizes and delimits police violence employed against Palestinian citizens. It attends to the specific forms of police violence excluded from the Commission's investigation, such as rituals of arrest and interrogation, and the theatrical demonstration of state power in the streets of Palestinian towns in Israel. These acts, Esmeir explains, are classified as legal and legitimate performances aimed at maintaining order and securing the rule of law.

Next is an article by Amr Shalakany on the violent jurisdictions of Oslo in the Occupied Territories. Shalakany explores the connections between the laws of jurisdiction under the Oslo Accords and the collective punishment inflicted by the Israeli army on Palestinians living in the Occupied Territories. He investigates the physical violence wrought by Oslo's jurisdictional arrangements, as well as the discursive violence, which fragments the space of the Occupied Territories and disempowers lawyers struggling against the occupation as a whole.

Whereas Shalakany leaves us with a fragmented space of action available for lawyers under the framework of Oslo, Nimer Sultany begins with this fragmented space of action and investigates petitions brought before the Israeli Supreme Court during al-Aqsa Intifada in the Occupied Territories.

In these petitions, Palestinians and human rights organizations asked the Supreme Court to declare illegal certain practices of the occupation such as closures, land confiscations, arrests, etc. Sultany documents the Court's systematic rejection of such petitions, analyzes the legal techniques employed by the Court in this process, and concludes that petitions brought before the Israeli Supreme Court to challenge specific occupation practices are doomed to failure.

Next is a testimony by attorney Jamil Dakwar, co-authored with Jake Wadland. The testimony offers an account of Dakwar's experience while representing a Palestinian citizen of Israel who was administratively detained in November 2000. The use of repressive legal measures such as administrative detention points to the continuous state of emergency to which Palestinians in Israel and the Occupied Territories are subjected. In their article, Dakwar and Wadland address different constraints lawyers face when representing administrative detainees.

The next two essays in this section offer some insights on other forms of violence against Palestinian citizens and law's response to it. Leora Bilsky discusses the massacre of Palestinians in both Majd el-Krum in 1948 and Kufr Kassem in 1956. She analyzes how the Supreme Court separates the state's legitimate violence from its illegitimate violence, and explains the consequences of this separation for the boundaries of citizenship in Israel. Yousef Taiseer Jabareen investigates a violent attack carried out in 1997 by militant Israeli Jews against three Palestinian women, citizens of Israel, who lived in West Jerusalem. He too probes law's response to this

attack. Jabareen explores law's definition of "hostile attacks against Israel" and the Court's refusal to recognize the three Palestinian women as victims of such hostile attacks. The consequences of this legal response to violence, Jabareen argues, have far reaching effects on the definition of citizenship in Israel, from which Palestinians are effectively excluded.

For our case review, Muhammad Dahleh, in his "Fire and Advance," offers a critique of a Supreme Court decision on a petition filed by the Committee of Martyrs' Families and Adalah, which challenged the promotion of a Border Police Commander, Benzy Sau. The official Commission of Inquiry hearings revealed that Sau had command responsibility for the Wadi 'Ara area in which four Palestinian citizens of Israel were killed by security forces during early October 2000. Dahleh argues that in rejecting the petition, the Supreme Court ignored its own precedent in cases involving the promotion of an official whose actions had resulted in the loss of public trust. Dahleh concludes that the Supreme Court's decision in *Sau* failed to include Palestinian citizens in its definition of the "public." Palestinian trust or lack of it in state institutions is thus relegated as irrelevant, allowing the Court to uphold the promotion and ignore the consequences of Sau's actions.

The Special Inquiry dossier, the second section of this issue, compiles a collection of materials about the official Commission of Inquiry, which is investigating the "October 2000" events in Israel. The dossier presents readers with five documents. The first two - the indictment pronounced by the High Follow-up Committee for the Arab citizens in



Israel against the State of Israel and the statement of the Committee of the Martyrs' Families - reveal the expectations and ambivalence of the Palestinian community in Israel to the Commission. The next two documents address the connections between the Israeli Commission and tribunals that investigated state violence in England and Northern Ireland, including the Bloody Sunday Inquiry. The first of these documents is a letter to the Palestinian martyrs' families written by a civil rights activist from Northern Ireland, whose father was killed during the Bloody Sunday events in Derry in 1972. The second document is a legal opinion prepared by the Bar Human Rights Committee of England and Wales that outlines English laws and practices before tribunals of inquiry. Adalah solicited this document in preparation for the hearings before the Commission in Israel.

The Commission has not concluded its proceedings yet, and therefore this Special Inquiry dossier does not offer an evaluation of its work. The Commission, however, reached preliminary conclusions in February 2002 and issued 14 warning letters to eleven Israeli political leaders and police officials and to three Palestinian public representatives. In response, Hassan Jabareen, the General Director of Adalah, filed a motion to the Commission charging that the issuance of the warnings against the Palestinian public representatives is illegal and called on it to rescind these warnings. The Commission rejected this motion and warnings hearings began in mid-June 2002. Adalah's motion is the final piece in this volume.

End Notes

1. Robert Cover, "Violence and the Word," 95 Yale L.J. 1609 (1968).
2. Austin Sarat and Thomas Kearns, "Introduction," in *Law's Violence*, eds. Austin Sarat and Thomas Kearns (Ann Arbor: The University of Michigan Press, 1993) at 1.
3. See The Ministry of Justice, "Statistics on Arrestees and Detainees, 28 September-30 October 2000," available on Adalah's website: www.adalah.org/coi_reports/detainees.htm.
4. Statement of the Palestinian lawyers, 17 October 2000 on file with Adalah. See also ad in *Ha'aretz*, 27 October 2000 signed by over 450 lawyers calling for the immediate release of all Palestinian citizen detainees.
5. See Adalah, 1998 Annual Report; Adalah, 1999 Annual Report; Julia Kernochan, "Land Confiscation and Police Brutality in Umm al-Fahem," 1 *Adalah's Review* 49 (Fall 1999); and Orna Kohn and Tawfiq Rangwala, "Palestinian Students, Political Space, and Haifa University," 2 *Adalah's Review* 69 (Fall 2000).
6. Allen Feldman, "The Event and the Shadow: Figure and Ground in Violence," 8(1&2) *Transforming Anthropology* 3 (1999).
7. Government Decision No. 2490 issued on 8 November 2000 regarding the establishment of the official Commission of Inquiry.



On the Collective Criminalization of Political Protestors

Rina Rosenberg

This essay describes and analyzes the process of the collective criminalization of Palestinian citizens of Israel who engaged in political protest actions in solidarity with Palestinians in the Occupied Territories in October 2000. The essay focuses on the first stages of this process - arrest, indictment and detention. By process, it is meant the legal mechanisms available in the law itself and employed by state institutions - the police, the prosecution authorities, and the courts - at different stages through which collective criminalization was made possible. Through these mechanisms, Palestinian political protest at the beginning of the Intifada was defined as a criminal legal problem, in an effort to de-politicize it.

An examination of the process reveals that state institutions treated Palestinian citizen political protestors as a criminal collective and not as individuals. This is antithetical to the basic premise of criminal law, which is that of individual responsibility. Palestinian citizen political protest activity took many forms, from mere attendance at demonstrations to acts such as stone throwing, which caused harm to a few individuals. However, all of these acts were treated as insurgencies, as constituting a unified threat to the state. This "collectivization" was done at all levels - by the police through mass arrests, by the prosecuting authorities through requests for detention without bond until the end of trial in all cases, and by the Supreme Court, which ordered remand in almost all cases in October and November 2000.

This essay takes as a particular focus of inquiry the first detention case to be decided by the Supreme Court during this period - the case of *Hamed* - which set the tone and framework for all

subsequent decisions. An analysis of this representative case and decision, with references to several of the other Supreme Court judgments, offers a rich view of the legal and rhetorical mechanisms by which Palestinian citizen political protestors were transformed, as a group, into disorderly criminals.

The Police

Allen Feldman, in his study of violence in Northern Ireland, discusses the concept of the "collectivization of arrest," to describe the massive arrests of Irish citizens carried out by the British army and the police in the 1970s. He states that:

in ostensibly liberal democracies, juridical intervention and correction, from arrest to trial to prison, is predicated on individualization - the creation of a juridical subject through documentation and examination systems, and spatial confinement. The collectivization of arrest and interrogation, and their dissemination as routinized features of day-to-day life violated the jural principle of individualized accountability for criminal acts. Arrestees were extracted as insignias of dangerous and conspiratorial collectivities that extended from the paramilitary organization to the entire ethnic community.¹

According to Ministry of Justice statistics, from 28 September - 30 October 2000, the Israeli police arrested about 1,000 people (660 Palestinians and 340 Israeli Jews) for Intifada-related actions.² Causes for arrest of Palestinian citizens ranged from mere presence at the scene of demonstrations staged in Palestinian towns and



villages throughout the country, to closing entrance roads to Palestinian localities with burning tires, to throwing stones and sometimes Molotov cocktails at the police without causing injury, to other actions, which resulted in harm to a few individuals and their property. Arrests of Jewish Israelis were made primarily for citizen-to-citizen offenses such as shouting racist slogans calling for “death to Arabs,” attacking Palestinians, and causing huge destruction to their property and their holy sites during anti-Palestinian riots. Oftentimes, rather than assisting Palestinian citizens who were under attack, the police used violent forceful means against them, and sided with Jewish Israelis, the perpetrators of the attacks.

Arrests of Palestinian citizens continued throughout November 2000 for their alleged participation in the protests of early October 2000. The police effectuated these arrests on the streets, at the entrances of Palestinian villages and towns where internal “checkpoints” were established, and by conducting dozens of night-time “commando” raids, storming into homes in tens of Palestinian localities in Israel.³ In the course of arrest, numerous Palestinian citizens reported brutal treatment at the hands of the police, ranging from intense psychological pressure and intimidation during interrogation to physical beatings in order to force confessions to their participation in the clashes.⁴ Some of these arrests were treated as “security cases,” with the General Security Service (GSS) in charge of conducting the pre-indictment investigation. In these cases, Palestinian citizen political protestors were held in incommunicado detention for several days,

prohibited from meeting with lawyers.⁵

The actions of the Israeli police lay the groundwork for the collective criminalization of Palestinian citizen protestors. By executing mass arrests of Palestinian citizens and utilizing threatening methods of arrest such as checkpoints and night-time home raids as well as brutal force, the police made no distinctions between the different actions or behaviors of the protestors and other community members. This large pool of arrestees is determinant of the means by which the state authorities deemed it necessary to exert control over and contain the Palestinian political protestors.⁶

The Prosecutors

Based on these arrests, the State Prosecutor frequently indicted Palestinian citizens for the felony offense of maliciously endangering people on a traffic route.⁷ Popularly known as “stone-throwing for nationalistic purposes,” this offense is classified with attempted murder and manslaughter as a bodily harm offense, and carries the same maximum prison sentence of twenty years. Other crimes commonly charged included misdemeanor public order offenses such as prohibited assembly, riot, assault on a policeman in the performance of his duty, assault on a policeman under aggravating circumstances, and interference with a police officer in the performance of his duty, as well as property offenses such as malicious damage.⁸

Throughout October and November 2000, the prosecuting authorities requested detention in all cases relating to the October protests by Palestinian citizens - for those charged with simple

misdemeanors to serious felonies, and for adults and minors alike. The prosecutors also filed appeals to the Supreme Court to reverse all lower court judgments that granted the release of any Palestinian citizen political protestors for any reason. These blanket requests were based on a three-page policy paper issued by the State Prosecutor on 10 October 2000, which set forth instructions to prosecutors throughout the country for the handling of these case files.⁹

The State Prosecutor opened the policy paper by defining the Palestinian citizen protests as “nationalist riots,” and noted that these incidents have expanded to include “violent acts of Jews against Arabs.” The State Prosecutor emphasized that: “the prosecution’s officers should adopt a severe policy for those who participate in riots and commit violent acts, Jews and Arabs alike.” The policy to be adopted was for prosecutors to seek remand in all cases involving those who participated in the clashes: “As long as the riots are widespread, it is necessary to detain them until the end of trial; there is no alternative to the detention of a person who by his acts endangers the lives and bodies of others.” The basis cited for these detentions was deterrence - “the accused could repeat his acts... once the riots spread throughout the country, there is no value to an alternative to detention.”

Under Israeli law, the State Prosecutor has broad discretion in the pre-trial handling and disposition of criminal cases. She has the power to decide which offenses will be charged, and most importantly, the power to decide whether or not to file an indictment as well as whether to recommend release or detention. For certain

offenses, a police prosecutor has the authority to file indictments.

According to official statistics from 28 September - 30 October 2000 that appear on the chart,¹⁰ there is a large difference between the total number of individuals arrested and indicted, among both Palestinian citizens and Jewish Israelis. This difference, however, is substantially more pronounced for Jewish Israelis.

	Arabs	Jews	Total
Total no. arrested	660 (66%)	340 (34%)	1,000
Total no. indicted	248 (79%)	66 (21%)	314
Total no. indicted and remanded	126 (81%)	29 (19%)	155

According to these statistics, 38% of Palestinian citizens arrested for offenses related to the October events were subsequently indicted. By contrast, during the same time period, the indictment rate for Jewish Israelis amounted to 19%. These figures suggest that the prosecutorial power to indict - to criminalize - was used twice as much against Palestinian citizens as it was for Israeli Jews. Moreover, as scores of arrests of Palestinian citizen political protestors continued throughout November 2000, it can be inferred that the indictment rate for Palestinians as compared with that of Israeli Jewish citizens increased substantially.

There are no official statistics concerning the implementation of the State Prosecutor’s policy document - e.g., the number of requests for remand made by prosecutors throughout the country. However, even if the State Prosecutor mandated a “sameness” approach - to treat “Jews and Arabs alike” - in terms of requests for remand, the effect of this policy was much more severe on



Palestinian citizens than on Jewish Israelis, as at least four times as many Palestinians were indicted as were Jewish Israelis. Moreover, caselaw shows that in the lower courts, local prosecutors did not follow the strict remand policy for all Jewish Israelis.¹¹

The prosecuting authorities advanced the process of collective criminalization started by the police through mass arrests of Palestinian citizens. By fully utilizing the power of indictment and establishing the policy of requesting remand in all cases, the prosecuting authorities further exacerbated the suppression of Palestinian political opposition.

The Law of Detention

The Criminal Procedure (Enforcement Powers - Arrest Law) (1996) [hereinafter the “Detention Law”] comprehensively governs all phases of the arrest and detention process in Israel. The law itself makes available certain mechanisms that enable courts to further the process of collective criminalization through detention.

While the declared purpose of the law, as set forth in Section 1(b), is “ensuring maximal protections of a person’s liberty and rights,” the Supreme Court, pursuant to the law, ordered the remand of almost all Palestinian citizen political protestors. The key to understanding the Detention Law lies in the recognition of its inherent contradictions: The law both embodies principles of individual liberty and undermines them.

Section 21 of the Detention Law governs courts’ post-indictment inquiry as to whether or not an individual should be released or detained until the

end of trial.¹² On the one hand, Section 21 focuses on the individual. For example, the statute requires courts to determine whether there is *prima facie* evidence of guilt against the accused person [provision B]; whether the accused person is charged with a serious enumerated felony offense [provisions (A)(1)(c)(1-4)]; and whether there are conditions of release that involve less harm to the freedom of the accused [provision (B)(1)]. Case precedent interpreting the Detention Law also requires courts to consider individual mitigating factors such as a defendant’s age, health, lack of prior criminal record, etc.¹³

On the other hand, embedded deeply in Section 21, is the factor of “dangerousness” - whether “the accused will endanger the safety of human life, the public safety or the security of the State” [provision (A)(1)(b)]. The breadth of this provision affords courts enormous discretion. The provision makes no reference to specific Penal Law offenses, unlike (A)(1)(c)(1-4), nor does it provide any criteria for evaluating its scope. One interpretation of this provision is whether the particular individual defendant, considering all of his/her circumstances, is a threat to public safety or state security. Another interpretation of this provision is whether an individual, when viewed as a member of a collective, constitutes a threat.

However, even if a court determines that there is *prima facie* evidence and that a defendant is dangerous, the court still must consider alternatives to detention. Section 21(B)(1) provides that the court will not order detention, according to provision (A)(1), unless “the purpose of the detention cannot be reached through bail or through conditions of release that involve less

harm to the freedom of the accused.”

Two issues regarding the subject of dangerousness were addressed in *Ganimat*, the leading Supreme Court case interpreting the law of pre-trial, post-indictment detention.¹⁴ First, the Court held unanimously that “state disaster” offenses, in this case, car theft, do not constitute *per se* grounds for detention. According to the Court, “State disaster is not a reason for detention... The State will not satisfy this burden [under Section 21 of the Detention Law, danger to public safety], just by indicating that the indicted committed a charge or offense that is a state disaster.”¹⁵ Second, a majority of the Court held that mere deterrence, without proof of concomitant danger, will no longer constitute a ground for remand on its own.

Most importantly, in *Ganimat*, the Supreme Court recognized the heightened importance of the “constitutional” right to liberty and freedom of an individual, especially after the enactment of the Basic Law: Human Dignity and Liberty (1992). According to the Court:

The right of a person for freedom... is part of the Basic Law today... [The Basic Law] states that “a person’s liberty should not be deprived or restricted through imprisonment, arrest, extradition or in any other way... and that such violation is only permitted based on a law that reflects the values of the state of Israel, that is aimed for a proper purpose in a way that does not exceed appropriate measures”... Before the enactment of the Basic Law and, of course, after it, we must put the individual’s right for freedom as a principle in our decisions. We have to interpret the amendments [to the

Detentions Law] in light of the Basic Law, and we have to find the proper balance between this right and the public interest based on our “constitutional” perspective such that we exercise our arrest powers in a proper way on every occasion where it is requested and necessary.¹⁶

The Supreme Court

In October and November 2000, the Supreme Court of Israel decided at least 22 detention cases related to the October events, 16 of which involved Palestinian citizens of the state.¹⁷ In almost all cases, the Supreme Court countenanced the State Prosecutor’s detention requests and ordered the detention of Palestinian citizens defendants - adults and minors, regardless of the severity of the offense charged. The only exceptions - where the Supreme Court rejected the state’s request for remand - related to two cases involving minors, *Anonymous* (Nov. 7) and *Imad Adawy*,¹⁸ and one case involving an adult Palestinian citizen, *Said*,¹⁹ all decided in November 2000.

The Supreme Court also applied its strict detention policy to Israeli Jewish defendants charged with offenses relating to these events. One possible explanation for this approach is that the Court did not want to open the door to a large number of appeals by Palestinian citizen defendants, who would rely on these cases, seeking release. However, as was argued concerning the “sameness approach” of the State Prosecutor, the effect of the Supreme Court’s “equal” detention policy was much more severe on Palestinian citizens due to the larger pool of those indicted and brought before the Court.

Further, the Supreme Court's "equal" detention policy put all alleged offenders on the same level; in many instances, that meant equating Palestinian citizen political protest actions with that of Israeli Jewish attacks on Palestinians.

The Supreme Court's consistent use of its remand power warrants special attention. The Supreme Court dealt with the detention cases summarily; each case was decided by one judge, who issued a one to three page judgment ordering remand. Characteristic of all of the cases, the opinions were very short, did not note many facts or rely on case precedent, lacked legal reasoning, and set forth conclusions without attempting to justify them. Only the outcome was clear: All defendants were detained without bond until the end of trial.

The illustrative case is *Hamed*, the first detention case to be handed down by the Supreme Court, immediately following the political protests by Palestinian citizens.²⁰ *Hamed* and its companion case, *Anonymous* (Oct. 10),²¹ set the tone and the framework for all of the detention cases that followed. The Supreme Court and the lower courts repeatedly cited these two and three-page judgments, decided on 8 October 2000 and 10 October 2000, respectively, as precedent in all of the subsequent cases, and as the basis for remanding Palestinian citizen political protestors.

Mr. Hamed, an 18-year-old Palestinian citizen of Israel, was indicted with two other young men by a police prosecutor for the misdemeanor offenses of prohibited assembly and rioting on 3 October 2000 in Nazareth. Although the prosecutor requested that Mr. Hamed and the two

young men be remanded until the end of trial, the Nazareth Magistrate Court ordered conditional release for all.²² The Nazareth District Court granted the State's appeal for the two other young men, ordering them remanded, and denied the appeal as to Mr. Hamed, ordering his release.²³ The State requested and was granted a stay of the decision, and then filed a second appeal to the Supreme Court, which reversed the two lower court decisions, and ordered Mr. Hamed remanded.

The Supreme Court, by Justice Heshin, found *prima facie* evidence connecting Mr. Hamed to the alleged offenses. Citing police reports, Justice Heshin stated that:

the police arrived at the location and found a road "covered with burning tires, large stones, iron, and trash cans for 100 meters, and there was no possibility of driving in the lane"... right after the police arrived, young men started to throw stones at [them] from inside the neighborhood. The respondent himself admits in his statement to the police that he threw stones on the police. Indeed, [he] claims that the police were "far," but regardless of this fact, he still participated in rioting where stones were thrown at the police.²⁴

Based on this finding, Justice Heshin concluded that according to Section 21(A)(1)(b) of the Detention Law, Mr. Hamed was dangerous and thus the cause of his detention was proven: "A person who throws stones on policemen who are trying to maintain order on a public road shows that he can continue to endanger persons or public safety."²⁵

Justice Heshin then considered whether or not an alternative to detention was possible. In ordering Mr. Hamed remanded, Justice Heshin ruled that:

In Nazareth, on 3 October, in the Safafreh neighborhood, major riots took place and policemen, who were sent to enforce order as an orderly state does, encountered young men who fought them with stones. We cannot accept this situation... Young men and adults in Israel should know that whoever throws stones at policemen who come to enforce order in a rioting place, is showing himself to be dangerous to persons and public safety. And being dangerous, it is expected that he will be detained in order to protect these values, without which we cannot establish a worthy society. Indeed, [in the case of] a person who has proven that he intentionally holds a stone and throws it on a man who society sent to enforce law and order, an alternative to detention will not keep him from doing the same deed again.²⁶

Lastly, Justice Heshin noted that “when the State is calm, it could be possible to reconsider the detention of the respondent, but we have not reached this point yet.”²⁷

In ordering that Mr. Hamed be remanded, the Supreme Court ignored the declared purpose of the Detention Law, which is “ensuring maximal protections of a person’s liberty and rights.”²⁸ The Court also failed to follow or distinguish its holding in the seminal case of *Ganimat. Hamed*, in contrast to *Ganimat*, is devoid of any rhetoric of the interests of individual liberty. There is no discussion by the Court of adherence to fundamental principles of human dignity and

liberty or even of the need to strike a balance between these individual rights on the one hand, and the “security situation” on the other hand. The Supreme Court essentially ruled, contrary to its holding in *Ganimat*, that all October 2000 protest-related offenses constitute *per se* grounds for detention.

The Supreme Court adopted a broad interpretation of the Detention Law in finding that Mr. Hamed posed a danger “to public safety.” The Court did not engage in any discussion as to the meaning of this provision nor did it distinguish *Ganimat*; it merely set forth a blanket statement, that “a person who throws stones on policemen who are trying to maintain order on a public road shows that he can continue to endanger persons or public safety.”²⁹ By contrast, the District Court, which ordered Mr. Hamed’s release, ruled that the posing of a danger to “the safety of human life, the public safety or the security of the State,” as understood in the Detention Law, could not be deduced from Mr. Hamed’s actions. The District Court based its finding on the following individual factors, either rejected or excluded from the Supreme Court’s ruling: While Mr. Hamed participated in stone throwing, the stone did not hit the officer. This fact suggested to the District Court judge that Mr. Hamed sought not to adopt too extreme a behavior. Mr. Hamed also admitted the offense and in the judge’s opinion, this worked in his favor. In addition, the judge noted that Mr. Hamed did not attempt to resist arrest and had no prior record.³⁰

The Supreme Court repeated this general rule - that stone throwers are dangerous and must be detained until the end of trial - in the subsequent



detention cases. For example, in *Wael Herbawi*, a case involving a Palestinian adult indicted for stone throwing at police, aggravated assault on a police officer, and disturbing the police in the fulfillment of their duty, the Supreme Court, by Justice Heshin noted:

[The] appellant is indicted on the kind of charge that we call “offenses of the day.” Those crimes are not like other crimes; they are crimes made by the times... the day is not far away that the country will be still. Until that day comes, as aforesaid, the public must be strictly protected against acts by stone throwers and against people who endanger the public’s lives... He who throws stones intentionally is a dangerous person to the public and he must be detained until the end of his trial. This is the general rule. This is the decision for the appellant.³¹

The Supreme Court also did not consider alternatives to detention as mandated by the Detention Law. The Detention Law instructs that even if *prima facie* evidence and dangerousness is found, “a court will not order a detention, unless... the purpose of the detention cannot be reached through bail or through conditions of release that involve less harm to the freedom of the accused.”³² In *Hamed*, the Court simply stated that for a person who throws stones, “an alternative to detention will not keep him from doing the same deed again.”³³ Thus, the Supreme Court relied on “deterrence” as the basis for detention, although the Detention Law does not authorize detention on this ground. Further, *Ganimat* prohibits “mere deterrence” without

concomitant proof of danger as a permissible ground for remand. The Court’s decision in *Hamed* cites no evidence presented by the state to prove that “the purpose of detention cannot be achieved.” As with the subject of dangerousness, this inquiry requires courts to review the special circumstances of the alleged commission of the offense, the personal circumstances of the defendant, and the possibility of release to alternatives to detention. The Supreme Court avoided such an analysis in subsequent detention cases, as well.

Justice Heshin in *Hamed* also introduced a new extra-legal test, completely absent from the Detention Law, for determining whether or not a defendant should be released or detained. In apparent contradiction to his finding that stone throwing is dangerous and mandates detention, Justice Heshin noted that it would be possible to reconsider the question of detention “when the State is calm.” The problems with this test are manifold. Who decides whether or not the State is calm - the police, the State Prosecutor, the Prime Minister, or a Supreme Court justice? Is calm restored when all clashes with the police cease? Does calm mean an end to the Palestinian citizen demonstrations? Does calmness in the state mean the whole country, a particular region, or within a specific town or village?

In subsequent Supreme Court cases, other justices followed Justice Heshin’s test of calm and formulated their own signature responses to justify remand. For example, in ordering the detention of Ala’ Eldin Igbarieh, a Palestinian adult charged with stone throwing at the police, illegal assembly, rioting, and assaulting a police officer on 2 October

2000 in Umm al-Fahem, Justice Tirkel stated:

Indeed, in quiet and peaceful times, in our cities and streets, it was suitable to deal with a minor [sic] like this with patience and mercy, and certainly, it was suitable not to detain him with criminals. But in times when the embers are burning and the fire may re-ignite again in our cities and streets, we should be extra careful. Beyond the need of the criminal, it is the need of the public and the necessity of the hour.³⁴

Problems with the test of calm abounded. Notably, on the same day as then Minister of Internal Security, Shlomo Ben Ami, announced that, “the situation is under control, it’s calm,”³⁵ the Supreme Court delivered remand decisions in *Igbarieh*³⁶ and *Hodaifeh Darawsheh*.³⁷ In *Hodaifeh Darawsheh*, the Supreme Court overturned the decision of the District Court ordering the release of three Palestinian citizen minors, charged with participating in riots and attempted assault on a police officer in Nazareth in early October.³⁸ The basis of the Supreme Court’s decision rested on the rejection of the District Court’s findings, which in a 12-page ruling, challenged the test of calm.

The test of calm completely divorces the issue of detention from individual considerations, and shifts the determination to the behavior of the community. It looks to the outside, external situation, unrelated to the individual and the offenses charged against him, to determine whether or not he will be released or detained.

An examination of the Supreme Court’s rhetoric, in particular its depiction of authority and violence, is also crucial to understanding the

detention phase of the process of collective criminalization. As Alan Norrie tells us:

Liberal theory wishes to portray the criminal law as existing within a consensual world in which all individuals qua individuals come together under the law. This is central to the theory and practice of criminal law, as well as to the philosophical legitimization of the criminal justice system as a whole. But in a society based upon deep social and political conflicts, this representation can only be maintained if the conflicts can, so far as possible, be excluded from a court of law. Harmony between state and society in the context of the criminal process can only be maintained if social conflicts are filtered out in advance.³⁹

In its October and November 2000 detention decisions, the Supreme Court avoided all discussion of the political causes of the insurgencies; it provided no explanation for the occurrence of Palestinian citizen protests and demonstrations. The decisions read merely as a report on disorderly mobs of Palestinian citizens engaging in menacing attacks on the police. This ahistorical, de-contextualized account of the events deprives readers of learning why, at this moment in time, Palestinian citizens of Israel staged political protests and mobilized in such unprecedented numbers.⁴⁰ Readers also never learn from the decisions that 13 Palestinian citizens of Israel were killed and hundreds more injured by Israeli police during these events. These issues, which relate to how the Supreme Court portrayed the police, what is included and what is excluded, are important, as this kind of

reporting facilitated the de-politicization of the protesters' actions and their construction as "lawless" or "disorderly."

In these cases, the Supreme Court consistently portrayed the police as neutral "enforcers of order" and as those responsible for "maintaining law and order." In *Hamed*, for example, the Court emphasized that policemen were sent to the Safafreh neighborhood "to enforce order as an orderly state does," that "whoever throws stones at policemen who come to enforce order in a rioting place, is showing himself to be dangerous," and that those who throw stones "on a man who society sent to enforce law and order," will likely repeat this action and must be detained.⁴¹ Order, as conceived of by the Court, is fixed and naturalized, while the violence of this order was concealed.

Police violence was concealed by its total exclusion from the decisions of the Supreme Court. The Supreme Court neglected to expose all of the facts about police brutality against Palestinian citizen political protestors, as well as police violence against the Palestinian community in Israel in general during this period. For example, the Supreme Court, in discussing Mr. Hamed's statement to the police, stated: "The respondent himself admits... that he threw stones on the police." Glaringly absent from the Supreme Court's decision is a significant part of Mr. Hamed's statement: That he threw stones at the police when "he saw the police shooting toward his home and family."⁴² Also missing from the Supreme Court's narrative is Mr. Hamed's claim that the police beat him while he was in custody, that the police used tear gas against the

demonstrators, and that he was struck by a rubber-coated steel bullet shot by the police.⁴³ Further, nowhere in the decision do readers learn that snipers were positioned in hidden locations between the houses in Nazareth, that they fired at individual youths with rubber-coated steel bullets and live ammunition, or that they had killed two Palestinian citizen political protestors in Nazareth by 3 October 2000.⁴⁴

Other notable examples of the Supreme Court's exclusion of police violence are the cases of *Saber*⁴⁵ and *Tawfiq Darawsheh*.⁴⁶ In *Saber*, the Supreme Court, which ordered remand, stated that defense counsel raised a "number of suspicions regarding the manner in which [the confession and statements] were obtained, and regarding the manner in which the interrogation and prosecution officials acted." Absent from the Supreme Court's decision is the 3 a.m. police raid on Mr. Saber's house; the fact that the police prohibited Mr. Saber from meeting with a lawyer for four days after his arrest; and the brutality used by the police to obtain a confession from Mr. Saber.⁴⁷ In *Tawfiq Darawsheh*, the Supreme Court, which ordered remand of this 19-year-old student, referred to Mr. Darawsheh's "confession to throwing a stone." However, the Court makes no reference to Mr. Darawsheh's claim that he was repeatedly beaten and made to lie on the floor while a dog was brought into the interrogation room to scare him into confessing that he was among the protestors throwing stones at the police.⁴⁸

By ordering remand in almost all cases, the Supreme Court completed the process of the collective criminalization of Palestinian citizen

political protestors, started by the Israeli police and advanced by the state prosecuting authorities. Through legal and rhetorical mechanisms, the Supreme Court transformed the issue of detention from one of an individualized inquiry to one of collective community punishment. Despite its seeming efforts to conceal power relations and the national-political struggle in the state, the Supreme Court tacitly acknowledged that Palestinian citizen protest is part of a national-political conflict against which the state has to defend itself. Each of the juridical institutions - the police, the prosecuting authorities, and the Supreme Court - by emphasizing the collective, attended, in the final analysis, to the political as opposed to the criminal characteristics of the actions.

End Notes

1. Allen Feldman, *Formations of Violence* (Chicago: The University of Chicago Press, 1991) at 88-89.
2. The Ministry of Justice, "Statistics on Arrestees and Detainees, 28 September-30 October 2000." Available on Adalah's website: www.adalah.org/coi_reports/detainees.htm.
3. See Adalah, "Interim Report on Israel," submitted to the United Nations Committee on Economic, Social and Cultural Rights, 29 November 2000; and The Arab Association for Human Rights, "Weekly Review of the Arabic Press," No. 8 (24-30 October 2000), No. 9 (31 October-6 November 2000) and No. 10 (7-13 November 2000) (describing reports of these arrests in all of the Arabic-language newspapers) [hereinafter HRA, "Weekly Review of the Arabic Press"].
4. See Adalah, "Summary Report to the United Nations Human Rights Commission, Special Session on Israel/Palestine," 17 October 2000; and HRA, "Weekly Review of the Arabic Press," No. 15 (12-18 December 2000) (reporting on a 15 December 2000 article in *Al-Itibad*, which described the physical and psychological torture of Palestinian citizen detainees in October and November 2000).
5. See Jamil Dakwar, "Without Counsel: Palestinian Citizens of Israel," in 44 *Criminal Justice Matters* (King's College London) 32 (2001).
6. In response to these massive arrests, Adalah called for an emergency meeting of Palestinian citizen lawyers. Over 140 lawyers attended the meeting in which, among other resolutions, they confirmed the basic right of the Palestinian public in Israel to express dissent and their political views with regard to the oppressive policies of the Israeli government toward the Palestinian people, called for the immediate release of those arrested and detained, and denounced the violence by the police against Palestinian citizens of Israel. They also formed a national network and represented the political protestors on a voluntary basis throughout the pre-trial criminal process.
7. Penal Law, Article 332. See Aryeh Greenfield, *Penal Law 5737-1977, Third Edition: Verbatim English Translation, Incorporating all Amendments up to and Including Amendment No. 52* (Haifa: A.G. Publications, 1999) at 100.
8. Penal Law, Article 151 - Prohibited assembly; Penal Law, Article 152 - Riot; Penal Law, Article 273 - Assault on a policeman in the performance of his duty; Penal Law, Article 274 - Assault on a policeman under aggravating circumstances; Penal Law, Article 275 - Interference with policeman in the performance of his duty; and Penal Law, Article 452 - Malicious damage. See Greenfield, *Id.* at 61, 88, 128-129.
9. Ministry of Justice, The State of Israel, File No. 268, Reference No. 2000-0047-15224, "The Policy of the Prosecution Office Concerning the Recent Riot Files," 10 October 2000.
10. See supra note 2.
11. In early November 2000, *Ha'aretz* ran a long feature story on the *Hodáifeh Darawsheb* case, involving three Palestinian minors, and "the Afula case," involving three Jewish Israeli minors. The article was entitled: "Two laws for two peoples," and subtitled: "Three Arab teens and three Jewish youngsters were arrested for taking part in the recent inter-ethnic clashes in Nazareth and Afula. While the Arabs are still in jail, the Jews were released to house arrest." It provided an in-depth account of each of the cases and scathingly exposed and critiqued the state's disparate request for remand practices. See Aryeh Dayan, "Two laws for two peoples," *Ha'aretz English Edition*, 7 November 2000. The article discusses Cr.M. 2752/00, *The State of Israel v. Anonymous, et. al.* (Dist. Ct., Nazareth, 13 October 2000) (Khatib, J.) (Israeli Jewish minors released; no stay for appeal requested by the state) and Cr. M. 35/00, *The State*





- of Israel v. Hodaifeh Darawsheb, et. al.* (Dist. Ct., Nazareth, 22 October 2000) (Khatib, J.) (Palestinian citizen minors released; stay for appeal requested by the state). See also Cr. M. 7620/00, *The State of Israel v. Hodaifeh Darawsheb, et. al.* (S. Ct., 24 October 2000) (Heshin, J.) (Palestinian citizen minors remanded).
12. Section 21: Detention after the Filing of an Indictment
 - (A) When a bill of indictment has been filed, the court before which it is filed may order the detention of the accused in custody until the end of the proceedings, provided that one of the following conditions is fulfilled:
 - (1) The Court believes, on the basis of evidence that has been submitted to it, that there exists one of the following:
 - (a) a reasonable basis to the fear that the release of the accused or non-detention will result in the interference in the legal procedures or that the accused will fail to appear at the legal proceedings and sentence, or will bring about the disappearance of property, or will lead to the influence of witnesses or harm other evidence in some other manner;
 - (b) there exists reasonable grounds for the fear that the accused will endanger the safety of human life, the public safety or the security of the State; (c) the accused is charged with one of the following: (1) an offense which carries the penalty of death or life imprisonment; (2) a security offense as mentioned in Article 35(b); (3) an offense according to the Dangerous Drugs Ordinance (Consolidated Version), 1973, excluding an offense pertaining to the personal use of drugs or the possession of drugs for personal use; (4) an offense committed with severe violence or with cruelty or by means of firearms or other weapons (cold steel)...
 - (B) The court will not order a detention, according to subsection (A), unless it is shown, after hearing the parties, that there is *prima facie* evidence of guilt; and with regard to subsection (A)(1), the court will not order a detention, unless the following exists: (1) The purpose of the detention cannot be achieved through bail or through conditions of release that involve less harm to the freedom of the accused; (2) The accused is represented by a lawyer, or the accused declared that his will is not to be represented by a lawyer...
 - (E) The detention order will remain in force until the court delivers its verdict, unless the court decides otherwise...
 13. See The State of Israel, Ministry of Justice and Ministry of Foreign Affairs, "Combined Initial and First Periodic Report Concerning the Implementation of the International Covenant on Civil and Political Rights," submitted to the United Nations Human Rights Committee (1998) at 133 (citing cases).
 14. H.C. 2316/95, *Ganimat v. The State of Israel*, 49 (4) P.D. 589. See also English excerpt and editorial comment in 31 (4) Isr.L.R. 755 (1997).
 15. *Id.* at 648 (Chief Justice Barak).
 16. *Id.* at 633 (Justice Strassberg-Cohen). See also Eliahu Harnon, "The Impact of the Basic Law: Human Dignity and Liberty on the Law of Criminal Procedure and Evidence," 33 (3) Isr. L.R. 678 (1999).
 17. A case list is provided at the end of this essay. The author found published judgments on the website of the Supreme Court (www.court.gov.il). Additional unpublished decisions were provided to Adalah by numerous volunteer attorneys for the detainees.
 18. While the Palestinian community in Israel strongly protested against the severe detention policy from the beginning, in early November, the Jewish Israeli public joined this critique as to the detention of minors. The Knesset's Interior Committee held hearings to discuss the issue, and the Israeli Bar Association convened meetings to confer with lawyers, the Public Defender's Office, and NGOs representing the minors being detained. For the first time since the events began, on 7 November 2000, the Supreme Court in two different cases, ordered the release of one Israeli Jewish minor and one Palestinian citizen minor. See Cr.M. 7927/00, *The State of Israel v. Yosef Ben Tawfiq Shalibi, et. al.* and Cr. M. 7936/00, *The State of Israel v. Sivan Bendel, et. al.* (S.Ct., 7 November 2000) (Levy, J) (appeals joined for decision; Israeli Jewish minor released) and Cr.M. 7934/00, *The State of Israel v. Anonymous* (S.Ct., 7 November 2000) (Levy, J.) (Palestinian citizen minor released). See also Cr. M. 8630/00, *The State of Israel v. Imad Adawy* (S.Ct., 28 November 2000) (Levy, J.) (Palestinian citizen minor released).
 19. See Cr. M. 8151/00, *Fathi Said v. The State of Israel* (S.Ct., 20 November 2000) (Strassberg-Cohen, J.).
 20. Cr.M. 7171/00, *The State of Israel v. Muhammed Mahmoud Hamed* (S. Ct., 8 October 2000) (Heshin, J.).
 21. Cr.M. 7103/00, *Anonymous v. The State of Israel* (S.Ct., 10 October 2000) (Heshin, J.).
 22. Cr.M. 651/00, *The State of Israel v. Muhammed Mahmoud Hamed, et. al.* (Mag. Ct. Nazareth, 5 October 2000) (Azulay, J.).
 23. Cr.M. 2721/00, *The State of Israel v. Muhammed Mahmoud Hamed, et. al.* (Dist. Ct. Nazareth, 6 October 2000) (Maman, J.).
 24. See *Hamed*, supra note 20, at 2.
 25. *Id.*

26. Id.
27. Id. at 3.
28. See Section 1(b) of the Detention Law.
29. See *Hamed*, supra note 20, at 2.
30. See *Hamed*, supra note 23.
31. Cr.M. 7554/00, *Wael Herbawi v. The State of Israel* (S.Ct., 25 October 2000) (Heshin, J.).
32. See Section 21(b)(1) of the Detention Law.
33. See *Hamed*, supra note 20, at 3.
34. See Cr. M. 7406/00, *Ala' Eldin Igbarieh v. The State of Israel* (S.Ct., 24 October 2000) (Tirkel, J.).
35. After *Hamed*, defense attorneys searched for all evidence to indicate that the state is calm. One piece of evidence, not referred to in the Supreme Court judgments, but requested repeatedly from Adalah, was a statement made by the Minister of Internal Security, Shlomo Ben Ami, on 24 October 2000: "I hope so much that all of us will understand that this time is a time to be rational, to return back to our normal life. I turn to the Jews to come to the Arab villages, to come to Nazareth, to come to the stores. The situation is under control, it's calm. I know that most of the Arab community and the majority of this community, and I include the students, they want to be equal citizens in this State. It's very important to remove this fear from our hearts, Arabs and Jews to come each to the others homes, to go to stores, to eat hummus together. This is a very important thing." Ifat: Media Information Center - Press Clippings, News in Arabic, Channel 1 at 19:15, 24 October 2000 (Hebrew).
36. See supra note 34.
37. See supra note 11.
38. Id.
39. Alan Norrie, *Crime, Reason and History* (London: Butterworth, 2001) at 222-223.
40. See e.g., "A Double Responsibility: Palestinian Citizens of Israel and the Intifada - An Interview with Azmi Bishara," and Hassan Jabareen, "Palestinians in Israel," 217 Middle East Report 26, 30 (Winter 2000).
41. See *Hamed*, supra note 20, at 5.
42. See *Hamed*, supra note 23, at 14.
43. Id.
44. See Adalah, "Report on Submission to the Commission of Inquiry," 21 January 2001.
45. Cr.M. 8102/00, *The State of Israel v. Kial Saber* (S.Ct., 9 November 2000) (Levy, J.).
46. Cr.M. 8153/00, *Tawfiq Darawsheh v. The State of Israel* (S.Ct., 21 November 2000) (Strassberg-Cohen, J.).
47. See Cr.M. 3998/00, *Kial Saber v. The State of Israel* (Dist. Ct., Haifa, 19 October 2000) (Jarjoura, J.) (ordering release due to the fundamental flaws in the arrest process and at the pre-indictment detention hearing) and Cr.M. 4041/00, *The State of Israel v. Kial Saber* (Dist. Ct., Haifa, 7 November 2000) (Jarjoura, J.) (ordering release post-indictment; in this very rare case, the judge stated that the court has the duty to "assist, indirectly, in calming the situation and returning it to normal... [and could do so] if it enables the release of detainees who committed the "offenses of the day" under detention terms that will ensure that these defendants do not further endanger the public... it is unnecessary, in my opinion, to detain them until the termination of proceedings, in that the legislature, concerned that the basic rights and liberty of the individual would not be violated, made sure to give the court discretion, even in the cases of detention for days, to examine alternatives to detention.") See also HRA, "Weekly Review of the Arabic Press," No. 15 (12-18 December 2000) (reporting on a 15 December 2000 article in *Al-Ittihad* that featured Mr. Saber's case).
48. See Cr.M. 33/00, *The State of Israel v. Tawfiq Darawsheh* (Dist. Ct. Nazareth, 10 October 2000) (Ben David, J.). See also Adalah, supra note 3 and HRA, "Weekly Review of the Arabic Press," No. 12 (21-27 November 2000) (reporting on an interview with Mr. Darawsheh, which appeared in *Al-Ittihad* on 24 November 2000. In the interview, Mr. Darawsheh stated that he had consistently denied any involvement in the clashes, and that he "had been submitted to continuous psychological pressure and intimidation to confess to his participation.")

Supreme Court Detention Decisions Considered in this Essay

October - November 2000

Cr.M. 7171/00, *The State of Israel v. Muhammed Mahmoud Hamed* (S.Ct., 8 October 2000) (Heshin, J.) (18-year-old Palestinian citizen indicted for prohibited assembly and rioting on 3 October 2000 in Nazareth. Supreme Court overturned two lower court decisions and ordered remand. Court declared that stone throwing is dangerous and no alternative to detention will deter future actions. Court introduced the “test of calm.”)

Cr.M. 7103/00, *Anonymous v. The State of Israel* (S.Ct., 10 October 2000) (Heshin, J.) (14-year-old Palestinian citizen minor charged with three others for throwing stones at passing cars from a hill overlooking Umm al-Fahem junction, damaging one car, and rioting on 1 October 2000. Supreme Court ordered remand, noting that the acts charged are the “gravest felonies” and that his young age, lack of criminal record, and poor health requiring daily medical care are insufficient mitigating factors. Court reiterated the “test of calm.”)

Cr.M. 7507/00, *The State of Israel v. Anonymous* (S.Ct., 19 October 2000) (Tirkel, J.) (Israeli Jewish minor charged with throwing stones from the roof of a building on a passing car, “assuming that the car’s passengers were Arabs” on Yom Kippur

night in Jerusalem. The minor, a high school student with good grades, no criminal record, and good relations with his family, admitted his action to the police, and said that he was sorry. All agreed that “in regular days, [the State] would not even charge him, and certainly would not ask for detention until the end of trial.” Supreme Court ordered the minor remanded on the grounds that stone throwing is dangerous and the State is not calm.)

Cr.M. 7506/00, *Anonymous v. The State of Israel* (S.Ct., 22 October 2000) (Tirkel, J.) (Israeli Jewish minor charged with five others with engaging in a conspiracy to throw Molotov cocktails on houses belonging to “minorities” near Jerusalem. Minor claimed that he had no relationship with the other boys, who are secular and older than he, while he is Haredi (an ultra-Orthodox Jew), and denied all charges. Supreme Court rejected the appeal, and ordered the minor remanded on the grounds of dangerousness and that the State is not calm.)

Cr.M. 7532/00, *Ronen Tribiash v. The State of Israel* (S.Ct., 22 October 2000) (Heshin, J.) (Israeli Jewish adult, armed with a steel bar and ax, charged with stopping cars, attacking Arab drivers and damaging their cars on 1 October near Carmiel. Statements included: “That’s it, there’s no place for Arabs in the state and you all should be killed,” and “We will kill you motherfuckers, you Arabs.” Supreme Court ordered Tribiash remanded on the grounds that given the severity of the offenses and their ideological motives, an alternative to detention would be meaningless.)

Cr.M. 7620/00, *The State of Israel v. Hodaifeh Darawsheh, et. al.* (S.Ct., 24 October 2000) (Heshin, J.) (three Palestinian citizen minors charged with participating in riots and attempted assault on a police officer in Nazareth in early October. Supreme Court ordered the minors remanded on the grounds that the State is not calm.)

Cr.M. 7402/00, *Ehab Gaben v. The State of Israel* (S.Ct., 24 October 2000) (Tirkel, J.) (Palestinian citizen adult charged with throwing stones at the police on 1 and 2 October 2000 in Tur'an, breaking the hand of one police officer, and resisting arrest. Police alleged that Gaben confessed to the offenses and claimed sympathy and support for Islamic Jihad. State argued that an alternative to detention would not be effective to monitor Gaben, because the police were not entering some of the Arab villages. Supreme Court ordered Gaben detained on the grounds of dangerousness, based on the seriousness of the offenses and his declared ideological motives.)

Cr.M. 7406/00, *Ala' Eldin Igarieh v. The State of Israel* (S.Ct., 24 October 2000) (Tirkel, J.) (Palestinian citizen adult charged with stone throwing at the police, illegal assembly, rioting, and assaulting a police officer on 2 October 2000 in Umm al-Fahem. Supreme Court ordered Igarieh detained on the grounds that the State is not calm and that stone throwing is a danger to the public.)

Cr.M. 7554/00, *Wael Herbawi v. The State of Israel* (S.Ct., 25 October 2000) (Heshin, J.) (Palestinian

citizen adult indicted for stone throwing at the police, aggravated assault on a police officer, and disturbing the police in fulfillment of their duty in Jerusalem. Supreme Court ordered remand on the basis of the charges - "offenses of the day" - and that the State is not calm.)

Cr.M. 7927/00, *The State of Israel v. Yosef Ben Tawfiq Shalibi, et. al.* and Cr. M. 7936/00, *The State of Israel v. Sivan Bendel, et. al.* (S.Ct., 7 November 2000) (Levy, J) (Supreme Court joined two appeals by the state. *Shalibi* involved four Palestinian citizen adults charged with rioting, throwing stones and bottles at passing cars, and damaging one car on 2 October 2000 near Iksal. *Bendel* involved two Israeli Jewish minors charged with similar offenses. Supreme Court remanded the four Palestinian citizen adults and one Israeli Jewish minor, and released one Jewish minor. Court stated that "it has never been the policy of any previous judgments, to totally ignore the circumstances of the specific accused; especially... for a young person," and set forth a new policy regarding minors: Release will be ordered except when a minor "expresses initiative and exceptional violence... no distinction can be made between [him] and an adult regarding the question of detention.")

Cr.M. 7934/00, *The State of Israel v. Anonymous* (S.Ct., 7 November 2000) (Levy, J.) (first Palestinian citizen minor released by the Supreme Court. Minor charged with throwing stones at police and passing cars on 1 and 2 October 2000 in Tur'an. Supreme Court referred to detention of minors as "traumatic" and as an experience,

which might damage their future. Stated that the Court had to make a “gradual change in policy” for this “honest, decent young 17-year-old; a son of a normal family with no defect, which perceived his deed in a very harsh way.”)

Cr.M. 7933/00, *Vladislov Sholov v. The State of Israel* (S.Ct., 9 November 2000) (Levy, J.) (Israeli Jewish minor charged with shouting to attack Arabs and resisting arrest. Supreme Court ordered remand stating that: “From the evidence, there is an impression that the appellant is one who leads and encourages others to hurt Arabs, and because of that, his deed is terrible. It’s true that such a deed... might be perceived in regular days as justifying his release by alternatives to detention, but as long as this period of tension between the different sectors continues, shouting to hurt the Arabs might find the ear of listeners, and from now until the violence will be realized, the road is very short.”)

Cr.M. 8102/00, *The State of Israel v. Kial Saber* (S.Ct., 9 November 2000) (Levy, J.) (Palestinian citizen adult charged with others for throwing stones on an Israeli Jewish driver and damaging his car near Jedaide. Supreme Court ordered remand on the grounds of dangerousness and acting with ideological motives. Court prioritized the “security of the public” and the “right of driving on the road” over an individual’s liberty interest.)

Cr.M. 7937/00, *The State of Israel v. Ahmad Mahameed* (S.Ct., 9 November 2000) (Levy, J.) (Palestinian citizen adult charged with throwing

stones at a bus and police cars, fleeing from the police, and when caught, punching a policeman in the face in Umm al-Fahem on 11 October 2000. Supreme Court ordered remand on the basis that “the winds of war are still blowing” and extreme dangerousness.)

Cr.M. 8230/00, *Ibrahim Jahjah v. The State of Israel* (S.Ct., 19 November 2000) (Strassberg-Cohen, J.) (Palestinian citizen adult charged with throwing stones and attacking a policeman. Supreme Court ordered remand on the basis that: the riots became a “general phenomenon... which is not just disrupting order but it will also escalate the tension between the citizens of the State and its sectors; it is enough to indict for stone throwing against the police to justify the detention,” and past criminal record.)

Cr.M. 8151/00, *Fathi Said v. The State of Israel* (S.Ct., 20 November 2000) (Strassberg-Cohen, J.) (Palestinian citizen adult charged with rioting, prohibited assembly, and assaulting a police officer under aggravating circumstances on 3 October 2000 in Nazareth. Only Palestinian adult ordered released to house arrest by the Supreme Court. Grounds for release included: Said had already been detained for 50 days, had no criminal record, had worked and lived a normal life, and “the winds” in Nazareth had become calm. Additional facts included: several affidavits from witnesses who raised claims of police brutality and supported Said’s contention that he was merely present at the protests and did not participate in riots, and the state proffered no confession.)

Cr.M. 8097/00, *Mustapha Zarani and Rasmi Dableh v. The State of Israel* (S.Ct., 21 November 2000) (Levy, J.) (Palestinian citizen adults charged with rioting and throwing stones at police cars on 1 October 2000 in Tur'an. Supreme Court ordered remand on the basis of dangerousness, ideological motive, and police reports indicating that "the embers are still burning, and from here the fire might re-ignite.")

Cr.M. 8153/00, *Tawfiq Darawsheh v. The State of Israel* (S.Ct., 21 November 2000) (Strassberg-Cohen, J.) (19-year-old Palestinian citizen student with no criminal record charged with taking part in riots in Nazareth on 3 October 2000. Supreme Court ordered remand on the basis that "these riots, with the political and security background, together with the context of the relationship of Israel with the Palestinians, is a hard and worrying phenomenon." The Supreme Court ordered that no alternative to detention can keep the appellant from wandering all hours of the day if allowed to start his medical school studies.)

Cr.M. 8027/00, *Eli Tal v. The State of Israel* (S.Ct., 21 November 2000) (Levy, J.) (Israeli Jewish adult charged with shouting "Death to Arabs." Supreme Court ordered remand on the same basis as *Sholov*.)

Cr.M. 8576/00, *The State of Israel v. Mahmud Yosef el Gamel* (S.Ct., 24 November 2000) (Levy, J.) (Palestinian citizen adult charged with prohibited assembly, rioting, and assault on a police officer under aggravating circumstances on 1 October 2000 in Jatt. Court ordered remand on

the basis of police reports indicating that the State is not calm and el Gamel's ideological motives, which increased the risk of danger. The Chief of the State Prosecutor's Criminal Department represented the state before the Supreme Court.)

Cr.M. 8630/00, *The State of Israel v. Imad Adawy* (S.Ct., 28 November 2000) (Levy, J.) (Palestinian citizen minor charged with stone throwing, attempted aggravated assault on police officers, rioting, and prohibited assembly on 2 October 2000 in Tur'an. Supreme Court ordered release on the basis that: "an alternative to detention... should be considered especially when the subject matter is minors.")



Law's Conceptions of State Violence

Samera Esmeir

On 8 November 2000, the Israeli government appointed a Commission of Inquiry in accordance with the Commissions of Inquiry Law (1968). The Commission's mandate is to investigate the clashes between the security forces and Arab and Jewish citizens that culminated in the deaths and injury of Israeli citizens starting from 29 September 2000. To be sure, the "clashes" were political protests staged by Palestinian citizens of Israel in solidarity with al-Aqsa Intifada in the Occupied Territories. These protests in Israel were met with the full force of the police, and developed, in part, into acts of insurgency. The clashes also consisted of anti-Palestinian riots carried out by Israeli Jewish citizens in Palestinian neighborhoods in Israel. "The deaths and injury of Israeli citizens" were the deaths of 13 Palestinian citizens and the injury of hundreds more together with some Israeli Jews. The "clashes" also resulted in the arrests of close to 700 Palestinian citizens of Israel during the months of October and November 2000 for Intifada-related offenses, but these are not addressed in the mandate of the Commission.

The Commission began its proceedings in February 2001 and completed the first stage of its hearings in February 2002. During this time, it heard testimonies from 349 witnesses, and based on these testimonies and other evidence, reached preliminary conclusions. These initial conclusions led the Commission to issue letters of warning to former Prime Minister Ehud Barak, former Minister of Internal Security Shlomo Ben Ami and nine police officials. In addition, the Commission issued warning letters to three Palestinian public representatives. By issuing these three letters, the Commission ignored, and effectively dismissed,

several legal challenges to its mandate. The main challenge consisted of the argument that official commissions of inquiry are only permitted to investigate the actions of the executive branch.¹

This essay does not discuss the Commission's preliminary conclusions explicated in the letters of warning; instead, it focuses on the legal techniques employed by the Commission to investigate state violence, and more specifically, police violence against Palestinians in Israel. The essay investigates the Commission's conceptualization and delimitation of some forms of state violence against Palestinian citizens. It attends to the specific forms of police violence, which the Commission found to merit investigation. These acts were the shooting and injuring of Palestinian stone-throwers, protestors and peaceful citizens. The essay discusses the framework of assumptions, rationales and strategies, which structures the investigation of these forms of violence. It then examines other forms of police violence excluded from the Commission's investigation, such as rituals of arrest, acts of detention and interrogation, and the theatrical demonstration of state power in the streets of Palestinian towns in Israel. The violent character of these latter acts, which, it is argued, comprise a general threatening structure, was neither recognized nor investigated by the Commission. Rather, these acts were classified as legal and legitimate performances aimed at maintaining order and securing the rule of law.

To probe these concerns, this essay focuses on Nazareth, a Palestinian city in Israel, where the above-mentioned forms of violence coincided during the Intifada. The essay proceeds by



analyzing the Commission's conceptualization of police violent performances, the legality of which is scrutinized but not necessarily invalidated. Next, the essay considers other police deeds, the violent character of which is not acknowledged and thus, the legitimacy of which is not questioned. Finally, the essay offers some reflections on the consequences of such legal techniques employed by the Commission on questions of gender and citizenship.

This essay relies mainly on the Commission's proceedings as documented in its protocols, as well as on observations I made while attending the Commission's hearings on the "clashes" in Nazareth. The quotes presented in this essay are representative of the rationales and assumptions underlying the Commission's conceptions of violence in the case of Nazareth. These rationales and assumptions, however, are neither coherent nor without failures. Further, the Commission's conceptions of violence are merely one terrain out of many that require critical attendance. Others include, but are not limited to: the Commission's interpretation of legal documents; its definition of its own mandate; its choice to summon certain witnesses and not others; the rules of procedure adopted; the interaction of witnesses with the Commission's members; the different series of questions, not related to violence, that are posed to the witnesses by the Commission; and the suppression of the historical context.

The Included and the Excluded

In his "Critique of Violence," Walter Benjamin defines violence as belonging to the very act of

founding and preserving the law. Violence is the origin of law and has two functions in relation to law: "law-making violence" - the founding violence, the one that institutes law - and "law-preserving violence" - the violence that conserves the law and ensures its enforceability. This separation between the functions of violence in relation to law is suspended in the institution of the police, for the police are constantly engaged in law-making functions while preserving the law. The assertion, writes Benjamin:²

[that] the ends of police violence are always identical or even connected to general law is entirely untrue. Rather the "law" of the police really marks the point at which the state... can no longer guarantee through the legal system the empirical ends that it desires at any price to attain. Therefore, the police intervene "for security reasons" in countless cases where no clear legal situation exists... without the slightest relation to legal ends, accompanying the citizen as a brutal encumbrance through a life regulated by ordinances, or simply supervising him.

The police then have the power to exercise previously unsanctioned forms of violence through the mediation of the legal category - "security reasons." This legal technique, which belongs to the general law, allows for the expansion of law's mechanisms of control to include new forms of police violence, which until the recent actions of the police were extra-legal. Because the category "security reasons" belongs to the general law, it has the power, if there is enough factual evidence to justify reliance on it, to



transform any end achieved by police action into a legal end. It allows the police to make law while they preserve it.³

The Intifada in Israel, which resulted in the deaths of 13 Palestinian citizens and the injury of hundreds more, testifies to the law-making violence that characterizes the police. For, as Benjamin puts it, in the exercise of violence over life and death, more than any legal act, law affirms itself.⁴ The Commission's investigation, which is restricted to the examination of what is conceived of as exceptional acts of shooting and injuring - acts that threaten life previously unthreatened on such a wide scale - is meant to address the lawfulness of the new empirical ends set by the police, the law-making violence of the police. For official commissions of inquiry are not meant to address the ordinary and the mundane, but the extraordinary, the new and the exceptional. It follows that the Commission is not investigating the ordinary law-preserving violence of the police, such as arrests, detention, and interrogation. The following quote in which the Chairperson of the Commission, Justice Theodore Or, asks about the use of snipers against Palestinian citizens, explicates this interest in the new and the exceptional:⁵

Justice Theodore Or: Do you know if, before that day, the second of October in the north, there was sniper fire, shooting at the legs of those who hurled stones by hand and by sling-shot in the state of Israel?

S: I don't recall.

Justice Theodore Or: You don't recall, and how many years have you been in the Special

Operations Unit?

S: You are speaking about... excuse me, Your Honor, you are speaking about the entire period?

Justice Theodore Or: Yes, yes. In Israel... rioting, did you come across in the past any case, or do you know of any instance in which, because of any riot during any kind of procession, and there was an order that in the case of sling-shot assaults or the hurling of Molotov cocktails, live fire should be used?

S: The case of Uzi Meshullam is a possibility, of...

Justice Theodore Or: That is another case.

S: Rioting...

Justice Theodore Or: Uzi Meshullam was another case...

S: Also firing and also throwing of barrels...

Justice Theodore Or: We know that in that case someone fired live ammunition at the forces. We know about another case where a person barricaded himself and opened massive fire (unclear). Therefore, I asked about mass rioting, disturbances of the peace. Was there at any time prior to the disturbances... such a directive or an instance where snipers were used?

S: Not that I remember.

Shooting, Injuring and Killing

It is this new gap, then, between old legal ends and new empirical ones, ordinary police violence and exceptional police violence, the gap founded by the new law-making violent activity, that the Commission investigates. The police were able to establish this new end by arguing that the riots were exceptional, that they caused a state of emergency, and that security reasons necessitated

such an expansion of violence. The Commission in turn investigates the lawfulness of such law-making violence. It does so by examining whether the law of the state allows for such activity of law-making on the part of the police.

How does the Commission go about investigating the lawfulness of these new excessive acts of violence? How does it decide on whether the violent means of police intervention during the protests in Nazareth were lawful? Benjamin argues that the most elementary relationship within a legal system is that of means to ends, and that violence can be used only in the realm of means, not ends. The legal system, however, does not contain a criterion for violence as a principle, e.g., whether violence is a moral or immoral means to just or unjust ends. The only criterion available is for cases of its uses, e.g., the circumstances under which violence is used.

The Commission's proceedings indeed testify to its focus precisely on the cases of the use of violence: when, where and how violence is used. Violent actions by the police are not accepted or dismissed as such; rather, the different uses of violence are scrutinized. The questions posed by the Commission to police officers are not about the lawfulness of employing lethal force as such, but are about the proper and proportional use of lethal force. Whether a police officer stood 50 meters or 90 meters from the stone-throwers when opening fire becomes a central concern for the Commission, for in the former case, it is lawful to open fire, while in the latter it is not. Whether police fired rubber-coated steel bullets or live ammunition is another major concern for the Commission, even though in both cases someone

died or was injured as a result of the fire. The deadly consequences and the deadly means are not important as long as the use of the deadly means (or lethal force) meet the legal criterion of proportionality. In the following quote, Commission member Professor Shimon Shamir questions the police about the distance and the type of weaponry used:⁶

Prof. Shimon Shamir: To your knowledge, when there is such a threat from a distance of 40 to 70 meters, wouldn't rubber bullets be safer and just as effective? Isn't this exactly the range of rubber bullets?...

Prof. Shimon Shamir: Why is it not possible to tell them: look, this is the effective range for firing rubber, it is unnecessary to use live fire in this case?

Justice Or asks similar questions about the police to a Palestinian witness:⁷

Justice Theodore Or: And you saw them [the police] a short time before you were struck? A long time? How much time before?

Ibrahim Krayim: I saw them about five to seven minutes [before].

Justice Theodore Or: Did you see what they were doing?

Ibrahim Krayim: I saw them standing there. I didn't see what they were doing.

Justice Theodore Or: Did you see whether they had weapons in their hands?

Ibrahim Krayim: Everybody had a weapon.

Justice Theodore Or: And where were the weapons when you saw them? Holding them, aiming them, on them?

And finally, Judge Hashim Khatib poses a similar question to a police officer, whose identity is not revealed:⁸

Judge Hashim Khatib: In your opinion, if we are really speaking about a distance of 50-70 meters, as my colleague Prof. Shamir asked you, why didn't the Special Patrol Unit forces, who saw exactly the same thing that the Special Operations Unit saw, neutralize the guys with the sling shots by shooting rubber bullets? Do you have any answer, Mr. S?

All of this might seem obvious to law-trained readers, for arguably there is no other way to assess the legality of violent actions. These concerns are less obvious to those who were injured or harmed. For them, whether police used tear-gas, rubber-coated steel bullets, or live ammunition is not central, but the fact that police utilized these means against them as Palestinians is of importance. The violence of the police would then be conceptualized in terms of effects and consequences, as opposed to means. This is not to argue that there are no distinctions between the different means of violence employed by the police. Instead, it is to remind us of the kinds of questions that modern positive law is capable of asking and investigating. This constitutes an important reminder when attempting to address a political conflict through a legal investigation that keeps many questions unanswered. In the following quote, Mr. Shawkat Lawabneh, who testified before the Commission, answers the questions of the Commission's members about the means used by the police, but also attempts to register the effects of these means on his body, to

shift the focus from the means to the actuality of the bodily violence, to disturb the legal logic imposed on his testimony:⁹

Shawkat Lawabneh: I heard people, I went up to see what was happening, and this is what happened to me. I want to make a comment...

Justice Theodore Or: Yes, please.

Shawkat Lawabneh: I, now... my life is in tatters. I want to show you what happened to me.

Justice Theodore Or: Yes. The witness is raising his shirt and revealing his body.

Shawkat Lawabneh: Before I was injured, I worked, I was satisfied. They asked... my children do not come to me as they did before. I stopped going on trips. I hurt at night. I have been receiving treatment at Rambam Hospital twice a week. My life is different than it was before. My body has lost something. My son doesn't come up to me as he did in the past. I can't pick up my small children.

Justice Theodore Or: You remember that at the time of the incident... not the day of the incident [but the day] with investigators from the Commission who prepared a report at the location?

Arresting, Interrogating, Detaining and Torturing

Nazareth witnessed a deployment of police and security forces on its streets for several days. In addition to the use of lethal weaponry, the activities of the police ranged from a mere presence in the streets of Nazareth to acts of harassment and intimidation, leading to massive arrests and culminating in night-time "commando" raids, storming into houses to arrest people. When people were arrested, they were interrogated and

sometimes beaten; many of them reported brutal treatment. Specific official statistics about arrests during this period in Nazareth are not available. However, the official statistics that do exist indicate that from 28 September-30 October 2000, police arrested about 1,000 people throughout the country, 660 of whom were Palestinian citizens and 340 Israeli Jews.¹⁰ These official numbers do not include the number of those who were arrested during the following months for Intifada-related cases. The majority of Palestinians were arrested for participating in political protest activities against the police and the state, including stone-throwing. The others were arrested for harming police and Israeli Jewish citizens. The majority of Israeli Jews were arrested for carrying out attacks against Palestinians and their property.

Instead of probing the discriminatory policies of the police, it is important to attempt an understanding of the different functions of these arrests. Official statistics indicate that among the 660 Palestinian arrestees, 248 were indicted, while 126 were indicted and detained.¹¹ The fact that less than half of those arrested were indicted, indicates that arrests were not only meant to locate offenders and to punish them; nor were they only meant to restore order in the sense of extracting individual disorderly offenders from the community. Arrests appeared to function as a mechanism by which to monitor the population and extract information. They were also rituals symbolizing the power of the state and reminding the population of the state's ability to repress challenges to its monopoly over violence.¹² Or as Benjamin would put it, law-preserving violence (the violence that conserves the law and ensures

its enforceability), is a threatening violence. The threat is not intended as a deterrent as liberal theory would have it. A deterrent would require a certainty, which contradicts the idea of a threat. It is the uncertainty of the violence that is threatening, Benjamin asserts.

Deployment of police forces in the streets of Nazareth signified a threat that the police would exercise its power to open fire, arrest, detain and torture. The periodic exercise of these powers reinforces this threat and alerts the population to the possible actualization of these threats, if it fails to act in an orderly way.

The story of Tawfiq Darawsheh, which, like many similar stories, will not be subjected to the Commission's investigation, is illustrative. Tawfiq Darawsheh was arrested in Nazareth for throwing stones at the police. In the court hearing in which the State Prosecutor asked for Darawsheh's detention until the end of the trial, his lawyer, Fahim Dahoud, presented the court with the details of his arrest and torture:¹³

The Respondent admitted to the police that he threw a stone, but we contend that his confession was drawn from him unwillingly by means of extreme brutality. Regarding the *prima facie* evidence, even if his confession is sufficient to make a *prima facie* showing, we deny the evidence. Respondent 2 went with his two minor brothers and picked up their relative, Respondent 1, to guide them to the houses of invitees to the wedding of his sister, which is taking place on Saturday in Kufr Iksal. In Nazareth, in the Safafreh neighborhood, they were forced to stop the car, were pulled from within the car with batons and beatings. The person

involved is a young man who completed twelfth grade with honors, and was accepted into medical school. He had no criminal record. A person who wants to throw stones can do it in Kufr Iksal. Did he decide to go with his two brothers, when there were invitations to his sister's wedding in the car, reach Nazareth, get out of the car, take a stone, and throw it at police officers? I intend to file a complaint with the Ministry of Justice Police Investigation Unit. The policemen used a forbidden method that recalls unpleasant times when they brought a dog into the room where this young fellow was being interrogated and the policeman was standing over him telling him, "You threw the stone." Under the threat of the trained dog this young, inexperienced fellow was directed what to do. I would have done the same. He was beaten in the interrogation room, and that [signing the confession] was his only choice... I sat with him in the cell. He sat there and wept. Such an incident causes incredible emotional injury that the court is aware of.

In short, these state rituals are meant to threaten the population and to force them into submission. They constitute a reminder of the party holding power and the means of violence. But more importantly, when actually exercising law-preserving violence, the police succeed to establish a distinction between violent, disorderly and criminalized activity on the part of the monitored population, and their own activity now defined as one of restoring order.

These law-preserving forms of violence are not subjected to the Commission's investigation. In fact, very often the Commission members would wonder about the criticism that Palestinian

witnesses voiced to the very presence of the police on the streets of Nazareth. They refused to recognize the hostility that Palestinians had for the police. The police, defined as neutral restorers of order, Commission members asserted, should be present in the streets of Nazareth, for the terror-imposing function of the police is not acknowledged.

Accordingly, the mediation of law, which deems legitimate acts of arrest and interrogation, makes the search for stories about terrorizing forms of violence in the protocols of the Commission more difficult. Each of the testimonies given during the Commission's hearings is a direct speech. However, it is a speech prompted by the requirements of an official investigation¹⁴ that does not question police presence and its violent, yet non-lethal, rituals. These are not subjected to the test of proportionality, for these are considered *a priori* legitimate and unexceptional.

Nevertheless, traces of the terrorizing power of the police can still be found in testimonies of Palestinians who appeared before the Commission. However, these traces were not pursued by the Commission. Omar Abu Ass'ad Ben Walid, who witnessed the killing of Iyad Lawabneh by police forces, explained the reasons for his hesitation to provide information to police about the incident:¹⁵

Justice Theodore Or: How long after the incident did you talk about it to attorney Odeh for the first time? When was the first time that you approached them or they approached you, and you told the story of what happened that day? Do you



understand the question?

Omar Abu Ass'ad Ben Walid: No, I did not understand.

Justice Theodore Or: How much time passed from that day, the second of October, to the time that you told somebody from Adalah about what happened?

Omar Abu Ass'ad Ben Walid: At least two, three months.

Justice Theodore Or: Two, three months. Why didn't you do it sooner? You saw how a person was killed, you saw a person that...

Omar Abu Ass'ad Ben Walid: I'll tell you, sir. Before this incident, I passed by another incident in which policemen took a fellow named Iyad Zo'abi, took him in the front of his house, I was passing in my car, and I tell you, this is like the reason why I didn't go to the Ministry of Justice Police Investigation Unit... Then they took him alongside the house, beat him, and took him back in to the house, just like that - just like a gang.

Justice Theodore Or: Yes...

Omar Abu Ass'ad Ben Walid: And then I... It was as if, not wanting to get involved in these matters, I did not want to, but on the other hand, it is necessary to gather the strength and will to tell about everything that I saw and about everything that I saw [sic] and about everything that I know.

Justice Theodore Or: And so you kept it inside yourself for two months?

Omar Abu Ass'ad Ben Walid: Yes, but not to the police, to Adalah, at least someone who would give me proper support, who would not support to close the... to tailor [to cover up] the police officers.

Justice Theodore Or: Good.

Consequences

The Commission seeks to break away from the Intifada and distinguish it from the ongoing killing of Palestinians in the Occupied Territories by eventualizing specific actions that occurred during October in Israel. The structure of violence that governs Palestinians' lives is dealt with by reducing it to isolated injuries and deaths: concrete violent actors who operated at certain times, from specific locations, and from particular distances. The minutes of the hearings reveal precisely such a process of detaching an event from its living context and setting it up as an empty positivity outside of power relations. It is a process intended to leave nothing of state violence except the "then" and "there" of a deadly exceptional activity. The matrix of a real violent experience is transformed into a set of questions and answers aimed at extracting the illegal from the legal, and setting it apart as something that can be evaluated and possibly dismissed. All that is defined as legal and that has shaped Palestinians' lives during the Intifada and its aftermath, remains unquestioned, completely excluded.

The Commission's narrative of the law-making violence of the police violates the actual sequence of what happened in order to conform to the logic of a legal intervention, which occurs only in exceptional cases. Palestinians did not simply protest against the state, and some of their protests did not suddenly develop into acts of insurgency. These acts also resulted from the ordinary unexamined practices of the police. In many cases, the threatening presence of the police and its offensive non-lethal activities as experienced not only during the Intifada, but also in previous

interactions with police, have mobilized some to riot against the police, who symbolize the state. These riots in turn resulted in the use of deadly force against them despite the absence of danger to the police. To only investigate the use of deadly force is to abuse the full experience of Palestinian citizens and to forget that the exceptional always follows the ordinary.

In addition, when the investigation is narrowed down to concrete acts of violence, of shooting and injuring, the testimonies that become relevant are those of Palestinian citizens who witnessed or were directly injured by the police, as these were demarcated from other law-preserving violent acts. The testimonies of those who feared leaving their homes, those who worried about walking in the streets, those who had to depart from their family members, and those who were arrested, interrogated, tortured, and sometimes imprisoned - all of these testimonies are not relevant to the inquiry. It is not surprising, then, that only two Palestinian women testified before the Commission. One woman who testified was directly injured in her car, while driving with her husband and the other woman was protesting at the forefront. Women who were in their homes or in the streets of Nazareth, not necessarily protesting, were not asked to testify about their experience of police violence during this time. They were not effective witnesses.

Fiona Ross, who wrote about women's testimony in the first five weeks of public hearings of the South African Truth and Reconciliation Commission (SATRC), argues that the differing testimonies of these women were similar in one important way. For the most part, she observes,

women told stories about the human rights violations experienced by others and how these experiences affected them. Ross writes: "in their testimonies about others, women described their own experiences of the pernicious effects of apartheid on domestic life, families, intergenerational relations, and gender roles."¹⁶

Israel's Commission of Inquiry is not and should not be compared to the SATRC. Its mandate, status, procedures and above all, the expectations from it are distinct from those of the SATRC. Ross' observation, however, is relevant in another way. Her explanation of the logic of women's testimonies in South Africa sheds light on the reasons why the testimonies of Palestinian women were not considered by the Commission. The women's potential testimonies would not be directly related to the events. Women, for the most part, occupied the domestic sphere, and did not directly witness the actual violent events as defined by the Commission. All the Palestinian witnesses that the Commission investigated were either political personas or were directly involved in the Intifada events. The absence of women is indicative of the absence of many others who experienced state violence from their homes, schools and neighborhoods. When state violence does not include, in its official conceptualization, law-preserving violent rituals, relevant witnessing is also impinged upon. The gendered structure of power that reaches into the domains of intimate feelings and familiar spaces¹⁷ is not examined and testimonies testifying to its overreaching consequences are no longer effective testimonies.

Finally, if police violence is reduced to concrete acts of shooting and injuring, and if the general



threatening structure imposed on Palestinian citizens is neglected in the Commission's investigations, it will be difficult to appreciate the structural consequences of the violence utilized by the state against Palestinian citizens. The violence experienced through arrests and interrogation, and by threats of arrest materializing in the presence of the police on the streets of Nazareth, is as politically and socially determining as the experience of deadly force. These serve, as Allen Feldman reminds us, the purposes of surveillance, extraction of information, spatial obstruction, and periodic elimination of family and community relations.¹⁸ They remind Palestinians of the party holding the monopoly over violence and they police their daily behavior and their potential political opposition. They contribute to the production of alarmed citizens who shun expressing challenging opinions and avoid pursuing political change.

The focus of the Commission on acts of shooting and injuring, therefore, testifies to the shrinking of Palestinians' citizenship in Israel. The killing of 13 Palestinian citizens constituted the ultimate act of disenfranchisement. For after depriving citizens of their rights and turning them into subjects, the state, as a last resort, can either expel its citizen-subjects or kill them. The act of killing, then, can occur only after rights have been deprived or gradually violated, after citizens have been turned *de facto* into subjects. These citizen-subjects could find themselves engaged in existential struggles - struggles to live, to have a life. Accordingly, it was not only the Commission that focused on acts of shooting and injuring but the Palestinian organization, Adalah, which

provided the Commission with testimonies focusing on similarly defined acts of violence. The act of killing 13 citizens was for Adalah and others in the Palestinian community an extraordinary act generating a rupture in their relationship with the state, attenuating their expectations from the state, widening the boundaries of their potential suppression to include murder, and effectively shrinking the substance of their citizenship to that of the new empirical end introduced by the state, e.g., to that of killing or injuring (attempting to kill).

End Notes

1. See Adalah's letter to the Commission of Inquiry, "Request to Cancel Notices of Warning Given to Arab Public Representatives," published in this volume of Adalah's Review at 128.
2. Walter Benjamin, "Critique of Violence," in *Reflections*, ed. Peter Demetz (New York: Schocken Books, 1978) at 287.
3. See Jacque Derrida's reading of Benjamin's "Critique of Violence" - Jacque Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Deconstruction and the Possibility of Justice*, eds. Drucilla Cornell, Michel Rosenfeld, and David Gary Carlson (New York and London: Routledge, 1992) at 3.
4. W. Benjamin, *supra* note 2, at 286.
5. Protocol of the Commission of Inquiry at 3103. "S" is a police witness who testified behind a screen. His identity was not revealed.
6. *Id.* at 3116.
7. *Id.* at 3398.
8. *Id.* at 3131.
9. *Id.* at 3408.
10. See The Ministry of Justice, "Statistics on Arrestees and Detainees," 28 September - 30 October 2000." Available on Adalah's website: www.adalah.org/coi_reports/detainees.htm
11. *Id.*
12. See Allen Feldman, *Formations of Violence* (Chicago: University of Chicago Press, 1991) at 86: "The analysis of arrest and interrogation forces one to read the state not only as an instrumental and rationalized edifice but as a *ritual* form for the constitution of power; in turn one is led to the central role arrest and interrogation play in the performative construction of state power in Northern Ireland."
13. Protocol of the hearing in Cr.M. 3663/00, *The State of Israel v. Adel Barakat, et. al.* (Mag. Ct. Nazareth, 5 October 2000) (Azulay, J.) at 2.
14. One very specific incident testifies directly to the Commission's attempt to generate narratives that are a product of its legal interrogation, as opposed to narratives

that are prepared in advance by the witnesses and Adalah. While delivering his testimony, Mr. Tarik Kubty was asked by Justice Or whether he or someone else had read him his testimony prior to the session. Justice Or explained that Mr. Kubty simply paraphrased his testimony that Adalah had submitted as an affidavit to the Commission months before. Although the protocols do not reveal his unease, it was clear during the hearing that Justice Or did not appreciate that witnesses prepared themselves, and he appeared to question the truth-value of such narratives. Interestingly, while Justice Or blamed Mr. Kubty for reading his own affidavit beforehand, Mr. Kubty did not understand the critical nature of Justice Or's comment and instead emphasized that he had been reading his affidavit every day. See Protocol of the Commission of Inquiry at 4060.

15. Protocol of the Commission of Inquiry at 2875.
16. Fiona Ross, "Speech and Violence: Women's Testimony in the First Five Weeks of Public Hearings of the South African Truth and Reconciliation Commission," in *Remaking a World*, eds. Veena Das, Arthur Kelman, Margaret Lock, Pamela Reynolds, and Mamphela Ramphele (Berkeley: University of California Press, 1999) at 250.
17. See Begona Aretxaga, *Shattering Violence* (Princeton: Princeton University Press, 1997) at 53.
18. A. Feldman, *supra* note 12.

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Violent Jurisdictions

On Law, Space and the Fragmentation of Discourse under Oslo

Amr Shalakany

There is such a thing as post-Oslo space.¹ In black-letter terms, it is captured in the legalese of “jurisdiction” as set out by the Interim Accords. On the ground, it is easily discerned in the nonstop mushrooming of checkpoints on West Bank and Gaza Strip roads. Its nature and borders are traced in indigenous mental maps that are constantly drawn and redrawn for routine patterns of movement under occupation. As such, post-Oslo space is a relatively new construct, formally introduced with the signing of the Oslo Accords.² While some of its jurisdictional arrangements are a carryover from pre-Oslo times,³ it is nonetheless distinguishable from the latter by an overriding characteristic: Post-Oslo space is neither stable nor unitary; rather, it is defined by the incessant fragmentation of space in ever-mutating forms. This characteristic, latent in Oslo since its inception, was starkly brought to light following the outbreak of the current Intifada.

In this article, I make two arguments about post-Oslo space. First, that Oslo’s jurisdictional regime has fragmented the Occupied Territories in a way that renders its space amenable to Israeli acts of violence. To illustrate this argument, I use collective punishment as a specific example of the relationship between violence and Oslo’s jurisdictions. Second, spatial fragmentation and its ensuing violence has a discursive sidekick: Aside from physically cutting up the Occupied Territories, Oslo’s jurisdictions have also caused a fragmentation of the legal discourse on occupation. This fragmentation has proved especially problematic in developing legal arguments against Israeli occupation. The violence wrought by Oslo’s fragmentation of space is, thus,

both physical and discursive.

Before developing this argument in detail, one caveat should be mentioned at the outset. In this article, the goal is not to use Oslo as a framework for calibrating the legality of Israeli violence. Oslo is relevant as a source of spatial reordering which makes it tenable for certain acts of Israeli violence to take place during the present Intifada. Doctrinal analysis of the legality/illegality of violence under Oslo can hardly turn out to be a useful exercise. As a legal document, Oslo is riven with such gaps, conflicts and ambiguities, such that an analysis of the legality/illegality of violence would turn out to be predictably indeterminate. More specifically, “closure” is perhaps the most rudimentary form of collective punishment known in the Occupied Territories today. A basic example of Oslo’s indeterminacy with respect to “closures” would run as follows: Oslo compels both parties to “respect... and preserv[e] without obstacles, normal and smooth movement of people, vehicles, and goods within the West Bank, and between the West Bank and the Gaza Strip.”⁴ Oslo thus makes it illegal for Israel to pursue the policy of “closure” on these roads. However, these very same roads happen to be fully located in jurisdictions under Israel’s security control. Under Oslo, Israel can legally put these roads under “closure” given the necessary “security and safety considerations.” And yet, Israel’s security considerations are not absolute. Again, under Oslo, Israel is obliged not to close down the roads in such a way as to prejudice “the importance of the economic and social life, development programs and projects, and emergency healthcare services of the Palestinian population.”⁵ Therefore,



even security-based closures are arguably illegal. Oslo will make closures legal/illegal depending on when, where, and how you read the document.

International law, not Oslo, is the relevant frame of reference for determining the legality of collective punishment. In the Palestinian written presentation to the Sharam al-Sheikh Fact Finding Committee (known as the Mitchell Committee), no argument is made to the effect that collective punishment is illegal under Oslo. Instead, the Palestinian presentation argues that violence during the Intifada is “the result of both Israel’s failure to abide by international human rights law and humanitarian law, and the international community’s failure to insist that it do so.”⁶

This article is divided into three sections. First, I explain what is meant by post-Oslo space by mapping out Oslo’s jurisdictional regime and comparing it with pre-Oslo spatial ordering. Second, I outline the various forms of collective punishment made possible under Oslo’s jurisdictions. Finally, I conclude by discussing how the fragmentation of space has also fragmented the discourse on occupation.

Law and Space

Following the 1967 War, the entire territory of the West Bank and Gaza Strip lay contiguously as a single jurisdictional unit under Israeli military occupation.⁷ Palestinians were governed by one jurisdictional regime, which applied to the entire Occupied Territories, while Israelis traveling or settling there were subject to the extraterritorial application of Israeli law. Checkpoint arrangements are a good indicator of this

jurisdictional regime. On the ground, the Israeli army could be anywhere and everywhere, inside Palestinian urban and rural communities, on the roads connecting such communities together, as well as on roads leading from the Occupied Territories into the pre-1948 borders of Palestine. The army’s potential omnipresence partially accounts for the near-absence of permanent checkpoints on any of these roads. Thus, in pre-Oslo space, indigenous mental maps emerged in which movement around the full territory of mandatory Palestine became imaginable for the first time since the country’s partition following the 1948 War. Roads, devoid of checkpoints, governed by a single jurisdictional regime, connected West Bank and Gaza Strip towns with each other and with a previously inaccessible Palestinian hinterland inside Israel.

In post-Oslo space, jurisdiction came unbound. While the Interim Agreement opens by confirming that “the West Bank and the Gaza Strip [are] a single territorial unit, the integrity and status of which will be preserved during the interim period,”⁸ the Agreement moves on to fragment the Occupied Territories under three types of jurisdiction: Territorial, functional and personal. As of the writing of this article in 2001, territorial and functional jurisdictions are divided into three core spatial regimes: Areas A, B, and C.⁹ In Areas A, presently covering about 17.2% of the West Bank territory, the Palestinian Authority (PA) exercises jurisdiction over “internal security and public order,”¹⁰ and has a wide range of “civil powers and responsibilities.”¹¹ In Areas B, covering about 23.8% of the West Bank territory, the PA has exclusive jurisdiction over “public order for



Palestinians,” and has “civil powers and responsibilities,” while Israel has the “overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism.”¹² Finally, Areas C, covering about 59% of the West Bank territory, is under full Israeli jurisdiction regarding security and public order, as well as “territory related civil matters” (e.g., resource allocation and infrastructure), while the PA has “civil powers and responsibilities not relating to territory.”¹³ A similar division of jurisdiction governs the Gaza Strip, while another mutation governs select areas in the West Bank city of Hebron. These arrangements are further subordinated to an overriding regime of personal jurisdiction, effectively giving Israel exclusive jurisdiction over Israelis in the Occupied Territories.¹⁴ Finally, Israel retains all powers that are not explicitly transferred to the PA under any of the above regimes.

Accordingly, while pre-Oslo space was governed by a unitary jurisdictional regime, post-Oslo space is fundamentally riven with internal differentiations. Oslo’s new jurisdictional regime is responsible for molding a new Palestinian subjectivity, one with new mental maps of the West Bank and Gaza Strip to trace the latest change in patterns of movement under occupation. In these maps, movement occurs in a fragmented space with unstable borders, a space torn between autonomy and incarceration. More concretely, Oslo’s jurisdictional regime was meant to improve the lives of Palestinians by providing them with increased autonomy to govern their own affairs. Concurrently, by promising autonomy, each of Oslo’s jurisdictions also

functions as a prison for its residents. For example, while streets in Areas A may be free of Israeli soldiers, moving from one Area to another Area now involves the crossing of checkpoints manned by Israeli soldiers, always capable of blocking access between jurisdictions. Further, the borders of this space are far from stable. Checkpoints demarcating the boundaries of Oslo’s various jurisdictions come in different stripes and are constantly changing. The paradigmatic example here is what Palestinians call the “flying checkpoint.” This is a combination of Israeli soldiers and light plastic blocks, opening one road and closing another, changing by the day one’s mental map of which road to take between any two given points.

“Jurisdiction” is used to endow post-Oslo space with the conflicting functions of sanctuary and prison. In doing so, the Oslo Accords appear in line with the basic workings of neo-colonial legality, where new jurisdictional arrangements reify old relations of authority based on spatial affiliation. Similar examples abound: Late apartheid in South Africa is marked by a conspicuous expansion of jurisdictional strategies as a mode of enforcing a rigorous separation between white neighborhoods and black shantytowns, effectively expelling black Africans from 87% of all land in the nation. Northern Ireland is another case where jurisdiction was used to similar effect.¹⁵ Equally significant is local government law in the United States, where “the production of local jurisdictions and local cultures... can be an effective strategy for consolidating and maintaining centralized power.”¹⁶ Finally, Israel applies jurisdictional



arrangements to disempower its Palestinian citizens.¹⁷ In all of these examples, the power of jurisdiction lies in its ability to avoid defining authority in the language of force. As it levels and equalizes the parties involved (black / white, majority / minority, colonizer / colonized), jurisdiction gives the impression of moving away from a violent regime of status to a liberal universe ordered by contractual consent.¹⁸

Space and Violence

Israeli violence against Palestinians in the Occupied Territories is as old as the occupation itself. However, to the extent that there is such a thing as post-Oslo space, there is also a specific type of violence that this new space has made available. The specific type of violence examined here is a new form of “collective punishment,” closely connected with the jurisdictional regime described above. This form of collective punishment is something that generally happens in relation to an Israeli military checkpoint on the road from one jurisdiction to the next. While punishment may literally take place at the checkpoint, more often than not, it does not: Palestinians are collectively punished in a space physically divorced from the checkpoint yet effectively rooted in its shadows. The “collective” character of the various forms of punishment described below is manifested by the fact that none of the Palestinians killed or injured and none of the Palestinians with property damaged or economic livelihood impaired were involved in clashes or resistance to occupation. They were punished simply by virtue of “being there,” e.g., their punishment was made possible merely by

the fact of living in post-Oslo space, by virtue of seeking movement within Oslo’s jurisdictional regime.

The list below is neither exhaustive nor conceptually coherent. It is merely intended to give a sense of the different kinds of collective punishment taking place in the jurisdictional interstices demarcated by Oslo’s checkpoints.

With respect to being punished *at the checkpoint*, the most simple example here is that Palestinians who need to physically cross the checkpoint from one jurisdiction to another are often “collectively” not allowed to do so. This is the moment when Oslo’s jurisdictions, promising sanctuaries of autonomy, flip into the prison-like role of spatial incarceration. This basic formula produces hundreds of mutations from the systematic smashing of headlights by Israeli soldiers of Palestinian cars waiting to cross the checkpoint, to Palestinians literally losing their lives because of roadblock delays that prevent ambulances from crossing checkpoints on time. In this vein, the Palestine Red Crescent Society cited at least 162 incidents during the first months of the Intifada in which its ambulances were denied access through the Israeli checkpoints between Areas A and B.

The simple act of “closing the checkpoint” produces an even longer list of collective punishments, covering diverse fields of social activity that span from education to economic development.¹⁹ For example, since the beginning of the Intifada, checkpoint closures are responsible for shutting down 41 schools attended by approximately 20,000 students. Further, education at 275 schools has been severely

disrupted; many textbooks are missing from classrooms because Israel does not allow trucks carrying these books to cross the checkpoints. With respect to the economy, the inability of Palestinians to travel on roads blocked by the checkpoints has caused total daily economic losses estimated at \$12,700,000, which amounts to a 51% drop in the GNP. Every day checkpoints prevent 125,000 Palestinians from reaching work, producing an average daily income loss of \$6,250,000. The number of Palestinians living in poverty, those who earn less than \$2 a day, has doubled with “checkpoint closures,” affecting 1.3 million people today. The World Bank has estimated that if the policy of internal and external closure of the Occupied Territories is not lifted, then 50% of the population will live under the poverty line by the end of 2001.

Checkpoints can thus extend their shadows far beyond their immediate space. Laying siege on Palestinian population centers is the most ubiquitous example where the closing of checkpoints ends up punishing Palestinians regardless of their need to cross the checkpoint. Closure has meant that public services such as water and sanitation have deteriorated rapidly, increasing the frequency of water-borne diseases. Closures have disrupted health plans affecting over 500,000 children, including vaccination and early diagnosis programs, with the result that almost 60% of children in Gaza suffer from parasitic infections today. Even freedom of worship is affected: Since the beginning of the Intifada, checkpoints have prevented the absolute majority of Palestinians from reaching Jerusalem, denying them access to Christian and Muslim holy

sites even during religious holidays such as Easter or Ramadan.

In his report, Mr. Terje Roed-Larsen, UN Middle East Envoy, describes the above forms of collective punishment as the most severe and sustained set of movement restrictions imposed on Palestinians since the beginning of the occupation in 1967.²⁰ Herein lies another paradox of post-Oslo space: The cutting up of the Occupied Territories into a myriad of jurisdictions has allowed the realization of many of the above collective punishments, punishments which were spatially unimaginable prior to Oslo. For collective punishment to be feasible, the punished group of people must be located on some differentiated space, a space that may then be bounded and controlled. As argued earlier, pre-Oslo space remained largely undifferentiated: All occupied and all open.

One caveat is important to note here. Israeli acts of violence and Palestinian acts of resistance existed in pre-Oslo space, as much as they exist today in 2001. However, with the post-Oslo reconfiguration of space come alternative modes of violence and resistance. Among other factors, pre-Oslo violence derived much of its possibilities from the physical presence of the Israeli army of occupation within Palestinian urban and rural space, as opposed to the army’s post-Oslo presence outside and around such space. Thus, for example before Oslo, while closures rarely took place around Palestinian cities and villages, these sites were repeatedly subjected to curfews that restricted movement within them. Modes of resisting violence have also changed. The pre-Oslo presence of the Israeli army inside



Palestinian urban centers gave rise to a plethora of resistance strategies, based on social networking, which ultimately characterized the first Intifada. Due to a variety of factors, space being among them, most of the first Intifada strategies are unavailable in today's post-Oslo space.²¹ None of this implies that conditions of violence and resistance qualitatively "improved" or "deteriorated" under Oslo. Space, and hence violence and resistance, are simply different.

Fragmented Space Fragmented Discourse

Did you draw the map on soap because when it dissolves we won't have any of these stupid borders?²²

The violence wreaked by post-Oslo space is not merely physical; it is also discursive. The fragmentation of space into a myriad of jurisdictions has made the imposition of a number of collective punishment measures against the Palestinian people possible. However, the dangers of fragmentation do not stop there. The legal reordering of space under Oslo has also produced a fundamental reordering in the discursive practices available to lawyers working against occupation. To the extent that Oslo's law of jurisdiction has fragmented the Occupied Territories, it has also fragmented the way in which we have come to discuss "occupation" itself. Oslo broke down the debate from a clear demand for de-colonization into minute legal arguments regarding the nature of powers in the different jurisdictions it created. In that sense,

law's relevance during the current Intifada has been discursive rather than normative. Law is not about right and wrong, nor is it about rights and duties. Law shapes what people discuss, and more importantly, what they fail to discuss. To the extent that Oslo caused a violent reordering of spatial experiences, it has also controlled and reshaped the discourse through which such experiences are discussed.

The Israeli-Palestinian conflict has always been legalized in the sense that law has always exerted a role in shaping the issues discussed under the rubric of the conflict. The pre-Oslo discourse on occupation was no more coherent than its post-Oslo counterpart; lawyers working prior to the Oslo Accords also had to discuss occupation in a fragmented way. They were constantly bogged down with minute and intricate questions ranging from specific challenges such as the demolition of Palestinian houses or the expropriation of Palestinian land, to the staging of a mega-critique of occupation under international law. The Accords' significance lies in the type of fragmentation it introduced. There are at least three ways in which the fragmentation of space under Oslo jurisdictions has fragmented the way we discuss occupation.

First, the emergence of Oslo's jurisdictions allows Israel to use law in order to stall, defer, postpone, suspend, and generally legitimate a condition of impasse in de-colonization. For example, Israel has repeatedly argued that it will not sit down and negotiate a final settlement of the conflict until the PA brings a "100% end to the violence." However, the jurisdictional regime created by Oslo makes it nearly impossible for the

PA to fulfill such a demand. In the West Bank, Palestinians control security only in Areas A, which in the aggregate is 17% of its territory. As discussed earlier, this aggregate is itself fragmented into disconnected islets of jurisdiction. In order for Palestinian security personnel to move between the various clusters, which form this 17%, they first need to obtain Israel's permission to cross through jurisdictions under Areas B and C. Israel arbitrarily grants and refuses to give such permission, thus effectively limiting the PA from achieving what Israel demands of it. In this way, the legal division of jurisdictional powers allows Israel to indefinitely postpone its return back to the negotiating table.

Second, by creating a jurisdictional regime in which an entity called the "Palestinian Authority" enjoys a certain degree of "autonomy" in Areas A, the Oslo Accords promote a fuzzy and decidedly fictitious impression of an independent Palestinian state. This impression is then marshaled against Palestinian interests in a variety of discursive maneuvers. For example, relying on the PA's jurisdiction in Areas A, Israel has argued before the Mitchell Committee that the present conflict in the Occupied Territories is an "armed conflict short of war."²³ Such a characterization is meant to give Israel legitimate leeway in using severe military violence against Palestinians. Needless to say, such a characterization is incorrect, least of all because the legal situation in the Occupied Territories is one of military occupation, with rules of engagement governed by international humanitarian law, as well as the Geneva Convention (IV).²⁴ In addition, Oslo's fuzzy jurisdictional regime allows Israel to impart on the

PA a misleading impression of sovereignty, leading the outside world away from the simple fact that the West Bank and Gaza Strip are still under occupation. Outsiders ask over and over why the Palestinians are complaining anyway since CNN/BBC/NY Times say that jurisdictions such as Areas A, Residual Areas, whatever you want to call them, are not occupied anymore? Explaining that Oslo's jurisdictional regime is really a neo-colonial ploy that allows Israel to continue occupying the territories while appearing not to do so, often serves to aggravate media-led syndromes of "Palestine-fatigue."

Third, the fragmentation of space allows Israel to justify its violence against Palestinians more easily, because Israel's violence is now viewed *piecemeal*. Each action belongs to a fragmented space, and each is governed by a fragmented legal discourse. Under X, Y or Z scenarios, in Areas A, B or C jurisdictions, was it legal/illegal for Israel to stop the ambulance/worker/schoolboy, demolish the house/orchard/olive tree, smash my car's headlights or kill my neighbor's cousin? Under the weight of a fragmented mass of stories, as we attempt to deal legally with each story on its own jurisdictional terms, Israel can legitimate its actions more easily. Palestinians lose the sympathy of the outside world for the rudimentary facts of occupation now masked by Oslo's jurisdictions.

And so, though it may be a well-worn cliché that Oslo as a "process," is dead, its concept of jurisdiction has demonstrated tremendous staying power in its ability to shape the issues we argue about today. In other words, Oslo has a specter, and its specter is discursive. In that sense, Oslo's violence does not stop at the fragmentation of



space in a way that makes people suffer under a myriad of collective punishments. Rather, it is these collective punishments, the product of post-Oslo space, that have silenced the greatest problem of all: Occupation. For people interested in formulating arguments against Israeli occupation, Oslo's immediate violence happens to be discursive. Instead of discussing the immediate need for de-colonization, we are now consumed with fragmented stories of segregated spatial experiences, staged in the shadow of checkpoints, on roads that lead us nowhere in particular.

End Notes

- * I would like to thank Yishai Blank, Samera Esmeir, Rema Hammami, David Kennedy, Rina Rosenberg, Yezid Sayigh, and Raef Zreik for helpful comments on earlier drafts. The writing of this article was made possible by the generous support of The Ford Foundation Cairo Office.
- 1. The term "space" is a convenient, if somewhat too fashionable tool, for describing a set of new disciplinary movements that connect between social theory and geography. I use the term here in an intentionally opportunistic way, cutting and pasting between different schools of thought in the field. For an excellent collection of the various methodologies available, see Mike Crang and Nigel Thrift, eds., *Thinking Space* (London: Routledge, 2001).
- 2. The term "Oslo Accords," "Oslo," for short, will be used throughout this article to describe a series of agreements between the State of Israel and the Palestine Liberation Organization. The most important agreements for purposes of this article are the 1993 Declaration of Principles on Interim Self Government Arrangements (the "DOP") and the 1995 Palestinian-Israeli Interim Agreement on the West Bank and the Gaza Strip (the "Interim Agreement").
- 3. For example, the personal jurisdiction regime governing Israelis in the Occupied Territories under the Oslo Accords continues a pre-Oslo tradition in this field. For further analysis on this point, see Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Occupied Territories* (London: Kluwer Academic, 1997) at 79-93.
- 4. *Interim Agreement*, supra note 2, Annex I, Art I.2.
- 5. *Id.*, Annex I, Article IX.2.b.
- 6. *A Crisis of Faith: Second Submission of the Palestine Liberation Organization to the Sharam al-Sheikh Fact Finding Committee*, 30 December 2000 at 20.
- 7. Following the 1967 War, Israel redrew the map of Jerusalem, officially annexed the territory, and then applied its civil jurisdiction over it.
- 8. *Interim Agreement*, supra note 2, Article XI.1.
- 9. The following description of the jurisdictional regimes in the Occupied Territories is intentionally simplified. A detailed analysis would further expose the numerous exceptions, which riddle the functional powers enjoyed in each of these jurisdictions. For a detailed discussion, see R. Shehadeh, supra note 3, at 35-45.



10. *Interim Agreement*, supra note 2, Article XIII.1.
11. *Id.*, Article XI.2.
12. *Id.*, Article XIII.2.
13. *Id.*, Article XI.2.
14. Article XVII.2.c of the *Interim Agreement* states that, "The territorial and functional jurisdiction [of the PA] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement." Annex IV gives Israel exclusive personal jurisdiction over Israelis involved in any criminal offense, even for those committed in areas under full PA jurisdiction. In civil matters, Israelis come under PA jurisdiction only under six exceptional scenarios.
15. See Allen Feldman, *Formations of Violence* (Chicago: University of Chicago Press, 1991) at 17-45.
16. Richard Ford, "Law's Territory (A History of Jurisdiction)," 97 (4) Mich.L.R. 843, 915 (1999). For intellectual background, see Michel Foucault, "The Eye of Power," in *Power/Knowledge*, ed. Colin Gordon (New York: Pantheon Books, 1980) at 146, 149.
17. See Raef Zreik, "On Law, Planning, and the Shaping of Space," 1 (1) HAGAR International Social Science Review 168 (2000).
18. The same argument has been applied with equal force to liberal legality. Liberalism promises a move from status to contract, from relations based on sheer force to those based on the legitimate power of consent. Yet, force continues to permeate liberal legal regimes in a myriad of forms. An extensive critical tradition in this vein can be traced back to diverse founding texts in both fields of law and philosophy, such as Walter Benjamin or the American Legal Realists. For an excellent overview, see Beatrice Hanssen, *Critique of Violence* (New York: Routledge, 2000) at 16-29. For the Realist critique, see William W. Fisher, et. al., eds., *American Legal Realism* (London: Oxford University Press, 1993).
19. All the data mentioned below is cited from the Health Development Information Policy Institute, "HDIP Fact Sheet," covering the period of 28 September 2000-27 November 2001, available at: www.hdip.org/intifada_files/fact_sheet.htm.
20. *Id.* as cited by HDIP.
21. For an excellent comparison between the first and second Intifada, see Rema Hammami and Salim Tamari, "The Second Uprising: End or New Beginning?" XXX (2) 118 *Journal of Palestine Studies* 5 (Winter 2001).
22. Question asked to the Palestinian artist Mona Hatoum on her artwork entitled "Present Time," depicting the map of Oslo on fragmented pieces of Nabulsi soap. See Mona Hatoum, et. al., *Mona Hatoum* (London: Phaidon Press, 1997).
23. See *First Statement of the Government of Israel to the Sharam al-Sheikh Fact Finding Committee*, 28 December 2000.
24. See *The Palestine Liberation Organization Final Submission to the Sharam al-Sheikh Fact Finding Committee*, 3 April 2001.

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The Perfect Crime

The Supreme Court, the Occupied Territories, and al-Aqsa Intifada

Nimer Sultany

There I see a miserable people groaning under an iron yoke, the human race crushed in a grip of oppressors, and an enraged mob overwhelmed by pain and hunger whose blood and tears rich men drink in peace. And everywhere the strong are armed against the weak with the formidable power of law.

Jean Jacques Rousseau, *The Principles of the Rights of War*¹

The occupation does not occupy only territory; it also occupies people and daily life. It occupies the past, present, and future. It distorts history, alters names, and oppresses the language of the occupied people. With one stroke, the West Bank becomes Judea and Samaria, Nablus becomes Schem, al-Khalil turns into Hebron, and the Occupied Territories become the Area, the administered Territories or the Territories. Language becomes a mechanism to disguise and conceal the reality, a mechanism to present an alternative reality by giving it new packaging.² The Supreme Court cooperates with these processes and helps rewrite the history of the Occupied Territories. In creating judicial principles that have in the passage of time become judicial heritage, the Court has assimilated the perspective of the occupier and rejected that of the victim.

“It is in the nature of a victim” writes Jean-Francois Lyotard, “not to be able to prove that one has been done a wrong. A plaintiff is someone who has incurred damages and who disposes of the means to prove it. One becomes a victim if one loses these means. One loses them, for example, if *the author of the damages turns out*

directly or indirectly to be one’s judge. The latter has the authority to reject one’s testimony as false or the ability to impede its publication.... the ‘*perfect crime*’ does not consist in killing the victim or the witnesses... but rather in obtaining the silence of the witnesses, *the deafness of the judges*, and the inconsistency (insanity) of the testimony.”³ [emphasis added - N.S.]

Following Lyotard, this article examines the rhetorical means that the Supreme Court uses to erase the Palestinian narrative by rejecting it as false and trampling on its remains. The article focuses on Supreme Court decisions concerning petitions filed on behalf of Palestinians in the Occupied Territories during the Intifada that erupted in late September 2000. In particular, it explores the legal discourse underlying these decisions, and the enormous gulf between two conflicting narratives. In the Jewish Israeli narrative, the Intifada is perceived as violence and terror that threatens the daily existence and personal security of Israelis. In the Arab Palestinian narrative, the Intifada is perceived in terms of freedom, national liberation, independence, self-determination, and struggle against occupation.

Supreme Court decisions delivered during the Intifada show that the Israeli judicial discourse does not register the Palestinian narrative, and the cries of pain and the desire for freedom that characterize it. The justices do not understand the Palestinian suffering, which is viewed as false and its representation in the legal language entails violence. As May Jayyusi writes: “The representation of the ‘other’ between two unequal discourses involves a violence in that, as Talal



Asad points out, weaker languages are more likely to submit to forcible transformation in the process... The violence done to the 'other' lies in that this other has to present itself within the terms of the dominant discourse."⁴ In cases brought by Palestinians, the Supreme Court employs legal techniques that Avigdor Feldman categorizes as cunning:

Repression, justification, avoidance, and forgetfulness... In the Territories, the Supreme Court adjudicates people whose life experiences do not touch it, whose language is foreign to it, whose culture is estranged to its culture. No channel of communication exists between it and them.⁵

The Supreme Court

With the outbreak of the Intifada, the effect and severity of human rights violations against Palestinians in the Occupied Territories increased, thereby presenting the Supreme Court with great challenges. The Supreme Court did not meet these challenges and failed to act and protect human rights in the Occupied Territories. Rather, it chose to serve as a rubber stamp for questionable security considerations, employing judicial violence and oppression. The Court readily expressed its desire not to interfere with the military and "security" considerations, an old fig leaf used to cover up grave harm to Palestinians. Palestinians who turned to the Supreme Court returned empty handed, their petitions rejected.

As far back as 1986, Avishai Ehrlich found that Palestinians in the Occupied Territories had no chance to succeed in their petitions to the Supreme Court. Of 59 petitions filed in the second

half of 1986, none of the Palestinians emerged victorious. Ehrlich further found that 87.7% of the petitions dealt with the military's use of physical force, such as demolition and the sealing of houses, expropriation of property and land, deportation, denial of freedom of movement, restrictions on entry and exit from the country, and the prevention of family unification.⁶

Ronen Shamir found that of 557 petitions filed from 1967 to 1986 by Palestinians in the Occupied Territories, the Supreme Court ruled in favor of the petitioners and rejected the position of the Israeli authorities in only five instances, representing less than 1% of the cases. Only 65 petitions reached the litigation stage. Shamir noted that Palestinian victories were only symbolic; in those cases, too, the Supreme Court's decisions reinforced the legitimacy of Israel's occupation policy.⁷ Supreme Court decisions from the end of September 2000 to early September 2001, some of which are discussed below, provide comparable results to those found by Ehrlich and Shamir.

The argument over whether to seek redress in the Supreme Court and the utility (or lack of utility) of petitioning the Court is not new.⁸ Some Palestinians contend that applying to the Supreme Court symbolizes recognition of the occupying state and legitimizes the oppressive military regime, without offering fair consideration. In addition, it should be emphasized that the acceptance of the rules of the game itself necessarily results in comparable use of these rules and of the language in which the legal proceedings are held, e.g., the language in which the rules of the game are written. These rules are rigid and changing them is complex. The attempt

“to take part and yet feel not a part,” that is, to petition the Court without yielding to the dictated rules is ineffective and does not lead to success of any kind, as I demonstrate in the discussion of the cases below.

Palestinians are allowed to petition the Supreme Court as a matter of goodwill and not of right. Some argue that this practice expresses the liberal nature of the occupation. Ehrlich rejects this contention and argues that the purpose of allowing Palestinians to petition the Israeli Supreme Court was to challenge the status of the Arab Supreme Court of Appeals that operated in Ramallah, and to give a liberal image to the occupation, which masks its oppressive reality.⁹ Leon Sheleff argues that judgments in favor of the authorities are built into the arrangement:

Conditioning the litigation on the consent of the authorities-respondents tied the hands of the Court, because a large number of decisions in favor of the petitioners was liable to raise doubts about the continued consent of the respondents.¹⁰

According to Sheleff, this explains the judicial passivity so evident in decisions relating to the Occupied Territories, a passivity that is reflected in the readiness of the Court to accept the authorities’ arguments dealing with security considerations.¹¹

The Rhetorical and Narrative Tools of the Profession

A conspicuous characteristic of the vast majority of the judgments dealing with the Occupied Territories during al-Aqsa Intifada is that they are

brief, most of them containing only a few lines. The Court is not interested in the details of the oppression as stated in the petitions, and it rushes to rule in favor of the Israeli authorities. The Court does not seriously address petitions filed by Palestinians. It acts with a lack of trust, is closed-minded, and shows utter disregard to the petitioners’ arguments and the suffering that they wish to portray to the Court. It should be noted that in most cases the Supreme Court delivers its decisions without holding a hearing or after only one hearing is conducted.

Another evident symptom is the collective decision-making and yet, the anonymous issuance of decisions. One justice does not deliver the decision in his or her name in which other justices join or dissent; the decisions are signed by the whole panel hearing the case. This anonymity indicates the uniform and consensual approach of Israeli Supreme Court justices. This unanimity may be explained by the fact that the justices belong to the Israeli consensus on the Question of Palestine, and play an important role in shaping that consensus. All justices of the Supreme Court are Jews and most served in the State Attorney’s Office. The Internet logo of Israel’s judiciary opens with “Zion shall be redeemed with judgment, and those that return unto her with righteousness.” (Isaiah 1: 27). That is, the law is perceived as a tool to attain the collective Jewish goal, and hence, the religious quotation.

Another element that assists the Court in ignoring Palestinian reality is the frequent use of the phrase “we are satisfied,” also stated, as noted, in the plural.¹² The Supreme Court considers itself part of the “struggle of the people of Israel.” It



allows the authorities to do the “important work” without obstacle. At times, the Court “forgets itself” (or perhaps reminds those who forgot) and adopts without deliberation the opinion of the state authorities. In doing this, the Supreme Court turns the state’s security interests into lofty and natural interests that are not open to criticism. For example, in *S’adi ‘Abd Al-‘Ashi*,¹³ in which the petitioners contested the decision of the General Security Service to prohibit a detainee from meeting his attorney, Justice Heshin-Engelard-Levy ruled that:

In the application of Petitioner’s counsel, we read, *in camera* and without him being present, written material submitted to us in the matter of the Petitioner, and we were persuaded that *the lofty interests of state security* demand that it not be divulged to Petitioner’s counsel.¹⁴ [emphasis added - N.S.]

In *Dir Astiyeh Local Council*,¹⁵ the petitioners objected to the army’s expropriation of land. The army contended that the land was necessary for a military purpose, namely, the paving of a road for the movement of army vehicles. Justice Barak-Dorner-Beinisch presented the case in the first line of the judgment, as follows: “The Petitioners’ land was seized to meet military needs.” This statement sealed the fate of the petition. After summarizing the petitioners’ claims in two lines, the panel stated:

We are unable to accept these claims. In the past, stones were thrown at vehicles on the existing road... We have no basis not to accept the

Respondent’s position on the motive for taking this measure, and on its contribution to the security of the area. It is not collective punishment. We did not find anything unreasonable in the action that was taken. For these reasons, the petition is rejected. [emphasis added - N.S.]

*Physicians for Human Rights*¹⁶ dealt with the legality of the army’s policy of establishing checkpoints. The judgment opens with a statement of the facts and its first few lines dictate the result:

The checkpoints exist and have existed for several months, following the grave security situation in these areas, *as part of the army’s effort to prevent terrorist attacks*, which take a heavy toll on human life in the Territories themselves and within Israel. *The Petitioner contends* that these checkpoints, which create a closure or constitute a siege cause the local population to suffer... [emphasis added - N.S.]

The Supreme Court presents the army’s contentions as concrete facts. The contention about Palestinian suffering is always an unreliable claim. The Court adopts the army’s position and, in a few plain, forceful, and short sentences rejects the petitioners’ contentions. These judgments are important also because of what is missing. Most of them fail to give any response to questions such as: Who are the specific petitioners? What damages have they suffered? What are their living conditions? How will the judgment affect them? The Supreme Court shows no interest in these matters. Furthermore, for understandable reasons,



the word “occupation” cannot be found in its judgments. Everything is conducted as if there is no occupation, or injustice or injury resulting from it. In the reality that the occupation has generated, everything is handled as if justice and judges are non-existent.

Violence by Formalism: The Petition is Premature The Petition is General

The drastic methods adopted by Israel since the beginning of the Intifada, particularly the restrictions on freedom of movement and the high number of gross human rights violations, as well as the rapid pace of events create difficulties for human rights organizations. Coupled with the lack of resources and personnel, it is difficult for human rights activists to obtain data and affidavits. The element of time places organizations and individuals wanting to petition the Supreme Court in a problematic position: The matters require urgent attention and delay is liable to render the petition moot or result in rejection due to laches. Filing a petition with great haste may also result in denial of the petition on procedural grounds such as failure to exhaust other remedies or premature application to the Supreme Court, or on the grounds that the petition is general and lacks a sufficient factual basis. For example, in *Israeli Committee Against House Demolitions*,¹⁷ Justice Heshin-Zamir-Beinisch ruled that:

Without discussing the merits... this petition is premature. The Petitioners should have waited for a reply to their letter before applying to the Supreme Court. Prior request to the competent

authority, including giving the proper amount of time for a response to the request, is a preliminary condition for applying to the Court. The Petitioners did not comply with the requirement imposed on them; therefore, the petition should be summarily denied. The petition is denied.

This formal procedural reasoning completely ignores the facts underlying the petition, which was filed on 29 March 2001. At that time, dozens of Israeli settlers, some of them armed, had for several days, vandalized Palestinian property in al-Khalil and attacked Palestinians living in the city. These acts raised the danger of a pogrom against the Palestinian residents. The media broadcast pictures of the events worldwide, showing Israeli soldiers and police failing to do anything to stop the settlers’ rioting. It was very likely that the Israeli army would initiate military action against the Palestinian Abu-Sneineh neighborhood, which is located nearby the Jewish settlement in the city, and would evacuate its residents and destroy the neighborhood or part of it. In their petition, the petitioners mentioned these concerns and the circumstances that caused them to file their petition with great haste. They also mentioned that the Israeli army shelled the neighborhood and requested its residents to evacuate the area. The Court turned its back on the petitioners.

The Supreme Court’s approach enabled it to avoid relating to important subjects and to desist from delving into issues requiring difficult decisions, as well as from conducting a genuine investigation into the security considerations and the state’s candor in raising such grounds for their actions. In doing so, the Supreme Court approved

practices that severely violated human rights and refrained from placing restrictions on the army. The Court's approach made the petitioners' mission impossible.

At the beginning of the current Intifada, human rights organizations attempted to challenge the army's policy of placing physical, unmanned roadblocks throughout the Occupied Territories. These roadblocks prevented Palestinians from moving about in their vehicles, affected the orderly supply of food and medicine, and made it impossible for millions of Palestinians to live normal, routine lives. Claiming that the petitions were general, the Supreme Court rejected the first two petitions relating to the roadblocks. In *Na'im Salem al-Adreh and The Association for Civil Rights in Israel*,¹⁸ Justice Matza-Dorner-Tirkel ruled that:

The second demand set forth in the petition requests that we order the Respondent to remove all the physical barriers that it placed on the roads and thoroughfares in the area, and that it refrain hereinafter from using the method of placing physical barriers. This part of the petition does not state a cause of action for the Court's intervention. In addition to its being general and banal, no concrete foundation is presented that enables the Court to examine the reasonableness and proportionality of the measure under discussion, to achieve the objectives for which they were employed... As a result, therefore, the petition is denied...

This decision ignores the factual basis that the petitioners presented in great detail in their

petition and affidavits. The judgment transforms the petitioners' description of the drastic consequences of the roadblocks into a picture of something general and banal. In *Physicians for Human Rights*,¹⁹ Justice Heshin-Zamir-Beinisch ruled:

The Petitioner presents the Court with a general picture laying no sufficient factual foundation on which to base the order requested... The Court does not consider it proper to grant the Petitioner the relief sought, which is general relief, without the customary and required factual foundation...

As a result of these two judgments, human rights organizations were compelled to undertake endless and unavailing efforts in smaller areas to meet the requirements that the Supreme Court set. The effect of the Supreme Court's decisions was to marginalize the overall picture and give major significance to the marginal.²⁰ The rulings of the Supreme Court reflect a simple equation; as the oppression increases, the generality of the petition grows.

Experts' Discourse

The Supreme Court held the legal discourse hostage to the security discourse, and subjected it to an "experts' discourse" in which Palestinians are not part of a national or political group that opposes the occupation. The Palestinians are severed from the overall picture and are turned into a security issue. In this discourse, the Palestinians are a passive entity. Israeli Jewish experts define for the Palestinians their needs and design the conditions under which Palestinians



live. The experts' discourse is ostensibly objective, apolitical, and pure, but for them "security" is the most important thing. The expert is always an Israeli Jew and the Palestinians' contentions are always weaker.

The Supreme Court does not critically assess these experts' considerations or determinations in the manner that it should examine the statements of an interested party. The opposite is true. Even when the Court senses that something is wrong, it does not intervene. For example, in *Zaqariyya al-Bakri*,²¹ the petitioners requested that the Court order the Israeli authorities to cease present and future construction in the Tel-Rumeida antiquities site in al-Khalil. The Court ruled:

Ostensibly, at face value, the State's response regarding the reasonableness of granting building permits on an archeological site is not persuasive. But this is a security-political decision in which this Court does not intervene.

The Absurd

The judgment in *Israeli Committee Against House Demolitions*²² illustrates the hardship faced by petitioners in the Supreme Court. The Court describes the relief that the petitioners sought:

The Petitioners request that we order the Respondent, the Commander of IDF forces in the West Bank, to employ soldiers and police to prevent settlers living in Hebron from using violence and hooliganism against Palestinians; that he allocate appropriate forces for this purpose; that he refrain, himself and anyone on his behalf, from collective punishment against the Abu-Sneineh

neighborhood in Hebron and from evacuating residents from their homes; *and, if he intends to take military action against the Abu-Sneineh neighborhood, that he prepare a specific plan that will meet international standards.* [emphasis added - N.S.]

In their petition, the petitioners recognize the legitimacy of the military's activity in the Occupied Territories and demand that the activity comply with international standards. By doing so, the petitioners refrain from challenging the occupation. A further example of this is that the petitioners also mention that "their objective in filing the petition is to *strengthen the Respondent* in ensuring that the settlers obey the law, to prevent it from capitulating to rioting against Palestinians, and require it to consider, gauge, and slant its military response as to those who are not at fault." (emphasis added - N.S.)

After the Supreme Court rejected the petition on procedural grounds, the petitioners filed another petition.²³ This second petition refers to the settlers, in some of the instances, as "Israeli citizens who live in Hebron," and requests that the Court order the military commander to require the settlers to protect "the enclaves in which they live." The petitioners explain this request on the grounds that the protective means, "can be effective in protecting the Israeli residents, save lives, and prevent increased violence entailed in any attack. All this can be attained at relatively little cost in regards to the injury to the residents."²⁴

Entry into the halls of the Israeli judiciary led the petitioners awry. It led to adoption of the rules

of the game and rhetoric of the Israeli legal establishment.

The Oppression

The Supreme Court's decisions reproduce the asymmetry of power found outside the courtroom. The law gives the illusion that there are two equal parties standing before it. In practice, the occupier remains the occupier and continues to be the strong party. The occupied party remains the occupied party and is further weakened. Initiating court action does not change the status of the parties. The Court preserves the existing situation, perpetuating the asymmetry.

The oppression continues also within the courtroom because any uncritical examination of reality results in its preservation. The legal apparatus generated for itself an internal means of justification for the continuation of its existence and for the oppression that it produces.

End Notes

* I would like to thank Dr. Eyal Gross and Samera Esmeir for reading drafts of this essay and providing helpful comments.

1. Jean Jacques Rousseau, "Principles of the Rights of War," in *Reading Rousseau in the Nuclear Age*, trans. Grace Roosevelt (Philadelphia: Temple University Press, 1990) at 233.
2. David Grossman, *The Yellow Wind* (New York: Farrar, Straus and Giroux, 1988).
3. Jean-Francois Lyotard, *The Differend: Phrases in Dispute*, trans. George Van Den Abbeele (Manchester: Manchester University Press, 1988) at 8.
4. May Jayyusi, "Justice, Narrative and the Occlusion of Particularity," available at www.muwatin.org.

5. Avigdor Feldman, "Build a House, Cut Down a Tree, Marry a Woman, Bear a Son: The Territories, the Supreme Court, and the Late Return Motif," *Politics*, June 1987 at 14-15 (Hebrew).
6. Avishai Erlich, "*Bagatzim*" - Petitions to the High Court - A Statistical Portrait," 1 *Israeli Democracy* 33, 34 (May 1987).
7. Ronen Shamir, "Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice," 24(3) *Law & Society Review* 781 (1990).
8. Oded Lipschitz, "Don't Go to the High Court, Muhammad!" *Hotam Al-Hamishmar* (Weekend Supplement), 31 July 1987 at 8, 16 (Hebrew).
9. A. Erlich, *supra* note 6. See also Ilan Peleg, *Human Rights in the West Bank and Gaza: Legacy and Politics* (Syracuse: Syracuse University Press, 1995) at 85.
10. Leon Sheleff, "The Green Line is the Border of Judicial Activism: Queries about Supreme Court Judgments in the Territories," 17 *Tel Aviv University Law Review* 757, 759 (1993) (Hebrew). Yoram Dinstein maintains that the Court erred when it ruled that it does not have jurisdiction to hear petitions relating to the action of the military commander. In his opinion, "In the absence of special legislation enacted by the Knesset that grants the military commander immunity to judicial review, there is nothing to prevent... the Supreme Court... from reviewing his acts in the Occupied Territories." Dinstein also criticizes the Supreme Court's position that its power to directly apply the Hague Regulations to the Convention (IV) on the Laws and Customs of War on Land (1907) to the acts of the military commander results from the goodwill of the state attorney's office. See Yoram Dinstein, "Judicial Review on Acts of the Military Administration in the Occupied Territories," 3(1) *Tel Aviv University Law Review* 330, 332 (1973) (Hebrew).
11. Id. L. Sheleff at 761. See H.C. 3950/99, *Sami Sadeq Mahmud Sabih, et. al. v. Minister of Defense, et. al.*, delivered on 27 June 2001, in which the petitioners sought to nullify the proclamation of certain parts of al-Aqaba village in the West Bank, as a closed military area, and to force the army to cease conducting exercises on village land. Justice Heshin-Zamir-Beinisch ruled that, "... the Petitioners' contention that there is no military necessity in making the proclamation or conducting the exercises was not persuasive two years ago. Today, *in light of the deterioration in the security situation, it lost all weight...* This is sufficient cause to deny the petition." (emphasis added-N.S.) See also H.C. 4592/01, '*Abd al-Rahman al-Ahmar, et. al. v. Minister of Defense, et. al.*, delivered on 12 June 2001, where the detained petitioner argued that the



- General Security Service was using forbidden methods of interrogation and did not allow him to receive medical treatment. Justice Matza-Strassberg-Cohen-Levy ruled that, “the response of the state, confirmed by the affidavit of the interrogator in charge, would have been sufficient to satisfy the Court also in the matter of the first and principal subject raised by the petition that is the contention regarding the use of forbidden methods of interrogation.” See H.C. 8286/00, *The Association for Civil Rights in Israel v. Commander of IDF Forces in Judea and Samaria*, delivered on 13 December 2000, where the Supreme Court upheld the army’s seizure of a school.
12. See e.g., H.C. 1118/01, *Faiz Shahwan, et. al. v. General Security Service*, delivered on 13 February 2001 by Justice Levin-Strassberg-Cohen-Rivlin, ruling that: “We are satisfied that it would be improper to reveal the confidential material to the Petitioners’ counsel. We so decide.” Regarding the demand to meet with an attorney, the judgment stated that, “We reviewed the confidential material that was submitted to us, and we also received verbal explanations. We are satisfied that there is no basis for intervention in the order prohibiting the Petitioner from meeting with his attorney... The petition is denied.” In H.C. 3330/01, *Sari ‘Arabi Taha v. General Security Service*, delivered on 2 May 2001, Justice Barak-Strassberg-Cohen-Engelard ruled that, “With the consent of Petitioner’s counsel, we heard *in camera* the position of the General Security Service. We are satisfied that the security of the area justifies the secret evidence order. The statement of Respondent’s counsel that no physical measures will be used against the Petitioner is on the record. The petition is denied.” See also H.C. 936/01, *Faiz Shahwan, et. al. v. General Security Service*, delivered on 17 February 2001; H.C. 556/01, *‘Amad Saptawi v. Commander of IDF Forces in the Gaza Strip, et. al.*, delivered on 22 January 2001; H.C. 3814/01, *Mamdouh Ibrahim Abu Musa, et. al. v. General Security Service*, delivered on 15 May 2001; H.C. 3811/01, *‘Ali Rajeb, et. al. v. Commander of IDF Forces in Judea and Samaria*, delivered on 23 July 2001.
 13. H.C. 4092/01, *S’adi ‘Abd Al-Asbi, et. al. v. General Security Service*, delivered on 24 May 2001.
 14. The author has found no Supreme Court decision delivered during the current Intifada that allowed, after the justices reviewed confidential material, the petitioner’s counsel to review the material or a ruling that allowed a petitioner, subjected to a General Security Service prohibition order to meet with his attorney. See supra note 12.
 15. H.C. 2716/01, *Dir Astiyeh Local Council, et. al. v. Commander of IDF Forces in Judea and Samaria*, delivered on 5 April 2001.
 16. H.C. 9242/00, *Physicians for Human Rights v. Minister of Defense, et. al.*, delivered on 21 March 2001.
 17. H.C. 2555/01, *Israeli Committee Against House Demolitions, et. al. v. Commander of IDF Forces in the West Bank*, delivered on 30 March 2001.
 18. H.C. 32/01, *Na’im Salem al-‘Adreh and The Association for Civil Rights in Israel v. Commander of IDF Forces in Judea and Samaria*, delivered on 22 January 2001.
 19. See supra note 16.
 20. The petition in H.C. 2811/01, *Fares Amin Riabi, et. al. v. Commander of IDF Forces in the West Bank*, delivered on 16 April 2001, also involved physical roadblocks. It, too, was denied. Another petition on this matter is H.C. 3637/01, *Musa Shaqarneh, Esq., et. al. v. Commander of IDF Forces in the West Bank* (withdrawn on 9 January 2002 with leave to re-file.)
 21. H.C. 3352/01, *Zaqariyya al-Bakri, et. al. v. Civil Administration for Judea and Samaria, et. al.*, delivered on 12 August 2001. On this point, see also supra note 11.
 22. See supra note 17.
 23. H.C. 4647/01, *HaMoked: Center for the Defence of the Individual, et. al. v. Commander of IDF Forces in the West Bank*, submitted 12 June 2001 and withdrawn on 19 December 2001.
 24. The examples brought in this article raise other issues that are no less important. Among them are the functioning of Israeli human rights organizations, the tactics and rhetoric employed by these groups, and their perception of the legal system as a tool for change of the sociopolitical reality. These important issues are left for discussion elsewhere.



Administrative Detention

A Lawyer's Testimony

Jamil Dakwar with **Jake Wadland**

In November 2000, Mr. Ghassan Athamleh, a Palestinian citizen of Israel, was detained by the General Security Service (GSS, also known as Shin Bet), under suspicion of organizing and taking a central part in disturbing the peace, throwing stones at security forces, illegal association and conspiring to perpetrate a crime. Athamleh is a member of the Central Committee of the National Democratic Assembly (NDA), an activist Arab political party that poses serious challenges to the definition of Israel as a Jewish state. Following a ten-day investigation by the GSS, during which Athamleh was held in incommunicado detention, prohibited from meeting with a lawyer, he was placed under administrative detention for six months, imprisoned without any formal charges being brought against him.

According to the Emergency Powers (Detention) Law (1979) ("Detention Law"),¹ once the Minister of Defense signs an administrative detention order against an individual, the individual is brought before the President of a District Court who is authorized to approve the detention order, to cancel it or to shorten the period of detention. Such an order permits detention for an initial period of six months and may be renewed indefinitely. Under the administrative detention procedure, the state is not required to bring charges against the detainee, or to allow him the opportunity to review evidence against him or to cross-examine witnesses. The decisions handed down in such cases are typically short, and do not reveal any background information. Moreover, according to Article 9 of the law, the procedure to approve the administrative detention order is conducted *in*

camera; only the presiding judge is empowered to provide details concerning the proceedings.

Throughout the 1980s and 1990s, the Israeli security forces administratively detained thousands of Palestinians from the Occupied Territories, primarily during the first Intifada,² as well as Palestinian citizens of Israel. Prior to detaining Athamleh, however, the Minister of Defense had not issued an administrative detention order against a Palestinian citizen of Israel for three years.³

The state's approach to the Palestinian minority in Israel changed in late September 2000, following the outbreak of al-Aqsa Intifada in the West Bank and Gaza. These events came after the failure of the Camp David talks and MK Ariel Sharon's (then head of the Israeli opposition) provocative entry to al-Haram al-Sharif. At that time, Palestinian citizens of Israel staged massive solidarity demonstrations with the Palestinians in the Occupied Territories. Clashes between Israeli police and Palestinian citizens at the time of these demonstrations led to the deaths of 13 Palestinian citizens of Israel, the wounding of hundreds more, and the detention of over 1,000 people, many of whom were subsequently indicted. In the context of these events, Athamleh's detention indicated not only that the state is monitoring Palestinian citizen political activists, but that it is also willing to revive draconian measures to suppress their dissent and protest.

Al-Aqsa Intifada reinforced the perception within the Israeli security establishment that Palestinian citizens of the state represent a security threat, and that measures such as administrative detention constitute a legitimate means of



managing this perceived threat. In addition to detaining Athamleh, the state issued numerous orders, after October 2000, restricting the movement of Palestinian citizens of Israel. These restrictions included prohibiting citizens and political activists from traveling to the West Bank, the Gaza Strip, Jordan, and Egypt.

What follows is a personal testimony of my experience as a lawyer and a political activist in representing Athamleh. Lawyers who represent administrative detainees routinely confront the issues that I raise in this account, and even face much harsher conditions particularly in representing Palestinian detainees from the Occupied Territories in the military courts. For them, Athamleh's case is neither exceptional nor unique, but part of their daily routine. This testimony is not only meant to address the particular and the new; it is also meant to note practices that have become typical and conventional. We are often encouraged to stop registering the usual, as the flow of events is so overwhelming and new techniques of monitoring and punishment are continuously being introduced, which themselves demand critical examination. I have chosen, however, to focus on the revived techniques of the past, which continue to be effective in silencing political dissent. It is vital that the practice of administrative detention be exposed and analyzed again and again, in order to resist its normalization, particularly in the wake of the 11 September terror attacks in the United States. The discourse of the "war against terror" is now routinely invoked in an unprecedented manner to justify sweeping human rights violations including the use of secret evidence,

torture and detention without trial in the United States and elsewhere. Similarly, the State of Israel uses this discourse to legitimize human rights violations committed against Palestinians.

Previous Restriction Orders and Administrative Detentions

Athamleh did not appear before the court as a first time "offender." As result of his political activism, he had previously been detained and had his movement restricted on several occasions.

In 1987, at the beginning of the first Intifada, a restriction order was issued against Athamleh under the Emergency Regulations (1945), limiting his movement for six months. At that time, Athamleh was an active member of the political movement Abna' al-Balad (Sons of the Country). It was alleged that he had been in contact with Fatah, the main faction of the Palestine Liberation Organization (PLO) led by Yasser Arafat, classified formally then and now, as a terrorist organization under the Prevention of Terrorism Ordinance. Under the terms of the restriction order, Athamleh was forced to remain in his village, and to report to the local police station on a regular basis. This order was subsequently renewed for an additional six months.

In July 1988, Athamleh was administratively detained for the first time, for allegedly violating the 1987 restriction order against him. The GSS alleged that he had continued to remain in contact with Fatah, and he was detained for six months. Athamleh was administratively detained again in November 1994, for three months, under allegations that he had been in contact with Fatah representatives while abroad.



All of the detention and restriction orders against Athamleh were approved by the Israeli courts, including the Israeli Supreme Court,⁴ based on secret evidence that neither he nor his attorneys were permitted to review. His due process rights were severely violated. To this day, Athamleh has never been indicted, and no charges have been filed against him, with the exception of a 1981 incident in which he was indicted as a minor, while still in high school, for throwing a Molotov cocktail. Because his political activism resulted in the formation of a “past record,” the courts were more inclined to view Athamleh as a potential threat.

Gag Order

On the evening of 20 November 2000, without any prior warning, dozens of police and GSS officers descended on Athamleh’s home, terrifying his family. There was nothing to indicate that such action was required to apprehend him; indeed, the actions of the police and GSS were clearly excessive. It is important to emphasize that the methods used by the police to arrest Athamleh were no different than those used to arrest scores of other Palestinian citizens in Israel. The Israeli army uses even harsher methods to arrest Palestinians in the Occupied Territories.

The Nazareth Magistrate Court, before which Athamleh was initially brought, extended his detention. The Court accepted the request of the GSS to issue an absolute gag order on his case. The gag order prohibited me from discussing even the fact of his arrest and detention in public. The GSS also banned Athamleh from meeting with me, as his attorney, under Article 35 of the Criminal

Procedure (Enforcement Powers - Arrest) Law (1996).⁵ Thus, at this initial court appearance, I represented Athamleh without ever seeing or speaking to him; he appeared before the court alone and I appeared on his behalf in his absence. Further, all court proceedings against Athamleh, up to and including his Supreme Court appeal, were conducted *in camera*. At the beginning of his administrative detention proceedings on 7 December 2000, the President of the Nazareth District Court only allowed the following publication: “The fact that a request to approve an administrative detention order issued by the Minister of Defense for six months against respondent Ghassan Muhammed Hassan Athamleh, who lives in Reineh village, was submitted to the District Court in Nazareth before the President of the District Court.” This ban on communication by the GSS and the Israeli courts and the closed-door proceedings prevented me and other human rights activists from engaging in the vital work of generating awareness of Athamleh’s case in the media and marshalling public pressure as well as advocating against the use of this repressive measure.

On 14 January 2001, Judge Yehuda Abramovich, President of the Nazareth District Court, approved the administrative detention order signed by then Minister of Defense and Prime Minister Ehud Barak. For six months, Athamleh was kept in virtual isolation, forced to remain in his cramped cell for 23 hours a day. The Prisons Authority permitted Athamleh only one hour of visiting time with his family every two weeks, during which he was separated from them by a glass partition. Ostensibly, Athamleh was detained



as a preventive measure, as the state claimed that he constituted a threat to public security. Clearly, however, the conditions of his detention suggested punitive rather than preventive objectives.

In representing Athamleh, I argued, *inter alia*, that his detention was politically motivated. I demanded that if the State had evidence, it should initiate a criminal prosecution and submit an indictment outlining the charges against him. Citing the need to protect “secret sources,” Judge Abramovich rejected my arguments and upheld the administrative detention order.⁶ A subsequent appeal to the Supreme Court was also dismissed on similar grounds by Justice Ya’kov Tirkel.⁷

These events prompted Amnesty International to recognize Athamleh as a possible prisoner of conscience. His long-term detention without trial, based on secret evidence, severely violated his due process rights, and constituted a clear contravention of the International Covenant on Civil and Political Rights (ICCPR), ratified by Israel in 1991.⁸ In Amnesty’s view, Athamleh’s detention constituted “cruel, inhuman and degrading treatment.”

During Athamleh’s detention, a second administrative detainee was placed in his cell. The details surrounding this individual’s case were (and continue to be) subject to an even stricter gag order than the one applied to Athamleh. I became aware of this suppressed information through conversations with Athamleh. Although I was initially concerned that this second detainee was an informant seeking to extract information from Athamleh, it later became clear that he too was in fact under administrative detention. The second detainee was also a Palestinian citizen of Israel,

and was represented by a lawyer; however, I could not even discuss the case with his lawyer because of the sweeping gag order. This detainee was being kept, along with Athamleh, in an extremely cramped and uncomfortable cell, one that could not guarantee their basic right to dignity. Like Athamleh, he was permitted one brief visit with his family every two weeks, and was allowed to leave his cell for only one hour a day. As a result of the strict gag order, however, it was impossible to bring local and international pressure to bear on these serious human rights violations.

Imaginary Judicial Review and Attorney as Co-Suspect

After the Minister of Defense signs an administrative detention order, it is brought before the President of a District Court for judicial review.⁹ As has been illustrated, however, the term judicial review is extremely misleading. The words suggest an independent, impartial and balanced evaluation by a neutral third party. They imply that the arguments of both sides will be duly considered. Moreover, by judicial review, one expects a process that not only results in justice being done, but also in the appearance of justice; that is to say, a process that is fair and transparent.¹⁰

In the case of Athamleh, the judicial review process was neither fair nor transparent, but occurred in an environment of exclusivity and intimacy between the State Prosecutor and the judges. This intimacy is even more objectionable in light of the fact that the proceedings to approve administrative detention orders take place before only one judge in both the District Court and the

Supreme Court. The judicial review process, in Athamleh's case, did not give the appearance of justice, but of two powerful parties, the state and the judiciary, allied against a weak one, the administrative detainee. Throughout the proceedings, the power relations between the four parties - the judges, the representative of the State Prosecutor's office, the GSS officers and myself, as Athamleh's attorney, were made exceedingly clear.

In my representation of Athamleh, there was a sense that I, as his lawyer, was regarded not as an independent professional, but as standing alongside the accused, as a co-suspect. Part of the proceedings in both the District Court and Supreme Court were held without my presence. In these sessions, the judges, the representative of the State Prosecutor's office and the GSS officers discussed so-called "secret evidence." I was refused the right to inspect this "secret evidence" against my client, as well as being denied the opportunity to cross-examine key witnesses, who were available only to the prosecution and the judges. In my view, my role was not to take part in the intimate relationship between the state representatives and the judges, but to ensure transparent, fair and appropriate representation for Athamleh.

The judges chose to use the Detention Law to fully exclude me, both from the presentation of the evidence and from hearing the arguments made by the GSS and the representatives of the State Prosecutor's office in favor of detaining Athamleh. Specifically, Article 6(c) of the law states:

In the procedures of articles 4 and 5 [which deal with the approval of the detention order] the President of

the District Court is allowed to receive evidence, even without the presence of the detainee or his counsel, or without revealing it to them, if after he has reviewed the evidence or heard arguments, even without the presence of the detainee and his counsel, he is convinced that disclosing the evidence to the detainee or to his counsel might endanger state security or public security.

It would have been possible to allow me to review evidence and/or hear arguments without my client being present; however, the judges decided that revealing any of this information to me would somehow "endanger state security or public security."

Not only was I excluded from reviewing evidence and hearing arguments that were presented *ex parte*, but both the District Court and the Supreme Court dismissed my requests to cross-examine the Minister of Defense or the military secretary who presented the secret evidence to him. My cross-examination was meant to verify that the Minister had received all the relevant information, had considered it appropriately, and had allowed sufficient time to make such a significant decision. Without access to the substantive evidence, the arguments that were presented in the *ex parte* hearings and the secret testimonies of GSS witnesses, I was forced to defend Athamleh in a figurative state of darkness.

Unable to Challenge the Constitutionality of the Law

The Detention Law, which was enacted to replace the repressive Emergency Regulations (1948), demands scrutiny. The Detention Law allows

absolute restrictions on the liberty of an individual for six months, which can be indefinitely extended when there is a reasonable basis, based on secret evidence, that state security reasons oblige that an individual must be kept in detention. It suggests a preventive measure rather than a punitive measure. Not only does this law contradict international human rights norms and standards, but it is also *prima facie* unconstitutional according to the Israeli Basic Law: Human Dignity and Liberty (1992).

Article 5 of the Basic Law guarantees the right to liberty as a constitutional right. It stipulates that: “There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.” It must be read, however, with Article 10 of the Basic Law, the preservation of laws clause, which states: “This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law.” Case law has established that statutes enacted prior to the passage of the Basic Law, e.g., The Emergency Powers (Detention) Law, cannot be constitutionally challenged pursuant to the Basic Law. Rather, prior statutes should only be interpreted in light of the Basic Law.¹¹

In addition, the Detention Law confers upon the state a range of arbitrary powers to be used only in times of emergency. This may seem reasonable, until one considers that Israel has been in a declared state of emergency since its establishment in 1948. Thus, in fact, the Detention Law is not an emergency law at all, but effectively functions as a regular law. Moreover, it is often argued that the Detention Law offers greater legal protection to administrative detainees than the

Emergency Regulations (1948) mainly because of the drastic change in the judicial review process mandated in this newer law. However, the practice of judicial review, as was described above, suggests that the Detention Law is merely a re-packaging of earlier legislation.

GSS Attempts Search

On Friday, 8 December 2000, at the beginning of the District Court hearings on the administrative detention order against Athamleh, armed GSS and police officers came to Adalah’s offices early in the morning to demand the return of “secret documents” relating to his case. The documents in question had been given to Adalah staff lawyers by a representative of the State Prosecutor’s office, as part of a collection of largely irrelevant materials that were considered acceptable to be released to Athamleh and his attorneys. The GSS claimed that these documents had been released by mistake.

Although Adalah’s offices are normally closed on Fridays, one staff member was present. The officers showed her a handwritten decision issued by Judge Abramovich and demanded to search the premises in order to find the documents. Refusing to accede to their request, she immediately contacted other Adalah staff members to come to the office. Adalah staff did not provide the officers with the requested documents, and they refused to allow them to search the office, arguing that the decision they presented was illegal.

The attempt by the GSS and police to search Adalah’s offices was highly irregular. They did not notify the Israeli Bar, nor were they accompanied by a representative of the Bar, as is commonly done when attorneys’ offices are searched in order



to guarantee the protection of confidentiality afforded by the attorney-client privilege. In a further example of irregular search procedures, GSS officers went to the home of Judge Abramovich, the President of the Nazareth District Court, to obtain a handwritten decision to search Adalah's offices. Although Judge Abramovich stated that he issued "a warrant," the document itself is entitled a "decision," and states:

I hereby give an order that allows the Israeli police or a representative of the GSS to take out the abovementioned documents from the materials that were handed to the Respondent's lawyers. It is possible to execute this order and to take out the abovementioned documents from their control, from Attorneys Jamil Dakwar and Orna Kohn, or in any prohibited place where the documents may be found.

At the very least, such intimacy between a sitting judge and the GSS is clearly inappropriate. Further, neither the representative of the State Prosecutor nor the GSS requested that the documents in question be returned before going to the judge to get his authorization to search. The judge also did not demand that such a request be made before issuing his decision. On page 4 of his 14 January 2001 decision in the case, Judge Abramovich notes that:

The representative of the state handed to the Respondent's representative all of the materials that the GSS representatives concluded could be presented to the respondent or his lawyers. However, on Thursday 7 December 2000, in the

evening hours, they called me and informed me that by mistake two documents that should be seen as secret materials were inserted [in the documents given to the respondent's lawyers]. Therefore I was asked to decide on this matter. I did not see any need to invite the respondent's lawyer, nor the state's lawyer. Therefore I invited the legal representative of the GSS to [my house on] 8 December 2000 and he presented before me the two documents that were at stake. After an explanation of the matter, I came to the conclusion that these documents are classified. In light of that, [I issued] a warrant that instructs that these two documents be returned to the GSS, and no more, and all of the trouble that the Respondent's attorneys created in this matter in the press is much ado about nothing.¹²

By attempting to search Adalah's office, the GSS sought to send a clear, threatening message to Adalah, which works as the legal representative of the Palestinian minority in Israel. In its work, Adalah seeks to empower Palestinian society, protect the collective and individual rights of Palestinian citizens, and increase the confidence that the society has in itself. By attacking an organization that stands as a symbol of community advocacy and legal representation, the GSS attempted to undermine these confidence-building efforts, and tried to weaken people's trust in Adalah's ability to protect sensitive information. At a time when Adalah was gathering evidence and testimony from Palestinian citizens to be presented before the official Commission of Inquiry into the October 2000 protest demonstrations, as well as coordinating the representation of hundreds of

Palestinian citizens detained during these events, the conduct of the GSS could have been severely damaging to the organization and to the community.

Conclusion

The administrative detention of Ghassan Athamleh points to serious problems in the ways in which the judicial system relates to the Palestinian minority in Israel. The judiciary has a particular responsibility to uphold the rights of the minority to a fair trial and due process, even in times of emergency. Further, it must ensure that justice is not only done, but is also seen to be done, through fair and transparent hearing procedures. The courts must maintain their independence from the state security establishment.

The case also demonstrates that while a law may have the appearance of legitimacy, and may be passed by a majority of the state's elected representatives, its substance may still be unconstitutional and anti-democratic. Such is the case with the Emergency Powers (Detention) Law (1979), used under the terms of Israel's ongoing state of emergency to violate the rights of Palestinian citizens of Israel, in contravention of international human rights norms.

The revival of administrative detention against Palestinians in Israel is a signal to the community that the state can reactivate the severest of measures against political activists, and serves as a warning to curtail political struggle. Indeed, Athamleh's detention appears to have presaged an increasing reliance on state-of-emergency legislation to suppress political dissent by Palestinian citizens.

In November 2001, MK Dr. Azmi Bishara, head of the NDA party, was charged under the Prevention of Terrorism Ordinance (1948) in connection with political speeches he made in Umm al-Fahem, Israel and Kardaha, Syria. The Prevention of Terrorism Ordinance is applicable only under a state of emergency. In an attempt by the state to add legal weight to this unprecedented and politically-motivated indictment, MK Dr. Bishara and two of his parliamentary assistants were also charged under the Emergency Regulations (Foreign Travel) (1948) in relation to visits they assisted in organizing whereby elderly Palestinian citizens of Israel traveled to Syria to meet with refugee relatives they had not seen for fifty years. In February 2002, the state again invoked the Emergency Regulations (Foreign Travel) (1948) to ban the Head of the Islamic Movement in Israel, Sheikh Ra'ed Salah, from traveling anywhere outside the country for six months.¹³ A similar restriction was also recently imposed on the Secretary General of Abna' al-Balad, Mohammad Asa'd Kanaa'nah. Such suppression of internal dissent through the application of colonial-era legislation, in the context of Israel's normalized state of emergency, is a threat not only to the rights of the Palestinian minority, but mainly to the possibility of a democratic regime for all citizens.

End Notes

1. For a detailed analysis of the Emergency Powers (Detention) Law, see Eyal Nun, "Administrative Imprisonment in Israel," 3 *Pilim* 168 (1992) (Hebrew).
2. See Emma Playfair, "Administrative Detention in the Occupied West Bank and Gaza," Occasional Paper, Al-Haq (1985).
3. Authors' Note: This essay was written before the Israeli army's offensive in the Occupied Territories in late March 2002, during which thousands of Palestinians were arrested and detained. According to the state, the total number of Palestinians arrested since the beginning of that operation is about 7,000; the total number released from detention is 5,600; the total number currently detained is 1,500; and the total number currently held in administrative detention is 990. See State's written response, dated 6 May 2002, to H.C. 3239/00, *Iyad Mahmud Ishak Mirab, et. al. v. The Commander of the Israeli Army in the West Bank* (challenging the legality of Military Order 1500, issued on 5 April 2002, which permits the 18-day incommunicado detention of Palestinians; case pending). The number of Palestinian detainees increases each day, as the Israeli army's operations in the Occupied Territories continues.
4. See H.C. 672/87, *Ghassan Athamleh, et. al. v. The Military Commander of the Northern District*, P.D. 42 (4) 708 and A.A.D. 1/95, *Anonymous v. The Minister of Defense*, Takdin Elyon 95 (1), 1522.
5. For more information on denial of the right to legal counsel, see Jamil Dakwar, "Without Counsel: Palestinian Citizens of Israel," in 44 *Criminal Justice Matters* (King's College London) 32 (2001).
6. See A.D. 1/00, *The State of Israel v. Ghassan Athamleh* (Dist. Ct. Nazareth, 14 January 2001).
7. A.A.D. 1232/01, *Ghassan Athamleh v. The Minister of Defense*, unpublished decision delivered 12 March 2001.
8. Article 9(1) of the ICCPR states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such ground and in accordance with such procedure as are established by law." Article 9 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary arrest, detention or exile."
9. See Article 4 of the Emergency Powers (Detention) Law (1979). This Article empowers the judge not only to examine the reasonableness of considerations of the Minister of Defense and its proportionality, but also authorizes him to consider the very need for the detention based on the evidentiary material and to use his discretion in lieu of that of the Minister of Defense. See e.g., H.C. 2320/98, *Abd al Fatab Mahmoud Almamlah, et. al. v. The Military Commander of the IDF in Judea and Samaria, et. al.*, P.D. 52(3) 346.
10. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).
11. See H.C. 2316/95, *Ganimat v. The State of Israel*, P.D. 49 (4) 589.
12. See supra note 6, at 4-5.
13. For more information on the cases of MK Dr. Azmi Bishara and Sheikh Ra'ed Salah, see Adalah's website: www.adalah.org/legal_advocacy.shtml

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Kufr Qassem: Between Ordinary Politics and Transformative Politics

Leora Bilsky

The Political Trial as a Border Case

The term “political trial” is problematic for liberal legal thought. The term itself testifies to a mingling of fields - the political and the legal. Contrary to prevailing opinion, which attributes political trials to totalitarian regimes, Otto Kirschheimer showed as far back as the 1960s that the phenomenon also exists in democratic states.¹ Kirschheimer also pointed out that the special function of political trials was to legitimize the regime. In his view, political trials, unlike other means of political repression give legal legitimacy to state action, turning political adversaries into criminals. However, to retain the legitimizing effect of the judgment, the political authorities have to guarantee some degree of judicial independence even at the cost of introducing elements of uncertainty into the trial.

During the 1980s, writers associated with the Critical Legal Studies (CLS) movement criticized the liberal attempt to define a separate category of political trials and argued that every trial is a political trial.² However, CLS writers did not relate to the significant difference between two types of political trials that I shall call for the purposes of this article “ordinary” political trials and transformative political trials. The former help retain the hegemonic narrative, while the latter serve as an important social junction in which the boundaries of collective identity are exposed and criticized through a confrontation with an Other (usually the defendant in a criminal trial) who challenges the collective identity and offers an alternative identity narrative. This article is intended to sharpen this distinction by examining the judicial narrative, an important though often neglected

element of political trials.³

The Kufr Qassem trial was a transformative political trial, and this article examines the extent of its success in redefining the boundaries of the Israeli collective. I do this by placing it within the broad context of infiltrators’ trials in the 1950s, and by comparing it with a low-profile case (*Hussein*) heard by the Supreme Court. This comparison will illustrate the difference between the two types of political trials.

Ordinary Politics: Trials of Infiltrators During the 1950s

In his article, “Unfortunate or Perilous: The Infiltrators, the Law and the Supreme Court 1948-1954,” legal scholar Oren Bracha investigates the political and legal map that characterized the handling of infiltrators during the 1950s.⁴ Many of the Arab infiltrators had left the country during or after the 1948 War. Their attempt to return was perceived as threatening the stability of the borders of the newborn Jewish state. In order to prevent their return, the authorities adopted several means, including the establishment of a border police, a tough policy of “free shooting” against the infiltrators, routine searches and deportations of infiltrators who were caught, and the like.⁵ The issue soon arrived on the doorstep of the Supreme Court. Some infiltrators who were caught by the border police petitioned the Court to intervene to prevent their deportation and order the authorities to issue them Israeli identity cards. Bracha contends that the ideological beliefs of the Court were reflected in the creation of legal categories that prevented a genuine understanding of the complexity of the phenomenon and contributed to



a black and white presentation of the matter. The Court decided most petitions according to one of two categories - either “forced deportation” or “free-will emigration.” Only those who came within the rubric of “forced deportation” were entitled to relief. The Court denied relief to “free-will emigration” petitioners, who included, in part, people who fled because of the fear of war and students and workers who left for study or work. In other words, narrowing the category of “forced deportation” and expanding the category of “free-will emigration” provided a favorable result for the authorities.

The Court thus provided the political system with legal justification for its tough policy against infiltrators. However, the Court maintained a degree of independence from the political authorities in cases where it intervened and prevented the deportation.⁶ The Court’s willingness to criticize, intervene, and even change the decision reached by the authorities, although rare, enhanced the status of the judiciary and contributed to its image as defender of the rule of law. The Court’s treading along a narrow thread between legitimization and criticism is illustrated clearly in *Hussein*.⁷

In *Hussein*, the Court decided on a petition filed by several Arab inhabitants of Kufr Majd el-Krum who fled from their village following an act of retaliation committed by an Israeli army unit several days after the army seized control of their village. The petitioners subsequently re-entered Israel. They petitioned the Supreme Court to prevent their deportation and to order that Israeli identity cards be issued to them. The Supreme Court had to decide between two opposing factual

versions. The petitioners claimed that they left because of the army’s actions in the village, which included the shooting and killing of several residents and the destruction of a number of houses. The army claimed that the petitioners had not been in the village on the day of the conquest, and that it had not conducted any special action in the village after taking control.

The Court demonstrated a certain degree of independence when it granted little credibility to the army’s version of the events, which was based on confidential sources, while it afforded a high degree of credibility to the testimony of one of the village’s leaders [*mukhtar*]. The Court ultimately preferred the petitioners’ version, though it made a point of describing the action as “an ordinary retaliatory act.”⁸ However, while the Court considered it an ordinary retaliatory act (which would not require examination of its legality), the historian Benny Morris states that there had been a massacre and as a result dozens of families left the village and went to Lebanon.⁹ The different name given to the event that took place in Majd el-Krum turned out to be crucial in this case.

Surprisingly, the Court’s acceptance of the petitioners’ version of the events was not decisive. In order to decide the legal issues, the Court created, for the first time, a distinction between two categories of people who had left Israel during and after the war - “forced deportation” and “free-will emigration” - and determined that only the first would justify Supreme Court relief in favor of the petitioners. In *Hussein*, the Court ruled that there was no forced deportation from the village, but only that people left as a consequence of the “retaliation act.” Therefore, the Court rejected the



petition. This double move - accepting the factual basis of the petition, while rejecting it on the merits - enabled the Court to retain its independence vis-a-vis the political authorities and the army and enhanced its legitimacy. At the same time, it created a legal classification that would provide the basis for denial of most future petitions.

Ostensibly, the Court could have based rejection of the petitioners' claim on the legal classification. However, Justice Heshin, speaking for the Court, added a moral justification to the legal argument, in the form of a short narrative. One reason for adding this narrative might be that this was the first time that the classification had been presented. The short narrative, stated in the last sentence of the brief judgment, reveals the norm that shaped the Court's judgment:¹⁰

At a time in which the state is in danger, when it is surrounded by hostile nations that had fought it relentlessly and viciously, and are still harassing it and are determined to swallow it alive - in those chaotic days, people desert the country and move over to the enemy camp. Later they return, claiming to be its loyal citizens, and have the presumption to demand equal rights with all the other citizens... This Court is of the opinion that a person who travels of his own will, and without permit, from the line of defense of the state, to the line of attack of the enemy, is not worthy of this Court's providing him with remedy and help in the fight the army authorities are waging with him and his like to defend the state and its citizens.

These paragraphs reflect a sharp reversal. Until this point, the Court was satisfied with a formal legal

explanation for rejecting the petition. Here, the Court offers a moralizing narrative according to which the petitioners abandoned the country in a time of hardship, joined the enemy, and later, professing to be its loyal citizens, had the audacity to claim their rights in Court. This narrative seems odd. Ostensibly, even if the petitioners were not legally entitled to relief, based on the facts that the Court accepted as true, someone who left the country after an act of retaliation by the army cannot morally be equated with someone who just "traveled" of his own free will and chose to join the enemy. The language the Court chose to use, describing the petitioners as people who had "abandoned" or "traveled" of their own free will to cross enemy lines is possible only if we ignore the moral meaning of the act of retaliation that was described above.

The short narrative that the Court provides is immensely important. Its role is to retell the events so that people will fall neatly in one of two categories: Either loyal citizens or enemies. The petitioners entered the Court as infiltrators and left it as people who "professed" to be loyal citizens but were revealed as belonging to the enemy. This legal narrative leaves no place for the ambivalence or complex reality of Arab citizens of Israel. In other words, the legal narrative performs an act of boundary drawing, placing the infiltrators (except those who had been deported by force) behind enemy lines.

Transformative Politics: The Kufr Qassem Decision¹¹

In contrast to the Majd el-Krum affair that was discussed in the *Hussein* judgment and did not



become part of Israeli collective memory, the Kufr Qassem massacre became a symbol, to a large extent, because of one memorable paragraph in the decision, known as the “black flag” paragraph:¹²

The hallmark of manifest illegality is that it must wave like a black flag over the given order, a warning that says: “forbidden!” Not formal illegality, obscure or partially obscure, not illegality that can be discerned only by legal scholars, is important here, but rather, the clear and obvious violation of law... Illegality that pierces the eye and revolts the heart, if the eye is not blind and the heart is not impenetrable or corrupt - this is the measure of manifest illegality needed to override the soldier’s duty to obey and to impose on him criminal liability for his action.

The Israeli legal scholarship discussing the *Kufr Qassem* judgment has mainly dealt with delineating the proper limits of the duty to obey an illegal order. For the most part, it ignored the long narrative that preceded the “black flag” paragraph, even though, as I shall argue, it was this narrative that contributed the main novelty of the decision.¹³

Understanding this novelty does not lie in comprehending the delicacy of the legal precepts but in the study of the story told by the presiding judge, Benjamin Halevi. His narrative constituted the first attempt by an Israeli court to look straight at the violence of the Israeli soldiers and the suffering of the Arab victims, and to give them a name, face and voice. In order to do this, the judge had to overcome the legal impulse to classify and see the events through the prism of legal categories

that tended to mask the problematic reality that was the fertile ground of the massacre.¹⁴

By going back to the narrative of Halevi, it is possible to focus on the way he used the massacre at Kufr Qassem to attempt to transform the collective consciousness regarding the meaning of Israeli citizenship. In this sense, the judgment in *Kufr Qassem* joins a long tradition of transformative political trials, which constitute junctures of identity in the society. The main power of these political trials lies in the new narrative that they offer. This new narrative sought to redraw the boundaries of the collective and thus reshape the Israeli collective identity.

The Kufr Qassem massacre took place in 1956 in a border zone, a place of political and existential ambiguity. The villages of the Triangle were located close to the Israeli-Jordanian border. Although their residents had received Israeli citizenship, they had been under military rule since the 1948 War. The Arabs lived under a permanent nighttime curfew beginning at 9:00 p.m.¹⁵ The massacre took place several hours before the offensive of the Sinai War began. However, as Rosenthal contends, the massacre was intimately connected to this war, as indicated by the extended curfew (which was changed to begin at 5:00 p.m.) that was placed on the village because of the planned offensive.¹⁶ The responsibility for keeping the curfew was given to a unit of the Border Police that had been annexed to an Israeli army brigade for the duration of the war. As noted, the Border Police had been formed as a response to the wave of infiltrators.¹⁷ The policy on opening fire on infiltrators was especially severe.¹⁸

As *Hussein* shows, the great ambiguity of the



border area requires the Court to draw clear lines, but also provides it with discretion as to how to draw these lines. The Court could have chosen to place the Kufr Qassem massacre in the context of the Sinai War, the struggle against the infiltrators, the military rule, and to see them all as mitigating circumstances. Previous, well-known cases of massacres, such as Dir Yassin and Kibye, never reached the Court. These cases are generally considered to be actions that occurred during combat, or beyond the borders of the State of Israel, and therefore as falling outside the Court's jurisdiction.

The fact that the Kufr Qassem massacre is remembered in Israel as a massacre of 49 peaceful, innocent Arab citizens is not only due to the different circumstances but is largely the result of the narrative Judge Halevi chose to advance. As in *Hussein*, this narrative reveals the politics of the Court. However, in contrast to *Hussein*, the judgment in *Kufr Qassem* was not meant to confirm the hegemonic narrative with the help of legal classifications, but to change the prevailing beliefs about the Arab citizens of Israel, from perceiving them as a fifth column or partial enemies to recognizing them as full-fledged citizens.¹⁹ The course leading in this direction entailed the change in language first and foremost.

The Achilles heel of developing an Israeli civil discourse was the phenomenon of infiltrators. A close reading of the *Kufr Qassem* judgment reveals how much the hybrid category of the infiltrator blurred the line between enemy and citizen, and prepared the emotional grounds for the border police unit to commit the massacre.²⁰ Here lies the link between the infiltrators' petitions to the

Supreme Court and the criminal case of the Kufr Qassem massacre. In their testimonies during the trial, the soldiers time and again pointed out the difficulty of distinguishing between an Arab citizen and an infiltrator, and how much it helped that there was such a draconian curfew, during which anybody who violated it (even those who were unaware of the curfew) would be shot. For example, Major Melinki testified that he asked Colonel Shadmi about the curfew order: "I am ready to kill a *fida'i*, but what about the civilian returning to his village without knowing about the curfew?" Colonel Shadmi's answer to this question has become part of Israeli collective memory ever since the trial: "I don't want any sentiment, I don't want any arrests, *Allah Yerahmo* [God have mercy on them]."²¹

The category of infiltrators is thus used to blur the line between a civilian and a fighter. This moral twilight is most obvious in the cross-examination of Major Melinki on the murder of the women: "And if I see someone returning to the village who says he is not a *fida'i*, who can guarantee that every woman is really a woman, and that every woman with a belly is pregnant and not a *fida'i* who is carrying something?"²² The Court's opinion explained that Lieutenant Gabriel Dahan, the commander in charge of the unit that committed the massacre, was at the time mainly occupied with fighting infiltrators.²³ Judge Halevi concluded that the problem is that the soldiers are completely incapable of distinguishing a combatant from a citizen. Therefore, the judge drew the line clearly, so that Arab citizens of Israel would be included among Israeli citizens.

The rhetoric employed by the judge indicates

his awareness of the deep connection between language and citizenship. The judge's involvement in "translating" is conspicuous. Throughout the judgment, he changed the expression "Arabs," which the soldiers used, to "citizens." Regarding one of the cases, he pointed out that, "In these three confessions they refer simply to 'Arabs,' without explaining that most of the victims were women; none of the defendants was interested in emphasizing this shameful and aggravating circumstance."²⁴

In addition to changing the language, the judge offers a narrative that is intended to give the Arabs a human face. Rather than settle for a customary general summary of the massacre and rapidly getting into a discussion of the legal principles involved, he adopts a strategy of delay. He breaks down a massacre that took place over an hour into small episodes that are described in chronological order - from random shooting at vehicles to taking the people out of the vehicles, standing them in a row and executing them by firing squads, to individual shooting of the injured who were still alive. This description creates in the reader a growing sense of horror that is intensified as the events unfold. Moreover, at the end of each episode the judge lists the names of the victims killed, one after the other, as if the judgment should also serve as a memorial to them. In the midst of every shooting episode, the judge inserts brief exchanges of words that took place, which show the human interaction and enhance the sense of horror: "Isma'il, who saw nearby the bodies of those who had been killed in the previous incident, and could already sense the murderous intention of Dahan and his soldiers, approached Dahan

saying, '*Dakhikum* (please), why do you want to shoot us?' 'Shut up!' Dahan answered, and gave the order to fire and shot the three with the Uzi in his hand."²⁵

The judge contrasts these hair-raising descriptions with the way in which the defendants chose to describe the events, demonstrating in this way how language itself becomes part of the dehumanizing process. "Later... a truck came with about seven or eight Arabs on it. I stopped it in order to get them into the village... I told them 'follow me' but they began to run. I opened fire and killed them. After that, another car came, also with about seven or eight Arabs, and it was the same again. After that came a horse-drawn wagon with five Arabs in it, and the same happened."²⁶ The judge quotes from these testimonies and rejects as a lie the claim that the victims ran away before they were shot. He points to the routine explanation that the soldiers provided ("and it was the same again") as throwing light on the terrible nature of the crimes that were committed in Kufr Qassem.

Kufr Qassem marked the first time in which soldiers from the Israeli army were put on trial for committing a massacre, and the Court responded to the challenge. The aim of the judgment's legal narrative was to turn a fuzzy category of Arab citizens into a clear one, situating the massacre deep within the boundaries of civil society (applying the penal and administrative law) and in this way, subject the army to the rule of law. The Court thus undertook to redefine the boundaries of legitimate army action so that the civil law, rather than the laws of war, apply, and so that the Arab victims are recognized as Israeli citizens (and not

as a quasi-infiltrators). The attempt to move the case into the civil sphere was undermined from the beginning. The trial was conducted in a military court, and the judges, defendants, and prosecutors wore army uniforms.²⁷ However, the function of the judgment is to move the reader from the military discourse, which does not acknowledge any boundaries, into a civil discourse that is limited and defined by the law, and to move the public discourse from an ethnic categorization of Jews and Arabs into a civic categorization of Israeli and non-Israeli citizens. The Court's decision can be seen as erecting a metaphoric border: The Arabs enter the Court suspected of being enemies (of war, infiltrators, a fifth column) and leave it as full-fledged citizens of the state of Israel. The army enters the Court with unbounded powers (security prevailing over the law, war, defense regulations, emergency) and comes out subjected to the rule of law.²⁸

The Limits of a Transformative Trial

Judge Halevi's efforts succeeded in impressing on the public that the events at Kufr Qassem included the murder of Israeli citizens. Nonetheless, they did not induce a collective process of soul-searching. What can explain this failure?

One explanation involves the relations between the Court and the political authorities. *Kufr Qassem* was a kind of ritual in which the state cleansed itself from the sin that was attributed to it.²⁹ The politicians, particularly Prime Minister and Defense Minister David Ben Gurion, preferred to silence the whole affair. Confronted with international pressure, they agreed to a trial but were not willing to truly condemn the soldiers who committed the

massacre.³⁰ Indeed, the politicians' involvement after the Court gave its judgment led to pardons being granted to the convicted defendants.³¹ The defendants were not dismissed from the security forces but rather the opposite occurred - they were promoted within the defense establishment,³² a pattern that repeated itself in similar cases.³³ Moreover, even the narrative forwarded by Judge Halevi made a sharp distinction, which was so important to Ben Gurion, between the conduct of the border police unit that committed the massacre and the army's conduct.³⁴ This distinction ultimately enabled preservation of the ethos of Israel's purity of arms and rendered unnecessary the self-examination of the weaknesses of Israeli democracy (treatment of its Arab citizens, and its attitude toward the army and the other security forces). Judge Halevi's judgment surely led to the prosecution of Colonel Shadmi (who was not a defendant in the trial of the border police unit), but he was only convicted of exceeding his authority by altering the start of the curfew, for which he was given a symbolic fine of one *grush* (cent).³⁵ These developments can help explain how "Shadmi's *grush*" and not Halevi's transformative narrative became a symbol of the trial for Arab citizens of Israel. They saw it as expressing more than anything the low value given to the lives of Arab citizens by the army authorities and Israeli courts alike.

Another explanation for why the *Kufr Qassem* judgment failed to induce a change in Israeli collective identity is internal to the legal discourse. Judge Halevi tried to use his judgment as an entrance card for Arab citizens into the Israeli collective. The facts of the massacre taught the

judge that providing formal citizenship to Arabs did not prevent the *de facto* exclusion created by the military government and did not change the public's suspicious attitude toward Arab citizens of the state. By means of language and an empathetic narrative, Judge Halevi sought to combat the severe de-humanization apparent in the soldiers' testimonies at the trial. To accomplish this, the judge identified with the Arab victims, respecting them as human beings and defending their right to live in dignity. In other words, the judge chose a liberal discourse to give individual effect to the citizenship of Arabs living in Israel. For this purpose, the judge had to ignore the historical and group context of the national conflict. The entrance card to citizenship provided in his judgment was issued to Arabs as individuals; the citizenship was passive (negative liberty) and minimal.³⁶ These constraints on the legal narrative shaped the collective memory of the events as the murder of citizens, while the historical context of the Sinai War, the military regime, the harsh border police policy, as well as the racism revealed in the testimonies of the soldiers, disappeared.

Conclusion

The starting point of this article was my belief that there is no way to completely separate law from politics, and that we have to learn to accept the existence of political trials. I argued that the degree of legitimization of a political trial is connected to the degree of the courts' independence from the state authorities. For this purpose, I suggested distinguishing between two types of politics, a routine (ordinary) politics, and a transformative politics (intended to change public consciousness).

In *Hussein* and *Kufr Qassem*, the Court attempted to draw the boundaries of the Israeli collective identity by confronting the complex case of Arab citizens of Israel, or of those who wished to obtain citizenship. However, while the routine politics in *Hussein* advanced a narrative intended to conform the specific case to the hegemonic narrative of the period, the transformative politics of the decision in *Kufr Qassem* offered an alternative reading of Israeli citizenship that included Arab citizens more fully.

In the two cases, the Court sought to preserve its independence from the political and military authorities. In *Hussein*, the independence of the Court was mainly manifested on the procedural level, but at the narrative level, the Court supplied the moral justification to further validate the authorities' actions. It was this gap that helped the Court fulfill the legitimization function of the political trial.

In *Kufr Qassem*, this dialectic of legitimization and criticism was more complicated. This time the Court used its judgment as an educational tool, offering a new reading of Israeli citizenship that included Arab citizens more fully. For this purpose the Court had to confront the army directly and, for the first time, impose judicial rule. This confrontation was apparent, for example, in the judge's denial of the army's motion to conduct the trial *in camera*³⁷ and in the severe prison sentences imposed (from seven to seventeen years). However, the judge was unwilling to go all the way (or maybe he was unable), so his judgment also functioned to conserve the ethos of purity of arms of the Israeli army by laying all the blame on the border police unit.

The significant gap between action and words was revealed subsequent to the decision, when its sting was nullified. The overall result was a divided, rather than a collective memory of the events. Israeli Jews remember the affair with the image of the “black flag,” symbolizing the superiority of the rule of law over the rule of power. The Arab minority in Israel remembers the affair through the image of “Shadmi’s *grushb*” as standing for the utter disregard for the lives of Arab citizens, and the superiority of force over the law in Israel. Our return to the narrative of the judgment can help expose the transformative potential of Halevi’s judgment, a potential that remains essentially unfulfilled.

End Notes

- * Thanks to Samera Esmeir, Pnina Lahav, Assaf Likhovsky and Ron Harris for their comments and cautions on earlier versions of the article. Special thanks to Ori Hirshtein, Ori Aharonson and Analu Verbin for their tireless research.
1. Otto Kirschheimer, *Political Justice* (Princeton: Princeton University Press, 1961).
 2. For elaboration, see David Kairys, et. al., eds., *The Politics of Law* (New York: Basic Books, 1998).
 3. This article is part of an extensive work on political trials in Israel as junctures of collective identity that will be published by the University of Michigan Press in 2002. For further discussion on transformative political trials in Israel, see Leora Bilsky, “The Kastner Affair,” 12-13 *Theory and Criticism* 125 (1999) (Hebrew); Leora Bilsky, “Law and Politics: The Trial of Yigal Amir,” 8 *Plilim* 13 (1999) (Hebrew); Leora Bilsky, “I Accuse: The Deri Trial, Political Trial and Collective Memory,” in *SHAS in the Israeli Political Perspective*, ed. Yoav Peled (Tel Aviv: Yediot Aharonot, 2001) at 279 (Hebrew).
 4. Oren Bracha, “Unfortunate or Perilous: Infiltrators, the Law and the Supreme Court 1948-1954,” 21(2) *Tel Aviv University Law Review* 333 (1998) (Hebrew).
 5. For details, see Benny Morris, *Israel’s Border Wars 1949-*

1956 (Oxford: Clarendon Press, 1993) at 118-184.

6. O. Bracha, *supra* note 4, at 369.
7. H.C. 125/51, *Muhammad Ali Hussein v. Minister of Interior, et. al.*, P.D. 5, 1386.
8. *Id.* at 1391. The Court presents the chronology of events at 1390.
9. Benny Morris, *The Birth of the Palestinian Refugee Problem 1947-1949* (Cambridge: Cambridge University Press, 1988) at 228. Morris bases this conclusion on an investigatory report of the United Nations. This report appears only in the extended Hebrew version of his book at page 304, published by Am Oved: Tel Aviv, 1991.
10. See *supra* note 7, at 1392.
11. Military Court 3/57, *Military Prosecutor v. Major Melinki, et. al.*, 17 Dist. Ct. Rep. 90 [hereinafter: *Kufr Qassem Judgment*]. For further discussion, see Yoram Shahar, “Black Flag is Waved,” in *The Courts of Law: Fifty Years of Adjudication in Israel*, eds. D. Hesin, et. al. (Tel Aviv: Ministry of Defense Publishing, 1999) at 54 (Hebrew).
12. *Id.* *Kufr Qassem Judgment* at 213-214. The translation is in Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. Haim Watzman (New York: Hill and Wang, 1993) at 301.
13. See e.g., Ilan Schiff, “By Virtue of the ‘black flag’ Test” and Adi Parush, “Critique of the ‘black flag’ Test,” in *Kufr Qassem*, ed. Ruvik Rosenthal (Tel Aviv: Kibbutz Hameuchad, 2000) at 117, 131 (Hebrew); and Adi Parush, *Obedience, Responsibility and Criminal Law: Legal Issues from a Philosophic Perspective* (Tel Aviv: Tel Aviv University Press, 1996) at 65-116 (Hebrew).
14. For a rejection of the formal distinctions raised by the defense, see *Kufr Qassem Judgment*, *supra* note 11, at 186, 192.
15. For details, see Amos Carmel, *It’s All Politics: The Israeli Political Lexicon* (Tel Aviv: Dvir, 2001) (Hebrew).
16. Ruvik Rosenthal, “Who Killed Fatma Sarsur,” in *Kufr Qassem*, *supra* note 13, at 14. According to Rosenthal at 18, the objective of the curfew was unclear. It was presented (in the disclosed part of the judgment) as being intended to protect the residents from accidental injury by the army. In the concealed part of the judgment, the curfew was described as resulting from the army’s fear that residents would collaborate with the enemy.



17. B. Morris, *supra* note 5, at 121-123.
18. *Id.* at 431-434. Morris, at 429, connects the rigid Israeli army policy to the growth of the *fedayeen*, terrorist infiltrators employed by the Egyptian authorities beginning in the spring of 1954.
19. It is certainly possible to say that as far back as the signing of the Declaration of Independence, there were supporters of the narrative granting equal civil rights to Israel's minority groups. However, formally recognizing civic equality in the Declaration of Independence (where the primary emphasis is the Zionist narrative of movement from exile to redemption) differs significantly from recognizing Arab citizenship by severely punishing soldiers who failed to assimilate Arab citizenship and perpetrated the massacre. In the *Kufr Qassem Judgment*, the Israeli Court coped with the danger that Israeli society would face if its Arab citizens were not treated equally. For further reading, see Pnina Lahav, "A Jewish State... to be Known as the State of Israel: Notes on Israeli Legal Historiography," in 19(2) *Law and History Review* 387 (2001).
20. B. Morris, *supra* note 5, at 433. Morris, at 431-434, contends that the free-shooting policy, which began in 1949 and led to the killing of between 2,700 - 5,000 infiltrators, nurtured an attitude of disregard for Arab lives. Incomprehensibly, during these years, not one Israeli soldier was prosecuted for injuring infiltrators or for harming Arabs citizens of Israel while conducting searches for infiltrators in their villages.
21. The testimony is brought in the *Kufr Qassem Judgment*, *supra* note 11, at 152.
22. *Id.* at 154.
23. *Id.* at 223. Karpel elaborates and states that Dahan attained fame as the assassin of infiltrators. A photo of him appears on the cover of *Olam Hazeh* (Issue 966), with his foot resting on the body of an infiltrator. See Dalia Karpel, "Yes, We are From the Same Village," in *Kufr Qassem*, *supra* note 13, at 181.
24. *Kufr Qassem Judgment*, *supra* note 11, at 105.
25. *Id.* at 109.
26. *Id.* at 115 (quoted from 'Ofer's affidavit).
27. The trial was held in a military court because it involved offenses set forth in the Military Jurisdiction Law that were committed by soldiers (reserves called up for the Sinai War). For details, see *Kufr Qassem Judgment*, *supra* note 11, at 199. Judge Halevi was a civil judge who consented to serve as the president of the military court. This was not the first time he consented to serve in this capacity. See Tom Segev, *supra* note 12, at 267. Halevi was harshly criticized for wearing an army uniform during the trial. See Ron Leunenber, "The Kufr Qassem Affair as Viewed by the Israeli Press," 2 *State and Government* 48, 55 (1972) (Hebrew).
28. Symbolic evidence of this is the decision to publish the military court judgment in the civil court judgments reporter rather than in a separate reporter, as is customary.
29. Yigal Eilam, *Complying with Orders* (Jerusalem: Keter, 1990) at 58 (Hebrew).
30. R. Rosenthal, *supra* note 16, at 44-45.
31. *Id.* at 46.
32. *Id.* at 13, 27. See also D. Karpel, *supra* note 23, at 178-195.
33. For details, see the judgment in the Yossi Ginossar case, H.C. 6163/92, *Yoel Eisenberg, et. al. v. Minister of Construction and Housing*, P.D. 47(2) 229.
34. The *Kufr Qassem Judgment*, *supra* note 11, is littered with comments distinguishing the army from the border police. At 120, the judge also creates a moral distinction by presenting army officers' comments against the border police unit: "You are killers of innocent people on their way from work. You are committing a crime. Stop it!"
35. From the start, the authorities did not intend to prosecute Shadmi. His trial was a by-product of the harsh judgment given by Judge Halevi. R. Rosenthal, *supra* note 16, at 42; and Y. Eilam, *supra* note 29, at 58.
36. The results of the individualistic approach can be found in H.C. 6698/95, *Qa'dan v. Israel Lands Administration*, P.D. 54 (1) 258.
37. One-third of the sessions were held *in camera*. R. Rosenthal, *supra* note 16, at 37.





Unwanted Neighbors

A Story of Three Palestinian Women

Yousef Taiseer Jabareen

This article examines a recent case involving equal rights of Palestinian citizens of Israel. The case demonstrates how the Jewish character of Israel has been afforded primary status at the expense of the state's declared democratic commitment. The case further shows that even when the Israeli authorities involuntarily try to mitigate this outcome, they do so within the limits of the Jewish character of the state and therefore, reinforce existing conditions of domination. Israel is a Jewish state not only in terms of its demography and makeup but also in its policies and practices. One of the major reflections of this is the absence of equality for Palestinian citizens of Israel, one-fifth of the population.

This article focuses on the role of law in perpetuating inequality. By examining one exemplary case, I explore some of the unstated assumptions of the Jewish definition of the state. These assumptions undermine the presumed neutrality of significant governmental policies and certain Israeli laws, which, in turn, shape the political, social and legal status of the Palestinian minority in Israel.

Racist Attacks

Manal Diab, Sonia Khoury, and Wafa Khoury are three Palestinian women students - citizens of the state - from the Galilee in the north of Israel. They moved to Jerusalem in order to attend Hebrew University. In July 1997, they rented an apartment in the West Jerusalem neighborhood of Musrara, which borders the Jewish ultra-Orthodox neighborhood of Mea She'arim. Ms. Diab and the Khoury sisters were the only Palestinian tenants in the building and in the entire neighborhood.¹

On three separate occasions - October 1997, November 1997 and April 1998 - the women students came under attack.² In the first incident, the attackers threw gasoline-soaked rags at the front door of their apartment, setting it on fire. The second attack involved a bomb made of four aerosol cans, which exploded on their front doorstep. In the third attack, on the eve of Israel's Independence Day, a pipe-bomb exploded in front of their apartment.

Prior to these attacks, the women were subjected to racist harassment and intimidation in the neighborhood. The harassment began with verbal attacks including cries of "Go to Jordan!" "Go to Gaza!" "This is not your country," graffiti sprayed on the entrance door of their apartment, and stones thrown at them by neighboring Jewish youths.³ Through this harassment and the three attacks on the women's apartment, the attackers eventually fulfilled their aim of driving the women out of the neighborhood. Following these incidents, the landlord informed them that he would not renew their lease.

Despite, or maybe because of the trauma that the women suffered, they decided to talk publicly about what they experienced. They knew that if they remained silent, the essential issues they faced would never be addressed. They also knew that their case reflected broader concerns of the Palestinian minority in Israel. In addition, they decided to pursue legal action.

While working with the Association for Civil Rights in Israel (ACRI), I represented the three women following the first attack. Whereas the political nature of the attacks was clear, the legal bases for their case were tenuous. ACRI decided



to base its legal strategy on three main arguments. The first claim involved the failure of the Israeli police to provide adequate protection for the women. The second argument addressed the right of Palestinian citizens to decide their place of residence free from housing discrimination based on their race or national origin. This article does not discuss these two arguments⁴ but focuses on the third argument, which raised the issue of compensation: The State of Israel has an obligation to recognize the women as victims of terrorist attacks - a recognition which is a prerequisite to receiving compensation from public funds for property damage and bodily injuries.

Historically, the Israeli authorities have granted this recognition mainly to Jewish victims. Palestinian victims of terrorist attacks carried out by Jews have been denied any compensation. Consequently, when the Israeli authorities rejected the women's request to be recognized as victims of a terrorist attack, the women were determined to challenge the legal basis of this disparity. A discussion of the legal development of this challenge, its implication and its meaning follows.

“Hostile Acts Against Israel?”

Under two Israeli laws - The Property Tax and Compensation Funds Law (1961) (applicable to property damage) and Restitution for Victims of Hostile Acts Law (1970) (applicable to damages for bodily injuries) [hereinafter: The Compensation Laws] - victims of “hostile acts against Israel” are entitled to compensation from public funds.⁵ The idea behind this compensation

scheme is that individual victims of these actions should not be left alone to pay the price of the political conflict in the region.

Palestinian victims of terrorist acts carried out by militant Jews are not entitled to any compensation, according to the official position of the Israeli authorities. Following the terrorist attacks on the women and their apartment, ACRI challenged the legality of this position for the first time. The goal of the representation was to guarantee the women's right to be compensated from public funds. The failure to provide compensation to victims of racist attacks is effectively a second injury to those persons. The second injury is the pain of knowing that the government provides no remedy and does not recognize the dehumanizing experience. Indeed, “the government denial of personhood through its denial of legal recourse may be even more painful than the initial act of hatred. One can dismiss the hate group as an organization of marginal people, but the state is the official embodiment of the society we live in.”⁶

ACRI filed an appeal to the Jerusalem District Appeals Committee arguing that the State of Israel discriminates against Palestinians because it does not apply the laws equally to both Jewish and Palestinian citizens. It follows from the Israeli authorities' position that every Jew in Israel who is attacked because he is Jewish is automatically entitled to compensation from the state, even if he is not an Israeli citizen. Meanwhile, a Palestinian in Israel who is attacked because she is a Palestinian is not entitled to compensation, even if she is a citizen of Israel. Ironically, the latter is entitled to compensation only if she shows that

the assailant mistakes her for a Jew.

The legal representative of the Israeli authorities contended that the relevant Compensation Laws do not cover the attacks against the Palestinian women. He argued that these laws were designed to cover only violent attacks that threaten either Israel's sovereignty or Israel's Jewish citizens. Accepting the argument of the legal representative, the Jerusalem District Appeals Committee dismissed the appeal.

Subsequently, ACRI appealed to the Jerusalem District Court. ACRI's brief emphasized that the attacks were extreme acts of terrorism, motivated by nationalist racism that targeted the three women for no reason but that they are Palestinians. It also argued that the goal of these attacks was to frighten and harm the women, to force them to leave the neighborhood of Musrara, so that it might remain "free of Arabs." Nationalist attacks of this sort, ACRI argued, whether aimed at Jews for being Jews or at Palestinians for being Palestinians, undermine basic democratic principles, subvert the rule of law and injure the vulnerable fabric of Jewish-Palestinian relations in Israel - and as such, are actions hostile to the state. Palestinian victims of such attacks should also therefore be entitled to compensation from public funds.

After negotiations, the parties reached a compromise agreement, freeing the Court from issuing a judgment. The compromise required the Israeli government to pay immediate compensation to the women, as soon as the damage to their property was assessed. This measure marks the first time that Israel promised to pay compensation to Palestinian citizens

targeted specifically by terrorist acts undertaken by Jews. The compromise further resulted in an undertaking by the Attorney General to consider introducing legislation, which would provide compensation to Arab victims of Jewish terror. Indeed, the compromise agreement constituted an important first step in securing equal treatment before the law. However, this legal development, as I shall further explain, falls short of providing true equality based on full equal citizenship.

While essentially admitting that the current situation discriminates against Palestinian citizens of Israel, the Attorney General decided that the Compensation Laws, as currently interpreted, do not cover terrorist attacks against Palestinian citizens. Instead, and to enhance the "feeling of equality" for Palestinian citizens, the Attorney General decided that a special governmental committee charged with reviewing claims submitted by Arab victims of Jewish terror will be established. This committee will be given the power to grant or deny compensation to Palestinian citizens, comparable to the Compensation Laws, which serve Jews only.

Thus, the Attorney General rejected ACRI's suggestion to recognize Palestinian victims of Jewish terror as victims of "hostile actions against Israel." Rather, he established a special legal arrangement resulting in two separate tracks for compensation. While Jewish victims of attacks would continue to be recognized as victims of "hostile acts against Israel" and to recover compensation according to the compensation laws, Palestinian citizen victims of terrorist attacks would submit their claims to a newly-established special governmental committee.



These separate tracks are substantially unequal. In fact, the arrangement reflects the subordinate status of Palestinian citizens. Israeli political authorities and legal institutions are unwilling to perceive terror attacks against Palestinian citizens as hostile actions against the state. Israel, in their view, belongs to the dominant group - Jews - and only attacks against this group can be recognized as “hostile acts against Israel.” This view excludes the Palestinian community from the citizenry body of the state.

Concluding Thoughts

The case of the three Palestinian women touches basic universal concepts of equal citizenship, equal opportunity and justice. It reinforces the argument that Israel’s self-definition, as a Jewish state is not a mere declaratory statement: It leaves no room for any other group and maintains a system of ethnic supremacy.

Indeed, it is impossible to understand this case without acknowledging the tension between the definition of the state as Jewish and the promise of equality between Jews and “non-Jews.” The consequences of the case must be examined on two levels. The first level relates specifically to recognizing only Jewish victims of terrorist attacks as eligible for compensation from public funds. The compensation laws were designed to cover only attacks that threaten either Israel’s sovereignty or Israel’s Jewish citizens. This in itself is hardly consistent with basic democratic principles.

The second level relates more generally to the limits of identification and belonging to the state. The state privileges one group - the Jews - those

who reside in Israel and those who reside abroad whether or not they hold Israeli citizenship. Even if Palestinian citizens achieve truly equal compensation through the special committee established to handle their claims, the implication of the Compensation Laws is clear: Israel is the state of the Jewish people and not that of the Palestinian citizens. This illustrates how the Jewishness of the state dictates a distinct structure of Israeli citizenship, and a unique “us versus them” relationship in Israeli society.

A state that is defined by the ethnic-religious-nationalist project has, then, given up the idea of ever guaranteeing true equal rights for all citizens. Palestinian citizens can never belong to this project. The three women challenged the compensation laws with the idea that entitlement to a public good must be based on civic principles (citizenship) and not on ethnic-religious affiliation (Jewishness). Namely, a racially motivated attack against Israeli citizens is a hostile attack against the state regardless of the victims’ ethnic-religious affiliation. This view suggests an inclusive model of Israel as the state of all its citizens.

Apart from the inclusive approach suggested by ACRI, and the exclusive approach initially advocated by the Israeli authorities, the compromise proffered by the Attorney General suggests a third alternative. Reiterating that the entitlement for compensation from public funds for victims of “hostile acts against Israel” is based on ethnic-religious affiliation, the Attorney General practically conceded that this interpretation excludes Palestinian citizens from the scope of the Compensation Laws’ protection. However, the Attorney General’s alternative may

enhance the feeling of equality for Palestinian citizens, as under the new legal arrangements, both national groups, Jews and Palestinians, are entitled to compensation from public funds as victims of racially motivated violence. Thus, while rejecting the encompassing civic principle, the Attorney General's approach, in essence, deals with Palestinian citizens as a distinct ethnic group.

This special remedy should be seen as an acknowledgement of the Palestinians' group dimension. Because they, as a group, are excluded from the definition of the state, they, as a group, must be "compensated."⁷

While granting them compensation as a group, this remedy actually reinforces their group-exclusion. Namely, in order to guarantee complete and true equality for its Palestinian citizens, Israel must seriously and honestly offer them, as a national group, the same structure of rights and the same sense of belonging that it offers to its Jewish citizens. In effect, this requires a re-definition of the state to encompass both of its national groups, Jews and Palestinians.

This case demonstrates that the Israeli political establishment is unwilling to take the risks involved in the suggested sweeping change. But for the Palestinians in Israel, not belonging to the state does not weaken their belonging to the land - their homeland. The Israeli establishment, then, has to reckon with the fact that its Palestinian citizens have not given up on the idea of realizing their full individual and group rights in their own homeland.

End Notes

1. See Netty Gross, "Worst of Both Worlds," *The Jerusalem Report*, 8 January 1998; and Dan Izenberg, "Unwanted Neighbors," *The Jerusalem Post*, 5 December 1997.
2. For a broader description of these attacks, see "A State of Denial: Israel's Disregard for Palestinian Victims of Terrorism," 4 *The Palestinian Human Rights Monitor* 2, 5-9 (April 2000). See also Robin Shulman, "Women Besieged in Apartment: Three Arab Israelis Suffer Threats, Violence in Jerusalem," *The Miami Herald*, 26 May 1998; Patrick Cockburn, "No Home for Israel's Arabs," *The Independent*, 21 May 1998; and Barry Trachtenberg, "On the Frontline in Jerusalem," *Peace News*, March 1998.
3. Ms. Diab and the Khoury sisters were not the only Palestinians subjected to harassment because of their nationality; former Palestinian residents of the same neighborhood were also subjected to similar verbal intimidation. See Manal Diab, "Facing Israeli Violence: A Palestinian Woman's Personal Account," *Tikkun* 11 (July/August 1998).
4. For a discussion of those aspects of the case, see *The Palestinian Human Rights Monitor*, supra note 2, at 20.
5. Section 35 of The Property Tax and Compensation Funds Law awards compensation from public funds for damage to property incurred as a result of "... hostile acts against Israel." The Restitution for Victims of Hostile Acts Law awards compensation from public funds for bodily harm to victims of an injury "caused through hostile actions by military or semi-military or irregular forces of a state hostile to Israel, through hostile acts by an organization hostile to Israel or through hostile acts carried out in aid of one of these or upon its instructions, or its behalf or to further its aims."
6. Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," in *Words That Wound*, eds. Mari Matsuda, Charles Lawrence, Richard Delgado, and Kimberle Crenshaw (Boulder: Westview Press, 1993) at 49.
7. On group compensation see Charles Lawrence and Mari Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston: Houghton Mifflin, 1997).





Fire and Advance The Promotion of Benzy Sau

Muhammad Dahleh

Benzy Sau is an officer in the Israel Police Force. He was the Border Police Northern Brigade commander, and during the first two days of October 2000, commanded Police and Border Police forces in Umm al-Fahem and Jatt village in the Triangle. At that time and place, four young Arab citizens of Israel were killed and dozens were wounded by live ammunition and rubber-coated steel bullets fired by police forces.

Sau testified before the Commission of Inquiry, chaired by Justice Theodore Or, which questioned him about the part he played in these events and his personal and command responsibility for what occurred, primarily the death of the four young men. Sau's testimony, as well as the testimony of the other police officers who were involved in those events, indicated that Sau, as the commander of the Police and Border Police forces, issued instructions to his forces to open fire. The testimony also revealed that Sau did not have basic knowledge about the Israel Police forces' Open-Fire regulations. Sau testified that he knew nothing about the circumstances surrounding the deaths of the four young men. The autopsies indicated injuries that were inconsistent with proper implementation of the Open-Fire regulations. The Commission's hearings further revealed that Sau, together with the commander of the Northern District, Alik Ron, ordered the use of snipers to disperse the demonstrations in Umm al-Fahem, in violation of the Open-Fire regulations. Also, it was Sau who ordered snipers to fire at one of the young men who was killed in Umm al-Fahem by a bullet to the head. It was also found that Sau ordered his forces in Umm al-Fahem to seize control of one of

the houses in a populated area. This action, which he took despite his superiors' opposition, created a substantial danger to people's lives. Moreover, Sau's testimony to the Commission contradicted in significant details many of the other testimonies that were given to the Commission. These contradictions laid a firm basis for questioning the truth of his testimony to the Commission.

Following the events of October 2000, Police Commissioner Shlomo Aharonishky requested the Minister of Internal Security, Prof. Shlomo Ben Ami, to promote Sau to the grade of brigadier general. The Minister denied the Police Commissioner's request. Several months later, in March 2001, Uzi Landau became the new Minister of Internal Security. The Police Commissioner resubmitted his request, this time to the new Minister, that Sau be promoted to brigadier general. The new Minister approved the request, and appointed Sau commander of Border Police forces in Jerusalem, with the rank of brigadier general.

The Committee of the Martyrs' Families, composed of the families of 13 Arab citizens of Israel who were killed during the October 2000 events, petitioned, together with Adalah, the Supreme Court (sitting as the High Court of Justice) against the Minister of Internal Security's decision to promote Sau in rank and position. The petition, filed by Hassan Jabareen, Advocate, requested the Supreme Court to order the Minister to explain why he does not suspend Sau until the Or Commission publishes its final conclusions or alternatively, why Sau's promotion to brigadier general should not be frozen until the publication of the Commission's final conclusions.

The Supreme Court held a very short hearing on the petition and did not issue an order to show cause (*order nisi*). The Court gave its judgment in one and a half lines [in Hebrew], as follows:

We read the petition and the Respondents' response. We heard the supplemental comments of the counsel for the Petitioners. We conclude that the petition does not provide grounds for the Court's intervention in the decision of the Respondents.¹

Indeed? This is the question before us, and this article will critique the Supreme Court's decision, in part, by considering it in the context of the Court's decisions in similar cases.

The Supreme Court's very brief decision conceals more than it reveals. It does not face the arguments raised in the petition nor does it examine the petition in light of the Court's own prior judgments in comparable cases. Such a laconic decision makes the Court's work easier. At the same time, the decision creates problems for the litigants and their counsel as well as the commentators who seek to understand the grounds for the decision. The hearing was also extremely brief. The justices did not dedicate more than a few minutes to hearing arguments; as a result, it was impossible to learn anything from the comments usually made by the justices, when hearing petitions, because in this case, they were minimal.

Two other cases decided by the Supreme Court are relevant to *Sau*. In these cases, the petitioners opposed the appointment or promotion of civil servants, basing their challenge on the grounds of

breach of public trust as a result of the appointment or promotion. The first case, which involved the appointment of Yossi Ginossar as Director General of the Ministry of Construction and Housing, preceded *Sau*; the second, which involved the appointment of Ehud Yatom to head the War on Terror Office, was decided after *Sau*.

In *Ginossar*, the Supreme Court ruled that even though there exists no clear prohibition as to the power of public authorities to appoint or promote a candidate with a criminal past, nevertheless, "the criminal past of the candidate for a public position is a relevant consideration that the authority making the appointment may and must take into account before making the appointment."² The Supreme Court added:

The duty of the public authority to take into account the criminal past of the candidate when it appoints a person to a public position is derived from the status of the public authority. The public authority is a trustee of the public. It has nothing of its own. Everything it has is held in favor of the public.³

In the same matter, the Supreme Court also held:

The duty to take into account the criminal past of the candidate before making the appointment is derived from the public authority's status as trustee. The appointment of a public servant with a criminal past affects the functioning of the public authority and the attitude of the public toward it. It has direct and indirect ramifications on the public's trust in the public authority. The appointing authority must take these considerations into account.⁴

The Supreme Court added:

Public trust is the underlying foundation of public authorities and enables them to perform their functions. The appointment of a person with a criminal past - particularly a serious criminal record, such as when a person has committed a crime of moral turpitude - harms the vital interests of the public authority. It impedes the proper performance of its functions. It damages the moral and personal authority of the person holding the position and his ability to persuade and lead. It harms the trust that the general public gives to the governmental authorities.⁵

As noted, the Supreme Court nullified the appointment of Ginossar as Director General of the Ministry of Construction and Housing, after it had been approved twice by the government. On this point, the Supreme Court held:

Is it possible to establish trust between the citizen and the government when the government speaks to the citizen through the Respondent [Ginossar]. What is the social and ethical message that the government transmits to the citizen by its action, which the citizen will retransmit to the government?⁶

In its conclusion, the Supreme Court ruled as follows:

The appointment of the Respondent [Ginossar] to the position of Director General of a government ministry seriously damages civil service. It will almost certainly have a negative effect on the

functioning of the service. But most importantly, it gravely harms the public's trust in the public authority and in the civil service.⁷

In numerous cases decided long before *Ginossar*, the Supreme Court discussed the importance of public trust in government institutions. For example, in *Barzilai*, the Court ruled that:

Without trust, governmental institutions are unable to function. Such is the case regarding public trust in the courts... Such is the case regarding public trust in the other governmental institutions.⁸

In another case, the Court held that it is necessary to:

protect public administration from corruption, to ensure that it acts properly, on the one hand, and to safeguard the prestige that the public bestows on the public administration and the public trust regarding the proper manner in which it acts, on the other hand.⁹

Furthermore, the Supreme Court paid special attention to the public's trust in the state's policing authorities, which is relevant to the decision regarding Benzy Sau. In *Suissa*, the Court ruled that:

It should be noted that police officers are civil servants (in the broad meaning of the term). Like other civil servants, they too are public trustees. The ability of the police to perform their function depends on public trust, their integrity, fairness and reasonableness. Without trust between the police

officers and the community that they serve, the police would be unable to perform their tasks... Moreover, in light of the special function of police officers and their powers, in light of their exposure to the public and contacts with it, police officers must give special care to all details, whether minor or major, to attain the public's trust... Accordingly, it is necessary to ensure the appointment of the proper person to the position of police officer. This also is the basis of the logic in granting the power to dismiss a police officer even before he has been convicted by law, if the circumstances indicate that he is no longer suitable to perform his functions.¹⁰

In another case, then Chief Justice Meir Shamgar held that:

The police are charged with enforcing the law, and its actions are always subject to supervision and public criticism. Its image in the public's eyes is extremely important among all the factors that contribute to its success. One of the means to preserve its image is by ensuring that its forces do not contain persons with a tainted past.¹¹

In *Yatom*, which was decided after *Sau*, the Supreme Court nullified Yatom's appointment as head of the War on Terror Office. The Court held that:

In his decision to appoint Yatom to the position of head of the War on Terror Office, the Prime Minister did not give proper weight to the grave offenses that Yatom committed in the Bus Line 300 affair, and to the connection between his offenses and the position intended for him.¹²

By adopting the principle established in *Ginossar*, the Court concluded that the appointment of Yatom would probably damage public trust in the governing authorities and in the rule of law.

In *Ginossar* and *Yatom*, Chief Justice Aharon Barak and Justice Yehoshua Matza stated the considerations that the authority making the appointment must examine and balance in formulating its decision whether to appoint a person who has committed a criminal offense. If the criteria established in these two judgments were applied in *Sau*, the Supreme Court should have intervened and nullified the appointment. In *Ginossar*, Chief Justice Barak held:

The criminal past of a candidate for a public position must be taken into account by the authority making the appointment. The weight of this consideration varies depending on the effect of the reasons lying at the foundation of the consideration of the particular factor. A person who committed a crime in his youth is not the same as one who committed a crime as an adult; nor is a person who committed one offense the same as a person who committed many; nor is a person who committed a petty offense the same as a person who committed a serious offense; nor is a person who committed an offense in mitigating circumstances the same as a person who committed an offense in aggravated circumstances; nor is a person who committed an offense and expressed regret for the action the same as a person who committed an offense and expressed no regret at all; nor is a person who committed a "technical" offense the same as a person who committed an offense involving moral turpitude; nor is a person

who committed an offense many years previously the same as a person who recently committed the offense...

Furthermore, the type of position that the civil servant is slated to fill affects the weight to be given to the criminal past. A junior position is not the same as a senior position, a position that does not entail contact with the public is not the same as a position in which there is such contact; a position that does not entail control, supervision, direction, and instruction of others is not the same as a position entailing command over others and responsibility for discipline; a person whose position is to be led is not the same as a person whose position is to lead...

Finally, the necessity that the specific candidate for the public position be the person to fill the position must also be taken into account. A candidate who is one of many is not the same as a single, unique candidate who alone is likely, under the specific and exceptional circumstances, to fill the position. Also, consideration must be given as to whether there is a real emergency situation that requires widespread recruitment, including those with a criminal past, or perhaps it is the normal activity of the public administration, in which case it should draw its sources from employees with integrity.¹³

Why then did the activist Supreme Court decide to issue a brief, laconic decision without giving reasons in *Sau*? Are there really no grounds for the Court to intervene, not even by issuing an order to show cause?

Argument can presumably be made that *Sau* was never convicted of a criminal offense, as put forward by the Legal Advisor to the Ministry of

Internal Security in her response to Adalah's petition, and that at the time of the petition, the Or Commission had not yet issued its 27 February 2002 letter of warning to *Sau*. However, a criminal conviction is not required to establish a person's criminal past. On this point, the Supreme Court held in *Ginossar* that:

For the purposes of appointment of a person, a criminal past is not to be considered identical to a criminal conviction. Our interest in this matter is the administrative decision of the government to appoint John Doe to a public position, and not the decision to impose on John Doe the punishment set by law. Punishment for a crime does not precede the conviction for the crime. Appointments are different. With them, it is relevant to examine the data and facts that were available to the administrative authority. If based on these data, a reasonable authority could have concluded that a criminal offense had been committed - that is sufficient to provide a foundation for "criminal past" for the purposes of determining the reasonableness of the appointment. Indeed, regarding the reasonableness of the decision of the governing authority making the appointment, the decisive factor is the commission of the criminal acts attributed to the candidate. A criminal conviction, of course, constitutes proper "proof," but the proof may be provided in other ways as well.¹⁴

The Supreme Court held that the applicable principle in such cases is the "administrative evidence rule." A governmental authority may base a finding on evidence that, taking the circumstances into account, is such that "a

reasonable person would consider it to have evidentiary value and would rely on it.”¹⁵

In *Sau*, there was administrative evidence of great weight regarding his involvement in illegal acts. Sau gave a written statement and testified before the Or Commission. His subordinates also testified before the Commission. They all testified to the grave acts committed by Sau, as described above. Their statements clearly indicate that Sau authorized the police officers under his command to open fire; that he lacked basic knowledge of the Open-Fire regulations; that he was involved in summoning and positioning snipers; that he ordered one of the snipers to fire at one of the young men (who was killed as a result of the sniper-fire); and that he ordered his forces to seize control of a house in a populated area, in violation of the instructions and orders of his direct superiors in the police. Sau’s acts and omissions reflected his flawed judgment, which endangered the public safety. In addition, his testimony to the Commission was ambiguous. He was evasive and his testimony contradicted the other testimonies and evidence in numerous significant details. He even contradicted himself, making statements and later stating the opposite. He retracted earlier statements, made statements and a few seconds later testified that he did not recall the very same things.

All of these facts readily lead to the conclusion that the petitioners met their burden of proof and provided administrative evidence that was sufficient to convince a reasonable person that Sau acted unlawfully, that the tragic killing of the four young men was the result of a chain of illegal acts, and that Sau, who was the commander at the

scene of the events at the relevant time, bore personal and command responsibility for the deaths. It should be noted that neither Ginossar nor Yatom had been convicted; they were granted a presidential pardon prior to prosecution. Nevertheless, in examining the question of appointments to public positions, the Court held that, in accordance with the administrative evidence rule, they had criminal pasts.

Others may argue that Sau’s acts were less serious than those committed by Yatom and Ginossar, and for this reason the Supreme Court decided not to intervene. However, this argument is not sufficiently persuasive to explain the Court’s decision. The acts of Yatom and Ginossar were indeed very serious, with Yatom’s acts being substantially more severe than those of Ginossar. Yatom, together with his subordinates, took two of the men who had abducted Bus 300 to an isolated spot. They struck the men in the head with rocks and a metal bar and killed them. Yatom also obstructed justice, committed perjury before the Zorea’ Commission, and directed his subordinates to commit perjury before the same commission. Yatom was assisted by Yossi Ginossar, who was a member of the Zorea’ Commission. Ginossar was aware of the secrets being kept by the General Security Service (GSS) and leaked information to the GSS from the commission’s hearings. The cooperation between Yatom and Ginossar and the false testimony given to the Zorea’ Commission obstructed its inquiry. In addition, Yatom repeated his lies when he testified before a committee headed by the Attorney General, who was appointed to investigate the circumstances surrounding the deaths of the two abductors of



Bus 300. In his application for a presidential pardon and after the Attorney General had filed a complaint with the police to investigate the matter, based on information that was presented to him, Yatom finally admitted his illegal acts.

The offenses committed by Ginossar and Yatom were indeed severe; however, the acts and omissions attributed to Sau were not insubstantial. Sau had direct responsibility, and certainly command responsibility, for the deaths of four citizens. He personally summoned snipers and gave the order to one of them to fire at one of the young men, causing his death. Sau's acts and omissions were not miniscule. They certainly exceed the minimal threshold necessary for the Supreme Court to intervene.

Moreover, based on any criteria that guided the Supreme Court in other cases for weighing the criminal past of a candidate for a position or for promotion, the Supreme Court should have intervened in *Sau*. Sau committed several criminal offenses and not just one; he was an adult and not a youth, when he committed them; the offenses were not minor offenses, but were very serious; Sau did not express regret for his acts, rather he contended that he had acted properly and tried to evade responsibility; and most importantly, the offenses did not take place in the distant past, but just a few months prior to his promotion.

The passage of time, which is generally an important consideration that should be taken into account, is grounds for strict scrutiny in *Sau*, compared with *Yatom* and *Ginossar*. The appointments in those two latter cases were made some seventeen years after Yatom committed his offense and about eight years later in Ginossar's

case. Furthermore, both Yatom and Ginossar were granted pardons. The two also contended that they had been promised that their advancement would not be impeded.

In addition, the criteria that the Supreme Court established regarding the type of position to which the candidate was to be appointed does not explain the Court's decision in *Sau*. Sau was appointed commander of Border Police forces in Jerusalem and was promoted to brigadier general. This position is a senior position in the Israeli Police Force. It is also a position that entails contact with the public. Furthermore, the position involves the control, supervision, direction, training, and command of others. In addition:

When there is a clear and direct connection between the offenses that the candidate committed in the past and the position that he is a candidate to fill, it may be concluded that his criminal past completely prohibits him from filling the particular position. In these circumstances, considerations that should have been taken into account in support of his appointment had he been a candidate for another position (such as the time that has passed since he committed the offenses, his expression of regret, the quality of his performance since he committed the offenses, and his professional expertise) will not assist him, and his candidacy must be rejected.¹⁶

No one denies the clear and direct connection between the offenses that Sau committed a few months prior to his appointment and the position of commander of Border Police forces in Jerusalem with the rank of brigadier general. The

offenses attributed to Sau relate to the essence of his function as a commander in the field at the time of the confrontations between police officers under his command and a citizen population, which resulted in the killing of four citizens and the wounding of others.

Furthermore, the considerations regarding the necessity to appoint the particular candidate to fill the public position because he is uniquely suited to the position, as mentioned in the case law, does not support the Supreme Court's decision in *Sau*. Sau was not given the appointment because of his unique talents or because only he could fill the post. Furthermore, the respondents did not contend there was an emergency situation that required the recruitment of all forces, including those with a criminal past. These factors make the Supreme Court's unwillingness to intervene in Sau's appointment even more difficult to understand.

Some will argue that the Supreme Court did not intervene because the Or Commission had not yet completed its inquiry, and the Court did not want to be perceived as interfering with the Commission's hearings by drawing conclusions before the Commission reached its own conclusions. This, too, is not sufficient reason to refuse to intervene. At the very least, the Court could have issued an order to show cause and a temporary injunction, and left the petition pending, without issuing a final judgment, until the Or Commission completed its work. The Court has taken this course many times in the past, leaving petitions pending for prolonged periods. A more cogent argument is that the Supreme Court should have intervened to protect the Commission

of Inquiry, which is a quasi-judicial statutory body on which two judges sit, one of them a justice of the Supreme Court. The necessity for this support is particularly evident following the position taken against the Commission by the executive branch, primarily that of Minister of Internal Security Landau, who ordered Sau's promotion. Landau stated that, "It was a serious mistake to establish the Commission of Inquiry... I received a problem, I solved it, and everything worked out." His decision to appoint Sau was, therefore, a kind of challenge to the Commission, and was even intended to strengthen, by concrete measures, his statements against the legitimacy of the Commission. For this reason, it was necessary for the Supreme Court to protect the Commission of Inquiry. The Court's intervention could have frozen the situation, thus maintaining the status quo until the Commission completed its hearings and preventing its work from being undermined.

In light of the above, the Supreme Court's decision in *Sau* is hard to understand. Examining the decision in light of *Yatom* and *Ginossar* does not solve the puzzle. Why, then, did the Supreme Court refuse to intervene and nullify the appointment?

It seems apparent that judicial activism terminates at the "national boundaries." When the Court speaks about public trust in government institutions, it does not see the public of one million Arab citizens of the state. The Court is mainly concerned with the Jewish public. In general, the point of view of these two publics differed greatly regarding the October 2000 events, the manner in which the police functioned during the events, and the establishment of the



Commission of Inquiry. Arab citizens of Israel believed that the actions of the police forces were a reflection of its institutionalized discrimination against them, its treatment of the Arab population as an enemy, and its lack of concern for the value of Arab lives, which required in-depth inquiry and the punishment of those responsible. By contrast, many among the Israeli Jewish population perceived the actions of the police as necessary to protect “state security and public welfare,” keep the traffic arteries clear, and ensure freedom of movement. Thus, when damage to public trust is discussed, the identity of the public involved is crucial.

Arab citizens of Israel have not expressed much trust in governmental institutions, particularly in the Israel Police Force. Unlike other governmental agencies, the Arab public affords some degree of trust in the judiciary. It appears that the Minister of Internal Security’s decision to promote Sau and the refusal of the Supreme Court to intervene struck a fatal blow to the already low degree of trust in the police. More than this, however, it damaged the trust of the Arab public in the judicial branch.

End Notes

1. H.C. 3286/01, *The Committee of the Martyrs' Families, et. al. v. Minister of Internal Security, et. al.*, unpublished decision delivered 31 May 2001 [hereinafter: *Sau*].
2. H.C. 6163/92, *Yoel Eisenberg, et. al. v. Minister of Construction and Housing*, P.D. 47 (2) 229, 256-257 [hereinafter: *Ginossar*].
3. Id. at 258-259.
4. Id. at 259.
5. Id. at 261-262.
6. Id. at 271.
7. Id. at 270-271.
8. H.C. 428/86, *Barzilai v. Government of Israel*, P.D. 40 (3) 505, 522.
9. See Deputy Chief Justice, Menachem Elon, in Civ. App. 121/88, *The State of Israel v. Darwish*, P.D. 35 (2) 663, 682.
10. H.C. 7074/93, *Meir Suissa v. Attorney General*, P.D. 38 (2) 748, 783-784.
11. H.C. 66/85, *Haim Lariyeh v. Brigadier General Ibtzan, et. al.*, P.D. 39 (2) 724, 726.
12. H.C. 4668/01, *MK Yossi Sarid, et. al. v. Prime Minister Ariel Sharon, et. al.*, unpublished decision delivered 27 December 2001 [hereinafter: *Yatom*].
13. See *Ginossar*, supra note 2, at 262-263.
14. Id. at 268-269.
15. See Chief Justice Agranat in H.C. 442/71, *Lansky v. Minister of the Interior*, P.D. 26 (2) 337, 357.
16. See *Yatom*, supra note 12, at 12.





Special Inquiry

The Editors

In mid-October 2000, then Prime Minister Ehud Barak appointed a Committee of Examination to “examine the functioning of the police during the clashes with Arab demonstrators” earlier that month. The families of the 13 Palestinian martyrs who were killed during these “clashes,” worked together with political figures, NGO activists, and academics to compel the government to dissolve the Committee and to establish a legally-sanctioned Commission of Inquiry. There were serious concerns that this Committee lacked the necessary legal powers and independence to fully investigate the events that led to the deaths of 13 Palestinian citizens and the injury of hundreds more.

As a result of mounting pressure by the Palestinian community as well as concern about the upcoming elections and the “Arab vote,” on 8 November 2000, the Israeli government established the Commission in accordance with the Commissions of Inquiry Law (1968). This law gives the Commission various authorities including the power to subpoena witnesses and to compel their attendance. On 15 November 2000, Supreme Court Chief Justice Aharon Barak appointed the three-member Commission: Supreme Court Justice Theodore Or (Chair); Tel Aviv University Professor and former Ambassador to Egypt and Jordan, Shimon Shamir; and Deputy President of the Nazareth District Court, Judge Sahel Jarah. Judge Jarah resigned from his post for health reasons in June 2001, and Nazareth District Court Judge Hashim Khatib was appointed in his place.

Immediately after the establishment of the Commission, Adalah raised concerns about its mandate. According to Government Decision No. 2490, the Commission’s mandate is to investigate the clashes between the security forces and Arab and Jewish citizens culminating in the death and injury of Israeli citizens, starting from 29 September 2000. Its mandate further calls for an investigation into the “behavior of the inciters, organizers and participants in the events from all sectors, as well as the actions of the security forces.” One of Adalah’s main concerns was the reference to “the behavior of the inciters,” which appeared to implicate Arab public representatives. Israeli law dictates that commissions of inquiry are to be established solely in order to investigate executive branch authorities in cases in which their behavior created a loss of public trust. An investigation into the behavior of citizens is beyond the role of

commissions of inquiry.

Adalah was appointed by the High Follow-up Committee for the Arab Citizens in Israel (comprised of Arab MKs, mayors, and community leaders) to represent its interests as well as the Palestinian martyrs' families before the Commission. Three Palestinian lawyers - Riad Anes, Azmie Odeh and Mahmoud Shaheen - were also appointed by the High Follow-up Committee to work together with Adalah as members of the legal team.

On 21 January 2001, the High Follow-up Committee, the Committee of the Martyrs' Families, and Adalah held a press conference in Jerusalem to present an indictment against the State of Israel charging the political establishment, the field commanders and the Israeli security forces with using excessive lethal force against Palestinian citizens. The title of the indictment, presented in full on these pages is "The Arab Citizens of the State of Israel v. The State of Israel." The martyrs' names, ages, and towns were also read out to the press and for the record by Mahmoud Yazbak, who was the spokesperson of the Committee of the Martyrs' Families. The text of this statement is also included in this collection.

Immediately following the press conference, all of the participants and the family members of the martyrs traveled to the Supreme Court, the site of the future hearings of the Commission. The hallway of the Commission was turned into a theater to publicly demonstrate the Palestinian community's sense of loss and pain. Over one hundred relatives and friends of the Palestinian martyrs killed by Israeli security forces filled the Commission's hallway. They held pictures and remembrances of their loved ones and recollected the details surrounding their deaths.

The family members of the martyrs came to the Commission to present eyewitness testimonies, photographs, videotapes and hospital records, collected for over three months by Adalah's legal team. They came to present as complete a record as they could, realizing that such a record could never be fully complete.

The lawyers and the family members were called up to the podium town by town - Umm al-Fahem and Jatt, Nazareth and Kufr Kanna, Kufr Manda, Sakhnin and Arrabe; these were the towns in which Palestinian citizens were killed. Together, the lawyers and the family members presented the record of evidence, binders and binders of materials, to the assistant of the Commission's members. They opened each binder to show



her the photos, maps, and tens of testimonies collected in each town. They talked to her about each of the martyrs, attempting to leave an unforgettable imprint in her mind about the pain and suffering of each family with each loss.

The relatives of the Palestinian victims are not alone in their grief; family members of the Bloody Sunday victims share with them similar experiences. As in Israel, in 1972, the British army killed 13 Irish civil rights marchers in Derry, Northern Ireland, who were protesting against the government's internment policy of political activists. These events became known as Bloody Sunday. Tony Doherty, the son of one of the Bloody Sunday victims, wrote an open letter, included in this issue, to the Palestinian martyrs' families. In his letter, Mr. Doherty encourages them to go forward with their demands for a full and fair investigation into the deaths of their loved ones.

Adalah's representatives met Mr. Doherty and other family members of the Bloody Sunday victims during a study tour to Northern Ireland and England in early February 2001. To best represent the Palestinian community before the Israeli Commission, Adalah's representatives sought the consultation of lawyers, human rights NGOs, and activists working before tribunals of inquiry in England and Northern Ireland. The Israeli Commissions of Inquiry Law is closely modeled on English law and practice. Hosted by the Committee on the Administration of Justice, British-Irish Rights Watch and the law firm of Madden and Finucane, Adalah's representatives attended the hearings of the Bloody Sunday Inquiry, which is investigating the killings in Derry. They also briefed the Bar Human Rights Committee of England and Wales about the Israel's Commission of Inquiry. At Adalah's request, prominent members of the Bar Human Rights Committee prepared a legal opinion based on their experience in working before tribunals of inquiry. The opinion covers issues such as the right of access to all materials collected by tribunals; the right to cross-examine witnesses and to present evidence; and the right to publicly-funded legal representation for victims' family members and other interested parties. Excerpts from this opinion are included in this collection.

Pursuant to Israeli practice regarding commissions of inquiry, Adalah has no legal standing before the Commission. Accordingly, when the

Commission opened its hearings on 19 February 2001, Adalah's lawyers could not cross-examine witnesses who appeared before it, were not entitled to discovery of all documents and other evidence, and did not receive public funds to represent the High Follow-up Committee and the Palestinian martyrs' families. However, through its daily work, presence and consistent legal interventions over one year, Adalah gained some quasi-formal status.

During the first stage of its proceedings, 349 witnesses appeared before the Commission, and thousands of pages of protocols were generated documenting various aspects of police violence against Palestinian citizens. After one year of hearings, on 27 February 2002, the Commission issued 11 warning letters to former Prime Minister Ehud Barak, former Minister of Internal Security Shlomo Ben Ami and police officials. In addition, the Commission issued warning letters to three Arab public representatives, MK Dr. Azmi Bishara, MK 'Abd al-Malek Dahamshe, and Sheikh Ra'ed Salah. The warning letters indicate that each of these individuals will likely be affected by the inquiry or its conclusions. The warning letters to Palestinian public figures charge that these leaders, between 1998-2000, were "responsible for conveying messages supporting violence as a means to attain the goals of the Arab community in Israel." The Commission chose not to investigate any of the inciters in the Israeli Jewish community, including Ariel Sharon, whose provocative visit to al-Haram al-Sharif compound sparked the beginning of the Intifada. The warning letters to the three Palestinian leaders lay blame on the entire Palestinian community and its political leadership for the killing of 13 Palestinian citizens and the injury of hundreds more. This blame turns the victim into the guilty party.

Adalah challenged the mandate of the Commission that enabled it to issue such warning letters on three separate occasions. Adalah did not receive a reply to any of its motions. On 12 March 2002, Adalah submitted an additional motion to the Commission demanding that it rescind these warnings against the Arab public representatives. This motion is included as the final piece in this volume. It highlights many of the problematic aspects of the Commission, originally, when it did not attempt to amend its mandate to meet the legal requirements of the Commissions of Inquiry Law, and more recently, during the course of its hearings, when it



breached its powers and acted in a discriminatory manner toward Palestinian public representatives. The Commission denied this motion on 14 March 2002. The second stage of the Commission's proceedings - the warnings hearings - began in mid-June 2002.

Whether the Commission will reach final conclusions concerning the power relations organizing the relationship between Palestinian citizens and the state, which gave birth to the Intifada and to state violence, is an open question. However, by issuing warnings against Arab public representatives together with the Israeli political leadership, it seems that the Commission is masking power relationships and distributing responsibility in a politically symmetrical manner between the victim and the perpetrator.

The Arab Citizens of the State of Israel

v.

The State of Israel

Indictment

Today, 21 January 2001, I, Muhammad Zidan, the Chairman of the High Follow-up Committee for the Arab Citizens in Israel, present to the official Commission of Inquiry, chaired by Justice Theodore Or, an indictment against the State of Israel, on behalf of one million Arab citizens of Israel, including the families of the thirteen deceased who were killed by security forces' gunfire on the days of 1 October, 2 October, 3 October, and 8 October 2000. The indictment is as follows:

1. In response to the Israeli government's policy of oppression towards the Palestinians living in the Occupied Territories and in response to Ariel Sharon's entrance into al-Haram al-Sharif compound on 28 September 2000 and in response to the massacring of Palestinians in al-Haram al-Sharif on 29 September 2000, the High Follow-up Committee for the Arab Citizens decided on 30 September 2000 to call a general strike for 1 October 2000 in all Arab towns in Israel.
2. The Arab citizens of Israel answered the call. They observed a general strike and demonstrated in protest of the policy directed against their people. However, we did not know that the Israeli police had already developed and practiced a plan for oppressing Arab citizens, who would express their legitimate identification with the just struggle of their people. The police arrived at Arab towns equipped with the most lethal weapons. On 1 October 2000, two Arab citizens were killed in Umm al-Fahem and Jatt in the Triangle. News of the killings spread throughout the country, and the next day, Arab citizens participated in mass demonstrations against police practices. However, the police continued to show no restraint, and dispersed the demonstrations by opening fire with live ammunition against citizens. On the days of 2 October and 3 October, the security forces killed an additional nine Arab citizens. On the

evening of Yom Kippur, there was a pogrom against the Arab residents of Nazareth, who were attacked by Jewish residents of Natserat Illit. Not only did the police fail to prevent the attack, but they also assisted the attackers, opening fire with live ammunition against the victims and killing two Arab citizens: 'Omar A'kkawi and Wissam Yazbak. I witnessed the killing of Wissam Yazbak, who was shot as he stood with his back turned to the police and the residents of Natserat Illit, trying to help me and other leaders calm the people. He was shot in the back of his head.

3. During the events on 1 October, I tried several times to contact Ministers Shlomo Ben Ami, Matan Vilnai, Yossi Beilin and Benjamin Ben-Eliezer, in order to urge them to prevent the police from entering Arab towns, and to stop them from using live ammunition against Arab citizens. However, I did not get an answer.
4. On 2 October at 7:13 a.m., during an interview on Reshet Bet with journalist Aryeh Golan, the Prime Minister said, among other things, "I, yesterday, in a meeting that continued until after midnight in my home, instructed the Minister of Internal Security and the Israeli Police, who, by the way, deserve great compliments for the self control that they exhibited during the demonstrations, but I told them, you've got a green light to do whatever is necessary."
5. On 3 October, in a meeting with the Prime Minister and other ministers, we were promised that the orders the police were following would be changed and that new orders would be conveyed to them. According to the new orders, the police would be prohibited from using live ammunition against Arab citizens. However, about two hours after this meeting, as I was returning to my village, Kufr Manda in the north, people from the village informed me that the police were presently shooting at citizens with live ammunition, and that Ramez Bushnaq had been fatally shot.
6. In addition to killing 13 Arab citizens, the Israeli police failed to protect the lives of Arab citizens and their property from pogroms,

which were conducted by Jewish citizens during the first week of October throughout the country. Pogroms against Arab citizens occurred in Tabbariya, Akka, Carmiel, Afula, Hadera, Yaffa, Tel Aviv, Bat Yam, Or-'Akiva and Nesher, among other places.

7. The Prime Minister of Israel did not consider the events mentioned above as important enough to warrant a Commission of Inquiry, as required by the Commissions of Inquiry Law. Only after he was put under considerable public pressure did he agree to appoint an official Commission of Inquiry. However, in announcing the establishment of this Commission, the Israeli Government expanded the mandate to include investigation into the conduct of citizens. We therefore consider the mandate to be legally suspect, and to publicly undermine the importance of the events perpetrated against the national minority in Israel. For this reason, we oppose it. We consider it the legal and public duty of the official Commission of Inquiry to investigate the circumstances of the killings of Arab citizens of Israel, and to investigate operational as well as ministerial responsibility.

8. It is the legitimate right of Arab citizens to protest and to demonstrate, and it is the duty of Israeli Police to protect their safety in order to enable them to enjoy this right. However, the Israeli Police and the security forces opened fire with no justification whatsoever, actions that even contradicted their own internal Open-Fire regulations. The outcome was the killing of 13 Arab citizens of Israel and the injuring of 1,000.

9. On the basis of the above:
 - i. We indict the government which gave orders to the Israeli police forces to brutally oppress Arab citizens;
 - ii. We indict the government officials who failed to do anything to stop the brutality of the Israeli police force and the aggression against Arab citizens of Israel;
 - iii. We indict the Israeli police, in particular the Commanders of the

Indictment

Northern District, as responsible for killing:

Muhammad Jabareen, Umm al-Fahem
Rami Ghara, Jatt (Triangle)
Ahmed Jabareen, Umm al-Fahem
'Ala' Nassar, Arrabe
Asil 'Asleh, Arrabe
'Imad Ghanaym, Sakhnin
Walid Abu Saleh, Sakhnin
Iyad Lawabny, Nazareth
Musleh Abu Jared, Dir el-Balah, Gaza (killed in Umm al-Fahem)
Ramez Bushnaq, Kufr Manda
Muhammad Khamayseh, Kufr Kanna
'Omar A'kkawi, Nazareth
Wissam Yazbak, Nazareth

We will present testimonies of the killings to the official Commission of Inquiry, as well as evidence and substantial material that prove the assertions of this indictment. However, whatever the conclusions of the official Commission of Inquiry may be, we are certain that those accused in this indictment are responsible for killing 13 Arab citizens of Israel.

Muhammad Zidan, Chairperson
The High Follow-up Committee for the Arab Citizens in Israel
21 January 2001



Statement of the Committee of the Martyrs' Families

Read by **Mahmoud Yazbak**

21 January 2001

I do not want to speak about anything except the Martyrs. They are our sons, and each one of them is an entire world in which there were dreams, anger, happiness, hopes and accomplishments. We lost them in an unexpected moment. It is very difficult to describe the loss in a press conference, but their memory will always be with us. Our reason for coming from the north today is simply to submit the evidence of the killings of our sons. Whatever the conclusions of the Commission of Inquiry, our sons will never be returned to us. We know who is responsible for our sons' deaths.

To some among my people, "al-Shaheed" (the martyr) is a symbol. He is a symbol of the everyman. He is a symbol for each of us who could have been him. "al-Shaheed" died because of his nationality. Thus, he is me, you and us. However, beyond the symbolic value, each Shaheed has a name.

Muhammad Jabareen, 24, Umm al-Fahem
Rami Ghara, 21, Jatt (Triangle)
Ahmed Jabareen, 18, Umm al-Fahem
'Ala' Nassar, 18, Arrabe
Asil 'Asleh, 18, Arrabe
'Imad Ghanaym, 25, Sakhnin
Walid Abu Saleh, 21, Sakhnin
Iyad Lawabny, 26, Nazareth
Musleh Abu Jared, 14, Dir el-Balah, Gaza (killed in Umm al-Fahem)
Ramez Bushnaq, 24, Kufr Manda
Muhammad Khamayseh, 19, Kufr Kanna
'Omar A'kkawi, 42, Nazareth
Wissam Yazbak, 25, Nazareth

I have read their names because after their killings, they were treated only as numbers. We are not talking about numbers. We are talking about families' dreams which were cut short.

Mahmoud Yazbak was the Spokesperson of the Committee of the Martyrs' Families, and is a Senior Lecturer at the Faculty of Middle East History, Haifa University





An Open Letter to the Families of the Palestinian Martyrs

Tony Doherty

My name is Tony Doherty. I am the second eldest son of Patrick Doherty who was shot dead by British army paratroopers, along with 12 other civil rights marchers on the streets of Derry, Northern Ireland on 30 January 1972. The massacre is referred to historically as Bloody Sunday. Almost 30 years since the killings on Bloody Sunday, a Tribunal of Inquiry, commissioned by the British Government, is currently investigating the terrible events of that day.

I am writing to you, the families of the 13 Palestinian men and boys killed in Israel in October 2000, in order that you will somehow take heart and learn from our experiences in trying to find truth and justice here in Ireland regarding the deaths of our loved ones. The historical comparisons between Palestine and Ireland are at times startling. Furthermore, although I am not fully aware of the circumstances surrounding the deaths of your loved ones, I must say that the apparent similarities between Bloody Sunday and al-Aqsa Intifada are also startling.

I was nine years old at the time of Bloody Sunday. I am now 38 years of age. I, and people of my generation, inherited an unenviable legacy of injustice stemming from the first Tribunal of Inquiry - known as the Widgery Tribunal - established two days after Bloody Sunday by the British Government. While the Widgery Report has, for many years, been completely discredited and regarded as a "whitewash," we now know, because of our own perseverance in the pursuit of justice, that the Widgery Inquiry was established to support Britain's "Propaganda War" in Ireland. The Inquiry became a tool in Britain's arsenal.

Before the gunsmoke had fully cleared away, the Widgery Inquiry was set in motion and had actually made its Report by mid-April 1972. It is now clear that, from the outset, the task of the Inquiry was to allow the British Government to quickly cover over, explain and distort the facts about Bloody Sunday before the rest of the world. This was not so clear at the time. Mistakes were made. The families had not even the time to properly grieve for the dead. Nor were they given the time to properly prepare their case. "Haste can be the enemy of truth." Because the British were in control of the proceedings, the net effect of this situation was that they were able to clear the army of any wrongdoing or crime and, incredibly, to place the blame for the massacre on the Civil Rights Association.

Because of the "success" of the Widgery Inquiry, Bloody Sunday was



allowed to pass into legal abeyance for more than 25 years. Bloody Sunday became a watershed in the history of the struggle in Ireland. It has left a terrible legacy in Derry and other parts of the north. Many young people subsequently lost their lives or spent long years in prison because they went on to resist British rule.

It also left a legacy to the families of those who were killed. The motives of the families were not borne of vengeance. "Let vengeance be the laughter of our children," wrote Bobby Sands one year before he died on hunger strike. In 1998, after many years of sustained campaigning and fighting for truth and justice, the British Government announced the setting up of another Tribunal of Inquiry into the events of Bloody Sunday.

We had forced an amazing precedent in British law in that this was the first time that a Tribunal of Inquiry has been established to investigate a specific event which a previous Tribunal of Inquiry had already reported on. While the new Bloody Sunday Inquiry was announced in January 1998, it took more than two years to formally commence the proceedings such was the extent of preparation by both the civilian and army/government sides.

Preparations for an investigation into the deaths of so many people should, by their very nature, take a long time! "Haste can be the enemy of truth" is a quote, not of mine, but of Christopher Clark, QC, solicitor to the Bloody Sunday Inquiry. He was referring to the unhealthy pace of the previous discredited Widgery Inquiry.

I do not profess to be knowledgeable about all the circumstances of al-Aqsa Intifada, nor am I fully aware of the recently established commission of inquiry into the 13 fatal shootings. I have recently met representatives from Adalah, the lawyers' organisation which will represent the families of the deceased. I was alarmed by what they told me regarding this investigation. The dark and deceitful shadow of Widgery hangs over it. I believe that the hearings are due to begin soon.

You should not feel compelled to attend. Time is on your side. It does not belong to the killers of your brothers, sons and fathers. The decision is yours but you should take counsel from various friendly sources. Work out whom you can trust and whom you can work with. Garnering international support for your cause is absolutely vital.

I do not need to tell you that governments that massacre innocent

An Open Letter to the Families of the Palestinian Martyrs

people should not be trusted. The Israeli government is brutal, murderous and deceitful. However, do not be timid or pugnacious. Let your resolve and dignity be your collective strengths. James Connolly, an Irish Socialist executed by the British in 1916 once said of ordinary people: "The great only appear great because we are on our knees. Let us rise!"

February 2001





Tribunals of Inquiry

Excerpts from a Legal Opinion on Fundamental Principles of Practice and Procedure

Lord Gifford, QC, Ian MacDonald, QC, Jonathan Hall, Sara Mansoori

On 8 November 2000, the Israeli government approved the establishment of a Commission of Inquiry to investigate clashes between Israeli police and Arab citizens of Israel in which 13 Arab citizens were killed. The Commission was established under the Israeli Commissions of Inquiry Law (1968). The following are excerpts from a legal opinion outlining the fundamental principles of practice and procedure for Tribunals of Inquiry in England and Wales prepared on behalf of the British Bar Human Rights Committee at the request of Adalah: The Legal Center for Arab Minority Rights in Israel. In particular, this opinion concerns the law as it affects the issue of representation before Tribunals of Inquiry.

This opinion does not examine Israeli law relating to Tribunals of Inquiry, but rather sets out the general fundamental principles of practice and procedure governing such Inquiries, which apply equally in the United Kingdom (UK) and Israel.

General Fundamental Principles of Practice and Procedure

1. The primary aim of a Tribunal of Inquiry is to establish the truth. This contrasts with the role of the High Court where the primary aim is to “make a final determination on the basis of the evidence presented to it by the opposing parties.”¹ In a recent ruling, the Bloody Sunday Inquiry [a Tribunal established to investigate the killing of 13 Irish citizens - civil rights marchers - by the British army in Derry, Northern Ireland on 30 January 1972 - Editors’ Note] considered the proper function and nature of an Inquiry and stated that it regarded the following views, expressed by Professor Dermot Walsh, as an accurate statement of the legal position.

Under our adversarial system of justice when the High Court is hearing a case between two opposing parties, it does not play an active role in adducing evidence to determine the factual truth of a matter in dispute between the parties. Its primary role is to make a final determination on the basis of the evidence presented to it by the opposing parties. In discharging this role it relies on the parties to present all the relevant

evidence and to subject the evidence of their opponents to searching scrutiny. The High Court itself will not pursue this task. Its input is largely confined to ensuring that the parties respect the rules of procedure in adducing the evidence and in scrutinising each other's evidence. At the end of the day, the primary function of the High Court is to decide in favour of one side or the other in accordance with the rules of the game. It is not concerned first and foremost with establishing the truth...

The Tribunal of Inquiry by contrast is set up specifically to find the truth. It is expected to take a positive and primary role in searching out the truth as best it can. Certainly, it will seek the assistance of any interested party who has evidence to give or who has an interest in challenging the evidence offered by another party. It must be emphasised, however, that it is the Tribunal, and not the parties, which decides what witnesses will be called to give evidence. Indeed, strictly speaking there are no parties, no plaintiff and defendant, no prosecutor and accused, only an inquiry after the truth. It is the Tribunal that directs that inquiry. All the witnesses are the Tribunal's witnesses, not the witnesses of the parties who wish them to be called. Whether any individual witness will be called is a matter for the Tribunal. Moreover, the Tribunal can be expected to act on its own initiative to seek out witnesses who may be able to assist in the quest for the truth. Ultimately, the task facing the Tribunal is to establish the truth, not to make a determination in favour of one party engaged in an adversarial contest with another.²²

Terms of Reference

2. It is essential that the Tribunal be given terms of reference. In its report, the Salmon Commission recommended that, "The terms of reference of Tribunals should be drawn as precisely as possible. Tribunals should not be set up to investigate vague and unspecified rumours; equally they should not be fettered by terms of reference which are too narrowly drawn."^{3,4}
3. The Tribunal of Inquiry (Evidence) Act 1921 ("the 1921 Act") is silent

on the issue of whether there has to be terms of reference and whether such terms should be made public. However, given that the aim of a Tribunal of Inquiry is to publicly investigate into a matter of public importance, to give publicly required answers, and thereby to restore public confidence, it is necessary for the terms of reference to be made public. The Salmon Commission recommended that, “The Tribunal should take an early opportunity of explaining in public its interpretation of its terms of reference and the extent to which the inquiry is likely to be pursued. As the inquiry proceeds, it may be necessary for the Tribunal to explain any further interpretation it may have placed on the terms of reference in the light of the facts that have emerged.”⁵ Moreover, the terms of reference and the interpretation of such terms should be stated at the public preliminary meeting of the Tribunal. In the Bloody Sunday Inquiry and the Stephen Lawrence Inquiry [a Tribunal established to inquire into matters arising from the murder of Stephen Lawrence, a black youth killed by five white youth in 1993, and the functioning of state authorities in investigating and prosecuting racially motivated crimes - Editors’ Note], the terms of reference were published on the inquiries websites and are available to anyone worldwide.

Public Hearings

4. The Tribunal shall sit in public and has no power to exclude the public unless it is of the opinion that, “it is in the public interest expedient to do so for the reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.”⁶
5. The Tribunal should also ensure that a timetable relating to the Inquiry proceedings is available to the public. This should be set out at the earliest opportunity to ensure that all interested parties are aware of when the Tribunal will be sitting, who will be called as witnesses and when various issues are being dealt with and considered by the Tribunal.⁷ It is also important that interested parties are given adequate time to prepare for the Tribunal

proceedings and are able to make representations if they feel that more time is needed. In the Salmon Commission Report, one of the conclusions and recommendations was that the Tribunal should, at a preliminary meeting in public, give its interpretation of its terms of reference, and give directions as to procedure and intended lines of inquiry.⁸

Representation

6. The law on representation⁹ before Tribunals of Inquiry is derived from a number of sources:
 - i. Statute, in particular, the 1921 Act;
 - ii. The Royal Commission on Tribunals of Inquiry 1966 (“the Salmon Commission”);
 - iii. Common law and precedent since 1966;
 - iv. The European Convention on Human Rights;
 - v. Other international sources.¹⁰

Statute

7. The 1921 Act provides that the Inquiry may permit representation to any person “appearing to them to be interested.”¹¹ In the Vassal Inquiry (1962), it was held that the phrase “interested” covered “any person who in the event might be subject to adverse reflection, direct or indirect, from anything said in [the] Report.” At the Inquiry into the Aberfan Disaster (1966), the term was also held to include “any person or group of persons who had been affected by the disaster and who had suffered loss or damage.”¹²

The Salmon Commission

8. The Commission was established under the chairmanship of Lord Justice Salmon (later Lord Salmon) to consider the machinery set up under the 1921 Act and it heard evidence from a great number of individuals.

9. The Commission laid down six “cardinal principles,” applicable to all Tribunals of Inquiry:
 - i. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him or her and which the Tribunal proposes to investigate;
 - ii. Before any persons who are involved in an inquiry are called as witnesses, they should be informed of any allegations which are made against them and the substance of the evidence in support of them;
 - iii.
 - a) They should be given an adequate opportunity of preparing their case and of being assisted by legal advisers;
 - b) Their legal expenses should normally be met out of public funds;
 - iv. They should have the opportunity of being examined by their own solicitors or counsel and of stating their case in public at the inquiry;
 - v. Any material witnesses they wish called at the inquiry should, if reasonably practicable, be heard;
 - vi. They should have the opportunity of testing by cross-examination conducted by their own solicitors or counsel any evidence, which may affect them.¹³

10. At paragraph 55, the Commission stated:

We consider that the Tribunal should have discretion to allow anyone to be legally represented who is not a witness but who claims to be a person interested in the inquiry in that there is a real risk that he might be prejudicially affected by it. In order to succeed in his application to be legally represented such a person would have to satisfy the Tribunal about the existence of such a risk.

11. In his 1967 Lionel Cohen lecture, Lord Salmon observed that the practice under the 1921 Act had evolved gradually “through the applications of the principles of the common law and common sense.” The improvements recommended by the Commission were “no more than a logical development of the present practice.”¹⁴ The Commission drew back from recommending statutory rules to govern the procedure to be followed by Tribunals of Inquiry,

preferring that Tribunals should be entitled to adopt their own procedure, provided that the general fundamental principles were observed.

12. Both the Courts and subsequent Inquiries have stressed that the six “cardinal principles” of the Royal Commission are of central importance, and any public inquiry should always have regard to them and the discretion to adopt a flexible procedure to meet the needs and fairness of any particular case.¹⁵
13. Two recent Tribunals, the Lawrence Inquiry (1999) and the Bloody Sunday Inquiry (1998), have considered the issue of representation at Inquiries into deaths at which allegations were made against, firstly, the Metropolitan Police and, secondly, the Armed Forces by the families of those killed.
14. At the Lawrence Inquiry, the parents of the murdered teenager Stephen Lawrence were granted legal representation before the Tribunal, and their lawyers were permitted to cross-examine vital police witnesses who, in order to do so, were given disclosure of potentially relevant documents. In its Report, the Inquiry stated that: “All parties and witnesses were given every opportunity to see all potentially relevant documents which were disclosed to the Inquiry.”¹⁶
15. At the start of the second Bloody Sunday Inquiry, the Tribunal (chaired by Lord Saville) delivered an Opening Statement in which it recognized two distinct bases on which legal representation might be permitted before it:
 - i. Representation for those “against whom serious allegations are likely to be made [who] must be given a proper opportunity to challenge what is said against them and to do so, if that is what they want, through lawyers representing their interests;”
 - ii. Representation for others not in that position, “if we were satisfied that our search for the truth in a fair, thorough and impartial way

dictated that others should also be represented.”

16. In a subsequent preliminary ruling, the Tribunal held that “each family [of those killed] and each of the wounded has a private and personal interest, which must be borne in mind” in considering the question of representation. The Tribunal stated that:

The object of providing legal representation is to ensure that as a matter of justice and fairness the interests of the persons concerned are properly protected at an Inquiry. It follows in the present case that each of the families and each of the wounded would be entitled to separate representation if it could be shown that such separate representation was required in order to ensure that their respective interests were properly protected.¹⁷

The Tribunal accordingly allowed eight leading and junior counsel to represent the interests of the wounded and the families of the dead. The Northern Ireland Civil Rights Association, which organized the march that led to the confrontation on Bloody Sunday, was also granted representation before the Tribunal.

17. The participation of interested persons assists in the primary task of the Inquiry - to discover the truth. The Tribunal stated that whilst it is the Tribunal’s task to collect, collate, analyze and present the evidence, the Tribunal’s search for the truth is assisted by the active participation of those with a direct interest in the Inquiry.¹⁸ The Tribunal aims to prepare for the Inquiry “in an entirely open and non-partisan way, so that the world can see how it is conducting itself and so that all who have a direct interest in the Inquiry will have a reasonable opportunity to consider and assess all material evidence, as well as making suggestions for further or better investigations.”¹⁹

European Convention on Human Rights

18. Article 2(1) of the European Convention on Human Rights (“the

Convention”) provides that:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

19. By Section 6(1) of the Human Rights Act 1998 (the Act incorporating the Convention into the domestic law of the United Kingdom), it is unlawful for a public authority (including a Court or Tribunal) to act in way which is incompatible with a Convention right.
20. In *McCann v. United Kingdom*,²⁰ the European Court of Human Rights noted that a general legal prohibition of arbitrary killing by agents of the State would be ineffective, in practice, if no procedure for reviewing the lawfulness of the use of lethal force by State authorities existed. The Court held that the obligation to protect life under Article 2(1), together with the duty of States to secure the rights and freedoms defined in the Convention, requires that there should be “some form of official investigation when individuals have been killed as a result of the use of force by, *inter alios*, the State.”
21. In finding that the domestic Coroner’s Inquest proceedings held in *McCann*, supra, did constitute an “effective official investigation,” the Court noted that the victims’ families had been represented at that Inquest, and that their lawyers had been able to examine and cross-examine key witnesses, including military and police personnel, and to make submissions in the course of the proceedings.²¹
22. In *Kaya v. Turkey*,²² the European Court of Human Rights recalled the principle set out in *McCann* and considered the obligation of contracting States under Article 13 of the Convention, which guarantees the availability of an “effective” remedy at a national level. The Court considered the right to life enshrined to be one of the most fundamental rights in the Convention and concluded that

this must have implications relating to the nature of the remedy under national law:

In the view of the Court the nature of the right which the authorities are alleged to have violated in the instant case, one of the most fundamental in the scheme of the Convention, must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.²³

23. In addition to the points set out above from the *McCann* and *Kaya* cases, the European Court case law establishes the following propositions:
- i. Articles 1 and 2 of the Convention require that when individuals have been killed as a result of the use of force by agents of the state, there must be an effective official investigation;
 - ii. Such investigation should be capable of leading to a determination whether the force used was or was not justified in the circumstances;
 - iii. An effective official investigation should be capable of leading to identification and punishment of those responsible for unlawful violence;
 - iv. In the absence of such an investigation, legal protection of human rights would be ineffective, in practice, because it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity;
 - v. The inquiry should be conducted diligently with a genuine determination to identify and prosecute those responsible;
 - vi. Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on

the state to provide a plausible explanation of how the injuries were caused, failing which a clear issue arises under Article 3 of the Convention;

- vii. Article 13 of the Convention entails, in addition to a thorough and effective investigation, effective access of the complainant to the investigatory process and payment of compensation where appropriate;
- viii. Where fundamental values and essential aspects of private life are at stake, effective deterrents may be indispensable, and may only be capable of being provided by the criminal law;
- ix. The ultimate effectiveness of a remedy may depend on the proper discharge by the public prosecutor of his functions.²⁴

Other International Sources

24. By paragraph 9 of the “United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions” (UN High Commissioner for Human Rights),²⁵ there shall be “thorough, prompt and impartial investigation” in all suspected cases of extra-legal, arbitrary or summary executions, in order to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. Paragraph 16 states:

Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence.

25. The “UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”²⁶ provides that judicial and administrative mechanisms should be established to enable victims of crime²⁷ to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.²⁸ Victims should be informed of their role in the administrative or judicial processes, as well as the timing and the progress of the proceedings

and the depositions of their cases.²⁹ The views and concerns of the victims should be presented and considered at appropriate stages of the proceedings where their personal interests are affected.³⁰ Where acts have been committed that do not constitute violations of national criminal laws but do constitute violations of internationally recognized norms relating to human rights, the Declaration provides that States should consider incorporating norms proscribing abuses of power and providing remedies to victims of such abuses.³¹

26. The UN Principles are not binding on domestic Courts and Tribunals, but are persuasive authority and, in our opinion, embody the considerations appropriate to any Tribunal established to investigate such matters in the United Kingdom.

Conclusions - Representation

27. The following principles can be identified from the law and practice of Tribunals of Inquiry regarding the issue of representation:
- A. There is no automatic right to representation before a Tribunal of Inquiry; however, a Tribunal of Inquiry has the discretion to grant representation before it to any interested person.
 - B. Certain categories of interested persons have been identified in practice as meriting representation, and the Tribunal has a duty to consider granting representation to them, subject to the justice and fairness of the particular case:
 - i. A witness against whom adverse allegations are, or may be, made;
 - ii. A person who, albeit not a witness, may be prejudicially affected by the Inquiry;
 - iii. A victim, or family of a victim, where the victim's death or injury is or forms part of the subject matter of the Inquiry;
 - iv. A representative of a group or organization, which falls into any of the above categories.

- C. Persons granted representation may have the following entitlements, subject to the justice and fairness of the particular case:
 - i. Access to and prior disclosure of the likely evidence as it may affect them;
 - ii. (If appearing as a witness) examination by their own counsel or solicitor;
 - iii. Cross-examination by their own counsel or solicitor of any witnesses whose evidence may affect them;
 - iv. Having witnesses called on their own behalf.

- D. Whether an interested person will be able to bring or participate in other legal proceedings in relation to the subject matter of, and witnesses called before, the Inquiry is a relevant consideration to the question of whether to grant representation and the extent of any representation granted.

- E. When an Inquiry is investigating the death of persons as a result of the use of force by agents of the State, fundamental rights and obligations are engaged. An effective official inquiry is then a requirement. The Inquiry must consider as against this requirement:
 - i. That further witnesses may need to be called;
 - ii. That witnesses, including official witnesses, may need to be cross-examined in detail;
 - iii. That interested persons may have valuable submissions to make as to the conduct of the Inquiry in its search for the truth.

Costs of Representation before the Tribunal

- 28. The 1921 Act does not contain a provision giving the Tribunal the power to order that a witness should be paid his costs out of public funds. The Salmon Commission strongly recommended that this be changed. They observed that it would cause great hardship to witnesses if they were left to bear the costs of being represented before the Tribunal, and that, by being represented, they would be

assisting the Tribunal to uncover the truth, which was in the public interest. The Salmon Commission did not approve of *ex gratia* payments for costs, as they noted that this could put witnesses in embarrassing positions as they could feel they were accepting donations at the public expense. In paragraph 61 of its report, the Salmon Commission set out how the Tribunal's discretion in respect of costs should be exercised:

Normally the witness should be allowed his costs. It is only in exceptional circumstances that the Tribunal's discretion should be exercised to disallow costs... If the Tribunal came to the conclusion in respect of any witness that there had never been any real ground for supposing that he might be prejudicially affected by the inquiry and that it was therefore unreasonable for him to have gone to the expense of legal representation, the Tribunal should leave him to bear those expenses himself. In any case in which the Tribunal considered it reasonable for the witness to be legally represented, the practice should be to order that he should recover his costs out of public funds on a Common Fund basis, unless the Tribunal considered there were good grounds for depriving him of all or part of his costs. It is impossible to catalogue what these grounds might be; cases vary infinitely in their facts and the matter must be left entirely to the discretion of the Tribunal.³²

Appeals from the Findings of the Tribunal

29. The Salmon Commission recommended that there should be no appeal from the findings of the Tribunal.³³ Another Tribunal would have to be set up to hear any appeal, which would be impractical and undesirable. The Salmon Commission observed that, "... it is of the utmost importance that finality should be reached and confidence restored with the publication of the Report."³⁴

Conclusion

30. Although the procedure of Tribunals of Inquiry is not rigid and set in stone, the procedure must observe the general principles set out

above, as these ensure that the truth is uncovered (and is seen to be uncovered) with fairness and justice. This is vital to ensure confidence in the Tribunal by both the public at large and by those who have a direct interest in the subject matter of the Inquiry.

16 February 2001

End Notes

1. Professor Dermot Walsh, "The Bloody Sunday Tribunal of Inquiry - A Resounding Defeat for Truth, Justice and the Rule of Law." Paper on file with the Bar Human Rights Committee.
2. *Id.*
3. See "The Royal Commission on Tribunals of Inquiry, Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon," 1966 [hereinafter "The Salmon Commission Report"], Cmnd 3121, Recommendations no. 32 and 33.
4. For example, the Stephen Lawrence Inquiry terms of reference were: "To inquire into the matters arising from the death of Stephen Lawrence on 22 April 1993 to date, in order particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes." The terms of reference for the Bloody Sunday Inquiry were to inquire into "the events of Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day."
5. "The Salmon Commission Report," *supra* note 3, Cmnd 3121 at paragraph 79.
6. The Tribunals of Inquiry (Evidence) Act 1921, Section 2(a).
7. Lord Saville, in his opening statement in the Bloody Sunday Inquiry, on 3 April 1998, stated, "We have concluded that it will not be fair or feasible to start the full hearings in this Inquiry until the autumn. This will give everyone a reasonable opportunity for proper preparation. We shall of course publish the exact dates for the hearings as far in advance as possible."
8. "The Salmon Commission Report," *supra* note 3, Summary of Conclusions and Recommendation, no. 40.
9. "Representation" here refers to the right to be heard by the Tribunal rather than a right to legal representation.
10. See Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (United Nations High Commissioner for Human Rights), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.
11. The Tribunals of Inquiry (Evidence) Act 1921, Section 2(b).
12. "The Vassal Inquiry Report," Cmnd 2009 (1962-63) paragraph 7; "The Aberfan Disaster Report," HC Paper (1966-67) no. 553, paragraph 6.

13. "The Salmon Commission Report," supra note 3, Cmnd 3121 at paragraph 32.
14. "Tribunals of Inquiry," The Hebrew University of Jerusalem Lionel Cohen Lectures, Fourteenth Series 1967.
15. See "Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions," 1996 ("The Scott Report") paragraph B2.29; "Inquiry into the Matters Arising from the Death of Stephen Lawrence," 1999 [hereinafter "The Lawrence Report"], Cmnd 4262, paragraph 3.6; and *Crompton, et. al. v. Secretary of State for Health*, CA, 9 July 1993, unreported. Cf. The lecture by Sir Richard Scott (Chairman of the Inquiry into Dual-Use Goods) to the Chancery Bar Association, 2 May 1995: "The golden rule is that there should be procedural flexibility, with procedures to achieve fairness tailored to suit the circumstances of each inquiry."
16. *Id.* "The Lawrence Report," Cmnd 4262, Chapter 3, paragraph 3.5.
17. The Bloody Sunday Inquiry, "Rulings and Observations of the Tribunal on the Matters Raised at the Preliminary Hearing on 20 and 21 July 1998."
18. *Id.* "As we said in the Opening Statement, we need the active and continuing help of all concerned to help us find the truth about Bloody Sunday."
19. *Id.*
20. *McCann v. United Kingdom*, (1995) 21 EHRR 97 at paragraph 161.
21. *Id.* at paragraph 162.
22. *Kaya v. Turkey*, (1999) 28 EHRR 1.
23. *Id.* at paragraph 107.
24. See judgment of Lord Bingham of Cornhill CJ in *R v. Director of Public Prosecutions, ex parte Manning* [2000] 3 WLR 463 at 475 where he sets out the submissions of Nicholas Blake QC.
25. See supra note 10.
26. Adopted by United Nations General Assembly Resolution 40/34, 29 November 1985.
27. Victims of crime are defined in paragraph 1 as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of the fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power."
28. See supra note 26, at paragraph 5.
29. *Id.* at paragraph 6(a).
30. *Id.* at paragraph 6(b).
31. *Id.* at paragraph 19.

32. The Salmon Commission observed that if a witness during the course of the inquiry had sought to obstruct the Tribunal in arriving at the truth or had unreasonably delayed the inquiry, the Tribunal might be entitled to deprive that witness of part or all of his costs.
33. See “The Salmon Commission Report,” supra note 3, Summary of Conclusions and Recommendations, no. 50.
34. *Id.* at paragraph 134.

Lord Gifford, QC practices as a human rights lawyer in Britain and Jamaica, and is currently representing a bereaved family before the Bloody Sunday Tribunal in Northern Ireland

Ian MacDonald, QC is a practicing barrister at the English Bar, who specializes in immigration, human rights, and criminal law, and has chaired a number of Inquiries

Jonathan Hall is a member of the Bar of England and Wales, who practices principally in criminal law, and is a member of the British Bar Human Rights Committee

Sara Mansoori is a barrister who specializes in media and communication and is a member of the British Bar Human Rights Committee





12 March 2002

Members of the Official Commission of Inquiry
Supreme Court
Jerusalem

Re: Request to Cancel Notices of Warning Given to Arab Public Representatives

Dear Sirs:

I am writing on behalf of Members of Knesset (MKs) 'Abd al-Malek Dahamshe and Dr. Azmi Bishara, and also on behalf of Sheikh Ra'ed Salah, to request cancellation of the notices of warning that were issued to them on 27 February 2002. The said notices of warning were issued in violation of law, as is apparent from the following:

- A. The element of incitement set forth in the Commission of Inquiry's mandate exceeded the Commission's authority and was discriminatory.
 - A1. The government set the mandate of the official Commission of Inquiry when it established the Commission of Inquiry on 8 November 2000. This mandate called on the Commission, *inter alia*, to investigate the chain of events that began on 29 September 2000, including "the factors that led to the events at that time, including the conduct of the inciters and organizers from all sectors who participated in the events, and of the security forces."
 - A2. On 10 November 2000, I wrote to the then Prime Minister, Ehud Barak, and to the Chief Justice of the Supreme Court regarding the content of the Commission of Inquiry's mandate. My letter related explicitly to the legal problems raised by including incitement in the mandate, whereby the Commission was to examine and investigate the actions of the executive branch for an act or omission that it committed which led to the public's loss of confidence in it. The main reason for this lies in the principle of the separation of powers. At the end of my letter, I requested Prime Minister Barak to change the mandate to conform it to the legal function of an official Commission of Inquiry.
 - A3. In addition, the Chief Justice of the Supreme Court was requested to



instruct the members of the Commission, upon appointment, to exercise their authority pursuant to Section 2(b) of the Commissions of Inquiry Law (1968), and request the government to limit the mandate of the Commission of Inquiry so that it does not include incitement, thereby conforming the mandate to the applicable law.

- A4. On 19 November 2000, I sent a similar request to the members of the Commission of Inquiry, and repeated this request a year later, on 28 November 2001. In the last letter, in addition to the legal problems inherent in including the element of incitement, I warned that this element was directed solely towards Arab public representatives. I have not received any reply to my correspondence relating to the Commission of Inquiry's mandate.
- A5. After completion of the first stage of testimony, and following the issuance of the notices of warning, it is clear that the Commission chose not to exercise its power pursuant to Section 2(b) of the Commissions of Inquiry Law, and investigated the matter of incitement.
- A6. In so acting, we believe that the Commission did not consider and/or did not properly consider the reasons stated in our aforementioned letters relating to the legal problems inherent in including incitement in the Commission of Inquiry's mandate. These problems warrant the cancellation of the notices of warning that were issued to the Arab public representatives, all of which relate to incitement.

Attached hereto are copies of my letters relating to the mandate of the Commission of Inquiry, dated 10 November 2000, 19 November 2000, and 28 November 2001.

- A7. In his book *Official Commissions of Inquiry* (2001), Dr. Klagsbald emphasizes the need that official commissions of inquiry have an executive purpose and investigative power that does not exceed the powers of the executive branch, because:

The place of the official commission of inquiry in “the constitutional format” - as a wing of the executive branch that is intended to perform an administrative function - dictates its powers. Its powers must be derived from the areas of activity of the executive branch, in a manner that does not compete with the powers of the other branches that are part of the same “constitutional format.”¹

- A8. Prof. Segal holds the same opinion: “The existence of a matter of significant public importance that justifies investigation by a commission of inquiry results from the broad public distress based on a crisis of confidence in the governmental administration for an act or omission it committed.” Prof. Segal adds that, “the institution of the commission of inquiry must be reserved, in principle, to the investigation of matters relating to the responsibility of the government before the Knesset, and should not be employed to investigate other matters.”²
- A9. Experience in Israel indicates that, in the vast majority of cases, commissions of inquiry pursuant to the Commissions of Inquiry Law (1968) were established to investigate the executive branch following its act and/or omission that led to the public’s lack of trust in the executive branch. Noteworthy in this regard was the second Shamgar Commission of Inquiry, which examined, in 1996, the circumstances of the assassination of the late Prime Minister Yitzhak Rabin. It concentrated on the executive branch although the circumstances that preceded the assassination included savage incitement against Rabin himself.
- A10. Furthermore, implementation of the mandate of the Commission of Inquiry regarding the element of incitement discriminated against the Arab public representatives. The investigation of incitement was directed only against them. No investigation was conducted against any individuals from the Jewish community who were responsible for incitement, although information was provided on widespread rioting throughout the country by Jewish rioters calling out “death to Arabs” and injuring Arab citizens and Arab public and private property.

See my letter of 19 February 2002 to the Commission.

A.11 In addition, the Commission chose not to summon Ariel Sharon, the opposition leader at the time of the events that were the subject of the Commission's investigation, although it was Sharon's visit to the area of al-Haram al-Sharif on 28 September 2000, that was controversial. The then Jerusalem Police Commander, Major General Yitzhaki, warned the political echelon against Sharon ascending to the area of al-Haram al-Sharif on the grounds that it would increase the already existing tension. Also, former Minister Ben Ami accused Sharon, in a television broadcast that was submitted to the Commission, of taking actions that aggravated the situation.

A.12. It is surprising that the Commission ignored this subject, which took place only one day before the events began. Rather, the Commission deemed it appropriate to warn the three representatives of the Arab public for "messages of violence" that they allegedly conducted during the two years that preceded the October events.

A.13. For this reason alone - the discriminatory exercise of the Commission's mandate on incitement against the Arab public representatives - the Commission must cancel the notices of warning that it issued to those representatives.

B. Political questions asked by the Commission exceeded its authority and were discriminatory.

B1. The Commission of Inquiry asked the Arab public representatives political questions, and in so doing exceeded its authority as an official Commission of Inquiry.

B2. For example, during the questioning of MK 'Abd al-Malek Dahamshe on 2 January 2002, Justice Or asked him:

How you act as a Muslim - regarding the Temple Mount we already know, and your opposition to the occupation of the territories we

know. This is from your being a Palestinian. In which events, if you can point them out, in this conflict among the three identities that you mentioned, do you fight for your Israeli citizenship, in opposition to your being Palestinian or as a Palestinian... can you illustrate for us?³

- B3. Prof. Shamir also asked MK Dahamshe political questions, among them the following:

Let's go back to the matter of the mosques. Under the circumstances, I understand that your movement took several initiatives to build... to rebuild abandoned mosques. I can surely understand the Islamic emotion over abandoned holy sites, but wouldn't it have been more logical to dedicate the few resources to build mosques where there are worshippers, and not in a place where there are no Muslims at all? In other words, it is possible to build a mosque for people to pray, and it is possible to build a mosque for political reasons.⁴

- B4. The Commission of Inquiry also asked MK Azmi Bishara political questions during his testimony on 3 December 2001. For example, Justice Or asked MK Bishara about an interview he gave in 1998 to Ari Shavit of *Ha'aretz*:

Sir, you remember well... that matters got to a point there. To the point, Mr. Bishara. You said, "Correct, this is the paradox of the Arabs in Israel. This is the paradox of Azmi Bishara in the State of Israel. If Azmi Bishara tells you there is no paradox here, say to him 'liar.'" You can't say "I am a proud Arab and also a loyal Israeli." Are you a proud Arab?⁵

- B5. Prof. Shamir also asked Dr. Bishara political questions, such as the following:

Yes, but if we were to describe some scale that measures the primacy of the national attachment of parliamentary parties - I am not talking about Sons of the Country or other movements - would it be correct to say that Balad would be at the head of this scale?⁶

- B6. Prof. Shamir continued and made the following comments about the movement that Dr. Bishara represents:

... the legitimacy of the State of Israel was, and you [in the plural] in fact say it, the 'al Hoquq al Shar'iyah' [the legitimate rights], the decision of the United Nations that called for the establishment of the Jewish State and a Palestinian State. But as for the State of the Jews, now you come and operate an entire political movement that seeks to undermine it.⁷

- B7. The Commission of Inquiry also asked Sheikh Ra'ed Salah political questions during his questioning on 28 January 2002. For example, Prof. Shamir explicitly asked him about the political goals of the movement that he heads, and also about his position on the Oslo Agreements:

With your permission, I would like to go back to the question, what interests me is the political goals of the movement, then we can speak about other matters.⁸

With your permission, the Islamic movement was against the Oslo Agreement, right?⁹

- B8. The Chairman of the Commission of Inquiry, Justice Or, also asked Sheikh Ra'ed Salah political questions, among them a question on the meaning of a poem written by Sheikh Ra'ed Salah. After he read a translation of the poem, Justice Or, who does not speak Arabic, interpreted the poem as he understood it:

On 18 August, your poem was published, another poem, and you... this was after the destruction of the Sarphand Mosque and you state: "Desecrate the houses of prayer to Allah and massacre the worshippers, dig graves for our people, and pelt the muezzin with your blasts of anger, but your fate, good enemy, is removal. Proceed, destroy Sarphand and its hymns, desecrate, devour the splendor, and wash the *Jabe' al Habiba* in blood, chuckle while you make us bleed, but your fate enemy, enemy of justice, is surely removal, you are nothing more

than a growth on my flesh. Enemy of Allah, your fate of removal is decreed and your oppression too is on the way to hell.” Before I... explain what you mean. I’ll tell you how I understand it.¹⁰

B9. The Commission of Inquiry employed this pattern of questioning, e.g., asking political questions, only with the representatives of the Arab public. The Commission had no authority to take this approach, and in doing so, it discriminated against them. For this reason, too, the notices of warning issued to the three representatives of the Arab public are invalid.¹¹

C. Reliance on information from the General Security Service and police.

C1. It seems that the Commission of Inquiry was assisted by extensive intelligence material that was apparently submitted by the General Security Service (GSS) and/or the police. It is also clear that the Commission did not investigate the political statements made by representatives of the Jewish public, and certainly did not interpret them. These facts support the assumption that the GSS and/or police submitted information to the Commission only against the Arab public representatives. Such action by public entities, which are supposed to act with fairness, equality, and without bias, but in fact were motivated by racial discrimination, renders illegitimate the material that they submitted. Therefore, the Commission of Inquiry is prohibited from relying on the material in making its decisions.

For the reasons stated above, the Commission of Inquiry is requested to cancel the notices of warning that it issued to the three Arab public representatives - MK ‘Abd al-Malek Dahamshe, MK Dr. Azmi Bishara, and Sheikh Ra’ed Salah.

Your prompt reply would be appreciated.

Very truly yours,

Hassan Jabareen, Advocate

Request to Cancel Notices of Warning Given to Arab Public Representatives

End Notes

1. Avigdor Klagsbald, *Official Commissions of Inquiry* (Jerusalem: Nevo, 2001) at 140 (Hebrew).
2. See Zeev Segal, "Commission of Inquiry pursuant to the Commissions of Inquiry Law, 5728-1968: Its Constitutional Status and Legitimate Area of Activity," 3 Legal Research 199, 218, 245 (1984) (Hebrew).
3. Protocol of the Commission of Inquiry at 9073.
4. Id. at 9136.
5. Id. at 8519.
6. Id. at 8597-8598.
7. Id. at 8659.
8. Id. at 9536.
9. Id. at 9546.
10. Id. at 9524-9525. Editors' Note: The text of the poem by Sheikh Ra'ed Salah, quoted by Justice Or in Hebrew, is not an accurate translation of the Arabic original. For the full and accurate text in Arabic, see *Sawt al Haq Wa-al-Hurriya*, 18 August 2000.
11. Compare with A. Klagsbald, supra note 1, at 329.



