

On the Collective Criminalization of Political Protestors

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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 incomunicado 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 insurrections; 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-Ittihad*, 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 *Hodaifeh Darawsheh* 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*



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- of Israel v. Hodaifeh Darawsheh, 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 Darawsheh, 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 Shalabi, 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

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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 Igbarieh 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 Igbarieh 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, *Vladislav 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.”)

