

## Selective Enforcement: Repeal of Ban on Flag Hoisting

### Background

This policy paper was written in the aftermath of the serious events that transpired at the funeral of Palestinian journalist Shireen Abu-Akleh, which apart from hitting a new moral low highlighted the need for a specific amendment of the law.

Abu-Akleh, a journalist for the Al-Jazeera channel, was killed by gunfire on 11 May 2022 while reporting on clashes and fire exchanges between Israeli troops and armed Palestinians in the Jenin refugee camp. The question of who is responsible for her death remains in dispute, and both Israel and the Palestinians have launched separate investigations into the circumstances of her killing. Her funeral on Friday, 13 May 2022, set out from St. Joseph's Hospital in East Jerusalem to Mount Zion Cemetery in the Old City. Due to her renown as a journalist who covered the Israeli-Palestinian conflict for many years, her status as a Palestinian national symbol, and the circumstances of her death, thousands joined the funeral procession, some of them waving Palestinian flags. Media reports of the massive event show that Israel Police's Jerusalem District officers on the scene used batons to forcibly disperse the mourners. They beat people in the legs, used riot control gear, and even attacked the pallbearers until they almost fell to the ground. Moreover, police officers reportedly went to Abu-Akleh's home and demanded from family members to remove Palestinian flags hoisted on the house.

The violent dispersal of Abu-Akleh's funeral soon became the top media story in Israel and around the world.<sup>1</sup> Broadcast videos of the event indicate that the violence perpetrated by the police was partly related to the hoisting of Palestinian flags. The filmed documentation exposed people in Israel and around the world to the violent and provocative conduct of Israeli policemen toward the Palestinians in East Jerusalem who live in occupied territory annexed by Israel and have neither citizenship nor national or other rights. In addition, the event underscored Israel Police's selective use of the dry letter of the law to ban the hoisting of the Palestinian flag. Under Article 82 of the Police Ordinance, flag hoisting may be banned if it is perceived to disrupt public safety. In practice, the law is enforced primarily in East Jerusalem, in Palestinian neighborhoods, and in demonstrations, amid violation of human rights and freedom of protest, and therefore should be deleted from the law books of the State of Israel.

<sup>1</sup> Bar Peleg, Deiaa Haj Yahia, Aaron Rabinowitz, and Associated Press, [Clashes With Police Erupt at Palestinian Journalist's Funeral Procession](#), *Haaretz*, 13 May 2022; Patrick Kingsley and Raja Abdulrahim, [Israeli Police Attack Mourners at Palestinian Journalist's Funeral](#), *The New York Times*, 13 May 2022.

### **Violation of Palestinian Rights in East Jerusalem**

As stated, East Jerusalem was annexed in 1967 and has since been under Israel's control. Palestinians living in the area are defined as permanent residents and are not Israeli citizens. They have no right to vote for Israel's state institutions on the one hand, while on the other hand Israel sets them apart from the rest of the West Bank. This violates their right to self-determination, both on the personal and on the collective-national levels, not to mention other extensive violations of their human rights. The fact that Palestinians in East Jerusalem are permanent residents accords them basic social rights (such as social security and health insurance), but their temporary status exposes them to the threat of forced eviction or the repeal of their residency under various pretexts.

Due to the annexation to Israel's territory, all Israeli legislation applies in East Jerusalem (unlike the situation in the Occupied Territories, where the lives of Palestinian civilians are governed by military law). Thus, the legislation regulating Israel Police's activities in East Jerusalem also falls under the Police Ordinance applying to all parts of the country within the boundaries of the Green Line.

Nevertheless, the situation in East Jerusalem time and again illustrates the fact that its Palestinian residents are subjected to selective law enforcement. In our case, an anachronistic article of the Police Ordinance dating back to the British Mandate provides Israel Police with the legal justification for disproportionately violating the rights of Palestinians, including their right to hoist the flag they identify with.

### **Freedom of Protest**

Existing legislation pertaining to restrictions on the freedom of protest, including the ban on flag hoisting, is a relic of the Mandatory era that was unfortunately incorporated into Israel's law books. Its original purpose was to restrict the freedom of expression and protest of the pre-state Jewish Yishuv and to control with administrative means its ability to hold demonstrations, assemblies, and marches, similar to legislation in other British colonial regimes at the time. To repeat, today Israel uses this legislation to oppress another nation under its rule: the Palestinians.

Although the State of Israel chose to incorporate Mandatory legislation in its law books, the courts have consistently given it a reductive interpretation. The Supreme Court has time and again ruled that the right to demonstrate can be restricted only when there is near certainty of an impending major disruption of the public order or safety, and only to the extent this is necessary to prevent such a disruption. It has also ruled that the police must

respect the right to demonstrate, and that not only are they not entitled to unnecessarily restrict it but are dutybound to help fulfill it.

In any case, it should be noted that the Anti-Terrorism Law-2016 provides for the offense of identifying with a terrorist organization and inciting terrorism by raising a flag, while the Penal Code-1977 defines incitement to violence and membership in a prohibited association as an offense.

Freedom of protest, including the right to wave a flag in a demonstration, is a right that every person in a democratic regime deserves. All the more so when it comes to an occupied or annexed population, or a national minority in a country with a different national identity, when consideration must be given to the need of this population to protest in public and to exhibit its national identity while waving flags.

### **Article 82 of Police Ordinance<sup>2</sup>**

Article 82 of the Police Ordinance allows the Police Commissioner to "prohibit the hoisting or placement of a flag or emblem that is likely to provoke a public disturbance". Article 82(b) states that the ban may be comprehensive or hinge on a specific timing, venue, or circumstance. Article 82(c) authorizes any police officer to remove a flag that has been displayed in violation of the aforementioned provision. Article 82(d) stipulates a fine for violating these provisions.

Although the Supreme Court and the Attorney General basically reduced the enforcement of this article in the aftermath of the Oslo Accords, its use continued in order to prevent the hoisting of Palestinian flags, especially in the Jerusalem District, in Palestinian neighborhoods, and in demonstrations. Following the new relations between the State of Israel and the PLO that ensued the political agreements, the Supreme Court allowed the display of the Palestinian flag in election propaganda broadcasts, given that a flag is protected under the right to freedom of expression.<sup>3</sup> Furthermore, the Supreme Court endorsed the Attorney General's policy not to prosecute people for hoisting the Palestinian flag, except in exceptional cases.<sup>4</sup>

A directive drafted by the Deputy Attorney General on 1 September 2014 concerning the hoisting of PLO flags states that enforcement will occur only when there is real fear that

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<sup>2</sup> [Police Ordinance-1971 \[New Version\]](#), published in *Nevo* (Hebrew).

<sup>3</sup> [Supreme Court HCJ 651/03 Association for Civil Rights in Israel v. Chairman of Central Elections Committee for 16th Knesset](#), published in [supremedecisions.court.gov.il](#).

<sup>4</sup> [Supreme Court HCJ 93/5883 MK Shaul Yahalom v. Israel Police Commissioner Rafi Peled](#), published in *Nevo*, 26 May 1994 (Hebrew).

the flag hoisting rises to the offense of identifying with a terror organization or displaying sympathy toward it, or when it is feared with a high level of probability that it will lead to a severe disruption of public safety.<sup>5</sup> In view of the policy of basically non-enforcement, Likud MK May Golan submitted to the Knesset a bill to amend the Penal Code (Ban on Hoisting of Hostile Entity's Flag-2021). The very fact that the MK saw fit to submit such a bill speaks for itself.<sup>6</sup>

Nonetheless, enforcement of Article 82 in East Jerusalem intensified in recent years. Since the relocation of the US Embassy to Jerusalem in May 2018, there has been an increase in the confiscation of Palestinian flags and pennants waved at protest vigils in the Sheikh Jarrah neighborhood, even though in the previous 10 years this had been allowed almost without any interference.<sup>7</sup> In May 2020 police removed Palestinian flags hung in the Jewish neighborhood of Mea Shearim.<sup>8</sup>

Responding to a lawsuit filed for the forcible confiscation of the Palestinian flag from a protester at the vigil in Sheikh Jarrah, the court ruled that it had no substantive authority to hear the case but at the same time rejected the police's claim that the confiscation had been justified and criticized their conduct:<sup>9</sup>

It is the court's impression that the protest vigil was conducted in a peaceful manner. I did not find any support for what is stated in the action report with regard to disturbances by the protesters, and as noted earlier, police officer Fawur subsequently recanted what was written in the action report. The video filed by the plaintiff shows that the junction was not blocked, the protesters did not get off the sidewalk, only a few vehicles drove by, and there were hardly any pedestrians, if at all. I hereby declare as a factual finding that there were no disturbances on the scene even though it was reported so. I was not persuaded that the actions of the protesters constituted a disturbance of the public order or posed a clear and present danger justifying a violation of their freedom of expression. Nor was I convinced that prevention could not have been achieved otherwise, such as by deploying more troops

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<sup>5</sup> Justice Minister, [Legal Situation Concerning Hoisting of PLO and Terror Organizations Flags in State of Israel](#), Deputy Attorney General, 1 September 2014 (Hebrew).

<sup>6</sup> [Bill To Amend Penal Code: Ban on Hoisting of Hostile Entity's Flag-2021](#), *Knesset website*, 24 May 2021 (Hebrew).

<sup>7</sup> Nir Hasson, [Demonstrator Arrested in East Jerusalem for Holding Palestinian Flag Although This It Not Criminal Offense](#), *Haaretz*, 9 August 2019 (Hebrew); Josh Breiner and Nir Hasson, [The New Target of Israeli Police: Palestinian Flags](#), *Haaretz*, 17 May 2018; Edo Konrad, [Jerusalem Police's Mission: Snatch Away Palestinian Flags From Demonstrators](#), *Siha Mekomit*, 24 February 2019 (Hebrew).

<sup>8</sup> [Policemen Remove Palestinian Flags Hung in Mea Shearim](#), *Srugim*, 26 May 2020 (Hebrew).

<sup>9</sup> Jerusalem Magistrates Court, [Case 15567-07-18 Bitan v. State of Israel](#), published in *Nevo*, 17 September 2019 (Hebrew).

to the scene. The very fact that no police patrol was stationed at the site throughout the protest also speaks for itself. To the best of the court's understanding, a protest vigil and the hoisting of the Palestinian flag do not in and of themselves rise to a disruption of the public order and do not meet the test of clear and present danger.

As noted, Israel Police's response to the hoisting of Palestinian flags reached a peak of brutality at the funeral of Shireen Abu-Akleh. There is no doubt that the existence of this article in the law constitutes justification for unnecessary police violence. Given that Abu-Akleh was seen by many as a Palestinian national symbol due to her longstanding coverage of the occupation and life of Palestinians in the territories and East Jerusalem, the hoisting of Palestinian flags at her funeral was an act of national self-expression that required no justification and cannot be considered as disrupting public safety.

As long as such an article remains in the Police Ordinance and allows police to ban the hoisting of flags, and despite the restrictions on its enforcement set forth in rulings and directives by the Supreme Court and judicial authorities, the power to apply it remains in the hands of the Israel Police. As attested by the reality in East Jerusalem, selective enforcement of the law against Palestinians is not a one-time event. Although Abu-Akleh's funeral received unprecedented media exposure and raised the issue on the agenda in Israel and around the world, this is not an isolated event, which is why action is required so that such images and situations do not recur.

### **Conclusion**

Zulat proposes to delete Article 82 of the Police Ordinance. It is an outdated clause whose *raison d'être* is no longer valid, which is applied in a selective and discriminatory manner, and which does not contribute to public safety. On the contrary, its enforcement is incendiary and fuels a violent reality that violates human rights.