

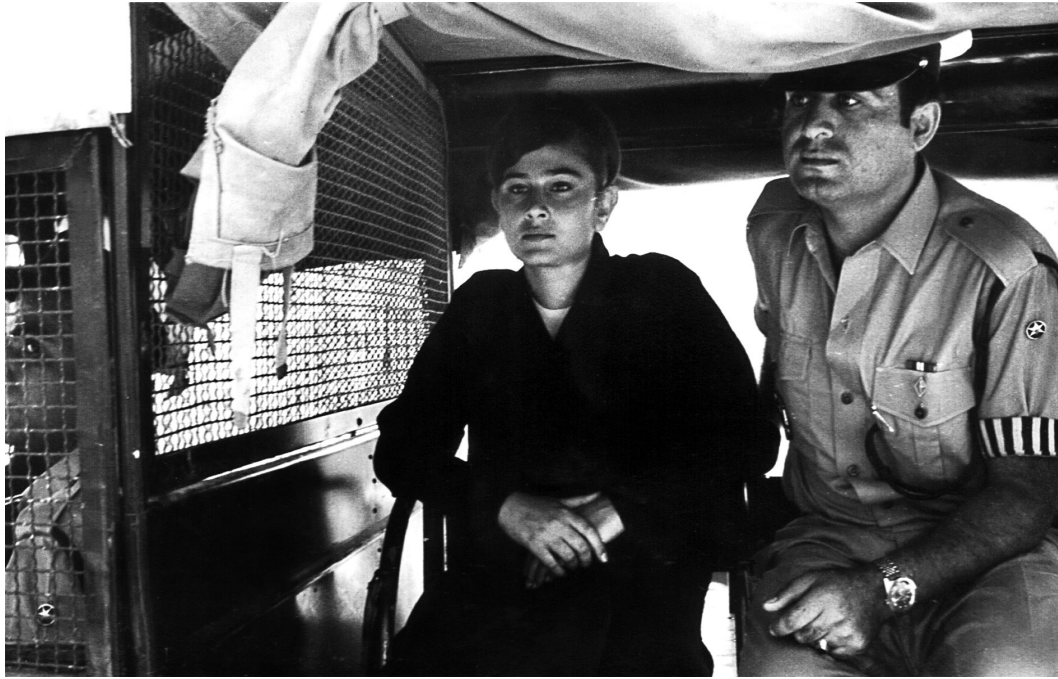
Adalah's Review

Volume 5, Spring 2009, ON CRIMINALIZATION

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1969, Jerusalem, Joseph Algazy

En route to the police station. The procession leader of a group of girls carrying a wreath for the Unknown Soldier is in his hands. He seems braced, his upper body turning towards her as though in a moment he will have to pounce if she tries to escape. In her relaxed and erect seated position, her glance staring forward, she signals a distance between her and the legitimate political deed she has undertaken, and the incriminating situation in which she is framed by the security forces.



Introduction

The Editors

This volume of *Adalah's Review* opens its pages to an examination of the ways in which forms of political activity and resistance are criminalized by the State of Israel, on pretexts of “security offenses” or “terror”.

Whereas the criminal justice system is commonly perceived as being aimed at removing “criminals” from the general population, it is often exploited by states in pursuit of other goals. These goals range from general goals, such as the creation of a compliant citizenry, to more specific goals, like curbing flows of immigration or repressing “undesirable” groups, for instance the holders of certain religious or political beliefs, members of specific ethnic communities, people with particular sexual preferences, and those suffering from mental illnesses. States also use criminal laws to restrict the movement of certain populations within their territories (e.g. the Pass Laws in Apartheid South Africa), to prohibit interracial marriage (e.g. the anti-miscegenation laws enforced in Nazi Germany, and in the United States prior to 1967), and to exclude specific national groups from entering a state (e.g. Israel's Prevention of Infiltration Law of 1954).

One of the other uses to which Israel puts its criminal justice system is as a means of removing political acts and expression by Palestinian citizens of Israel from the sphere of legitimate action, thereby neutralizing the political dimension of such acts and expression. Similarly, military courts and prisons, operating with the naked force of power and suspending certain rights, play a major role in the criminalization of the Palestinian population of the Occupied Palestinian

Territory (OPT) and the repression of their resistance to the Occupation.

The operation of the criminal justice system is the most invasive and coercive exercise of power by a state over its citizens, given the magnitude of the costs of enforcing a prohibition. These costs should be measured not only in terms of the loss of an individual's liberty, but also in terms of the wider damage caused to criminalized individuals and communities, which may include physical, psychological and economic harm. As a result of the potentially devastating ramifications of enforcing the criminal law, manipulation and abuse of the criminal law by states for political purposes is an exceptionally grave matter.

Volume 4 of *Adalah's Review* sought to investigate the concept of “security” and to explore the State of Israel's security-centered reasoning in various cases, a reasoning that assumes and requires the existence of a ‘threat’ and the consequent need to eradicate it. More specifically, that volume asked how practices carried out “in the name of security” against Palestinian citizens of Israel can be addressed critically without reconstituting the definition of these citizens, or some of their actions, as threats to state security.

Volume 5 of *Adalah's Review* takes as its point of departure a theme raised in the previous volume, the question of political dissent by Palestinians – in this case dissent by Palestinian citizens of Israel and the occupied Palestinian population – and explores ways in which dissent has been criminalized. The articles in this volume examine a range of channels pursued by Israel to this end, including holding political trials of Palestinian

political leaders, legislation aimed at further entrenching the criminalization of political dissent, the operation of the military court system, and the creation of the category of “security prisoner” within the Israeli prison system, which imposes additional restrictions and punishments on incarcerated Palestinian political prisoners. The discussion of criminalization is then expanded to the United States and the arrest and administrative detention of large numbers of Arab and Muslim men within a system of immigration-related detention following the attacks of September 11th, 2001. The volume closes by considering the development of universal jurisdiction as a means of imposing international criminal accountability on government officials for war crimes.

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Leora Bilsky opens this volume by probing the legitimate boundaries of the criminal law through an examination of two highly-charged trials of Palestinian political leaders held in Israeli courts in recent years. In these trials, the prosecution’s case pivoted on accusations of “terror” that were translated into specific criminal offenses. The first political trial was that of Azmi Bishara, a former Arab member of the Israeli Knesset and chairperson of the National Democratic Assembly-Balad party. The trial concerned political speeches Bishara made in 2000 and in 2001 in support of the Palestinian right of “resistance” to the Occupation and in praise of the Lebanese opposition to the Israeli occupation of South Lebanon. The second political trial was that of Marwan Barghouti, a member of the Palestinian Legislative Council and a prominent leader of the *Fatah* movement. While Barghouti was tried and convicted for multiple counts of murder, the charges against him dealt in large part with his political

speeches in support of the Palestinian *Intifada* against the Occupation. In the article, Bilsky examines how in these cases regular criminal law was used to attempt to control an “inter-group political conflict”. She further identifies difficulties that arise when the concept of “terrorism” is brought within the scope of the criminal law and when such cases are adjudicated within the national court system of a party to the conflict.

Bilsky argues that using criminal law against a political opponent lends legitimacy to the state as the trial masks its own political motivation and presents its political act as an ordinary act of criminal prosecution. Thus for the state, the aim of a political trial is to turn a legitimate political adversary into a criminal, i.e., the de-politicization of political adversaries. She concludes that criminal prosecutions obscure the political basis of the conflict, thereby effacing its political and collective context and the possibility of making moral judgments in light of this context.

Barak Medina and **Ilan Saban** also discuss the Azmi Bishara case, but focus on the Supreme Court’s decision in the case, delivered in February 2006. In a two-to-one split decision, the court’s justices dismissed the criminal charges against Bishara, ruling illegal the Knesset vote in 2001 to strip him of his parliamentary immunity for the purposes of criminal prosecution. Part of the significance of this case lies in the fact that it was the first in which an indictment was filed against an MK for political speech. Through this decision, and the Supreme Court’s decision of 2003 to reject the Attorney General’s attempt to disqualify Bishara from participating in the Knesset elections, Medina and Saban analyze the extent of the political space allowed to Palestinian citizens of the State of Israel to act

and express their political opinions in the context of the Palestinian-Israeli and Arab-Israeli conflicts.

Medina and Saban describe the Supreme Court's decision in the criminal case as a "courageous ruling", a liberal decision written "under fire". They argue that the decision "emphasizes the inherent ambiguity associated with speech crimes relating to a call for violence in the divided society of Israel", and that the silencing of a critical debate is likely to result in "special dangers". While Medina and Saban are highly critical of Bishara's political opinions, they nonetheless argue that he and other Arab political leaders must be permitted to exercise their freedom of speech in order to expand this space.

The issue of speech by Arab political leaders once again came to the fore in the run-up to the 2009 Knesset elections. In January 2009, the Central Elections Committee voted to disqualify two Arab political parties from standing for Knesset seats amidst allegations that the parties deny the Jewish nature of the state and voice support for armed struggle against Israel. The Supreme Court subsequently overturned that decision.

In 2002, following the filing of the indictments against Bishara and while the criminal cases were pending against him, the Knesset enacted a series of amendments to existing laws that imposed new limitations on the rights to political participation and expression. In his article, **Khalid Ghanayim** discusses one of these new laws, an amendment to the Israeli Penal Law that prohibits the publication of "a call to commit an act of violence or terror" or support for such an act and the issuance of a publication in which "there is a real possibility that it will result in acts of violence or terror." Ghanayim argues that the prohibition on

incitement contained within Article 144D2 of the Penal Law, which includes a test of content and a test of consequence, makes it difficult to distinguish between the crime of incitement and publications that are protected by freedom of expression. Ghanayim also contends that the addition of the term "acts of terror" to the law serves a political purpose, and that the term 'terror' itself is a political term. Since terrorism is viewed by the public as posing a risk to the stability of the regime and to public safety, the declaration of an organization that the state wishes to undermine or eradicate as a terrorist organization is in and of itself seen to justify the fight against it. The designation "terrorist" grants the state the legal authority to employ all means against its target, including the criminal law, on the pretext of "national security".

Moving on from the ordinary criminal law system to the military courts, the next piece is an interview held with Attorney **Sahar Francis**, a prominent woman lawyer representing Palestinians before the military courts and the Director of the Addameer Prisoners' Support and Human Rights Association. Interviewer Attorney Rasha Shammas inquires into Francis' professional experiences as a lawyer "in practice" representing adults and juveniles before the military courts, where Israel primarily prosecutes Palestinians residing in the West Bank on criminal charges for acts deemed to be crimes against state security. According to Francis, first and foremost the military courts relate to all Palestinians, civilians and combatants, in a political and criminal context as a single group that constitutes a threat, broadly defined, to its security through its political activities, be it stone-throwing by children or student activism. Francis identifies

a host of unfair procedures that govern the entire process of detention, including the prohibition on meeting with lawyers, administration detention, the detention of minors together with adults and their trial by the military courts as opposed to juvenile courts. She further considers how the Israeli criminal and military court systems differ, and how the law is implemented differently with regard to Palestinians and Jewish Israelis living in settlements in the OPT, even in cases that involve similar acts. She emphasizes that the military system is built to convict and incarcerate: the vast majority of Palestinians brought before the military courts are convicted and sentenced to long terms of imprisonment, which in turn contributes to the operation of the Israeli Occupation.

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The next article, written by Attorney **Abeer Baker**, discusses the classification of Palestinians incarcerated in Israel's prisons and detention centers as "security" prisoners, as opposed to simply criminal prisoners, and the almost exclusive designation of this classification to Palestinians. Baker terms this designation as "collectivization" and argues that its blanket application transforms thousands of Palestinian political prisoners (approximately 7,900 as of December 2008, of whom around 550 are administratively detained) into a single group that pose a uniform level of danger, and justifies the harsh conditions of their confinement and the almost absolute ban imposed on their early release. It is as a direct result of their "security" classification that Palestinian prisoners are, for example, prohibited from making telephone calls from the prison, denied furloughs, and refused the opportunity to make home visits under guard.

Baker contrasts this approach of

"collectivization" to that taken towards the very small number of Jewish prisoners categorized as security prisoners; despite the serious nature of their crimes, these prisoners, pursuant to the directives of the Israel Prison Service (IPS), are given substantially more lenient confinement conditions than those that are applied to Palestinians. The basis for this distinction, she contends, is that the IPS's approach towards Jewish "security" prisoners rests on their characteristics as individuals rather than on their "security" classification within the prison. A thorough examination of the designation of Palestinian prisoners as "security" prisoners, she argues, reveals that it is primarily designed to deprive them of basic rights and benefits provided to Jewish "security" prisoners.

Broadening the discussion of criminalization beyond Israel and the OPT, **Asli Bâli** examines the way in which the system of immigration-related detention in the United States was hugely expanded in the aftermath of the attacks of September 11th, 2001. At this time, the United States initiated a scheme of preventive detention on pretexts of technical immigration violations, primarily targeting men of Middle Eastern or Muslim appearance. These administrative detentions, which were designed to evade constitutional protections afforded to individuals within the criminal justice system, generated a shadow legal system whose victims were stripped of basic procedural protections. By the end of 2004 almost 20,000 men had been detained or deported through these post-September 11th immigration-enforcement initiatives; of these only four men were prosecuted for terrorism-related charges, all of which were eventually dismissed. Bâli argues that immigration-related detentions provided the U.S. government with an

alternative mechanism where the regular channels of the criminal system proved too onerous for its purposes in terms of guaranteeing procedural due process rights, including the presumption of innocence.

Bali also discusses practices of torture reminiscent of Abu Ghraib and Guantanamo Bay that were used in the domestic “war on terror” against September 11th detainees held in administrative detention facilities within the U.S. This discussion feeds directly into the debates currently raging in the U.S. over whether or not to initiate criminal investigations of Bush administration officials responsible for authorizing the perpetration of acts of torture.

Bali then moves on to compare the immigration detention system that developed in the U.S. with the use of administrative detention by Israel as a mechanism of exercising control over Palestinian residents of the OPT. Bali proposes that parallels between the two systems exist in practices that are designed to provide an alternative to criminal proceedings and to circumvent the usual evidentiary standards, various procedural protections, and minimum standards of detention afforded by law to prisoners. While noting several significant differences between the American and Israeli “uses and abuses” of administrative detention, Bali argues that even a cursory examination of the two systems reveals the similarities in the policy ends served by recourse to administrative detention. For example, both states invoke national-security related considerations and the protection of democracy, and both resort to the treatment of suspect groups on the basis of their national origin rather than on their individual characteristics and circumstances. Bali concludes that the dangers of engaging in arbitrary deprivations of liberty are acute in

both societies, and warns that the suspension of liberties in the name of security can quickly degenerate into systematic patterns of violations of due process which undermine the rule of law.

The abuse of state power and the use of various legal means to cover up such abuse have prompted scholars and activists in the international legal community to seek out countermeasures with which to hold such state officials accountable. Ad hoc international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, and civil society tribunals, such as the World Tribunal on Iraq, are but two examples of measures that have been employed to that end. John Borneman’s book, “The Case of Ariel Sharon and the Fate of Universal Jurisdiction”, is an edited volume dedicated to the discussion of universal jurisdiction as another way of holding state officials accountable under international law. **Richard Falk**’s review of Borneman’s book closes the pages of the journal. While Leora Bilsky discusses the problems entailed by “trying terror” in the courtroom of a state that is a party to a violent conflict with the group to which the defendant belongs, Falk explores one of the solutions developed in recent years to overcome these obstacles, namely international criminal accountability. The book under review contains a collection of articles written on the criminal case against Ariel Sharon that was brought in Belgium by survivors of the massacres perpetrated in Sabra and Shatilla refugee camps in Lebanon in 1982 for his complicity in the events. At the time the case was initiated, Falk argues, a consensus was emerging in relation to the international criminal accountability of leaders around the notion that there is a law above the law enacted

by states, even during times of war. Thus the initiators of the case took advantage of the favorable international climate and the 1993 Belgian law allowing such criminal actions to proceed on the basis of universal jurisdiction.

The various contributing authors evaluate, from an inter-disciplinary perspective, the plausibility of imposing accountability for crimes against humanity on the basis of universal jurisdiction following the breakdown of diplomatic relations between Belgium and Israel and the United States and the subsequent dismissal of the Sharon case in Belgium. Falk reviews several essays in the collection, almost all of which endorse the historic effort to impose criminal responsibility on leaders who have committed international crimes causing massive human suffering. He criticizes one of the contributors, who insists that the effort to impose international legal standards of accountability is doomed because it is insensitive to current political realities. Falk contends that this contributor assumes the adequacies of the state system, paying insufficient attention to the fact that “the Palestinian experience unfolds outside of the protective structures of sovereign states” and fails to offer solutions for stateless peoples in such a world order. Falk concludes his review by arguing that the current battle against impunity implicitly exempts the geopolitical actors who determine global policy, highlighting the selective way in which war criminals are prosecuted, which he states highlights “a reliance on double standards in the present shaping of world order.”

Falk’s discussion provides valuable insights into the potential international litigation against Israeli political and military officials for acts that may constitute war crimes carried out during Israel’s “Operation Cast Lead” offensive in Gaza of December 2008 to January 2009.

1972, Lod airport, Uzi Keren

Arab "looks" at the airport have always been a passport to a side cubicle, where behind a half-open curtain, body searches took place. Technology was not yet as advanced as it is nowadays, and the assumption that bombs or guns are hidden inside socks or shoes left the Palestinians the pleasure of looking down on his inspectors.



1982, Gaza, Yosef Ohman

The two detained children are not scared. They are braced to know what the soldier in charge will decide. They watch his movements, trying to salvage something from his body language or the things he says above their heads to another soldier to find out what awaits them.



Criminal Trials in an Age of Terror

Leora Bilsky

Introduction

What is the relationship between the boundaries of a national community and the scope of the applicability of its criminal law? Does this relationship change in an age of international criminal law? These questions are part of a broader inquiry I am pursuing into the changing nature of political trials in a global age. Elsewhere, I have taken issue with recent developments in international criminal law with regard to “universal jurisdiction”.¹

In this essay, I would like to approach the question from the opposite direction, asking how the attempt to domesticate an inter-group political conflict by resorting to criminal law changes both our understanding of the conflict and of the legitimate boundaries of the criminal law. I address the theoretical issue by comparing two “borderline cases”² that were tried in recent years by Israeli courts. The first case, the trial of **Azmi Bishara**, a former Arab member of the Israeli Parliament (the *Knesset*), dealt with a speech given by Bishara in Syria in favor of the Palestinian (and Lebanese) right of “resistance”.³ The second case, the trial of **Marwan Barghouti**, a member of the Palestinian Parliament and a political leader in the *Fatah* movement, was a murder trial, but contained a strong “speech” component (dealing with speeches Barghouti delivered in support of the *Intifada* against the Israeli Occupation).⁴ In both cases the criminal prosecution hinged on accusations of ‘terror’ that had to be translated into specific criminal offenses. I will argue that these were not regular trials, but rather “political trials”, in the sense that the very legitimacy of the use of criminal law was at issue, given the political nature of

the conflict. It must be stated at the outset that my designation of the trials as “political” does not mean that they should be forbidden in principle; rather, that we have to engage the unique problems they raise in an honest way (without hiding behind the mask of liberal legalism). Accordingly, I will attempt to point out the difficulties that emerge when terrorism is brought into the scope of the criminal law and is adjudicated by national courts associated with one side to the conflict. I will also point out the unexpected risks such trials might carry for the political authorities pursuing them, and weigh their role in classifying the defendant as “friend or foe” to the national community. Finally, I consider the extent to which such trials can provide a forum (limited and confined) for hearing the Other’s story (otherwise suppressed or denied), and for enlarging the space of political debate.

Friend and Foe

Liberal criminal law is based on the rejection of an identity-based approach to crime and on its replacement with an action-based approach (which is supposed to be more neutral).⁵ This liberal portrayal of modern criminal law was the object of criticism by the German jurist Carl Schmitt (who under the Third Reich became an advocate of Nazism). Schmitt pointed to a contradiction which characterizes the liberal legal system. On the one hand, it is committed to an action-based approach to crime. On the other hand, the very boundaries of the protection of the criminal law are drawn according to an identity-based approach, one that differentiates between friend and foe, citizen and enemy. In his book *The Concept*

of the Political, Carl Schmitt writes about the “political enemy”:

The specific political distinction to which political actions and motives can be reduced is that between friend and enemy... The distinction of friend and enemy denotes the utmost degree of a union or separation, of an association or dissociation... The political enemy... [is] the other, the stranger, and it is sufficient for his nature that he is, in an especially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible.⁶

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According to Schmitt, whoever is considered a “friend” is regarded as residing within the internal circle of the law: she could be a law-abiding citizen who might get into a political argument over the basic values of society, or she could be someone who takes the law into her own hands and thereby breaks it. She is then considered a criminal, regardless of whether the action stemmed from an opposing political or ideological value system. Someone outside the circle of the polity, on the other hand, can be either a friendly outsider, or, and most importantly, can be viewed as the “enemy”. With the enemy, even liberal democracies do not use the criminal law. In extreme cases, they resort to violent conflict called war, and are under the scope of a different set of applicable laws: the international laws of war.⁷ In other words, violence becomes a permissible tool in certain circumstances, depending on the prior classification of the adversary as “friend” or “foe”.

What we have witnessed in the last few years is a process of a blurring of this line between the internal and the external and between criminal law and the laws of war. This has been done through the introduction of the concept of “terror”. Expressions such as “War

on Terrorism” are used simultaneously with references to terrorists as mere “criminals”. This confusion indicates that there is a need to distinguish terrorists from the community of citizens, from the ordinary ways of protesting and breaking the law (treating them as the “enemy”). At the same time, there is a need to depoliticize their actions by criminalizing them. However, by resorting to criminal law a contradiction is revealed, since, traditionally, the application of criminal law indicates that the accused belongs to the polity (presupposing that he or she has an obligation to answer to the injured community.) Thus, extending the jurisdiction of criminal law over terrorists has the tendency to undermine the distinction between insiders and outsiders, friends and foes. At the same time, the criminal law can also underline this distinction, since liberal criminal law (unlike international law) makes no room for the “political motive” of the accused. His or her actions are thus devoid of political meaning, and the criminal defendant is depicted as the Other to society.⁸ By applying the criminal law over alleged terrorists the distinction between the internal and the external, friend and foe, citizen and Other, is blurred.

Kirchheimer: Political Trials and the Element of Risk

The traditional liberal response to this difficulty was one of boundary drawing. Liberal theorists rely on a binary structure that sharply distinguishes between criminal law and international law, and argue that the only relevant question is under which rubric we should deal with the “terrorist”.⁹ But such liberal legalism only avoids the problem I am raising here, since it does not acknowledge the process by which one is defined as “friend” or “foe” through the use of the criminal trial.

Perhaps a new conceptual framework is necessary, one that is capable of acknowledging the existence of political trials under liberal democracies, while demarcating the limits of the legitimate use of the criminal law against alleged terrorists. I submit that this is the task of a liberal theory of political trials.¹⁰ The question of how to assess the legitimacy of a political trial has been examined in the past by various liberal authors. I would like to rely here on the writings of Otto Kirchheimer in order to evaluate the current developments of adjudicating terror in national courts.

Kirchheimer identified a double function of the criminal political trial. One function is to banish a political adversary. A second function is to legitimize this act through the legacy of the “rule of law”. In other words, using criminal law against a political adversary legitimizes the powers that be because their own political motivation is camouflaged by the trial and their political move is presented as an ordinary act of criminal prosecution (especially since liberal criminal law does not allow the “political motive” of the accused to enter the legal deliberation). Thus, a successful political trial for the authorities is one that transforms a legitimate political adversary into a criminal whose criticism of the authorities no longer has to be addressed politically. However, this double function of the criminal trial carries an inherent risk for the political authorities. In order for the trial to bring about legitimization, some independence (separation of powers) must be guaranteed to the court. The defendant can rely on this relative autonomy of the court to expose the political motivation of the authorities and use the trial to de-legitimize them. The trial is then revealed not as a criminal prosecution but rather a political persecution. Under conditions of relative autonomy the political trial can become

a high-risk game for both parties. The entirety of Kirchheimer’s writings on this issue is directed at identifying this game and considering the possibilities of expanding the space of opportunity for the political defendant by introducing a genuine element of risk to the trial.

Resorting to criminal law against political speech threatens to narrow the political space in which conflicting groups debate the basic values of society. However, when we deal with alleged terrorists who are portrayed by the media as the “Other” to society, there is another, rarely acknowledged result: by conducting a criminal trial (as opposed to administrative detention or political assassination) the authorities also contribute to the possibility of a political debate through the structure of the trial (albeit in a constrained and a-symmetrical manner). This, ambivalent, character of political trials complicates our assessment of the merits of conducting a criminal trial against alleged terrorists.

Political Trials and Radical Difference

In attempting to acknowledge the special character of the political trial we should first attend to the way in which it diverges from the unarticulated presuppositions of an ordinary trial. Many political trials begin with what can be characterized as a situation of “radical difference”. This is a situation in which two groups with antithetical or irreconcilable ideas about law and society meet in court. The conflict is radical in the sense that the two sides cannot agree on the jurisdiction of the court, or on the substantive or procedural law that should govern the dispute. The controversy cannot be resolved solely by legal means since it does not concern a purely legal question, such as the interpretation of the law. Rather,

it raises the preliminary question of which legal system has the right to adjudicate the conflict and which tribunal has jurisdiction over the case.¹¹ Put differently, even if the defendant committed the alleged crimes, there is a question over whether the defendant should be answerable to the adjudicating court. In effect, each side calls for the recognition of a different historical narrative that governs the dispute and is assumed by the legal system as a source for its authority. In such cases, the triadic structure of the trial collapses into a binary structure of two opposite parties facing each other in a power struggle, in the absence of an accepted overriding law that can function as arbiter. In an ordinary trial, the two disputing parties can bring their case before a third party, whose position as an outsider to the dispute can guarantee its impartiality and thus endow its ruling with legitimacy. In cases of radical difference there is no such third party because the court, through its association with the regime, is deemed by one of the parties to be its adversary, and the legitimacy of the court is therefore called into question. It is this phenomenon of radical difference that turns the trial into a political one and makes the question of jurisdiction the focus of attention for both parties.

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The Question of Jurisdiction

In order to evaluate the ways open to the defendant to raise his political concerns before the court without endowing the trial with legitimacy, we should turn to the question of jurisdiction. It seems that the point of assuming jurisdiction over the case by the court is a crucial one in this matter. At the initial stage of the trial, the parties do not have to engage the substantive claims about the guilt or innocence of the defendant, but rather to debate what the proper tribunal is for

addressing these questions. It is therefore the stage at which “political” concerns can be introduced into the trial. Interestingly, whereas liberal theory generally insists on maintaining the ideal of the “rule of law” by safeguarding the distance between the tribunal and the parties to the dispute,¹² at this preliminary stage the opposite is required. Before the parties can present their substantive arguments, the court asks that its jurisdiction over the dispute be established and that the parties show a meaningful connection between the case of controversy and the court. In a criminal trial, the most important connection is based on a territorial link – that the acts causing the dispute occurred on the territory over which the court has jurisdiction (the territoriality principle). Another link is a personal one, in cases in which one of the parties to the dispute is considered a member of the political community over which the court is authorized to judge (the nationality principle). In addition, a temporal connection has to be proven – that there is no statute of limitations applicable to the act under consideration. These three links establishing the court’s jurisdiction are also the three basic relations that constitute a political community: place, people and time.¹³ This community basis of criminal law is of special importance when we deal with the jurisprudence of terror.¹⁴ It represents the modern understanding of criminal law as one of the most important expressions of state sovereignty, which is usually delimited in terms of territory and geography (promising to apply the criminal code in an equal manner to all the inhabitants of a certain territory).¹⁵ The law of jurisdiction can thus give us a first hint about the connection between law and community, a connection that might be too easily overlooked in an age of “universal jurisdiction.”¹⁶

Two Strategies of Political Defense

It is possible to identify two main approaches to a political trial on the part of the defendant. One strategy is to accept the rules of the game and to play according to those rules, hoping that, by winning her case on its merits, she will embarrass the authorities and show that the case was no more than a political ploy. The other possible strategy is one of non-cooperation: de-legitimizing the court by saying, “This court has no jurisdiction over my case. You can try me, but I will not legitimize you by appointing lawyers or by cross-examining your witnesses. Do whatever you want. I am here only as a symbol of your power over me. This is the rule of force and not of law, because you forced me to be here – you cannot force me to talk, or to defend myself, or to play according to your rules.” The problem with this strategy is that it does not really afford the defendant the opportunity to present her version of the events in court, and she usually just loses the case.

These two strategies were adopted by Bishara and Barghouti, respectively. In order to understand their different choices, we must first understand the choices made by the Israeli authorities in respect to the two trials. In both cases, the State of Israel decided to conduct a criminal trial in the regular, civilian courts. This was not an obvious decision in either case. In the Bishara case, in order to bring a criminal prosecution against a Knesset member, the state had to overcome the parliamentary immunity enjoyed by former MK Bishara. In the Barghouti case, since the prosecution had a choice between two parallel jurisdictions (military courts and civilian courts), the more obvious path would have been to conduct a trial in a military court, as Israel does in most of the cases of other Palestinians defendants.¹⁷ What can explain these unusual choices? Here

we see the explanatory power of Kirchheimer’s theory of legitimization. In choosing to conduct the trial in civilian courts and under regular criminal law (procedural and substantive), the conflict was further removed from its political context. In the Bishara case, the criminal trial had the potential of turning a political speech into a criminal act, thus banishing a political adversary from the realm of legitimate political debate. In the Barghouti case, a military court does not enjoy the allure of the “rule of law,” and therefore the civilian court, notwithstanding the added risk to the authorities, was the preferred way of de-legitimizing the Palestinian political leadership.

The two defendants concentrated their arguments on the political aspects of the trials at the jurisdictional stage. Issues relating to the political nature of the trial underlay the defendants’ arguments regarding the jurisdiction of the court. Both defendants sought to expose the political underpinning of the trial by showing the unequal treatment that they had received. Bishara stated that his trial constituted a precedent for the prosecution of an Israeli MK for political speeches, and Barghouti maintained that Israel was deviating from the norms of the international law of war by treating him as criminal instead of a “prisoner of war,” and by conducting a political trial against him. Both defendants thus questioned the legitimacy of resorting to domestic Israeli criminal law. For this reason both also stressed the collective nature of the prosecutions, in that the actual defendant was not the individual on trial but the group he represented.

In both of these cases the defendants are political leaders, and, most relevant to my thesis, both defendants advance narratives that compete with the hegemonic narrative of the basic values of Israel. Azmi Bishara is an Israeli

citizen, a former Member of the Knesset, and a political leader of a party that is identified with the ideology of transforming Israel into “a state of all its citizens” as opposed to a “Jewish and democratic state,” as the basic (constitutional) laws of Israel now define it. Barghouti, on the other hand, is not an Israeli citizen; he is a Palestinian resident of Ramallah, a political leader in the *Fatah* movement, and an elected member of the Palestinian Parliament. He promotes and supports a political platform that denounces the Israeli occupation of the Palestinian territories and advocates militant resistance to the occupation as an expression of the Palestinian right of self-determination. Barghouti, in contrast to some more radical Palestinian leaders, advocates limiting the violent resistance to the Occupied Territories (that is, against soldiers and settlers), and claims that this restriction makes the actions of the resistance legitimate under international law.¹⁸ His narrative of a struggle for liberation collides with Israel’s narrative in its own recent “war on terror”, a narrative that does not distinguish between acts of violent resistance and defines them all as acts of terror.

Notwithstanding the structural commonalities between the two cases, one important difference is that Bishara, unlike Barghouti, falls into the category of “friend”, that is, he is an Israeli citizen and an elected Member of the Israeli Parliament. This means that the door is open for him to compete with the accepted Israeli narrative at the political level and to incorporate his views (his political motive) into the law through a constitutional amendment. However, Bishara’s trial functioned as a means through which his hybrid identity as an Arab citizen of Israel (with conflicting loyalties to Israel and to the Palestinian struggle) is redefined as siding squarely with the “enemy” (the Palestinian

resistance movement). This might explain his decision not to question the very competence of Israeli courts to judge his actions. Bishara made a narrower claim that, under existing law, he was answerable only to the Knesset, since political speeches of members of parliament enjoy substantive immunity. Bishara argued that if the court ruled against him on this preliminary question, and asserted its authority to adjudicate the case, it would be redrawing the lines of legitimate political speech in Israel, by turning Arab criticism of the Israeli occupation, and its opposition to the Israeli ethos of a “Jewish and democratic” state into a criminal act.¹⁹ The state denied the validity of this claim, explaining that Arab citizens of Israel and Arab Members of the Knesset most certainly do enjoy freedom of speech, but that Bishara crossed the line of legitimate political speech when he advocated violent actions of resistance by Palestinians to the Israeli Occupation.

In the Bishara case, the jurisdictional claim against the court had an “external” quality since, although initially raised and rejected by the trial court, it was later taken up and reversed by the Supreme Court.²⁰ In the Barghouti case, the jurisdictional stage did not enjoy an institutional separation, since the same tribunal decided both the question of jurisdiction and the substantive question of criminal liability (the decision can be appealed only as a whole). However, Barghouti, as a political defendant, attributed considerable weight to this qualitative difference and acted accordingly. Thus, while he was legally represented and submitted a legal response on the issue of jurisdiction, he refused to be legally represented or to cooperate with the Israeli court or the Public Defender’s Office on any other issue so as to avoid the effect of legitimization. Being considered a “foe,”

Barghouti's claim against Israeli jurisdiction was far more radical than Bishara's: since the Palestinian people base their right of violent resistance on the right of self-determination, and since Israeli law does not acknowledge such a right, Israeli courts cannot serve as legitimate arbiters. The court rejected Barghouti's claims against the court's jurisdiction,²¹ insisting that his actions were not political but criminal, and that therefore "it is the duty of the state of Israel to bring the likes of Barghouti to trial."

We see then that the two political defendants concentrated their claims at the stage of jurisdiction, but that their defenses conveyed different degrees of legitimization to the court. We should now turn to see to what extent their respective defense strategies introduced "risk" to the trial and undermined the state's case against them.

The Barghouti Trial

In assessing the element of risk in the Barghouti trial, we should first take note of its relation to the broader public debate in Israel regarding the morality and legality of the state's policy of assassinating Palestinian military and political leaders. The Israeli Supreme Court has ruled recently on this matter. While affirming the legality of "targeted killing", the court stated that bringing the suspected terrorist to trial is always preferable in a state committed to the rule of law.²² Although many criticized the political nature of the Barghouti trial, it was difficult for the opposition to criticize the trial while at the same time condemning the policy of assassinations (against Hamas leader Sheikh Yassin, for example). Those who condemn the Israeli policy of "targeted killings" are thus led to evaluate the merits of the Barghouti trial as a political trial; that is, to evaluate potential for "risk" to be introduced to the trial.

In order to assess the space of opportunity allowed to the defendant by the court, we should consider two questions: Firstly, did the trial provide a stage for Barghouti to explain his opposing narrative, thus allowing the judges and the Israeli audience to hear a different story about the second *Intifada*? Secondly, did the trial carry any risk for the Israeli authorities?

Beginning with the latter question, one large risk did materialize in the trial in the form of the court's rejection of the prosecution's conception of the trial. The Israeli prosecution wanted to build a case similar to the Eichmann trial, in which the defendant could be found responsible for all the acts of terror committed by subordinate members of his political organization. In this way, the trial could function as a forum for telling the story of Israeli victimization during the second *Intifada*. The Israeli prosecution's conception was that, since Barghouti had advocated and supported the *Intifada*, any terrorist action taken by members of his group could be attributed to him. In order to achieve this political aim within the context of a criminal trial, the prosecution had to translate its conception into legal doctrines. Israeli criminal law is based on the principle of individual responsibility.²³ In order to convict Barghouti for the terrorist attacks committed by subordinate members of his organization, the prosecution had to provide an expansive interpretation of who should be considered an accomplice to a crime. The prosecution claimed that the mere fact of being a senior political leader advocating acts of violent resistance and providing financial support and weapons to the "men in the field" renders the leader personally responsible. Furthermore, the prosecution claimed that Barghouti should be viewed not merely as an accomplice to murder who bears an indirect responsibility, but rather as a principle actor

bearing direct responsibility.

The court convicted Barghouti only for specific acts of participation in terrorist attacks. However, it rejected the larger conception of the prosecution, thus undermining its most important political message.²⁴ How can our theory of political trials explain this result? Here we must pay attention to the dynamics of a criminal trial. Accepting the argument put forth by the prosecution had the potential to undermine one of the cornerstones of Israeli criminal law: the need to prove individual responsibility. In order to convict Barghouti, the court would have to blur the distinction between principle actor and accomplice. The judges refused to adopt the prosecution's interpretation of the law precisely because it undermined the autonomy of the law, and threatened the liberties of Israeli citizens. This is the dynamic of legitimization that Kirchheimer anticipated; in order for Israel to have the trial recognized as legitimate by the international community, it had to put Barghouti on trial in ordinary courts, following the general criminal code. At the same time, trying him under domestic criminal law meant that the conviction could create a dangerous precedent for the development of the criminal law by undermining the principal of individual responsibility. The judges' concern for the general direction of the criminal law had the upper hand. As an aside, the judges in the Eichmann trial faced the same dilemma after having rejected the "conspiracy" theory adopted by the Nuremberg court. They contended with this dilemma by relying on the "special law" of the Nazis and Nazi Collaborators (Punishment) Law, 1950, and by applying the special categories of "Crimes Against the Jewish People" and "Crimes Against Humanity".²⁵ In doing so, they safeguarded ordinary criminal law from

undesirable expansion. Yet, the decision of Eichmann's court to rely on the special law against Nazis and their collaborators had the potential to undermine the legitimacy of the trial, since it made it harder to claim that Eichmann had been judged like "any other criminal".²⁶

The judges in the Barghouti trial, in contrast, could not resort to this special law, since it restricts the application of Crimes Against Humanity to crimes committed during the Nazi period. Not willing to expand the general provisions of the criminal code, the Barghouti judges dismissed thirty-three of the thirty-seven counts of murder with which he was charged as irrelevant and found him guilty of being an accessory to murder and murder in four instances. In each conviction, the court found that direct involvement on the part of the defendant had been proven. Mere political activity, such as political speech encouraging military resistance, or even providing financial support and weapons for carrying out terrorist attacks in general, did not suffice in the court's view to turn Barghouti the political leader into an accomplice in all the attacks carried by his organization. The defendant, the court explained, "cannot be attributed with the general and sweeping crime of premeditated aiding and abetting of murder for each and every terrorist attack due merely to his general awareness that his people are executing attacks using weapons and funds that he secured for them."²⁷ In terms of criminal law, Barghouti was convicted of murder, so it was a legal victory for the prosecution in this respect. In terms of politics, however, the Israeli authorities failed to criminalize the political leadership of the Palestinian people as such for turning away from the Oslo Agreements and choosing the path of violent resistance. In this way, the court found a way of maintaining its

partial autonomy from the political authorities, making further persecution of this kind less desirable.²⁸

Where politics gained the upper hand, however, was at the preliminary stage of the trial in which the court's jurisdiction was deliberated. As mentioned, during the jurisdictional stage Barghouti cooperated with the proceedings and raised several grounds of legal objections.²⁹ However, once he lost on this matter, he ceased to cooperate. The entire trial was then conducted without his cooperation, which is in essence how he tried to de-legitimize the Israeli court.³⁰ This move forced the judges, used to playing the role of umpire in a trial, to try to imagine Barghouti's position in order to supply the missing side of the story. The defendant, on the other hand, saw himself in direct conflict with the court and not just with the prosecution. As Barghouti declared to the presiding judge (Judge Sirota), "I am a political leader, a member of parliament, an elected leader of the Palestinian people... I am fighting for peace and for the rights and independence of my people... I do not recognize this court. It is a court representing the occupiers."³¹ The defendant, who was obliged by the court to be represented by the Israeli Public Defender's Office, refused to advance a legal defense. With this performative act of refusal, he attempted to expose the rule of force underlying this trial.

Did Barghouti manage to use the trial to advance an alternative narrative to the official Israeli narrative? As explained, the defendant refused to advance a legal defense. However, the court did on occasion allow him to use the courtroom as a stage for advancing his political narrative. Thus, the trial became one of the most interesting intersections between the Israeli and Palestinian narratives regarding the collapse of the Oslo peace agreement.

According to the prevailing Israeli narrative, Barghouti represents the Palestinians' betrayal of the principles of the agreement. Barghouti, in contrast, attempted to advance the story of Oslo from a Palestinian point of view. According to this narrative, it was Israel that had broken its promises through the continued settlement building and by hardening the lives of the Palestinians following Oslo. Barghouti also expressed his personal perspective:

I am a person who lived and was born under Israeli occupation, and I know what occupation is. Maybe for you it is ruling another people, and you are proud that you conquered and that you have the power over the Palestinians. Occupation is killing and murdering a whole nation. It steals the air from the individual... This month, ten years ago, Arafat and Rabin signed an agreement of mutual recognition... I was one of those who led to this agreement and approved and encouraged it, seeing in it a new opportunity for the two people... When Rabin was murdered we paid the price... [author's translation.]

At the level of competing narratives, the court was unwilling to accept Barghouti's narrative of a legitimate struggle for liberation and the right of self-determination as a relevant defense of his criminal actions. Deciding on the matter of jurisdiction, the court rejected Barghouti's contention that he should enjoy the status of a "prisoner of war" under international law. The court distinguished between "legal combatants" and "illegal combatants", explaining that the latter do not enjoy the status of "prisoner of war" and are therefore legitimate subjects of criminal law.³² Judging Barghouti through the lens of the criminal law had the effect of veiling the collective nature of the conflict and presenting Barghouti as an ordinary criminal. The trial, however, had the opposite effect on the Palestinian public in

terms of the prevailing narrative, which viewed Barghouti as a persecuted political leader.³³ These bifurcated perceptions of the trial manifest the condition of ‘radical difference,’ which became apparent by the conducting of a criminal trial.

The Bishara Trial³⁴

On November 7, 2001, the Knesset voted to lift Bishara’s parliamentary immunity, and on November 11, 2001, the Attorney General filed two indictments against him. The first indictment charged Bishara with violating the Prevention of Terror Ordinance - 1948 in two public speeches he made, one in the Arab town of Umm al-Fahem on August 5, 2000, and the other in Kardaha, Syria, on June 10, 2001, at a memorial service marking the first anniversary of President Hafez al-Assad’s death. In the memorial service were present leaders of the Hezbollah party. The indictment claimed that Bishara’s speeches were in effect an incitement to commit terrorist acts against Israelis. He was indicted for supporting a terrorist organization.

The speech made by Bishara, for which he was indicted, stated the following:

It is no longer possible to continue without enlarging the realm between the possibility of a full-scale war and the impossibility of surrender. The Sharon government is distinguished by the fact that it came into power after the victory of the Lebanese “resistance” which benefited from the enlarged realm that Syria has continuously fostered between accepting Israeli dictates regarding a so-called comprehensive and enduring peace and the military option. This space nourished the determination and heroic persistence of the leadership and membership of the Lebanese “resistance”. But following the victory of this “resistance”, and following the Geneva summit and the failure of “Camp David”, an Israeli government came into

power determined to shrink the realm of resistance, by putting forth an ultimatum: either accept Israeli’s dictates or face full-scale war. Thus, it is not possible to continue with a third way – that of “resistance” – without expanding this realm once again so that the people can struggle and “resist”...³⁵

There was an irony in the Bishara trial, which I want to identify. It was much more difficult to try Bishara than Barghouti because the charges against him were based solely on political speeches. The term “resistance” that he used was ambiguous and therefore the legitimacy of the trial was undermined from the outset. It could be interpreted as an outright adoption of Hezbollah’s model of violence, or it could be seen as supporting the conditions for civil disobedience. The irony stems from the tension between the content of the speech and the form of the criminal trial. The speech for which Bishara was indicted dealt with expanding the space for political action, and creating a third option, between complete submission to Israel’s demands and total war. The criminal charges against Bishara demanded that his speech be classified according to a binary logic of either “free speech” or “supporting terror.” The form of the trial thus contributed to disguising the realm of action that stretches between these two polarities, which includes, for example, various types of civil disobedience.³⁶ The question to be deliberated by the court was what Bishara meant when he used the term ‘resistance’. While he did not clarify whether he meant violent or non-violent resistance, he did stress that he advocated a third path and, at least in his speech, spoke of expanding the political space. The reaction of the political authorities in Israel to this call was to reduce the political space of debate by removing

Bishara's political immunity. Symbolically, this act removed his views from the Israeli Parliament's agenda, the forum where he could express an opposing narrative to the all-encompassing dichotomy of peace or total war presented by the Israeli mainstream. The advocacy of a 'third path' was thus singled out by the prosecution as a non-political option, made into a criminal speech-act, and therefore an option the Israeli public did not have to contend with.

The tension between form and content put Bishara in a double bind. Responding to the accusations as a criminal defendant could carry the additional message of acquiescing to the binary structure the state wished to impose upon him. Conversely, refusing to engage the substantive accusation by focusing on the question of jurisdiction could signify an unwillingness to engage in substantive justification of his views. Bishara chose the latter path.

In comparison to the Barghouti trial, the jurisdictional stage seemed to better serve Bishara, since his actions were doubly distanced from the act of "resistance." Firstly, he was not charged with participating in the violent acts of "resistance" but only with speaking in their favor. And secondly, since Bishara was an elected MK, he could choose not to challenge the constitutionality of the substantive criminal law proscribing such speeches, but rather to claim parliamentary immunity from prosecution under such laws. He also enjoyed the institutional advantage of bringing his claims before the Supreme Court, sitting as High Court of Justice, once the trial court had rejected his claims (an option closed to Barghouti, whose appeal on jurisdiction could only take place after the conclusion of the trial and as part of an appeal against the whole judgment).

Was the dialectic of risk and legitimacy, identified by Kirchheimer, present in the Bishara judgment? On February 1, 2006, Bishara's petition to the Supreme Court against the deprivation of his parliamentary immunity was accepted and the criminal proceeding against him was terminated (then-Chief Justice Barak delivered the opinion of the court, with which Justice Rivlin concurred and Justice Hayut dissented). In deciding whether the speeches made by Bishara were protected by "substantive immunity", Chief Justice Barak was willing to presume that they indeed fulfilled the requirements of the offence of "supporting a terrorist organization." However, Barak decided that breaking the criminal law by a Member of Parliament under these circumstances is protected by parliamentary immunity and should be viewed as "an integral part of the legitimate act of taking a stand on political issues." An important factor in upholding Bishara's immunity was the impact of the decision on the constitutional structure of Israeli democracy, in particular on the balance between the criminal law (proscription against incitement to violence and support of terrorist organizations) and the protection of political speech. The court relied heavily on its prior decision to overturn the Central Election Committee's decision to disqualify Bishara's party from participating in Israel's parliamentary elections because of its platform of transforming Israel into "a state of all its citizens." This platform, the court ruled, did not contradict the Basic Law: The Knesset (1985), which declares Israel a "Jewish and democratic" state.³⁷ In our case, the Supreme Court took a further step in this direction and recognized the applicability of parliamentary immunity to speeches that seem to fall under the criminal proscription against incitement to violence and terror.

The criminal trial against Bishara was terminated. But was it also a political victory for the defendant? The decision of the Supreme Court to accept Bishara's petition can be interpreted as an attempt to uphold the distinction between form and content. The court expanded the protection granted to elected representatives of the Arab citizens so as to allow them to criticize the fundamental values of the polity without fearing criminal prosecution. In the short term, the decision seems to de-legitimize the case of the prosecution. However, in the long term, such a decision carries a far broader legitimizing effect for political prosecutions of ordinary citizens under the substantive criminal proscription of certain political speeches (supporting terrorist organizations). This is so since the criminal provision is validated by the participation of representatives of Arab citizens in the Knesset's deliberations, enjoying their immunity without fear of criminal prosecution.³⁸ Notwithstanding this legitimizing effect of the Supreme Court's decision, its ruling had the effect of expanding the political space of deliberation and rejecting the binary logic of criminal prosecution at least as far as members of Knesset are concerned. The fact that Bishara was a member of Knesset allowed the court to rely on a third option between acquittal and conviction – one that addresses the constitutional problematic of the criminal prosecution without deciding on the merits of the case.³⁹ A further implication of the decision was a refusal to redraw the lines of "friend"/"foe" narrowly and to view Bishara as standing beyond the pale.

Conclusion

In conclusion, I would like to return to the starting point of this article. Terrorism today poses a difficult challenge to legal liberalism.

On the one hand, the liberal commitment to the rule of law has been manifested in an attempt to make every expression of violence subject to the law's authority. On the other hand, the ability to demarcate the boundary between criminal law and international law is undermined when applied to the hybrid category of terror.

The initial reaction of the State of Israel, which has been an occupying regime for forty years and has been exposed to ongoing and particularly violent acts of terror, has been to unleash a military response and to develop methods of dubious constitutionality, such as collective punishment and "targeted killings." In this context, appeals to the regular court system and the application of criminal law over alleged terrorists can be considered "progress." However, as I have shown, the danger of criminal prosecutions is great as it contributes to obscuring the conflict's political basis and blurring the differences between the political defendant and the ordinary criminal defendant. The criminalization of the conflict means erasing its political and collective context and the ability to make moral judgments in light of this context. In short, substantive criminal law is ill-equipped to deal with situations of what I have called "radical difference". In addition, when terrorism enters the courtroom of a state that is involved in a violent conflict with the group to which the defendant belongs, a basic cornerstone of criminal law – the impartiality of judges – fails to exist. In light of these problems, there have been many calls to reject the legitimacy of political trials conducted under the guise of criminal law.

One of the solutions developed in recent years has been to transfer conflicts of this type to third-party courts (national courts such as in Belgium or international courts such as the

International Criminal Court (ICC)). This option, as I have argued elsewhere, creates problems of politicization of a different sort (stemming from the arbitrariness and inconsistency in enforcing international law), and does not fundamentally resolve the difficulty.⁴⁰ The alternative, which I examined in this essay, is to recognize that these criminal cases are legitimate, notwithstanding their political nature, and to evaluate them according to the margins of risk to the authorities that they present. In this article, I attempted to demonstrate how – even in the most difficult circumstances of violent conflict between groups – judges of national courts can still mitigate the political nature of a lawsuit by exercising internal legal considerations (the requirements of substantive criminal law, binding precedents and procedural safeguards), as well as institutional considerations (the independence of the legal system vis-à-vis the executive branch, the status of the courts vis-à-vis the international legal community, and so on). I called this phenomenon, following the jurist Otto Kirchheimer, “enlarging the margins of risk”. Precisely because modern criminal law is connected to a national community, the assigning of the status of a criminal defendant creates an opportunity for the defendant to challenge the system from within. In this essay I pointed to the space for maneuver opened up by the criminal trial for the political defendant. Having identified the dynamics of risk and legitimization, it is worthwhile developing legal methods for expanding and strengthening this “in between” space.⁴¹

End Notes

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1 Leora Bilsky, "Territory, Community and Political Trials: A New Challenge for International Law," 27(2) *Tel Aviv University Law Review* 655 (2003) (Hebrew).

2 'Borderline cases' in the sense of occupying the boundary between the criminal and the political.

3 C.C. (Nazareth District Court) 1087/02, *The State of Israel v. Bishara*, delivered on November 12, 2003. Bishara was charged with supporting a terrorist organization, a violation of article 4 of the Prevention of Terrorism Ordinance, 1948.

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4 TP.H (Tel Aviv District Court) 1158/02, *The State of Israel v. Barghouti*, (not yet published) delivered on May 20, 2004. The charges against Barghouti included violations of the following offences: Murder, according to sec. 300(a)(2) of The Israel Penal Law, 1977; assistance to murder, according to sec. 300(a)(2) and sec. 31 of The Israel Penal Law, 1977; instigation of murder, according to sec. 300(a)(2) and sec. 30 of The Israel Penal Law, 1977; attempt to murder, according to sec. 305(1) of The Israel Penal Law, 1977; conspiracy, according to sec. 499 of The Israel Penal Law, 1977; activity in a terrorist organization, according to sec. 2 of the Prevention of Terrorism Ordinance, 1948; and membership in a terrorist organization, according to sec. 3 of the Prevention of Terrorism Ordinance, 1948.

5 George E. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) at 343-349. Fletcher explains the difference in terms of 'tainting' versus 'blaming'.

6 Carl Schmitt, *The Concept of the Political* (New Brunswick, NJ: Rutgers Univ. Press, 1976) at 26-27.

7 In other words, criminal law assumes that violence is no longer a legitimate response within society and the monopoly over its use is handed over to the state. International law, on the other hand, still recognizes the legitimacy of the resort to violence in some cases ('just war'), but only when undertaken by recognized collectives. Fletcher explains that war crimes reside at the frontier between these two legal orders. "On the one hand, the alternative legal order called war suppresses the identity of the individual soldier and insulates him or her from criminal liability; on the other hand, the international legal order now holds individuals accountable for certain forms of immoral

and indecent treatment of the enemy." George Fletcher, "Liberals and Romantics at War: The Problem of Collective Guilt," 111 *Yale Law Journal* 1499, 1518 (2002).

8 This is so because of the commitment of liberal criminal law to exclude 'motive' from its consideration of responsibility. For a critical assessment of the role of political motive in liberal criminal law, see Alan Norrie, *Crime, Reason and History*, 2nd ed., (London: Buttersworth, 2001) at 35-58. For a response see, Anthony Duff, "Principle and Contradiction in the Criminal Law: Motives and Criminal Liability," in A. Duff (ed.), *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998) at 179-184.

9 Ronald Dworkin, "What the Court Really Said," 51(13) *New York Review of Books* (August 12, 2004).

10 For elaboration, see Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004).

11 Of course, questions of jurisdiction are also legal questions, but they point to an extra-legal political fact that should determine them.

12 The norms of independence and impartiality are based on safeguarding and enabling distance between tribunal and 'case'. For elaboration on the triangular structure of the trial as a basis for its legitimacy, see Martin M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

13 In legal terms, international law recognizes five bases for jurisdiction (the territorial principle, the nationality principle, the protective principle, the passive personality, and the universality principle). See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997) at 140-141.

14 It has other manifestations, such as the right to trial by jury in criminal law cases. For an elaboration of this link and its history in English law, see Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985).

15 For a different conception during the Middle Ages that linked criminal law to a community of people rather than to territory, see Marian Constable, *The Law of the Other: The Mixed Jury and the Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: University of Chicago Press, 1994).

- 16 The question of how universal jurisdiction fundamentally changes the relations between law, tribunal and community deserves a separate article. In my view, the move of cases of 'radical difference' to third party courts practicing universal jurisprudence does not necessarily solve the problems of politicization. See Leora Bilsky, *Universal Jurisdiction and the Eichmann Trial* (unpublished manuscript). Some writers have raised the problem by pointing to the democratic deficit of universal jurisdiction trials. See Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006).
- 17 The Military Court System operated in Gaza (until 2005) and is still in effect in the West Bank. It serves as a branch of the administrative military rule over the Occupied Territories. It tries Palestinians on a daily basis for committing acts of terror of varied nature. See Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley: University of California Press, 2005).
- 18 International law has gradually recognized situations of self-determination in which a people resort to force against a colonial power as not merely internal matters. The consensus definition of 'aggression' (1974), which was adopted by the UN General Assembly, presented in article 7 the right of people entitled to but forcibly deprived of the right of self-determination, "to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the 197 Declaration." See Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge, UK: Cambridge University Press, 2003) at 1036-39.
- 19 A summary of the claims posed by the petitioner is available on Adalah's website at: <http://www.adalah.org/eng/legaladvocacypolitical.php#11225>.
- 20 C.C. (Nazareth District Court) 1087/02, *The State of Israel v. Bishara*. At the time, the question of whether an Israeli MK enjoys parliamentary immunity from criminal charges was first deliberated in the Knesset Committee, which then submits its recommendation to the Knesset plenum. Only after immunity is removed by the Knesset can the case be tried in court. In the Bishara case, the trial court decided to postpone its decision regarding the issue of immunity to the end of the trial, after the substantive issues of criminal responsibility were decided. The defendant former MK Bishara petitioned the Supreme Court sitting as High Court of Justice on this decision, and on February 1, 2006 the Supreme Court ruled in his favor. H.C. 11225/03, *Azmi Bishara, et al. v. The Attorney General, et al.* (not yet published).
- 21 The trial court explained that Israel had the authority to guarantee the safety of Israelis even in the Occupied Territories and that this authority is specifically expressed in the Oslo Accords. The court added that since the Oslo Accords had been systematically breached by the Palestinians, "by any standard of human logic" the claim that the agreement should be enforced should not be accepted. The court ruled that Barghouti was not entitled to the status of 'prisoner of war' since he did not fulfill the requirements of the Geneva Convention (such as bearing a recognizable sign of being a soldier, openly carrying weapons and not attacking civilians), and should therefore be seen as an 'illegal combatant' who should stand trial for his crimes. According to the court there was no breach of international law, which allows arrests of those who may be of risk to Israel's security interests. The legality of the way in which Barghouti was brought to trial was a separate issue and did not bear on the jurisdiction of the court (on this argument the court relied on the precedent of the Eichmann trial). The court also ruled that international law does not recognize the immunity of a member of parliament in state A, who commits crimes in state B.
- 22 See H.C. 769/02, *The Public Committee Against Torture in Israel, et al. v. The Government of Israel et al.* (not yet published) delivered on December 14, 2006. While affirming the resort to 'targeted killing' against civilians who are also 'illegal combatants,' the Supreme Court stated that: "[A] civilian taking a direct part in hostilities cannot be attacked... if less harmful means can be employed. In our domestic law that rule is called for by the principle of proportionality. Indeed, among the military means one must choose the means of which harm to the human rights of the injured person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed ... Conducting a trial is preferable to the use of force. A state under the rule of law employs, to the extent possible, procedures of law and not procedures of force." (Justice Barak, at para. 40.)
- 23 For an elaboration on the tension between collective guilt and criminal law see, Fletcher, *supra* note 7.
- 24 TP.H (Tel Aviv District Court) 1158/02, *The State of Israel v. Barghouti* (not yet published) delivered on May 20, 2004.
- 25 C.A. 336/61, *Eichmann v. State of Israel* 16(3) PD 2033.
- 26 See criticism by Hannah Arendt on the court's reliance on "Crimes Against Jewish People" as opposed to "Crimes Against Humanity". Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).

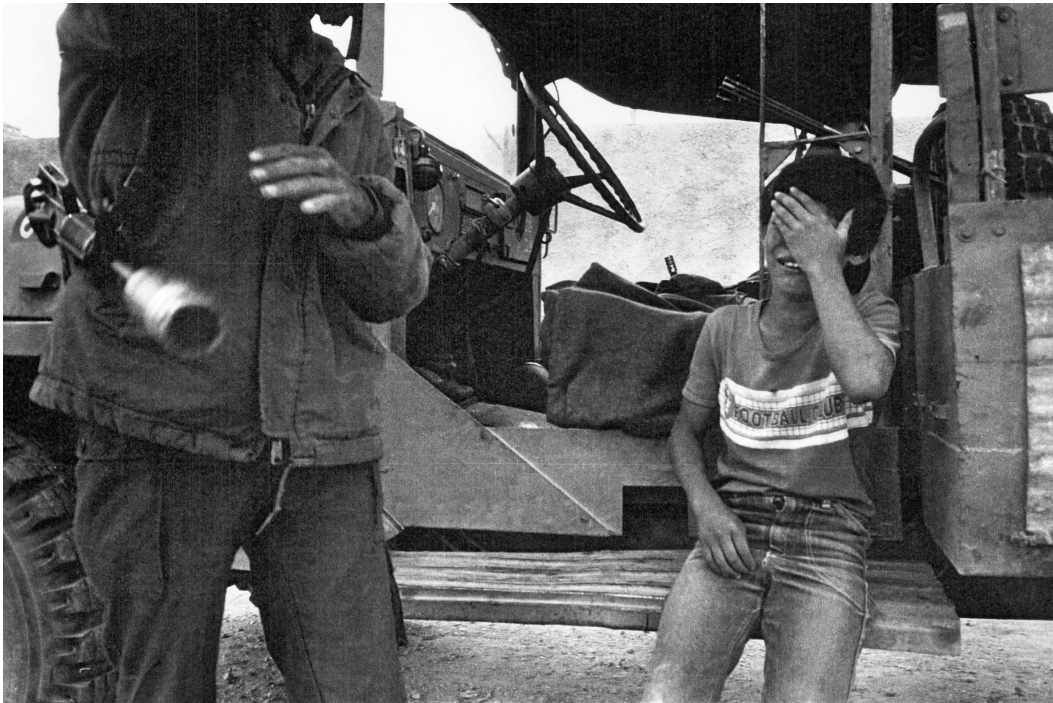
- 27 Barghouti, *supra* note 24, para. 171.
- 28 For an elaboration on the concept of ‘partial autonomy’ in political trials, see Robert Gordon, “Some Critical Theories of Law and Their Critics”, in David Kairys, (ed.), *The Politics of Law*, 3rd ed. (New York: Basic Books, 1998) at 61-64. The demonstration of relative autonomy by the Barghouti court seems to have had a practical effect on the policy of the Israeli prosecution. Thus, after the army’s capture of Ahmed Saadat for his alleged participation in the assassination of Israeli Minister Rehavam Zeevi, the Israeli prosecution decided not to conduct his trial in civilian courts, but in a military court. See *Ha’aretz*, April 27, 2006. Similarly, the Israeli prosecution chose to resort to proceedings before the military courts in cases of other Palestinian members of parliament. During June 2006, shortly after the kidnapping of the Israeli soldier Gilad Shalit, twenty Palestinian parliament members and ministers were brought to trial before military courts. The accusations included offences of membership in illegal organizations and, in some cases, propaganda in support of terrorist acts.
- 29 Barghouti was represented during the detention proceeding, in which the claim against the court’s jurisdiction was raised by his lawyers. However, the court did not resolve the issue of jurisdiction at this stage of the proceedings. See B.SH. (Tel Aviv District Court) 92134/02, *The State of Israel v. Barghouti* (not yet published) delivered on December 12, 2002. At the opening of his trial, Barghouti’s preliminary arguments against the court’s jurisdiction were presented by himself, already without legal representation. In his ‘speech’ he declared that, “The court and the Public Defender represents the Israeli Occupation and are here to defend it.... There is an indictment against me. I have not read it nor heard it... I do not recognize it”. The court’s decision that it had jurisdiction over the case referred to Barghouti’s legal arguments that were presented in the detention proceeding. Barghouti, *supra* note 24, decision delivered on January 19, 2003.
- 30 Barghouti refused both to retain a private lawyer and to accept a lawyer from the Israeli Public Defender’s Office. The court ordered the Public Defender’s Office to represent Barghouti nonetheless. Barghouti, *supra* note 24, decision delivered on March 27, 2003. However, lawyers from the Public Defender’s Office did not supply an active defense since it would be acting against their client’s will. For an elaboration, see K. Mann and D. Weiner, “Creating a Public Defender System in the Shadow of the Israeli – Palestinian Conflict,” 48 *New York Law School Law Review* 91 (2003) at 111-122.
- 31 “Intifada at Sirota’s Trial,” *Globes*, October 9, 2002 (Hebrew).
- 32 Judge Tal, Barghouti, *supra* note 24, decision delivered on January 19, 2003. Barghouti further claimed that he followed the limitations of the ‘laws of war’, since he restricted his people to act within the boundaries of the ‘Green Line.’ See, e.g., Barghouti, *supra* note 24, para. 42 (quoting the words of the witness Radaida, who explained that Barghouti was willing to supply him with weapons only so that he would act against soldiers and settlers). See also, *id.* para. 49 (quoting the witness Amur, who stated that Barghouti told him that military targets are to be preferred over civilian ones). The court rejected the distinction between different categories of civilians (settlers and Israelis within the Green Line) as legally invalid.
- 33 Indeed, Barghouti participated from Israeli prison in the 2006 elections to the Palestinian Authority and was elected to the Parliament. He also initiated and signed the ‘Prisoners’ Agreement’ between the various Palestinian factions regarding the 1967 borders (*Ha’aretz*, May 11, 2006).
- 34 Bishara was brought to trial under two indictments: one for facilitating visits to Syria for Arab citizens of Israel (the indictment was dismissed after two years of litigation) and a second for political speeches he made. The combination of the cases was meant to enhance the legitimacy of the criminal prosecution (since the former provided an ‘action’ basis for the criminal prosecution that goes beyond ‘speech’.) However, the legitimacy of the trial was undermined when the Magistrate Court dismissed the first case against Bishara. For an elaboration on the politics of these trials, see Nimer Sultany and Areej Sabbagh-Khoury, *Resisting Hegemony: The Azmi Bishara Trial* (Haifa: Mada al-Carmel, 2003) (Arabic and Hebrew).
- 35 The translation of this speech was taken from Bishara’s website. The speech in Hebrew translation appears in A.B. [Election Confirmation] 11280/02, *The Central Elections Committee for the 16th Knesset v. Tibi*, P.D. 57 (4) 1, para. 31, delivered on May 15, 2003.
- 36 For example, such a ‘third way’ of resistance was claimed to be practiced in the village of Bilin in demonstrations against the construction of the separation wall. See Jonathan Liss, “Lies and Excessive Force Against the Fence Protesters,” *Ha’aretz*, July 28, 2005 (Hebrew). Bishara’s subversive act of facilitating family visits of Arab citizens of Israel to their relatives in Syria can also be interpreted as an attempt to break away from the binary structure. According to the classical conception of international law, when two states are in a state of war (enemies), all subjects owing allegiance to one sovereign are at war with all subjects of the other state. Bishara’s arranged ‘visits’ highlighted the fact the Arab Israelis are both citizens of a state that views Syria as the ‘enemy’, and also connected through family relations to its subjects. In other words,

Bishara tried to introduce a wedge between the individual and the state and thus point to a third option – that of relationship (of travel and visit) between individuals of the two states. For elaboration on such third option through the use of private international law see, Karen Knop, *Public/Private Citizenship* (unpublished manuscript, on file with author).

- 37 Tibi, *supra* note 35, in which the Israeli Supreme Court reversed the Central Election Committee's decision to disqualify former MK Bishara and his party, the NDA (National Democratic Assembly) from participating in the general elections because of its platform of transforming Israel into 'a state of all its citizens'.
- 38 Interestingly, even the dissenting judge, who thought that parliamentary immunity should not extend to these speeches, agreed that greater protection should be given to elected members of parliament even in cases where their speech seems to infringe criminal proscription.
- 39 This opinion was not available in a previous case brought against an Arab journalist (C.A.H. 8613/96, *Jabareen v. The State of Israel*, P.D. 54 (5) 193), in which the Supreme Court opted for acquittal on the basis of a strict construction of the Prevention of Terrorism Ordinance, 1948.
- 40 Bilsky, *supra* note 1.
- 41 For an elaboration, see Leora Bilsky, "Strangers Within: The Barghouti and the Bishara Criminal Trials," in *Law and the Stranger* (Stanford: Stanford University Press, forthcoming).

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This boy's friend was ordered to remove the rocks placed across the road to block traffic. He himself was ordered to get in the jeep and wait. The different punishments were meant to instill uncertainty, sow fear and subservience, signal that law is irrelevant, that authority and its source are one and the same, that punishment is negotiable "flattery, collaboration, aiding and abetting might help", that punishment has an instructive aspect "make them learn a lesson". The boy seems to be aware of the fact that under the circumstances, he better hold back his tears.



“Expanding the Space(s)”: Thoughts on Law, Nationalism and Humanism – Following the Bishara Case¹

Barak Medina and Ilan Saban

In February 2006, the Supreme Court of Israel ruled that Azmi Bishara, a former Member of Knesset (MK), should not be criminally prosecuted for speeches he made several years ago in which he praised Hezbollah for its success in the fight against the Israeli military in southern Lebanon and expressed support for the “resistance” to the Occupation. The Supreme Court determined that MK Bishara’s remarks fell within the immunity accorded to MKs with regard to “expressing a view ... in fulfilling his role.” The case against MK Bishara was the first in which an indictment was filed against an MK for expressing a political view, and therefore the ruling was very important for determining both the scope of the material immunity enjoyed by MKs and the protection of free speech in general.

In this short article, we seek to discuss several aspects of the decision, including a political issue of particular importance and sensitivity: the space allowed by Israeli law for the Palestinian Arab minority to act in the Palestinian-Israeli conflict and the Arab-Israeli conflict.²

Like an Acrobat on a Thin Wire: The Palestinian Arab Minority and the Israeli-Palestinian Reality

An examination of the current state of affairs reveals that a longstanding choice has been made by the Palestinian Arab minority in Israel: to assist its people without joining the armed struggle against its state.³ Collaboration by Arab citizens of Israel with the armed struggle in its various forms remains a very marginal phenomenon that is met with serious internal condemnation. The overwhelming

majority of members of the Arab minority limits the assistance it tries to extend to its people to the methods permitted by Israeli law: parliamentary, legal and civil-political struggle, participation in the public discourses (the Israeli, the Palestinian, the pan-Arab and the global), material contributions to the needy and so forth. Nonetheless, within the Palestinian Arab minority there exists a range of views pertaining to questions that lie at the heart of the conflict: What are the goals of the Palestinian people’s struggle? And what are the legitimate means of attaining these goals? First, should the “two-state solution” be adopted and settled for? Or should there also be an assertive aspiration for a comprehensive realization of the right of return of the 1948 refugees and their decedents? Or, even further, should the goal be a bi-national state in all of the territory of Mandatory Palestine? Or perhaps a *Shari’a* [Islamic] state in the whole of Palestine should be established? Secondly, there is a profound disagreement among the Arab minority on the question of both the moral legitimacy and the effectiveness of various means, especially terrorism and armed struggle, employed in Palestinian endeavors to attain these or other goals. Thirdly, opinions are also divided over the type of future ties which should develop between the minority and the state of Israel, assuming that the latter deserves to continue to exist.⁴

Here arises the main question we seek to address: What is the space for expression permitted by Israel to its Arab citizens, with all of their diversity of opinion, regarding the goals and the methods of struggle adopted by their people toward their state?

At the heart of the *Bishara* case lies the issue of the extent of various spaces for activity. Firstly, it focuses on a call (by an Arab MK) for expanding the space for resistance to Israel's policies by the Palestinians and the Arab states and organized groups like the Hezbollah. Secondly, the ruling liberally outlines the space for political activity by the Palestinian Arab minority and its representatives with regard to the Palestinian-Israeli and Arab-Israeli conflicts. Thirdly, the ruling reflects an additional space, at the margins of liberty, that (still) exists for the Israeli Supreme Court in which to uphold fundamental liberal ideals of toleration, albeit the emergency situation.

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Creating "spaces" is indeed a vital need in the current reality. Each side in the Israeli-Palestinian conflict wallows in its pain, entrenches itself in self-righteousness, focuses on and is driven by its fears, and aspires to an outcome that will put a definitive end ("once and for all") to its suffering. The Palestinian-Israeli reality is all the more difficult because it carries a bewildering package of acute but necessary decisions together with demands for decisions that would be destructive if tackled acutely. The moods among us are colored in black and white, and ignore the complexity of the issues, narrowing the spaces and burning bridges which may provide us with a way out of the current reality. One example is the demand from the Arab minority in Israel of a sharp and decisive response to a paralyzing question: "Are you with us or against us?" This question is mainly asked by members of the Jewish-Israeli majority, but is sometimes heard coming from the other direction, that of the Palestinian national sentiment.

This demand is profoundly present in our shared lives. It stands, *inter alia*, at the basis of the demand from Arab citizens of the state to perform civic or national service. For the

majority, this demand constitutes a type of "litmus test" of loyalty. Jewish-Israelis say: "If you want real equality, accept equal obligations. This is the mark of your citizenship, a condition for your full integration." Arab citizens reply: "Make us feel truly equal and then we might be ready to contribute something like civic service." Each side is waiting for the fundamental change to occur (first, of course) on the other side. However, these assertions, of both sides, are insincere and, in any case, incomplete. Part of the tragic root of our current situation is the fact that the Palestinian Arab minority can never promise full loyalty towards or complete acceptance of the state of Israel until its people is liberated from Israel's Occupation. How can self-respecting people compromise on a "bilateral deal" that ignores a central third side: the weak, humiliated and occupied Palestinian people? Who is supposed to agree and declare that she agrees to a deal for a "flesh pot" in exchange for surrendering her solidarity with her people, which for two generations has been under occupation by her state? A similar example is the demand from the Arab minority to take on the role of the *avant-garde* in relinquishing the realization of the Palestinian refugees' "right of return" to Israel proper. Indeed, we believe that this concession is an essential component of an accord between the two peoples. However, it would be insensitive to fail to see why it is so hard for the Palestinian Arab minority in Israel to take such a role upon itself. This minority, which escaped the fate of becoming stateless refugees, finds it very difficult to spearhead the call to the unfortunate refugees to accept the fact that what transpired in 1948 is irreversible.

These are only two examples of strenuous demands currently presented to the Arab minority. Of course, not every unequivocal

demand is invalid. We believe there is at least one demand that the minority should closely heed. Palestinian Arab citizens of Israel, like other human beings, are obliged to fully respect the prohibition that morality and law impose on the use of terrorism. Similarly, as long as Israel does not degenerate into a murderous dictatorship, citizens should abide by the restrictions imposed by the internal social covenant; that is, not to participate in an armed struggle against the state.

However, there is an important moral distinction between a call to the minority to refrain from taking part in the armed struggle, and a sweeping demand from it to surrender its solidarity with the struggle of its people. Such a demand seeks to narrow not only the minority's freedom of action, but also its freedom of expression on an issue very close to its heart. Thus, such a measure carries the potential for great damage, and might exacerbate the crisis of legitimacy of "the Jewish and democratic state" in the eyes of the national minority. Such a sharp rupture in Israel's legitimacy in the eyes of the minority is a step on the road to its participation in the violent struggle. If this were to occur, the national confrontation in the Land of Israel/Palestine would undergo a fundamental transformation. The sides to the conflict, the possibilities for its resolution and the associated cost would immediately change. The three parties to the national divide (the Jewish majority, the Palestinian minority and the Palestinian people) would be reduced to two, and since Arabs and Jews in Israel are spatially mixed, the partition option (the two-state-solution) would die. Each side would then be perceived by the other as fighting to attain hegemony in the one and single entity/territory. In short, the national struggle would take on a terrifying "all or nothing" character.

Nevertheless, a substantial majority within the Jewish community in Israel insists on imposing such restrictions on expressions of sympathy with the Palestinian people's struggle against the state of Israel. Broad sections of the Jewish majority try to pressure the Arab minority to side with the interests of the Jewish state, or at least to avoid an explicit endorsement of its people's current struggle. This position was incorporated into legislation. Three main measures crystallized in the form of new amendments to laws passed in 2002, about a year and a half after the outbreak of the second Intifada:

1. Section 7A of the Basic Law: The Knesset, which deals with restricting the ability of individuals and political party lists to participate in Knesset elections, now stipulates the following instructions:

A candidates' list shall not participate in elections to the Knesset, and a person shall not be a candidate for election to the Knesset if the goals or actions of the list or the actions of the person, expressly or by implication, include one of the following:

- (1) negation of the existence of the State of Israel as a Jewish and democratic state;
- (2) incitement to racism;
- (3) support for armed struggle by a hostile state or a terrorist organization against the State of Israel.

The main amendment passed in 2002 is the addition of subparagraph 3.

2. Knesset Members' Immunity, Rights and Duties Law, 1951, [hereinafter: the Immunity Law] which is the focus of discussion in the *Bishara* ruling, was amended regarding the material immunity accorded to MKs. Paragraph 1 of the law now stipulates that:

1. (A) An MK will not bear criminal or civil

responsibility and will be immune to any legal action resulting from a vote or an expression of opinion, orally or in writing, or due to an action he took in the Knesset or outside of it, if the vote, expression of opinion or action were in fulfillment of his role or in order to fulfill his role as an MK.

(1A) To remove any doubt, an action, including an expression of opinion, by an MK, which is not be accidental, and that includes one of the following, is not considered, for the purpose of this paragraph, to be an expression of opinion or an action performed in the fulfillment of his role or in order to fulfill his role as an MK:

[...](4) support for an armed struggle of a hostile state or acts of terror against the State of Israel or against Jews or Arabs because they are Jews or Arabs, in Israel or abroad.

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3. The third measure is the addition of **Paragraph 144D2 of the Penal Law, 1977** (in parallel to deleting a paragraph from the Prevention of Terrorism Ordinance).⁵

The paragraph stipulates that:

If a person publishes a call to commit an act of violence or terror, or praise, or words of approval of, encouragement for, support for or identification with an act of violence or terror (in this section: inciting publication) and if – because of the inciting publication's contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, then he is liable to five years imprisonment.

And behold, in a move the importance of which is difficult to overestimate, the Supreme Court tempered the aforementioned legislative measures by interpreting them in a way that preserves "space" for significant political activity by the Palestinian Arab minority. We will illustrate this via the *Bishara* ruling, which is one of several rulings that follow the liberal, bridging path the Court has laid down on a

significant number of occasions.⁶ Still, we will hasten to add that it is difficult to count solely on the Supreme Court to block the collapse of red lines in the political culture of Israel. Recently, for example, it failed in a major test. In a majority opinion of six justices to five, it upheld the Citizenship and Entry to Israel Law (Temporary Order) 2003, which imposes sweeping restrictions on family unification by citizens of the state with their Palestinian spouses who are residents of the Occupied Territories. The alleged justification for the Law was national security, but the measure chosen to accommodate the security risk has been seriously disproportionate.⁷

The Bishara Ruling

Former MK Dr. Azmi Bishara was quoted as expressing support, on two different occasions, for the struggle of Hezbollah against the Israeli occupation of southern Lebanon. It was claimed that in a speech he made in June 2000 in Umm al-Fahem, Israel, MK Bishara declared, among other things, that:

Hezbollah won and, for the first time since 1967, we have tasted the flavor of victory. Hezbollah has the right to be proud of its achievements and to humiliate Israel.⁸

In addition, it was claimed that in a speech he made in Syria about a year later, Bishara expressed support for the "resistance option":

It is impossible to continue without expanding the space between the possibility of all-out war and the fact that surrender is impossible ... the Israeli government is trying to narrow this space to pose a choice like this: either accept Israel's conditions or face all-out war. Thus it will be impossible to continue with a third option, the option of 'resistance,' except by re-expanding this space so that people can conduct a struggle and 'resistance.' This space can only be expanded through an

effective and united Arab political stance in the international arena, and the time has indeed come for this.

These statements generated two legal responses. First, based on these two statements, the Attorney General decided in September 2001 to indict MK Bishara for the crime of supporting a terrorist organization, in accordance with the Prevention of Terrorism Ordinance, 1948. To pursue this indictment, the Knesset was requested to strip MK Bishara of his immunity. The request was approved in November 2001 and, as a result, an indictment was filed against him. In this context, it should be noted that only in June 2002 the Knesset enacted the amendment to the Immunity Law, as noted above, which added Paragraph 1(1A) to the law, stipulating that immunity does not apply, *inter alia*, to "support for an armed struggle of a hostile state or acts of terror against the State of Israel." Secondly, it was decided to take action to deny MK Bishara's right to run in the Knesset elections. To this end, in June 2002 the Knesset passed the abovementioned amendment to Paragraph 7A of the Basic Law: The Knesset, which stipulates, *inter alia*, that, "a person shall not be a candidate for election to the Knesset, if ... the actions of the person, expressly or by implication, include ... support for armed struggle by a hostile state or a terrorist organization against the State of Israel." Based on this provision, and at the request of the Attorney General, the Central Elections Committee for the 16th Knesset decided in January 2003 not to approve the candidacy of MK Bishara (and the Balad Party) for the Knesset elections. This decision was mainly taken in light of the abovementioned statements attributed to him.

In the ruling handed down in January

2003, the Supreme Court blocked the Attorney General's request and the Central Elections Committee's decision and determined, by a majority of seven justices to four, that MK Bishara is entitled to participate in the Knesset elections (the case is known as the *Tibi* case).⁹ The ruling states that the remarks attributed to MK Bishara do indeed express support for a terrorist organization, but that it was not sufficiently demonstrated that he supports an armed struggle or "violent resistance" by this organization, and therefore his right to be a candidate in the Knesset elections should not be revoked. In the decision that is the subject of our discussion (the *Bishara* ruling), the Supreme Court blocked the other proceeding – a criminal indictment for "supporting a terror organization" – and determined by a majority of two justices (Chief Justice Barak and Justice Rivlin) versus one (Justice Hayut) that MK Bishara has immunity from indictment for the statements attributed to him.

The decision rests on the following moves:

A. Chief Justice Barak accepted the view presented by the minority Justice, according to whom the amendment to the Immunity Law should be regarded as a "clarifying amendment," or a declarative amendment, which therefore applies even to statements or actions made prior to its enactment. We doubt the correctness of this interpretation, but for reasons of space will not discuss it here.¹⁰ Thus, Chief Justice Barak examined whether the limitation of material immunity enacted in this amendment applies to the statements attributed to Bishara. As indicated, this limitation stipulates that a statement by an MK will not find refuge in the shadow of material immunity if it constitutes "support for an armed struggle of a hostile state," or support for "acts of terror." Similar to the position of

the majority in the *Tibi* case (rejecting the disqualification motions), here too the majority's position distinguished between support for armed struggle or terrorism and "support for a terrorist organization." Support ("general") can be for the aims of an organization as opposed to its methods, or for the non-violent part of the arsenal of methods adopted by an organization.

Chief Justice Barak stipulated that an examination of the question of whether Bishara's statements constitute support for an armed struggle should be conducted, in principle, based on the assumption that the facts argued in the indictment are accurate; that is, without addressing, at this stage, the factual disputes over the content of the speeches or their circumstances. However, a certain lack of clarity on this point appears in the ruling of Chief Justice Barak, because he adopts the conclusion of the majority in the *Tibi* case, which was formulated not only on the basis of the statements attributed to Bishara, but also on the basis of explanations and additions that MK Bishara provided to the Central Elections Committee and elsewhere, as well as on an assessment of the persuasive power of the evidence presented to the Court, which together produced the following finding:

Did MK Bishara support an armed struggle of a hostile state or of a terrorist organization against the State of Israel? Note well, the question before us is not whether MK Bishara supports a terrorist organization. [...] as we have seen, the argument of MK Bishara is that opposition to violence and armed struggle derives from his liberal-democratic approach. According to his perspective, it is possible to oppose what he calls "occupation" without taking up an armed struggle. Thus, he opposes all attacks on civilians.¹¹

We believe that we were not presented with evidence the weight and strength of which meet the

required test ... We were not persuaded that we were presented with convincing, clear and unequivocal evidence that MK Bishara supports an armed struggle against the State of Israel.¹²

B. A central disagreement between the majority and minority in the *Bishara* ruling was the question of whether the judicial decision in the *Tibi* case, according to which former MK Bishara's statements should not be regarded as "support for armed struggle by a hostile state or a terrorist organization against the State of Israel" with regard to the right to participate in the elections, mandates the conclusion that the same statements do not constitute "support for an armed struggle of a hostile state or acts of terror against the State of Israel" under Paragraph 1(1A) of the Immunity Law.

Justice Hayut decided that a distinction should be made between the two judgments. In her view, "there is a fundamental difference" between the arrangement pertaining to material immunity and the negation of the right to be elected: "Preventing a list or preventing one of its candidates from running in elections irrevocably harms the individual's basic rights," while "not granting material immunity is a decision that is naturally limited to the circumstances of a concrete case about which the question of immunity arises, and it does not sweepingly strip the MK of his rights and of the possibilities for action and expression available to him in the framework of his position."¹³ Therefore, in her view, in the case of the limitation on the application of immunity, there is no reason to apply the strict tests established in the ruling on the restriction of the right to be elected. In particular, Justice Hayut decided that in light of the fact that the speeches of Bishara "include a song of praise and glorification for the Hezbollah organization," and in light of the

declaration of this organization as a terrorist organization, "it would be hard not to view the statements of the petitioner as support for an armed struggle of a terrorist organization."¹⁴

The majority took a different approach. Underlying the majority's opinion is the recognition that, even though the contexts are not identical, the considerations of policy at their core are similar: the aspiration to protect basic political freedoms. As Justice Rivlin emphasized, the decision over the scope of applying the limitation on immunity derives from "a principled conception of the best way for a democratic society and for Israeli society in particular to cope with statements of the type uttered by the petitioner."¹⁵ This conception is clearly expressed in the ruling on the right to be elected and it should also be applied in the context under discussion here. The majority justices determined that in order to apply the limitation on immunity, "convincing, clear and unequivocal evidence" is required that the MK expressed support for an armed struggle of a terrorist organization. In light of the fact that in the criminal proceedings no new evidence was presented (in addition to the evidence on which the decision over the restriction of the right to be elected was made), the conclusion is identical.

C. The discussion does not end here. Former MK Bishara was accused of the crime of "support for a terrorist organization" (Paragraph 4(B) of the Prevention of Terrorism Ordinance, as distinguished from incitement to an armed struggle or acts of terrorism), and the question is: Does material immunity apply *a priori* to this offence? I.e., do Bishara's attributed statements fall, in the first place, within the realm of "expressing an opinion ... in fulfillment of his role or in order to fulfill his role as an MK?"

According to the prevailing precedent, the *Pinhasi* case, the immunity involves illegal activities that fall within "*the natural range of risk*" of fulfilling the role of an MK:

Surrounding the lawful [fulfillment] of the MK's role, there is a range of behavior, encompassing all of the prohibited actions – which are not part of the role of an MK – but the expedited performance of the role creates a risk that is natural for the role ... [this entails] actions that are so tied to and entwined in his roles that a fear exists that, were the MK asked to provide an account of these illegal activities, it would directly influence and limit his ability to perform his [legitimate] role.¹⁶

Do the statements attributed to Bishara fall within the natural range of risk? The majority opinion responds affirmatively to this question, while formulating an important development in the natural range of risk test. It expands the test beyond the formula in the *Pinhasi* case. In the words of Dr. Ben-Shemesh:

It is now clear ... that the test of natural risk is not dependent on the cognitive condition of the speaker. A "slip of the tongue" is not required in the sense of a lack of attentiveness or something of the sort. The test of natural risk will also apply if the words are said intentionally and with forethought. Still, the prohibited remarks must not comprise the core of what is said and there cannot be an attempt to 'abuse' the institution of immunity. The argument for expansion: This is an expression that lies at the very heart of parliamentary activity. In addition, violations of speech are formulated in a very broad way. Thus, there is a need to protect material immunity in order to avoid weighing too heavily upon MKs in fulfilling their role (which is, as stated, primarily to express themselves in speeches, articles, lectures, etc.).¹⁷

Indeed, the majority opinion emphasizes the inherent ambiguity associated with speech

crimes relating to a call to violence in the divided society of Israel. It hints of special dangers that are likely to result from the coerced silencing of a discussion of issues and claims that are critical for a society that is searching for its way. Chief Justice Barak chooses to cite here the illuminating words of Prof. Kremnitzer:

The difficulty is that the expressions “praise,” “encouragement,” and “sympathy” are extremely broad ... Doesn’t the statement ‘If not for the Intifada, the Oslo Accords would not have been signed’ express sympathy for acts of violence? Doesn’t a description of the deprivation of the Arab minority and the difficulty or impossibility of generating significant change on this issue encourage violence? Doesn’t a severely critical description of the means of oppression implemented in the [Occupied] Territories constitute such encouragement? Doesn’t [quoting] historical research indicating that in certain situations it is impossible to draw the attention of the majority to the distress of the minority except through the use of violence serve to encourage violence? Doesn’t addressing the connection between the government’s actions and acts of terrorism encourage terrorism? We are talking here of things that lie at the heart of the realm protected by the freedom of speech.¹⁸

D. The ruling of the second majority justice, Justice Rivlin, adds important reasons for protecting the freedom of expression and material immunity of Arab MKs in particular. He makes an implied reference to the mediating rationale of the Court’s rulings, as indicated earlier in this article:

The expansive conception, which aspires to maintain basic freedoms as much as possible, does not necessarily clash with the defensive democratic conception. On the contrary, it emerges from within the same ideological platform. Restricting

the possibility to vote and be elected to the Knesset and in this way express opinions and views was not designed to repress views and positions, and certainly not to invalidate them. On the contrary, partnership in the democratic process is often a barrier to anti-democratic activity. And freedom of expression, which is a main tool for the work of an MK in fulfilling his mission, is often the reverse side of the coin of violence, the eruption of enmity, or the feeling of persecution and discrimination.¹⁹

[...] and with regard to our case not just any expression, but a political expression; and not just any political expression, but political expression by an MK; and not just any MK, but a representative of a minority group. Material immunity is designed first and foremost to ensure effective representation of the various population groups in the Knesset, so that their voice will be heard and not excluded (as far as possible under the limitations of a democratic society) from the public discourse in the State of Israel; [...].²⁰

Three Thoughts on Law, Jewish Nationalist Chauvinism, Palestinian Nationalist Chauvinism, and Humanism

1. The *Bishara* decision joins the *Bakri* ruling (regarding the screening of the film *Jenin, Jenin*)²¹ in that both force an expansion of the narrow and often self-righteous prism through which Jewish-Israeli society views the bloody conflict with its neighbors. In other words, these rulings pierce (slightly) the Jewish-Israeli “bubble.” This bubble is rigid, all-encompassing and multilayered in that it derives from at least two interrelated foundations that are difficult to alter. First, the majority Jewish-Israeli society is monolingual and therefore has no unmediated contact with the neighbors’ views. Its perception of the views of “the Other” comes via the information intermediaries who speak the language of this

community (primarily journalists, “experts” in Middle Eastern affairs, and security and intelligence personnel). Secondly, the Jewish majority has tools – which it indeed chooses to use – to impose a near-complete monopoly of its narrative. The curriculum for its children (and for the children of the Palestinian-Arab minority) is under its complete control and it also exercises considerable control over the mass media. In the state-owned media Arab editors and spokespersons are almost completely absent and the private Hebrew-speaking electronic media are controlled by Jewish plutocrats and editors.²²

The aforementioned rulings, among which the *Bishara* decision has an important place, enable “other voices” to penetrate the public discourse in Israel. These voices include those of diverse and eloquent representatives of the Palestinian-Arab minority, who seek to point out inconsistencies and exaggerations in the conventional stories the majority tells itself. These voices make it possible to identify openings in what others see or describe as “a dead end”, and they therefore contain a potential for productive power that is difficult to overstate.

2. The talk about the “potential” for productive power is intended to draw the attention of spokespersons for the minority itself. In this context, we wish to express the criticism that we harbor of Bishara’s stance.

Former MK Bishara’s stance is not presented in its full complexity and difficulty in the ruling of the majority justices. An examination of his petition to the Supreme Court, on which the ruling was based, enables a better understanding of the components of his position towards Hezbollah. Bishara actually declares support not only for Hezbollah, but also for its methods as “guerrilla

warfare,” aimed at winning liberation from occupation.

Note the following in paragraph 74 of the petition:

The petitioner [Former MK Bishara] will argue that the speech attributed to [him] in Umm al-Fahem is essentially similar to the speech he delivered several days earlier in the Knesset plenum, though the speech in the Knesset on 31 May 2000 was even more resolute, intense and acerbic than the speech attributed to him in Umm al-Fahem:

Honorable chairman, Members of Knesset – the government of Israel can portray its withdrawal from Lebanon as the implementation of Security Council Resolution 425. But the Lebanese resistance to the Israeli occupation also can rightly portray it as a victory over the Israeli occupation, not in the sense of a regular army and not in the sense of a classical army, but in the sense of a guerrilla war [...] Without a doubt, there is a victory here of the Lebanese resistance in every sense. The Lebanese resistance demonstrated a capability for consistency, steadfastness and persistence.

After all, Israel occupied Lebanon in an attempt to destroy the PLO, not Hezbollah, because there was no Hezbollah; the Israeli occupation is what created Hezbollah. I have never thought of Hezbollah as a terrorist organization. I have always thought that it is a legitimate resistance organization ... It did not defeat Israel and did not destroy Israel and did not annihilate Israel. It defeated the Israeli occupation in Lebanon...²³

At the Central Elections Committee prior to the 2003 elections, Bishara blurred his support for Hezbollah’s armed struggle. This is how Chief Justice Barak understood these statements in his ruling in the *Tibi* case:²⁴

With regard to Lebanon, he [Bishara] regards the

IDF's presence there as occupation and he recognized the legality of the Lebanese resistance against the occupation. At the same time, support for resistance does not mean support for violent resistance... MK Bishara goes on to note that it is not the role of a political party operating in Israel to give instructions on methods of resistance to occupation to those living under occupation. He does not regard Hezbollah as a terrorist organization, but rather as a guerrilla organization fighting for its land under occupation. As regards the [Occupied] Territories, he also regards the Israeli presence there as occupation. However, he opposes the use of violence against civilians – whether in Israel or the Territories. He opposes Palestinian suicide bombers and blames Israel for the creation of this phenomenon. In speaking before the Elections Committee, he noted that 'attacking innocent civilians is not acceptable to me ... wherever they are.'

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The majority opinion in the *Bishara* case saw this ambiguity as a basis for not applying the limitation of material immunity stipulated in paragraph 1(A1) of the Immunity Law.²⁵ However, here is precisely where we wish to voice our main criticism of former MK Bishara himself. This criticism stands on a moral rather than a legal ground.

Bishara speaks a great deal about "expanding the space." However, here the truly important space is that aimed at increasing possibilities for compromise between the parties to the conflict: the possibilities for ending the bloodbath. The contribution of leaders is judged by the question of how much they contributed to breaking the loathsomely familiar cycle of killing, killing in retaliation, and self-righteousness. If we are tired of this cycle, then what we need is not more nationalist sentimentality. What we need is the waning emotion of humaneness. This emotion

primarily focuses on the value of human life. It resolutely rejects the harming of innocents, and it looks for and is also prepared for compromise in order to attain this. Bishara is becoming increasingly ambivalent in this regard over time. Besides pointing to the main root of the violence – the Occupation and associated dispossession – he remains vague about his ideological position towards Hezbollah's activity directed against Israeli citizens in Kiryat Shmona or other Galilee towns and villages.

Moreover, regarding willingness to compromise, Bishara's vision for the Israelis and the Palestinians does not contain real room for compromise. It is "phased", and it appears that Bishara aspires ultimately to establish a single, bi-national state in Mandatory Palestine (the Land of Israel) – a liberal state with power-sharing arrangements.²⁶ This is an ethical vision the defectiveness of which does not lie in the realm of principle, but rather in the practical realm of the Israeli-Palestinian reality. In the aftermath of the Holocaust in Europe, after long years of living in a hostile region, and following the breakdown of the Oslo process and the outbreak of the second Intifada, very few Jewish Israelis are prepared to retreat from at least two red lines: Jewish control of the gates of immigration to Israel and Jewish control of the army and security forces to ensure their protection. A bi-national framework substantially diminishes Jewish control in these critical areas and thus arouses strong (and, in our view, justified) opposition. Thus Bishara's seeming ambivalence toward violence and his bi-national vision do not break our tragic cycle. The space for compromise that comes with them is very narrow or non-existent. They are likely to close rather than open dialogue.

Here the following counter-argument can be made: "Why shouldn't you, the Israeli Jews,

compromise more. The violent cycle can be expected to continue until we all accept the bi-national option. This is because the 'two state' option does not really offer a solution to the conflict. It does not provide a sufficient answer for the Palestinian sense of justice and it therefore leaves behind significant forces which will continue to violently oppose it." In response, we agree that the choice between the two competing options is not a principled, *a priori* one, but is rather contingent, dependent on circumstances. Both the bi-national state and two-state options are plausible, and certainly should not be dismissed out of hand. The choice between them should primarily be determined by an assessment of the projected cost of trying to realize each of them in the current and foreseeable circumstances. The following evaluations of this cost support, in our view, the two-state solution: It is a solution that is possible to reach within a relatively short period of time, and it has some clear and decisive consequences, including an end to the Occupation and the removal of the great majority of the two peoples from the cycle of bloodshed. On the other hand, it is far from clear that the bi-national state solution, if implemented, would indeed promise both peoples existential security and fairness. Why would this solution not collapse in violence after a relatively short time (as it did in Cyprus in the 1960s and 1970s and in the former Yugoslavia)? Moreover, this solution is not likely to be implemented in the foreseeable future and its chances of being realized almost certainly depend on the presence of an external foreign power capable of pushing the two peoples towards this type of "Siamese twins" solution (and capable of protecting this solution from a violent collapse). It should be admitted that it is very hard to see or foresee many such

benevolent foreign powers waiting in line. In the meantime, while awaiting this solution, further generations of Palestinians and Jewish Israelis will continue to shed each other's and their own blood.

Despite all this, it should be made clear that our reservations over some of MK Bishara's views do not constitute a cause to limit his freedom of expression. His – and our – freedom of expression is at the root of the mutual possibility to listen and be heard, to partly criticize and perhaps become convinced to some extent.

3. A final comment addresses the argument that the result in the *Bishara* ruling is inconsistent with the intention of the Knesset in amending the Immunity Law.

The legislation was approved by the Knesset in 2002 largely in reaction to statements made by former MK Bishara. The clear objective of the various sponsors of the amendments was that an MK who makes such statements would be denied of the right to be elected in circumstances similar to those of this case (by way of an amendment to paragraph 7A of the Basic Law: The Knesset), and that the MK would face criminal indictment (by way of an amendment to the Immunity Law). The Supreme Court's decision in the *Bishara* case, in conjunction with the decision in the *Tibi* case, significantly narrows the possibility of generating any legal response to statements by an MK that come dangerously close to supporting the armed struggle of a hostile country or terrorist organization against the state of Israel. Thus, criticism can be made on both the institutional level (*vis-à-vis* the court, to respect the will of the legislature) and on the substantive level (the claim that it is not suitable to adopt such a tolerant attitude toward the statements of Bishara).

The answer to the institutional argument is twofold. First, interpretation of the legislation is based on the assumption that, alongside the specific purpose of the legislation, it also has a "general purpose" of advancing the basic values of the Israeli legal system.²⁷ Respecting freedom of expression in general, and that of MKs in particular, is one of the basic values of the system, and the interpretation of the provisions of the Immunity Law are based on the presumption that the prescribed arrangement provides appropriate protection for these values. This has special importance with regard to protecting the liberties of elected officials who represent a minority group. Secondly, it should be remembered that a relatively simple "constitutional dialogue" exists in Israel's current constitutional regime: the court is not the "final arbiter" in Israeli society. Its errors, or those which are perceived as such, can be rectified via actions of the Knesset, in a rather simple way.²⁸

The substantive argument is directed at the proper limits of tolerance for expressions of the sort attributed to Bishara. The expression of support for actions which kill Israeli soldiers and ambivalence toward attacks against civilians are infuriating. Nonetheless, according to the conventional way of thinking in a democratic society, this is not a sufficient basis for imposing a legal prohibition, backed by a threat of criminal sanctions, on such expressions by MKs. Recognition of the great importance of ensuring freedom of expression in general, and freedom of expression for MKs in particular, necessitates the adoption of a tolerant attitude toward statements by MKs on political subjects. And behold, the usual protections of free speech (including the requirement that there be a real possibility of damage resulting from the expression) are often

insufficient; they do not provide a sufficient shield for the most likely objects of the majority's fury in volatile times – the minority representatives. Special vulnerability should be countered by enhanced protection. Thus, the protection for the freedom of action of MKs should be broadened through generous interpretation of the material immunity granted to them.

Conclusion

One of the most difficult dilemmas facing the Palestinian public in Israel pertains to the struggle of the Palestinian people against the Israeli Occupation in the Territories. On the one hand, the occupying regime severely damages the Palestinian inhabitants of the Occupied Territories, including profound and ongoing damage to their basic rights and living conditions. On the other hand, part of the struggle against the Occupation is conducted in a violent and cruel way, which causes injury to innocent Israeli civilians. Ostensibly, the complex identity of Palestinian citizens of Israel should not be significant in their taking a stance on this issue. Universal morality – and not the Palestinian national identity – mandates opposition to occupation; universal morality – and not Israeli civic identity – also mandates opposition to terrorism, even if the terrorism is aimed at bringing an end to occupation.

The dilemma of the Palestinian citizens of Israel entails the fact that in many contexts morality does not provide unequivocal answers. This is the case with regard to the question: What is the legitimate scope of resistance an occupied population can employ against an occupying regime? It is also the case with the question: Which military and other actions designed to prevent acts of terrorism are legitimate? The decisions on many concrete

issues in these contexts require complex assessments of the scope of absolute moral prohibitions, chances and risks, operational alternatives, and the proper balance between conflicting interests. The result is that legitimate differences of opinion are possible in the case of many central issues.

When an Israeli citizen expresses a view that favors the (narrow) interests of Israel (for example, supporting the policy of targeted killings of terror suspects), he is liable to be accused that his stance does not derive solely from a neutral and fair assessment of the relevant interests, but also (or perhaps primarily) from excessive identification with the interests of the majority in Israel. This is an accusation of intellectual dishonesty, immorality, and in some cases a lack of political astuteness, but the negative social ramifications are quite limited. On the other hand, when an Israeli citizen expresses a stance opposed to the (narrow) interests of Israel, he is liable to face accusations that his stance also derives (or perhaps primarily) from identification with Israel's enemies. In this case, the accusation is no longer limited to intellectual dishonesty, but expands to express a profound lack of faith in this type of citizen. This is liable to be used as justification for taking harsh measures to defend oneself from this type of citizen, even going as far as to deny his or her right to participate in making political decisions.

Against this background, the importance of the case at hand is clear: a legal response to statements by Arab citizens expressing support for "resistance" can be expected not only to have a direct impact – to deter, and conversely, to encourage expression. The legal response to such expressions also has an impact on the way in which the Jewish public views the speaker and the Arab public in general. Indictment for treason, aiding and abetting

terrorism and the like, as well as revoking the right to participate in elections, can be expected to intensify the impact of expressions of lack of trust toward the Arab public among the Jewish public. At the same time, they also affect the readiness of spokespersons for the minority to participate in the public discourse in Israel in an attempt to shape from within the society in which our lives are intertwined.²⁹

Thus, the *Bishara* ruling is a courageous ruling. It makes a liberal decision over the space that Israel must leave for action and expression by its Arab citizens towards the violent conflict between the state of their citizenship and their people, which is occupied by their state (and between their state and parts of the Arab nation). This is a brave ruling as it was written "under fire," the fire that has been consuming us, all of us, for many long years. There is no simple way of extinguishing the fire, and the correct way is certainly not to impose a comprehensive silence on those hurt by it or those who feel solidarity with others hurt by it. The majority opinion recognized this and found a legal way (which rests upon a long interpretative tradition in favor of freedom of expression and protection for the minority) to narrow as much as possible the scope of the imposed silence. Indeed, in this way, it also allows the inappropriate part of MK Bishara's remarks, but this is an unavoidable price to be paid in service of a redeeming act of the utmost importance: the act of expanding the correct "space": that in which humaneness and human rights balance, in an open debate, the excessive power of chauvinistic sentiments. This might be the space which will help us end our human sacrifices to Moloch, the Moloch of our exaggerated fears, of our quest for absolute security or for absolute justice.

End Notes

- 1 H.C. 11225/03, *Bishara v. The Attorney General* (not yet published); the ruling was delivered on 1 February 2006 [Hereinafter: the *Bishara* ruling or the *Bishara* case]. Former MK Bishara was represented by Adalah.
- 2 Elsewhere, we have discussed the quite complicated legal aspects of the ruling. These aspects arose from the disagreement between the majority justices (Chief Justice Barak and Justice Rivlin) and the minority justice (Justice Hayut). See, Barak Medina and Ilan Saban, "To Expand the Space? On the Scope of a Member of Knesset's Right to Express Support for 'the Resistance' to Israel's Occupation (following H.C. 11225/03, *Bishara v. The Attorney General*)," 37 *Mishpatim* 219 (2007) (Hebrew). Here we discuss only some of the legal aspects of the ruling.
- 3 Compare, *The Report of the State Commission of Inquiry into the Clashes between Security Forces and Israeli Citizens in October 2000* (2003) [The Or Report] at Section 1, Chapter A, paragraph 9 (Hebrew).
- 4 For a comprehensive survey of views among Arabs and Jews in Israel, and for its lucid analysis, see, Sami Smooha, *Index of Arab-Jewish Relations 2004* (Haifa: The Arab-Jewish Center, Haifa University; Jerusalem: The Forum for Civic Agreement; Tel Aviv: Friedrich Ebert Foundation, 2005.)
- 5 Paragraph 4(A) of the Prevention of Terrorism Ordinance, 1948.
- 6 For a discussion of various examples, see Ilan Saban, "After the Storm? The Israeli Supreme Court and the Arab-Palestinian Minority in the Aftermath of October 2000," 14(4) *Israel Affairs* 623 (October 2008). This article also refers to complementary criticism regarding the failures of the court in protecting the minority on other occasions.
- 7 H.C. 7052/03, *Adalah v. The Interior Minister* (not yet published; the ruling was delivered on 14 May 2006). For a harsh critique of the law, see, Guy Davidov, Yonatan Yuval, Ilan Saban, and Amnon Reichman, "State or Family? Citizenship and Entry to Israel Law (Emergency Order) 2003," 8 *Mishpat U'Memshal* 643 (2005) (Hebrew). For a harsh critique of the Court's ruling, see, Yaakov Ben-Shemesh, "Constitutional Rights, Immigration and Demography," 10 *Mishpat U'Memshal* 47 (2006) (Hebrew).
- 8 It is worth noting that former MK Bishara disputed the allegations made in the indictment. MK Bishara argued, for instance, that the quotations attributed to him are rife with inaccuracies. To support his claim, he presented his correspondence with the editor of the *Ma'ariv* newspaper, which published an article that served as the exclusive basis for one of the charges, as well as an admission by a representative of the newspaper that the article had been revised. See, in particular, paragraph 74 of the petition.
- 9 A.B. [Election Confirmation] 11280/02, *The Central Elections Committee for the 16th Knesset v. Tibi*, P.D. 57(4) 1.
- 10 See Medina and Saban, *supra* note 2.
- 11 *Tibi* case, at 42.
- 12 *Id.* at 43.
- 13 The *Bishara* ruling, at paragraph 15 of Justice Hayat's ruling.
- 14 *Id.* at paragraph 12 of Justice Hayat's ruling.
- 15 *Id.* at paragraph 1 of Justice Rivlin's ruling.
- 16 H.C. 1843/93, *Pinhasi v. Knesset of Israel*, P.D. 49(1) 661, 685-686.
- 17 Dr. Ya'akov Ben-Shemesh, a seminar presented at the "Professors Forum for Public Law," The Association for Public Law (Tel Aviv University, 31 March 2006).
- 18 Mordechai Kremnitzer, "The Alba Case: Clarifying the Laws of Incitement to Racism," 30 *Mishpatim* 105, 142 (1999) (Hebrew).
- 19 Paragraph 4 of Justice Rivlin's ruling.
- 20 *Id.* at paragraph 10. For a similar point, see also paragraph 8 of Chief Justice Barak's ruling.
- 21 H.C. 316/03, *Bakri v. The Israel Film Council*, P.D. 58(1) 249 (2003).
- 22 For a discussion of the exclusion of Arab citizens from the map of electronic media in Israel, see, *inter alia*, Amal Jamal, *The Culture of Media Consumption among National Minorities: The Arabs in Israel* (Nazareth: I'lam Center, 2006), in particular chapters 6 and 14; Amit Shechter, 'And the Stranger in your Midst' - Media Legislation and the Rights of the Palestinian Arab Minority in Israel, a Critical Look, available at: <http://www.personal.psu.edu/ams37/the%20stranger%20full%20version.htm>. The key points of this essay were presented at a conference entitled, "Media Rights as Collective, Political and Cultural Rights" (Nazareth: I'lam Center, 2005.)
- 23 Protocol of the Knesset debate on 31 May 2000, at 29-31.

- 24 Id. at paragraph 35.
- 25 In our view, another legal direction could have been pursued. Paragraph 1(A1)(4) of the Immunity Law stipulates that the "support" required for excluding the application of material immunity entails, "support for an armed struggle of a hostile state or acts of terror against the State of Israel or against Jews or Arabs because they are Jews or Arabs." Thus, former MK Bishara could argue that the limitation on immunity does not apply to his statements because he supports neither an armed struggle of a "state" nor "acts of terror." He supported an armed struggle of an organization that is carrying out a guerrilla war for liberation from occupation.
- 26 See Amal Jamal, "The Vision of a Nation State and the Challenge of a State of all its Citizens: Studies of the Writings of Azmi Bishara," 30 *Alpayim* 71 (2006) (Hebrew).
- 27 This is an old and well-known interpretative theory that can be found in all layers of Israeli law; it also appears in various sources of comparative law. See, e.g., Aharon Barak, *Interpretation in Law: Interpretation of Legislation* (1992) at 250-251, 417-475 (Hebrew); and H.C. 953/87, *Poraz v. Mayor of Tel Aviv-Jaffa*, P.D. 42(2) 309 at 329-330.
- 28 The constitutional powers in Israel lie with the Knesset, which carries two hats, or works in two guises, functioning as the Constitutional Assembly and as the Legislator. In most cases, a special procedure is not required for purposes of enacting, annulling, or amending the Basic Laws. Therefore, the difference between procedures of constitutional amendment in Israel and those of most other democratic countries is significant. The Basic Law: Freedom of Occupation, for example, has already been amended three times since its passage in 1992. See Yoav Dotan, "A Constitution for the State of Israel? The Constitutional Dialogue after the 'Constitutional Revolution,'" 28 *Mishpatim* 149 (1996) (Hebrew). A similar point was addressed in the following article: Ilan Saban, "Minority Rights in Deeply Divided Societies: A Framework for Analysis and the Case of the Arab-Palestinian Minority in Israel," 36 *New York University Journal of International Law & Politics* 885 (2004) at 973-974.
- 29 Notable here is the request MK Erdan submitted to the Interior Minister to consider stripping the citizenship(!) of MK Taha because of statements he wrote during the Second Lebanon War. The Interior Minister did not reject this request outright, and instead sought the opinion of the Attorney General. It is worth quoting part of the Attorney General's response to the Interior Minister, which clearly reflects the influence of the *Bishara* ruling: "I believe that there

is no room, as a rule, to make use of the authority to cancel citizenship due to breach of trust, in its current formulation, and certainly there is no room for this when the rationale is self-expression, as difficult and wretched as it might be. It should be added that in our case we are dealing with the self-expression of a Member of Knesset, who, naturally, and in accordance with Supreme Court rulings, is accorded a very broad right to freedom of expression, even beyond that of a regular citizen. This case, according to any criterion, is not appropriate and does not substantiate a reason to deny citizenship." Letter dated 6 August 2006. Its contents were attached to a statement by the Justice Ministry's spokesperson (on file with the authors).

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At the onset of the First Intifada, 'arrest procedures' did not yet include plastic cuffs and flannel strip blindfolds. For the detainees, the order to remain with hands on the back of one's neck is not necessarily less violent, arbitrary or humiliating. As for those in charge of the arrest, perhaps it is less effective.



Amendment 66 to the Penal Law (2002), Article 144D2 – Incitement to Violence or Terror: Legislation Based on Political Considerations

Khalid Ghanayim

In 2002, the Israeli legislature added Article 144D2, entitled “Incitement to Violence or Terror”, to the Penal Law, 1977.¹ According to this article:

If a person publishes a call to commit an act of violence or terror, or praise, or words of approval of, encouragement for, support for or identification with an act of violence or terror (in this section: inciting publication) and if – because of the inciting publication’s contents and the circumstances under which it was made public there is a real possibility that it will result in acts of violence or terror, then he is liable to five years’ imprisonment.

This law is the legislature’s response to the Supreme Court’s call to revamp the sedition chapter of the Penal Law, Articles 136-139, and Article 4(A) of the Prevention of Terrorism Ordinance – 1948, as well as to explicitly define in the Penal Law the limits of the phenomenon of incitement to violence. This call arose, explicitly and implicitly, through disagreements in the decisions of the Supreme Court regarding the definition of the value that the criminalization of the act of sedition in the Penal Law should safeguard; the limits of the crime of sedition;² and the limits of terrorism-related crimes according to Article 4(A) of the Prevention of Terrorism Ordinance.³

The Background to the Legislative Reform

Sedition is defined in Article 136 of the Penal Law, inter alia, as follows: [...]

3. The creation of discontent or resentment among Israeli residents;
4. The promotion of conflict and enmity between different parts of the population.

The chapter on sedition in the Penal Law is based on British law from several centuries ago.⁴ The historical background to the law indicates a desire within the political system, in particular the royal family, government and parliament at the time, to combat the press, which began to develop during that period, and to stifle all criticism of itself. The Mandatory British regime in Palestine incorporated the British law on sedition into the Criminal Code Ordinance – 1936. The Israeli legislature subsequently retained it in the Penal Law, though aware that it was a Mandate-era law and clearly contradictory to the fundamental principles of constitutional and criminal law, such as the principle of freedom of expression, the principle of legality, and the principles of legal clarity and certainty derived from it.⁵

Over the years, and principally during the period preceding the murder of Prime Minister Yitzhak Rabin, the chapter on sedition was used selectively in a small number of cases. There are two guiding Supreme Court rulings addressing the chapter on sedition.

The first case is *Anabtawi v. The State of Israel*,⁶ which involved an Arab resident of Haifa, an alcoholic, who, while intoxicated during an early morning argument with neighbors, said to one neighbor: “Kill the Jews,” “I’m going to bring Saddam Hussein to kill you,” and “I’ll launch an Intifada against you!”

For these statements, the Haifa District Court convicted Anabtawi of sedition and sentenced him to two years of prison time plus a suspended term of an equal duration. The court also imposed a cumulative sentence of

eighteen months and a concurrent suspended sentence of eight months. Thus the defendant was sentenced to an active prison term of three and a half years. Anabtawi submitted an appeal to the Supreme Court. At the outset of the hearing, his attorney and the prosecutor submitted a plea bargain according to which the sentences would run concurrently. In addition, the defense attorney noted that Anabtawi planned to leave Haifa (a mixed, Jewish-Arab city) and relocate to Nazareth (an Arab city) with the intention of rehabilitating himself, apparently in order to encourage the prosecutor and the Supreme Court to accept the plea bargain. The Supreme Court noted this fact and accepted the plea bargain.

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I will argue that the aforementioned statements do not constitute a basis for the crime of sedition. Firstly, the statements were not made publicly, and therefore no harm was done to public safety. Secondly, the statements were made by an intoxicated alcoholic and within the context of an argument between neighbors. Thus under these circumstances, no danger was posed by the statements, even if they are perhaps immoral. Thirdly, the statements, from a criminal law perspective and in the context of protecting social values, fall within the realm of absurd actions, since the speaker concerned had no control over Saddam Hussein or over the other residents in the neighborhood (to compel them to launch an Intifada with him). Absurd actions are not prohibited by the criminal law and a person performing absurd actions is viewed as someone who is detached from reality, similar to someone who is mentally ill – an insane person.⁷

The second case is *Aliya v. The Attorney General*,⁸ which involved a resident of the West Bank who photocopied flyers calling for a strike, including a threat against anyone who

violated it. According to the circumstances of the incident, the flyers were not distributed, or at least it was not possible to prove that they were. The District Court convicted the accused of sedition and sentenced him to five years in prison (half of which was an active term and half a suspended sentence). The Supreme Court rejected an appeal filed against the sedition conviction, ruling that, “Preparation of the flyer is part of an overall attempt at rebellion aimed at harming the state.” The Supreme Court did, however, accept a further appeal filed against the severe length of the sentence, and imposed a reduced prison sentence of three years (half an active term and half a suspended sentence).

This case, I argue, also fails to constitute the crime of sedition. Firstly, it was not proven that the publication was made public. Secondly, the conviction is based on the danger of harm posed to the state, and not on the fact that the defendant called for harming strike-breakers. The flyer’s call to violence, however, was not directed against the state. A strike that has no violent basis against the state cannot constitute the crime of sedition. Such a strike falls within the realm of protected freedom of expression. Thirdly, the criminal offense of sedition is intended to (also) protect the structure of the state’s regime;⁹ it is very doubtful that the criminalization of the act of sedition can help to maintain a state’s military hold over a specific territory.

Following the murder of Yitzhak Rabin, the practice of using of the sedition chapter of the Penal Law sporadically ended, and it came to be used in an extensive and unfocused manner against members of the (extremist, mainly settler) right-wing.¹⁰

As stated above, the sedition chapter of the Israeli Penal Law is legislation from the British mandatory-era and was thus enacted by a non-

democratic lawmaker. As such, it violates fundamental democratic values, including freedom of expression in all of its aspects. The use of the sedition chapter over the years was unfocused and even arbitrary. Severe criticism of it and a call to amend it were made in two fundamental court rulings. The first was a criminal appeal involving Kahane, the facts of which were as follows: Benjamin Kahane of the 'Kahane Chai' movement, prior to the latter's disqualification from participating in elections to the Knesset, published an article during the election campaign of 1992 calling for the bombing of the Arab town of Umm al-Fahem.¹¹ In this case, a majority of Supreme Court justices ruled that criminal offenses relating to sedition were intended to protect the structure and stability of the regime alone, and not public safety, in the sense of preventing incitement to violence in general.¹² In support of this interpretation, the majority relied upon the legislative history of the sedition chapter of the Criminal Code Ordinance – 1936, entitled "Treason and Other Offences Against the Authority of the Government." The Court also relied on the English common law, based in modern British law,¹³ Canadian law,¹⁴ and Australian law,¹⁵ according to which the sedition chapter is intended to protect the regime (in terms of its structure and stability) and not public safety, in the sense of preventing incitement to violence. However, the majority ruled in Further Criminal Hearing Kahane that paragraphs 3 and 4 of Article 136 of the Penal Law are also intended to protect social cohesion – that is, also public safety – and therefore prohibit incitement to violence.¹⁶ The majority relied on the wording used by the legislature in enacting the criminal offense of the "publication of racist incitement" (Article 144B) in the Penal Law,¹⁷ as well as on a previous ruling that addressed the

phenomenon of incitement to racism,¹⁸ according to which Article 136(3) and (4) prohibit both incitement to racism and incitement to violence. Due to these differences in opinion over the social interest protected by the sedition chapter, and its anti-democratic nature, the Supreme Court called for its revision and for a clear definition of the phenomenon of incitement to violence.

Article 4(A) of the Prevention of Terrorism Ordinance, entitled "Supporting a terrorist organization," states that:

A person who publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence – shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand pounds or to both such penalties.

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Article 4(A) of the Prevention of Terrorism Ordinance is discussed at length in the Jabareen Criminal Appeal and Further Criminal Hearing, which also elicited a call for legislative reform in this area. In this case, the defendant wrote a newspaper article in Arabic that praised the throwing of stones by children at Israeli soldiers during the first Intifada. According to the majority opinion in Criminal Appeal Jabareen,¹⁹ Article 4(A) prohibits the support and publication of words of praise or sympathy for a crime that has a terrorist nature; that is, criminal acts characteristic of a terrorist organization. It does not require that the criminal act be perpetrated by a terrorist organization (as opposed to an individual).²⁰ In contrast to this opinion, the majority justices in Further Criminal Hearing Jabareen²¹ stated that the Prevention of Terrorism Ordinance only addresses terror organizations and not individuals, and thus

only criminal acts perpetrated by terror organizations fall within the purview of Article 4(A). To strengthen their conclusion, the majority referred to the ordinance's stated purpose of fighting terrorist organizations, as well as to its historical background. Therefore, according to the majority opinion in the Jabareen ruling, the publication of words of praise and identification with a crime perpetrated by an individual is not criminally prohibited by Article 4(A) of the Prevention of Terrorism Ordinance. In addition, and as indicated in the ruling in the Kahane case, there is a contradiction in the rulings pertaining to the parameters of the criminal offense of sedition under Articles 133-136 of the Penal Law. This ambiguity led the legislature to enact an amendment and add Article 144D2 to the Penal Law; at the same time, Article 4(A) of the Prevention of Terrorism Ordinance was annulled.

48

Phenomena that Fall within the Category of Incitement under Article 144D2

Article 144D2 of the Penal Law defines two forms of incitement: direct incitement in the sense of an explicit or implicit call to commit acts of violence or terrorism, and indirect incitement in the sense of publishing words of support and encouragement for perpetrating an act of violence or terrorism in the future, or publishing words of praise for and identification with an act of violence that was committed in the past. Therefore, acts of violence or terror – that is, actions that entail the exercise of physical force against a person's life or limb – constitute the object of incitement.

My contention is that the addition of the term "acts of terror" is superfluous and derives from political motives. "Terrorism" is a

political term;²² terror is a Latin concept that means instilling fear through violence or a threat to use violence. From an historical perspective, "terrorism" does not have a negative or political connotation.

The use of the term "terrorism" in the political-state context reached a peak in the 19th century, when any action detrimental to the regime's image or that challenged its legitimacy was perceived as an act of terrorism. The term "terrorism" was an instrument employed by the regime to attack movements and organizations that did not identify with it. For example, immediately after the Nazi regime's rise to power, the term "terrorism" was used against rival political entities in order to persecute them. Hence, for example, the Communist Party (KPD) and the Social Democratic Party (SPD)²³ were declared terrorist organizations, on February 28, and June 22, 1933 respectively.²⁴

Declaring a party, movement or organization a terrorist organization makes it illegal and provides legal authorization to exercise all means, including criminal law, to fight it. The phenomenon of terrorism is viewed as undermining the regime's stability and public safety. Therefore, from the public perspective, the fight against such organizations is justified. As Professor Gad Barzilai notes, "If obedience to the law is seen as necessary for national security, it is advisable not to criticize the law. If national security is a collective need, then it justifies laws that violate human and civil rights. The laws of 'preventing terror' are a salient example of state law that violates human and civil rights, while employing arguments of national security."²⁵

The phenomenon of using law as a means of tackling a political rival is not foreign to the State of Israel. The Prevention of Terrorism Ordinance – 1948 was approved by the

People's Council, a non-elected parliament controlled by former Prime Minister David Ben-Gurion and those close to him, in order to "take care of" the Etzel and Lehi underground organizations that were his political rivals. There are two historical explanations for the legislation of the Prevention of Terrorism Ordinance. The first was the murder of the United Nations emissary, Count Bernadotte, and his aide, the French Colonel Andre Serot, in Jerusalem on September 17, 1948. The provisional government and People's Council passed the Prevention of Terrorism Ordinance at lightning speed on September 23, 1948; that is, five days after the murders. This act was intended to send a message to the UN General Assembly regarding Israel's determination to fight the phenomenon of the politically-motivated use of force, including murder. The second reason was to provide the provisional government with an additional means of "taking care of" rival political organizations. The provisional government (composed of Ben-Gurion and his associates) feared that such organizations, such as Etzel and Lehi, would not accept the authority of the new government, would fight against it and try to alter the nature of the Israeli regime.²⁶ The provisional government therefore wanted to concentrate all military power in the hands of the state's army, which was under the authority of the government, and therefore enacted the ordinance. Thus, as can be seen from its formative background, the Prevention of Terrorism Ordinance was originally intended to be used for political ends.

The foregoing indicates that it is best to refrain from inserting the political term "terrorism" in the law, or at least to reduce its use in the legal system as far as possible. Moreover, as stated, the term "terrorism"

means the use of violence, including intimidation and the threat of violence in order to achieve a goal, primarily a political one, and therefore entails the element of violence. For this reason, the addition of the term "terrorism" to the criminal offense of incitement is redundant and surprising.²⁷

The Phenomenon of Incitement to Violence: A Conduct Offense of Causing Fear and Danger

As noted, incitement can be both direct and indirect. Direct incitement constitutes an explicit or implicit call to commit acts of violence. We have already addressed the nature of direct incitement and the danger it entails.²⁸

The anti-social nature of direct incitement represents a challenge to the rule of law and the legal order, as well as a violation of public safety, in the sense of living in peace and security without fear or anxiety. This is the main value protected by the offense. It should be noted that the wrongdoing (anti-social act) of direct incitement is less than the wrongdoing entailed by inciting individuals or a specific, small group of individuals. The public inciter does not have the same influence as the person who incites at a personal level; the public inciter lacks a direct, personal influence on those who are incited. Public figures, the media and other entities can publish denunciations of incitement and reduce the severity of its 'anti-sociality'. Nonetheless, direct incitement is a serious phenomenon and there is clear justification for its criminalization. Indeed, direct incitement can be considered to be 'Janus-faced,' both as regards instigation, which is addressed by the general part of the Penal Law, and the phenomenon of harming public safety, which is addressed by the specific part of the Penal Law. If instigating someone to perpetrate a crime is a serious, anti-social

phenomenon the punishment for which, at least from a normative perspective, is the same as that for a direct perpetrator, then direct incitement is close to instigation and its criminalization is justified. The fact that the wrongdoing of direct incitement is to a certain extent less than that of instigation is expressed in the fact that the punishment for direct incitement is less than that for instigation. In addition, legal systems and the approach of Professor Gur-Aryeh, view direct incitement as a type of instigation;²⁹ that is, a serious phenomenon the prohibition of which has a clear justification.

On the other hand, indirect incitement – publishing words of encouragement and sympathy for future acts of violence, or publishing words of praise for and identification with acts of violence committed in the past – is less, even far less, anti-social in nature. The main ‘anti-sociality’ entails the cumulative effect of acts of indirect incitement, which could create a more conducive climate or atmosphere in which to commit similar acts.³⁰ The impact on internal public safety of explicit or implicit incitement, in the sense of living in peace and tranquility, including the public’s sense of living in peace and tranquility, as well as on the rule of law, is more severe and effective than the impact of words of support, sympathy, encouragement and praise. Indirect incitement is a criminal offense that causes fear and danger that acts of violence might be committed.

A connecting line cannot be drawn between the publication of indirect incitement and the commission of an act of violence against the object of incitement. The phenomenon of indirect incitement is on the fringe of criminal law, at the border between the serious phenomena that justify criminalization and the less serious phenomena that do not. Therefore,

designating indirect incitement as a criminal offense is permissible as an emergency measure in situations of crisis.

Furthermore, in order to prevent a situation in which the offense of indirect incitement becomes tantamount to punishing thoughts alone, the potential for committing acts of violence is required. The requirement for the potential of harm underlines the objective ‘anti-sociality’ inherent in indirect incitement. The cumulative test for indirect incitement is, therefore, a necessary condition for its criminality. In addition, in the absence of an objective characterization of the act of indirect incitement statements protected under freedom of expression in a democratic regime are liable to be included within the prohibition.³¹ An example is the remark made by former Prime Minister Ehud Barak that he would have joined the rejectionist organizations – Hamas or Islamic Jihad – if he had been born a Palestinian in the Occupied Territories. Finally, having an objective should be required as a ‘special state of mind’³² in order to make the ‘anti-sociality’ of the offense more severe and to enable its criminalization.

The criminal offense of incitement to violence according to Article 144D2 of the Israeli Penal Code includes two tests: a test of content and a test of consequence. It thus requires that the acts of violence, from an abstract and objective perspective, with real potential to cause harm to life and limb, and that the inciting publication in the concrete case creates a real possibility of the commission of acts of violence liable to harm life and limb. The combined content and consequence test takes into account all the considerations and circumstances that affect the possibility of creating a danger and its realization, such as time, place, target audience, and the standing and influence of the publisher. In the words

of former Israeli Supreme Court Justice Theodor Or, proving “this potential in one specific case or another depends on the particular circumstances of each case ... the court will draw its conclusions in this matter from the entirety of existing circumstances ... this entails an assessment of the possible impact of the concrete publication at the time it was made. First and foremost, the court will study the content of the publication, both in terms of its meaning and its style. The court will also study the circumstances surrounding the case – which medium was used, who the target audience was, where the publication was made, and when it was done.”³³

As stated above, an objective should be required as a special state of mind in order to increase the severity of the objective ‘anti-sociality’ of indirect incitement, which is otherwise insufficient for applying criminal law and criminalizing the action. However, in Israeli law the prohibition suffices in practice with the defendant’s awareness of committing a crime. Thus the prohibition violates freedom of expression and makes it difficult to draw a clear line between the dangerous and criminal phenomenon of incitement and publication that is protected by freedom of expression. This criticism was also leveled by the Supreme Court when it ruled that, “Such a prohibition [the publication of words of praise for acts of violence, even if committed in the past] constitutes a significant violation of freedom of expression; it is possible to accept this [however] in a democratic society when dealing with terrorist organizations, and the great and special danger they present.”³⁴

It seems that the legislature wanted, by sufficing with the defendant’s awareness only, to greatly expand the criminal prohibition and to prevent unjustified criticism of it from both legal rulings and from the legal literature, in

order to encourage the state prosecution to utilize this prohibition in a selective way, similar to the selective use of the broad and unjustified prohibition on sedition.³⁵ Proof of the politicization of the prohibition on incitement to violence can be found in the Knesset debates, when fractions raised arguments against the legislation and the scope of the prohibition, fearing that it would be detrimental to their supporters.³⁶

This broad definition of the prohibition, which generates selective use, is flawed and violates the rule of law. The criminal prohibition is general, its application is not restricted to a specific target group, and its use is selective; it is also motivated, perhaps primarily, by political considerations, which renders it invalid. A prohibition should be clear, justified, and directed toward the general public.

End Notes

- 1 Book of Laws 226.
- 2 Criminal Appeal 6696/96, *Kahane v. The State of Israel*, P.D. 52(1) 535; Further Criminal Hearing 1789/98, *The State of Israel v. Kahane*, P.D. 55(5) 145.
- 3 Criminal Appeal 4147/95, *Jabareen v. The State of Israel*, P.D. 50(4) 38; Further Criminal Hearing, 8613/96, *Jabareen v. The State of Israel*, P.D. 54(5) 193.
- 4 See Criminal Appeal Kahane, supra note 2, at 585; Further Criminal Hearing Kahane, supra note 2, 158. Mordechai Kremnitzer and Khalid Ghanayim, *Incitement, Not Sedition* (Israel Democracy Institute, 1997) at 7; Moshe Negbi, *Freedom of Press in Israel – Values in the Legal Mirror*, (Jerusalem, 1995) at 62; Mordechai Kremnitzer and Liat Levanon-Morag, “Restricting the Freedom of Expression Due to Fear of Violence – On the Protected Value and Probability Tests in Crimes of Incitement to Sedition and Incitement to Violence in the Wake of the Kahane Case,” 7 *Mishpat U’Memshal* (2004) 308-309. See also the criticism of the definition of sedition in English law and Canadian law, which is identical to the definition in Israeli law: James Fitzjames Stephen, *A History of the Criminal Law of England*, Vol. II (London, 1883) at 298; *Law Reform Commission of Canada Working Paper 49, Crimes against the State* (Ottawa, 1986) at 35.
- 5 See also Kremnitzer and Ghanayim, supra note 4, at 7, 9-10; Further Criminal Hearing *Kahane*, supra note 2, at 159-160.
- 6 Criminal Appeal 1448/91, *Anabtawi v. The State of Israel*, Takdin Elyon, 2396 (3)91.
- 7 See Kremnitzer and Ghanayim, supra note 4, at 28.
- 8 Criminal Appeal 294/89, *Aalia v. The Attorney General*, P.D. 43(4) 627.
- 9 Regarding the protected value in the criminal offense of sedition, see supra note 2.
- 10 See also Kremnitzer and Ghanayim, supra note 4, at 10; Mordechai Kremnitzer, “What is Prohibited Incitement,” in Michael Konfino (ed.), *The Power of Words and the Weakness of Knowledge: Propaganda, Incitement and Freedom of Expression* 100 (Tel Aviv: Am Oved, 2002) 104; Meriam Aryeh, “Criminal Restrictions on Expressions that Contribute to Creating a Violent Climate,” in *Sefer Shemgar*, Vol. B 115 (Tel Aviv, 2003) 116-117.
- 11 The prosecutor’s decision to indict on charges of sedition is strange, because the relevant criminal offense is incitement to racism. See Kremnitzer and Levanon-Morag, supra note 4, at 311, 317; see also Magistrates’ Court Judge Z. Zilbertal in Criminal Appeal *Kahane*, supra note 2, at 546-547.
- 12 Criminal Appeal *Kahane*, supra note 2, at 552 and following – ruling by Justice Goldberg, at 582-583 – ruling by Justice Barak; this is also the minority opinion in Further Criminal Hearing *Kahane*, supra note 2, at 181 – ruling by Justice Barak, at 192 – ruling by Justice Turkel.
- 13 See *R. v. Burnes*, 16 Cox C.C. 355 (1886); *R. v. Aldred*, 22 Cox CC 1 (1909); *R. v. Chief of Metropolitan Stipendiary Magistrate, ex parte Choudhury*, 1 All E.R. 306 (1991); Lobban, “From Seditious Libel to Unlawful Assembly: Peteloo and the Changing Face of Political Crime c770-1820,” 10 *Oxford Journal of Legal Studies* 307 (1990); James E. Boasberg, “Seditious Libel v. Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson,” 10 *Oxford Journal of Legal Studies* 106 (1990).
- 14 See *Boucher v. The King* [1951] S.C.R. 265; L.R.C. of Canada, supra note 4.
- 15 See *Burns v. Ransley*, 79 CLR 101 (1949); Laurence W. Maher, “The Use and Abuse of Sedition,” 14 *Sydney Law. Review* 287 (1982); *Review of Commonwealth Criminal Law, Fifth Interim Report, June 1991, Part V - Offences Relating to the Security and Defence of the Commonwealth*, para 32.15.
- 16 See Further Criminal Hearing *Kahane*, supra note 2, at 154 and following – ruling by Justice Mazza, at 183 – ruling by Justice S. Levine, at 183 – ruling by Justice Kedmi, at 185 and following – ruling by Justice Dorner. This is also the minority position of Justice Mazza in Further Criminal Hearing *Kahane*, supra note 2, at 572.
- 17 See the Penal Code Bill (Amendment 24) 5745-1985, at 195-196.
- 18 See Criminal Appeal 2831/95 *Alba v. The State of Israel*, P.D. 50(5) 221, at 244-254; HCJ 399/85, *Kahane et al. v. Executive Council of the Israel Broadcasting Authority et al.*, P.D. 41(3) 255, at 313; see also the view of Justice Mazza in Criminal Appeal *Kahane*, supra note 2, at 573, as well as Justice Or in Further Criminal Hearing *Kahane*, supra note 2, at 155. See also Kremnitzer and Ghanayim, supra note 4, at 7.
- 19 Criminal Appeal *Jabareen*, supra note 3, at 38. This view was unanimously expressed in Criminal Appeal *Alba*, supra note 18, at 295.
- 20 Justice Mazza in Criminal Appeal *Alba*, supra note

- 18, at 285; Further Criminal Hearing *Jabareen*, supra note 3, at 217; Justice Kedmi joined this view, id. at 212-215; and Justice S. Levine, id. at 214-217. See also Criminal Case (Kfar Sava) 149/96, *The State of Israel v. Axelrod*, (not yet published) November 2, 1997; Criminal Case (Jerusalem) 1035/97, *The State of Israel v. Bar Yosef*, (not yet published) November 19, 1998, page 12.
- 21 Further Criminal Hearing *Jabareen*, supra note 3.
- 22 Gad Barzilai, "Center versus Periphery: 'Anti-Terror' Laws as Politics," *Plilim* 229, 234 (2000) (Hebrew).
- 23 This party formed the government and the president was a party member prior to the rise of Hitler; after the fall of the Nazi regime following the end of World War II, the Social Democratic Party returned to the political arena and formed the government during various periods. The Communist Party also returned to political life, but the reasons for banning it in 1956 were, in the view of many, primarily political. See Martin Kutscha, *Hochverrat und Staatsgefaehrung in der Rechtsprechung des Bundesgerichtshofs* (Bonn, 1962) at 69-84.
- 24 See Friedrich-Christian Schroeder Schroeder, *Der Schutz von Staat und Verfassung* (Muenchen 1970) at 155.
- 25 Barzilai, supra note 22, at 233.
- 26 Id. at 229; Further Criminal Hearing *Jabareen*, supra note 3, at 203-204.
- 27 Perhaps the term "terrorism" would be useful for a state in late stages of legislation, but it is clear that the use of term terror in the criminal offense of incitement to violence is superfluous.
- 28 See Kremnitzer and Ghanayim, supra note 4, at 17 and following.
- 29 See Gur-Aryeh, supra note 10, at 143-152; English law, see Glanville L. Williams, *Criminal Law – The General Part*, 2nd ed. (London, 1961) at 612.
- 30 See Kremnitzer and Ghanayim, supra note 4, at 26-27, 32-34; Gur-Aryeh, supra note 10, at 122; and Justice Or in Further Criminal Hearing *Kahane*, supra note 2, at 167.
- 31 See also Criminal Appeal *Kahane*, supra note 2, at 558; and the remarks of Justice Barak, id. at 589.
- 32 See Kremnitzer and Ghanayim, supra note 4, at 27; Kremnitzer and Levanon-Morag, supra note 4, at 350; Justice Dorner in Further Criminal Hearing *Kahane*, supra note 2, at 191.
- 33 Further Criminal Hearing *Kahane*, supra note 2, at 172-173.
- 34 Justice Or in Further Criminal Hearing *Jabareen*, supra note 3, at 205; also, in Further Criminal Hearing *Kahane*, supra note 2, at 180.
- 35 Regarding the selective application of criminal directives and the claim of discrimination, see also Criminal Case 2212/02, *The State of Israel v. Amara*, a ruling by the Nazareth Magistrate's Court on November 14, 2002 (not yet published). On the claim of discrimination and the selective use of the law, see also Shlomo Avineri, "How Democracies Defend Themselves," in Michael Konfino (ed.), *The Power of Words and the Weakness of Knowledge: Propaganda, Incitement and Freedom of Expression* 169 (Tel Aviv: Am Oved, 2002) 172-173. On the selective and politically motivated use of the sedition crime in Australian law, see Maher, supra note 15.
- 36 See also Michael Konfino, "Rhetoric as a Battlefield," in Michael Konfino (ed.), *The Power of Words and the Weakness of Knowledge: Propaganda, Incitement and Freedom of Expression* 7 (Tel Aviv: Am Oved, 2002) at 30-31.

1991, Nablus, Alex Levac

No rifle-cleaning flannel strips left, so one of the detainees is simply ordered to take off his shirt and use it as a substitute blindfold. The soldier leading the line smiles at the camera like a principal dancer on stage, setting pace for his troupe. Not only are the Palestinians blindfolded and disoriented, they have been instructed to hold hands and move in line so the soldier can easily control their movement as he leads them to court.



“In Practice”: Interview with Attorney Saher Francis on her Experiences in Representing Palestinians before the Israeli Military Courts

Rasha Shammās

Palestinians arrested by the Israeli military in the West Bank are prosecuted in the Israeli military court system, a jurisdiction created by the State of Israel after its occupation of the West Bank and Gaza Strip in 1967. The military court system is administered by the Israeli Military Advocate General’s Office. Palestinians brought before the military courts are prosecuted for offenses deemed to be crimes against the security of Israel, ranging from specific activities such as stone-throwing to broader activities such as belonging to or being involved in a Palestinian political party deemed illegal by Israel.

In 1993, the Palestinian National Authority was established by the Oslo Agreements, and was granted limited governance in some areas of the West Bank and Gaza Strip. Israel, however, maintained authority over all issues related to its own security in the OPT. It also maintained the right to arrest any person in all areas of the OPT and continued to operate the military courts in certain areas.

Formally, Israel’s “disengagement” from the Gaza Strip in 2005 brought an end to the jurisdiction of the military courts there.¹ Presently there are two Israeli military courts operating in the West Bank: the Ofer Military Court near the city of Ramallah, and the Salem Military Court near the city of Jenin. One military court operates in the south of Israel in the Naqab (Negev), the Ketziot Military Court, which presides over administrative detention cases. A further three Israeli military courts, including the Russian Compound or *Moscobiya* in Jerusalem, operate from within interrogation and detention centers for the purpose of extending the interrogation periods

of Palestinian detainees.

Under international humanitarian law, Israel, as an occupying power, has the right to implement its own laws in areas that it controls through military occupation in order to protect its own security.² However, this right cannot override the occupied population’s right to be treated with humanity and dignity, and in the case of suspected and/or detained persons, the right to a fair trial,³ rights which are being violated on a daily basis.

Israeli Military Order 378, proclaimed in April 1970 and entitled “Concerning Security Provisions”, establishes the jurisdiction of the Israeli military courts and the courts’ procedures, and broadly defines the majority of crimes prosecuted in the military courts.⁴ Israel uses Military Order 378 and the British Defence (Emergency) Regulations of 1945, periodically making amendments to these two instruments, to implement its administration of the Occupation.⁵ Israel argues that this is legal under international humanitarian law since it is protecting its own security.

The vast majority of detained Palestinians brought before the military courts are convicted and sentenced to long periods of imprisonment. Palestinians from the OPT are held in twenty-two Israeli prisons, detention and interrogation centers scattered throughout Israel⁶ and the West Bank.

As of February 2008, the Israel Prison Service (IPS) reported that there were 8,463 Palestinian adults and 300 Palestinian children being held in its facilities.⁷ Lawyers working for Defence for Children International – Palestine report that, based on their number-monitoring during regular visits to the prisons

and interrogation centers and attendance at military courts, there were approximately 327 Palestinian children from the OPT in the custody of both the Israeli military and the IPS in April 2008.⁸ The Addameer Prisoners' Support and Human Rights Association⁹ reported that there were 9,087 adults from the OPT being held in Israeli prisons and detention centers in April 2008.¹⁰ Numerous human rights organizations and private lawyers represent Palestinians in the military courts or otherwise work on prisoners' rights issues.

The following interview was conducted by Rasha Shammass, an Australian lawyer living in the West Bank and International Advocacy Officer for Palestinian Child Detainees at Defence for Children International – Palestine Section.¹¹ Rasha talked to Attorney Sahar Francis, the Director of Addameer, about her experiences "in practice" in representing Palestinian adults and juveniles before the Israeli military courts. Attorney Francis is a prominent Palestinian women lawyer working to defend the rights of Palestinian prisoners. She is a Palestinian citizen of Israel and has been a member of the Israeli Bar Association and a practicing lawyer since 1996.

What was the political climate in Israel and in the OPT when you began appearing in the Israeli military courts?

That was in 1995 and the period directly after the Oslo Agreements. At that time, right before the Palestinian Authority started governing parts of the West Bank and Gaza, Israel arrested thousands of Palestinians, and instituted a closure policy in the prisons: for nine months, Palestinians were banned from visiting their relatives in the military prisons.

I had just finished my law degree at the Faculty of Law, Haifa University, and was

working as a trainee lawyer for the Society of St. Ives in Bethlehem. In the organization we offered legal representation on human rights cases for Palestinians in the West Bank such as land confiscations, denials of freedom of movement and home demolitions. We started receiving requests to visit prisoners from the local community. Many people had relatives in prison, so we started to visit anyone in need of legal advice being held in any of the prisons and interrogation or detention centers, including women and children. Initially we intended to document prison visits and monitor violations, but then we began receiving requests from the prisoners themselves to appear on their behalf in the Israeli military courts. As soon as I received my Bar license in 1996, I started to represent Palestinians being held in administrative detention; that is, being detained without charge or trial.¹² Israel had arrested hundreds of Palestinian activists from Fatah, Hamas, the Popular Front for the Liberation of Palestine (PFLP), the Islamic Jihad, the Democratic Front for the Liberation of Palestine (DFLP), as well as other opponents of the Oslo Agreements, and around 850 Palestinians were being held in administrative detention. The numbers haven't changed much since then: today approximately 786 Palestinians are being held by Israel in administrative detention.¹³

How did you learn this specialized legal representation? Who were your mentors when you first began to appear before the military courts?

For me, it was a self-training exercise, and I think it's like this for all the lawyers who appear in the Israeli military courts. It's all

about teaching yourself, asking questions, researching, watching and learning. I relied a great deal on advice and support from colleagues who were familiar with and experienced in appearing in the jurisdiction. Lawyers from Addameer who had been representing Palestinian political prisoners for some time when I started practicing provided me with a lot of support. Other lawyers helped me through the learning process; Israeli Attorney Leah Tsemel, for example, gave me a lot of advice and assistance.

There was and still is a variety of lawyers at different professional levels appearing before the military courts: Palestinian lawyers from the OPT, Israeli lawyers, and Palestinian lawyers from Israel. The training is an ongoing process. Communicating with the prosecutors is also part of the process, because they can provide vital information such as copies of the Military Court of Appeals' decisions, which are otherwise unavailable.

Can you compare legal representation before the Israeli military courts to that within the regular Israeli criminal system?

The obvious differences have to do with the identity of the defendants, types of crimes prosecuted and the sentences imposed. According to Articles 1 and 7(f) of Military Order 378, the military courts have the jurisdiction to prosecute any crime by any person committed in the entire area of the West Bank. In practice, though, the courts prosecute only Palestinians in the area. A settler who murdered a Palestinian in the West Bank should therefore be prosecuted in the military courts. However, settlers are prosecuted in the regular Israeli criminal courts system, which imposes

considerably less severe criminal penalties.¹⁴

The Fourth Geneva Convention permits the Israeli military courts to exist because of Israel's Occupation of the Palestinian territories. However, the Fourth Geneva Convention requires that such courts make a distinction between civilians and combatants when they appear before the court. The Israeli military courts do not do this. The courts do not distinguish between Palestinian civilians and combatants; Palestinians are identified in a political and criminal context, as one group of people.

The procedure in the military courts is also governed by Military Order 378, which has been in effect since the 1970s. The Israeli Criminal Procedure Law and Evidence Law also apply to the Israeli military courts, and where there are gaps in Military Order 378 regarding any particular issue of procedure, Israeli civil law can be applied.

Technically speaking, the procedure is fairly similar in both jurisdictions but there are some fundamental differences. In sentencing, for example, a criminal court is guided by weighing the objectives and principles of punishment – protection of the community and the type of crime. But in the military courts the starting point is imprisonment and never anything else. This difference is one of ideology: in the principles of sentencing a different ideology applies in the criminal courts as compared to the military courts.

Also fundamental is that judges and prosecutors in the military courts serve within the same unit of the Israeli army and must be serving in the Israeli army. The process of appointing judges is not based on objective criteria, whereas in the Israeli

criminal and civil systems strict procedures apply in the appointment of judges, which occurs only after gaining five years of legal practical experience. Most of the judges in the military courts have no experience in other jurisdictions, including the regular civil or criminal courts, and have less than five years of practical experience; their practical experience is often limited to being prosecutors in the military courts.

When you visit the military courts, you see immediately how they differ from the regular Israeli criminal courts. Visit an Israeli court and watch a criminal prosecution and you will see how the rules are more formal and strictly applied. For example, an indictment in the Israeli criminal court system must include vital details such as the exact date, time and place of the offense, and a detailed description of the elements of the charge. In the military courts, however, charges are vague, and judges don't expect or require from prosecutors much detail beyond what the offense is. An example is a charge of stone-throwing in which the only information provided by the prosecutor in the indictment is the month, year and name of the village or town where the incident is alleged to have taken place, and no other particulars of the offense that could potentially strengthen the case of the defense.

Prosecutors also classify offenses more broadly and we often have legal arguments in court about what the correct charge is. For example, in one of my cases a Palestinian alleged to have fired a weapon at an Israeli military base was charged with attempted murder. The charge sheet did not specify any particulars regarding "intent to murder", any evidence of injury or any

information about the distance from the firing to the base. These are important details that may help the lawyer to argue the case properly. Not mentioning these details can severely harm the defense and result in an automatic conviction, which is what happens in most cases.

The arrest and detention process is also different. In Israel a person accused of criminal offenses must be taken to court within twenty-four hours of his or her arrest, and a public defender may be appointed by the court or a private lawyer may represent the accused. Prior to indictment, an adult accused of criminal offenses can be held for interrogation for up to thirty days without charge,¹⁵ and a juvenile for twenty days.¹⁶ An amendment to the criminal procedure law, enacted on 27 June 2006, created specific criminal procedures in Israeli law that enable the Israeli police and the General Security Services to order that a detainee suspected of committing 'security offenses' may be held before being brought before a court for forty-eight hours and in some instances ninety-six hours from the detention.¹⁷ This law also stipulates that such a detainee may be held for up to thirty-five days without being charged.¹⁸ For suspects who appear before the military courts, the situation is drastically harsher: a Palestinian detainee can be held for eight days after arrest as opposed to twenty-four hours before being brought to court, and can be detained for interrogation, before being indicted, for up to ninety days. This is the case for both juveniles and adults. Moreover, the Military Advisor or the Military Court of Appeals may extend the ninety day period for a further ninety days.¹⁹

In terms of evidence, prosecutions in

the military courts rely very heavily on confessions, which are almost impossible to challenge. Because of the length of the interrogation period and the methods used during interrogation, such as beatings and threats of harm to or arrest of family members, the reality is that a confession is produced in around 90% of adult cases and almost 100% of juvenile cases in the military courts. We once represented a seventeen year old who refused to confess and as a result was held in administrative detention for a year.

In general, the rules of evidence for confessions are the same in both the Israeli military courts and the regular Israeli criminal system: if a confession has been obtained using psychological, physical coercion or torture, and the defense wishes to exclude it as evidence, the burden of establishing the reason why it should be excluded lies with the defense. This is difficult because the defense has to show that the accused's psychological condition had been so severely affected by coercion or torture that the confession is unreliable.

How does Israel decide which crimes constitute a threat to its security and how does it define these offenses?

Under Military Order 378, offenses range from general acts to manslaughter and murder. Section 53 A of the order, for example, is entitled "Throwing an Object". You can see from this broad use of terminology how easily individual acts such as stone-throwing, when they occur in the context of a group demonstration or are committed against the Israeli army, can be interpreted as a crime against the State of Israel.

Another example is Section 68, entitled

"Activity against Public Order," which stipulates that, "Any person who commits any act which disturbs or is likely to disturb the peace or public order shall be guilty of an offence under this order." This offense could mean absolutely anything, and Palestinians carrying out a variety of acts that are not crimes, but political acts that are deemed disturbances of the peace, can be arrested. The charge of "Attempted Murder" which carries a maximum sentence of life imprisonment, is widely used by the Israeli army because it is not properly defined; the specific elements of the crime are not articulated in Military Order 378, and so a wide definition can be applied by the courts. A usual case is one of a Palestinian found in possession of a knife being charged with attempted murder without any real evidence to indicate that he or she actually used or intended to use the weapon to kill.

In your experience, what particular Palestinian political activities are prosecuted as crimes in the military courts?

The British Defence (Emergency) Regulations of 1945 are constantly being amended and used by Israel to create and define certain political activities as crimes, in accordance with the prevailing political situation. For example, during the elections to the Palestinian Authority in 2006, the Israeli military arrested dozens of university students for being members of student political movements that Israel considered to be affiliated with Palestinian political parties. Palestinian parties can be deemed to be illegal pursuant to Section 85(1) A of the regulations, and military orders are issued to name specific parties. Fatah and Hamas, for example, have been declared

illegal political parties. Student movements, such as the Kutla Islamiya, were deemed to be associated with Hamas and its student members were arrested and imprisoned for long periods of time.

Not only students were arrested: in the run-up to the elections, on 25 and 26 September 2005, Israel arrested between 200 and 300 Palestinians and then released them after the elections in order to prevent them from exercising any influence on the campaigns. Israel created many offences during the electoral campaigns that basically made any type of connection to Hamas illegal.

One of my clients, Mr. Ashraf Taqatqa, was arrested and placed under administrative detention at that time. When the detention period expired after four months he was charged with working for an organization declared illegal by Israel and alleged to be associated with Hamas. The organization was Dar al-Aytam, an orphanage located in the village of Beit Fajjar. We couldn't argue that the organization was not illegal because Israel had declared it as such under an amendment to the British Defence (Emergency) Regulations – 1945, and the discretion to do so lies solely with the Israeli government. Support or otherwise for Hamas' military operations had nothing to do with how the court defined the crime and so my client had to plead guilty, and was sentenced to six months' imprisonment. After 11 September 2001, Israel declared two charity organizations – The Jerusalem Foundation and Al-Aqsa Foundation – illegal. The United States and Europe also banned these organizations. If you worked for an organization that was funded by these organizations, such as a

kindergarten or fitness center, you were, according to Israel, committing a crime and could be arrested.

In the case of children, stone-throwing is the most common act defined as a crime against the security of the State of Israel. Children can be sentenced to months in prison for throwing stones. Children as young as ten years of age have been held for hours at Israeli police stations for throwing stones at Israeli military vehicles.

Are there special procedures or laws for juveniles in the Israeli military courts?

Military Order 132 specifically applies to juveniles but, generally speaking, there are no distinct procedural rules for them in the military courts. Their arrest and prosecution is essentially the same as for adults; Military Order 378 governs the prosecution of both. Military Order 132 defines children as persons up to the age of sixteen; in the regular Israeli criminal system it is eighteen. After the age of sixteen, a Palestinian child appearing before a military court is sentenced as an adult and is imprisoned with adults. Israel has a specialized juvenile justice system that deals with Israeli children. However, it does not operate such a system for Palestinian children in the West Bank.

When Israeli juveniles are arrested in Israel, they are dealt with by a specialized police officer and in juvenile courts that are closed to the public in order to safeguard their privacy. Children brought before the Israeli military courts usually appear in court shackled at the ankles. They are placed in the dock to await their hearings with adult detainees. Sometimes there can be up to ten male adult and juvenile detainees in the dock in the courtroom, all

awaiting their hearings. If there are male detainees already in the dock, female child detainees, who are accompanied by a female soldier when in court, are seated on a chair next to the dock. The courtroom is not closed and families of other adult or child detainees may be present, watching the child and the child's proceedings.

All Palestinian children who appear before the Military Courts are imprisoned; no alternatives to incarceration and no rehabilitation programs are considered, as they are in juvenile courts in Israel. Some special sentencing rules apply to juveniles up to the age of sixteen, but these rules do not reflect or uphold international human rights standards for the sentencing of children because they essentially just determine imprisonment periods.

How would you generally compare the outcomes in the two jurisdictions?

The main difference between the prosecution of Palestinians and the prosecution of Israelis is the sentence. Military court judges sentence Palestinians in the military courts, and indeed Palestinian citizens of Israel charged with "security" offences and prosecuted in Israel in the criminal court system, according to an ideology of collective punishment. They are viewed as security risks whatever the charge and whatever the evidence brought before the court. In stark contrast, Jewish Israelis are prosecuted in the criminal system as individuals in accordance with the evidence brought against them.

According to Military Order 132, Palestinian children aged between fourteen and sixteen cannot be given a custodial sentence of more than six months for offences that carry a term of imprisonment

of less than ten years. However, a child can be sentenced as an adult for offences that carry an imprisonment term of over ten years, and it is even possible for a Palestinian child to receive a life sentence.

In 2005 I represented a fourteen-year-old girl from Nablus. She had traveled to Jerusalem alone and was arrested at the Al-Aqsa Mosque in possession of a knife. She did not harm or attempt to harm anyone and just held the knife in her hand, but told Israeli police officers that she wanted to kill a policeman. She was charged with attempted murder and received a sentence of six years' imprisonment.

I also represented a nineteen-year-old who was not technically a juvenile, but I mention her because I would like to compare her case with the case of three Jewish Israeli juveniles who were charged with murdering a Palestinian farmer at around the same time. My client stabbed a policeman who, as a result, received a two-inch deep wound. He was injured but he survived. My client received a very harsh sentence of nineteen years' imprisonment from a military court judge. Close in time to the young woman's arrest, three Jewish Israeli juveniles were riding on a school bus home from school and playing with a wooden stick. They stuck the stick out the window of the bus and struck a Palestinian man as he was riding on his donkey beside the bus. He was killed. The three juveniles each received a two-year prison sentence.

Thus the prosecution of Palestinians in the Israeli military courts, in contrast to prosecutions in the regular Israeli criminal system, is not only about the procedure, but also the length of imprisonment. Judges in the military courts will hand down terms of imprisonment from the perspective that

the accused Palestinian intended to harm or kill a Jew for being a Jew, and will not make the same assumption in the case of a Jewish person. For example, three years ago, a group of settlers planned to place a gas bomb in a car parked near a girls' school in East Jerusalem. The settlers in the Beit Ein case, who were prosecuted in regular Israeli courts, received prison terms of twelve and fifteen years. Palestinians charged with offences in circumstances that are comparable to this case have received sentences of twenty-five to thirty years' imprisonment.

A Palestinian child charged with "involvement" in planning a suicide bomb could receive a custodial sentence of fifteen years or more. "Involvement" could mean anything from talking about the plan but not being part of the act itself, to carrying part of the bomb for someone else in a bag without being aware of its contents.

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End Notes

- 1 Under the Criminal Procedure (Detainees Suspected of Security Offenses) (Temporary Provision) Law – 2006, individuals from Gaza who are arrested by Israel are now brought before Israeli criminal courts, but Israel has legislated harsher detention laws that in practice apply only to them.
- 2 See Article 5, Fourth Geneva Convention (1949).
- 3 See Article 64, Fourth Geneva Convention (1949).
- 4 The text of the military order is available in English at: <http://www.geocities.com/savepalestinew/israelmilitaryorders/fulltext/mo0378.htm>
- 5 The text of the Defence (Emergency) Regulations from 1945 is available at: <http://www.geocities.com/savepalestinew/emergencyregs/emergencyregs.htm>.
- 6 It is a violation of Article 76 of the Fourth Geneva Convention (1949) for an occupying force to detain a person outside the occupied territory.
- 7 Statistics obtained from B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories, 28 February 2008.
- 8 Defence for Children International – Palestine Section, Child Prisoner Statistics, April 2008.
- 9 The Addameer Prisoners' Support and Human Rights Association is a Palestinian non-governmental, civil institution established in 1992 by Palestinian human rights activists. Addameer's activities focus on offering support to Palestinian prisoners, advocating for their rights, and working to end torture through monitoring, legal procedures and solidarity campaigns. For more information, see: www.addameer.org.
- 10 Statistics obtained from Addameer, 6 April 2008.
- 11 Defence for Children International (DCI) – Palestine Section is one of over thirty-five DCI Sections around the world. The International Secretariat of the organization was established in Geneva in 1979. The Palestine Section was established in 1992 in response to the urgent need to protect the rights of Palestinian children in the West Bank and Gaza Strip during the first Intifada. Its main office is located in Ramallah and branch offices are located at Bethlehem and Hebron in the West Bank. Lawyers who work in DCI Palestine's Legal Unit represent Palestinian children in the Israeli military courts and visit them in Israeli prisons. For more information, see: www.dci-pal.org.
- 12 The arbitrary arrest or detention and detention of persons without informing them of the charges they face or without bringing that person to trial within a reasonable period of time is in breach of Article 9 of the International Covenant on Civil and Political Rights (ICCPR). Administrative Detention in the Israeli Military Courts is governed by Military Order 1226 and Chapter E1 of Military Order 378.
- 13 Statistics obtained from Addameer, 6 April 2008.
- 14 See, B'Tselem, "The Dual System of Law in the Occupied Territories," available at: http://www.btselem.org/english/Settler_Violence/Dual_Legal_System.asp, and the testimonies of Palestinian victims of settler violence at: http://www.btselem.org/english/Settler_Violence/Index.asp.
- 15 Section 17(b) of the Criminal Procedure Law (Powers of Arrest) – 1996.
- 16 Section 10(3) of the Juvenile Punishment and Treatment) Law – 1971.
- 17 According to articles 3(1) and 3(2) of the Criminal Procedure (Detainees Suspected of Security Offenses) (Temporary Provision Law) – 2006.
- 18 According to article 4 of the Criminal Procedure (Detainees Suspected of Security Offenses) (Temporary Provision Law) – 2006.
- 19 According to Section 78 of Military Order 378, a Palestinian child can be detained by a low-ranking Israeli soldier or police officer for 96 hours without charge. Afterwards, the child can be held for interrogation for eight days before being brought before a court through a formal detention order issued by a higher ranking military official. A judge of the military court has the power to extend this period of detention for interrogation for up to 90 days. Also under Section 78, a judge of the Military Court of Appeals has the power to extend this 90 day period to a further period of up to three months.

1994, Jaffa, Ziv Koren

The Palestinian under arrest participated in riots that broke out in Jaffa following the massacre that Baruch Goldstein carried out in Hebron. The policemen try to get the detainee into the police car in a show of violence: holding him by the handcuffs, a club at his neck and gripping his ear so that any unnecessary movement might rip it off.



The Definition of Palestinian Prisoners in Israeli Prisons as “Security Prisoners” – Security Semantics for Camouflaging Political Practice

Abeer Baker

What are we dealing with here? With a definition? Can this or that definition do anything to add or detract from the prisoners’ conditions of confinement, or to release those we seek to release? The answer is: Yes! The definition we are demanding is a political definition and not a legal one, and not only a theoretical position of principle derives from it, but also a politically practical one. (Walid Daka, Gilboa Prison, 2005)¹

Introduction

Prisoners incarcerated in Israel are classified in two categories: “criminal” prisoners and “security” prisoners. The commands and directives of the Israel Prison Service (IPS) do not define a “criminal” prisoner, but they do define a “security” prisoner.² In practice, most of the prisoners defined as “security” prisoners are Palestinians, but there is a very small number of Jewish prisoners who are defined as such.

The determination that a particular prisoner is considered a “security” prisoner is the result of an internal administrative decision by the IPS and not as a result of a particular legislative order. In time, this definition has become a code of identification for Palestinian prisoners³ in general and not only *vis-à-vis* the IPS or the law enforcement authorities.

In this article, I argue that the definition of these prisoners as “security” prisoners – which I call “collectivization” – is problematic at the constitutional level and at the practical level. This definition, applied in a blind, categorical manner without distinction, transforms thousands of Palestinians imprisoned today in Israel into a single group that poses, as such, an identical level of danger

which justifies their stricter living conditions and supervision, and also the reduction of their prospects of early release. In contrast to the general approach towards prisoners, which is based on an individual assessment of a person and the extent of danger he or she presents, the attitude of the State of Israel toward the “security” prisoners is based on their group affiliation. In addition, the blurring of a prisoner’s personal characteristics by attaching to him or her the “security” definition not only violates the prisoner’s rights as an individual, but also denies his or her political existence and conceals the background and reality behind the imprisonment. As I will demonstrate, this collectivized approach is also reflected in the courtroom.

The same approach is not applied to Jewish prisoners categorized as “security” prisoners. Israel’s approach toward these prisoners is based on their characteristics as individuals, and not necessarily on their security classification within the prison. This attitude is not the result of a particular policy, but it is indirectly anchored in the directives of the IPS. In order to demonstrate how deeply rooted this attitude is – both in practice and in the written directives – I will first analyze the legal aspects of the definition of “security” prisoner and point out the practical ramifications of this definition and the discrimination it creates. I will then describe the collective lifestyle of Palestinian prisoners and focus on the connection between this lifestyle and the way in which the prisoners view themselves compared to the way in which they are viewed by the prison system and the courts.

Who is a “Security” Prisoner?

A “security” prisoner is defined as “A prisoner who was convicted and sentenced for committing a crime, or who is imprisoned on suspicion of committing a crime, which due to its nature or circumstances was defined as a security offense or whose motive was nationalistic.”⁴ This definition is grounded in the internal directives of the IPS and is not a normative directive anchored in primary legislation.

The IPS does not deny the fact that the classification of prisoners as “security” prisoners is intended, *inter alia*, “to make it easier to properly manage the prison facilities by holding these groups separately.”⁵ It is not clear which *groups* are referred to here, since the classification turns these prisoners into one, single group. The IPS explains the rationale behind this collective classification as follows:

Prisoners sentenced for crimes against state security usually have real potential for endangering the security of the state, in general, and the order and discipline in the prisons in particular – and this in light of the type of offense they committed, their past, their motives and their involvement in activity against the security of the state.

Most of these prisoners are also connected to terror organizations and this connection poses special dangers to order and discipline in the prison, as well as to the security of the state. The anticipated security threat from the ‘security’ prisoners requires that they be confined separately from criminal prisoners and be subjected to special restrictions in all things related to connection with the outside. This includes issues such as furloughs, visits, telephone calls and conjugal visits.⁶

By means of this general explanation, thousands of Palestinian prisoners classified as “security” prisoners are assigned an identical level of risk. A fourteen-year-old boy suspected

of throwing a Molotov cocktail that did not explode is regarded as equally dangerous as a forty-year-old man who commanded an armed cell that carried out attacks. Similarly, members of the Islamic Movement suspected of economic crimes and of forging economic ties with Palestinian organizations defined as hostile are regarded as threatening state security to such an extent that they are prevented from having physical contact with their children during visits to the prison,⁷ in the same way that combatants caught in the midst of active fighting are. And again, a prisoner sentenced twenty years ago for being a member of an armed cell that killed a soldier is considered to pose the same level of security risk as a prisoner who very recently committed a murder.

Ramifications of the Definition and its Blanket Application to Palestinian Prisoners

According to the directives of the IPS Commission, the assignment of the “security” definition to particular prisoners is ostensibly supposed to influence the IPS’s approach to handling these prisoners and detainees only with regard to designated issues pertaining to contacts with the world outside of the prison, as follows:⁸

1. Determining in which prison or in which prison-wing the prisoner will serve his sentence;
2. Granting furloughs;
3. Making telephone calls from the prison;
4. Making home visits under guard;
5. Regular reporting to the General Security Services (GSS) or police prior to completing two-thirds of the prison term in order to formulate a recommendation for the State Prosecutor’s Office.

It should be emphasized that these five items constitute only a partial list of the things that Palestinian prisoners are automatically denied because of their “security” classification. It is possible to enumerate a long list of additional violations of many other rights, but for the sake of brevity, I will not do so here.⁹

I will focus instead on those things that derive from the IPS Commission’s directive quoted above, and their *de facto* significance. The directive creates a sweeping prohibition that prevents prisoners classified as “security” prisoners from using the telephone and going on furloughs. The prohibition even blocks them from petitioning for early release from prison. Nonetheless, two exceptions were made to this rule, as will be discussed in detail below. A reading of the exceptions indicates, ostensibly, that they are based on an individualized conception that enables a person to enjoy such rights on the basis of his or her personal record. However, a thorough examination of these exceptions reveals that this individualized approach does not apply to Palestinian prisoners.

Exception (1): Non-affiliation with a Hostile Organization¹⁰

One of the exceptions that allow someone classified as a “security” prisoner to avoid restrictions is if the prisoner has not been a member of a “hostile organization” and has not assisted such an organization in committing a crime, and where in the GSS’s assessment state security will not be harmed if special restrictions are not imposed on him or her.

A “hostile organization” for the purposes of this paragraph is one of the following organizations: Hamas, the Islamic Jihad, the Popular Front for the Liberation of Palestine, the Democratic Front for the Liberation of Palestine (Hawatmah), Hezbollah, Fatah (Abu Mousa), the Popular Front for the

Liberation of Palestine – General Command (Jibril), the Abu Nidal organization, and Osama bin Laden’s organization.¹¹

Reading this exception, one could get the impression that this directive expresses an individual approach to the prisoner, based on an assessment of the level of his individual threat, despite his or her classification as a “security” prisoner. However, this individualized approach does not apply to the overwhelming majority of Palestinian prisoners classified as “security” prisoners. My contention is that this exception mainly serves Jewish prisoners classified as “security” prisoners.¹²

Firstly, no Jewish organization is listed among the hostile organizations defined in the IPS Commission’s directive, although history has demonstrated that there are Jewish organizations that advocate harming Arabs solely because they are Arabs, such as the Jewish Underground or the Kach Movement.¹³ Thus, this exception automatically applies to any Jewish prisoner classified as a “security prisoner,” whether he belongs to an organization that advocates the use of violence or not and regardless of the severity of any such organization’s activities. In other words, the approach toward Jewish “security” prisoners is always individualized because the exception that expresses an individualized approach always applies to such prisoners. The application of this exception dramatically eases the restrictions imposed on “security” prisoners. Consequently, the Jewish “security” prisoner will always enjoy the easing of restrictions, regardless of his organizational affiliation, as opposed to a Palestinian, whose organizational affiliation in almost all cases will preclude the easing of restrictions.

Secondly, in practice this exception can be applied to very few Palestinian prisoners. Practical experience teaches that the overwhelming majority of Palestinian prisoners are held in Israeli prisons on the charge of belonging to a “hostile organization”, in addition to other offenses. It was not possible to obtain updated figures for the number of Palestinian prisoners who are being imprisoned at least in part because of organizational affiliation. An indication of the small percentage of prisoners whose organizational affiliation is not defined can, however, be found in data presented in one of the IPS’s publications.¹⁴ According to this data, among the 3,167 Palestinian “security” prisoners sentenced for crimes that the IPS describes as involving “blood on the hands” (66% of all “security” prisoners) and who were confined in prison in 2005, only 101 were not recorded as not belonging to a “hostile organization”. The publication cited here does not address affiliations of the group of prisoners who do not have “blood on their hands.”

The significance of the aforementioned exception should not be understated. As a result of its application, Jewish “security” prisoners have received a significant easing of their terms of confinement and have been able to maintain contact with the outside world. An example is the Israeli Jewish prisoner Yigal Amir, who was convicted of assassinating former Israeli Prime Minister Yitzhak Rabin. Amir is classified in prison as a “security” prisoner. As such, and as with thousands of Palestinian prisoners, there is supposed to be a glass partition separating him from his family during visits.¹⁵ However, the fact that the IPS considers him to have no organizational affiliation enables him, according to the IPS Commission’s directive, to receive open contact visits.¹⁶ This prisoner, unlike all of the

other “security” prisoners, is also granted the right to speak with his family on a daily basis without disruption. The “non-affiliation” exception also helped him to fulfill his right to conjugal visits at the prison.¹⁷ Initially, Amir was denied the right to parenthood through conjugal visits due to concerns over state security, but the IPS later allowed him to father babies through *in vitro* fertilization.¹⁸ The security argument had suddenly vanished. This process is sufficient to demonstrate the individualized approach to this prisoner: despite the fact that he is defined as a “security” prisoner, the IPS examined him in accordance with updated assessments of risk, which can of course change.

Similarly, Israeli Jewish prisoner Ami Popper (who murdered seven Arab laborers in 1990) received many privileges in the terms of his confinement in comparison to other “security” prisoners. Popper was given the right to marry while in prison and to receive conjugal visits, through which he fathered three children. Popper even receives furloughs¹⁹ and is in constant contact with his family by telephone.

The conclusion is that this exception violates the right to equality, because as it is applied it discriminates based on national belonging, whether intentionally or otherwise.²⁰ This directive is unconstitutional if only because a constitutional right can only be violated if this violation is grounded in primary legislation; in this case, the violation of the prisoners’ constitutional right to equality is grounded only in an administrative order.²¹

Exception (2): Affiliation with a Hostile Organization after Serving a Third or Ten Years of a Sentence

The second exception in the IPS Commission’s directive,²² which also is ostensibly based on

an individualized approach to the extent of danger posed by a prisoner, stipulates that it is possible to refrain from imposing certain restrictions on a "security" prisoner, even if he or she has been a member of a "hostile organization" or aided a "hostile organization" to commit a crime, on two conditions. The first is that the prisoner has served a third of his or her sentence or ten years of it, whichever comes first. The second is that GSS has determined that the prisoner has severed all contact, direct and indirect, with the aforementioned organization and its members. The GSS is supposed to affirm thereby that it believes that state security would not be jeopardized by refraining from imposing special restrictions on the prisoner.

Theoretically, the significance of this exception, at best, is that the individualized approach toward a "security" prisoner who belonged to a hostile organization would apply only after serving a third or ten years of his or her sentence. In reality, almost no Palestinian prisoner has received particular privileges as a result of this exception.²³

The classification of the prisoners as "security" prisoners continues to overshadow any of their legitimate demands in prison, and the approach toward them continues to be collective and not individual. To illustrate this, it is sufficient to note that by the end of 2006 there were about 424 Palestinian prisoners who had been imprisoned for over ten years.²⁴ However, to the best of my knowledge there has not been any case so far in which these prisoners have received significant easements, such as conjugal visits, open visits on a regular basis, or daily telephone use. By contrast, some Jewish prisoners who were convicted of murdering Arabs with nationalistic motives were not only granted significant easements in prison, but were even released before serving

a third or ten years of their sentence.

In a report written by prisoner Mukhles Bural, ²⁵ a Palestinian citizen of Israel, he conducted a comparison that indicates that unlike Jewish prisoners who are citizens of the state and perpetrated acts against Arabs based on ideological motives, Palestinian prisoners who are citizens of the state have yet to receive any real commutation of their sentence or early release. For example, Danny Eisman, Michal Hillel and Gil Fox were convicted of murdering a taxi driver, Khamis Tutanji, a Palestinian resident of Israel, and were sentenced to life in prison. Tutanji's national identity was the motive of the crime of murder.²⁶ All three convicts were released less than a decade after committing the murder.

In 1993, Yoram Skolnik murdered an Arab in cold blood who was detained and handcuffed. He was sentenced to life in prison. His sentence was commuted several times by the president of the state and he was released after serving seven years.²⁷

Zeev Wolf and Gershon Hershkowitz, activists in the "Kahane Chai" movement, were sentenced in July 1993 to ten years' imprisonment for throwing a hand grenade into the butchers' market in East Jerusalem. The act was committed in revenge for the murder of the movement's leader, Meir Kahane. Both were convicted of causing the death of an Arab merchant and of injuring eight others. In 1997, less than four years after their conviction, then-president Ezer Weizman pardoned them and they were released from prison.²⁸

By contrast, two Palestinian prisoners, Muhammad Mansur Ziadeh and Mukhlis Bural, who are citizens of the state, were sentenced in 1987 to life in prison for throwing a hand grenade at a bus. The grenade did not explode and no passengers were hurt. Today,

twenty years later, the two prisoners are still incarcerated. Their sentence was recently commuted to forty years. This means that they are expected to be released after another twenty years, when they will both be in their seventies. Hafez Kondus, another Palestinian citizen of Israel, was sentenced to twenty-eight years imprisonment for tossing a grenade at the home of the Director of the Islamic *Waqf* because of the latter's intention to sell an Islamic cemetery to an Israeli construction company. Kondus has so far served over twenty-two years in prison and the parole board refused to release him after completing two-thirds of his term.

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Prisoner Walid Daka is a Palestinian citizen of Israel and resident of the city of Baqa al-Gharbiyeh. In 1984 Daka was sentenced to life in prison for being a member of a cell that abducted and murdered an Israeli soldier. So far, he has been in prison for over twenty years; his sentence was not commuted and a request for clemency submitted to the Chief of Staff of the Israeli military was rejected.

Thus, the exceptions defined by the IPS, which include conditions and criteria for granting privileges to "security" prisoners, were only designed for Jewish prisoners, and maintain the most severe conditions for Palestinian prisoners classified as "security" prisoners. This conclusion derives, as we have seen, from the interpretation of these exceptions, as well as from the way in which they are implemented in practice.

Collective Life in Prison – Danger or Democracy?

Until now we have discussed the legal difficulties associated with defining prisoners as "security" prisoners and the nationality-based discrimination it entails. The wording of the definition in the IPS's directives reflects

a collective approach toward Palestinian prisoners. However, the legal definition is not the only component on which the collective approach to prisoners is based. Another factor behind the IPS's collective attitude toward Palestinian "security" prisoners pertains to the prisoners' way of life inside the prison. The solidarity of Palestinian prisoners is interpreted by the Palestinian side as a symbol of democracy; from the perspective of the Israeli legal system, by contrast, it is regarded as a symbol of danger and as a security threat.

The Organization of Palestinian Prisoners within the Prisons from the Palestinian Perspective

Palestinian prisoners' way of life inside the prisons and their approach toward each other is different from that of other prisoners. A primary characteristic of their way of life is their collective outlook regarding the fact of their incarceration and the political reality that brought them to spend many years, if not their entire lifetimes, behind bars. This collective approach is expressed, for example, in managing a joint bank account for all of the prisoners and allocating a uniform sum to each prisoner; in maintaining unique rules of discipline, while preserving a high level of norms and values that include, for example, shunning prisoners convicted of crimes involving drugs, sex or alcohol; and in defining a mechanism for decision-making based primarily on cooperation. In the decision-making mechanisms, emphasis is placed on exchanging ideas and views, and in choosing the option of dialogue as a solution for disputed issues.

Despite the multiplicity of political factions to which the prisoners belong and the various disagreements liable to erupt as a result, the prisoners succeed in achieving cooperation

between all of the factions in the prison. The cooperation is facilitated by a mechanism through which decisions are made by representatives elected by the prisoners. In addition to the elected representatives, one can also find an institutional allocation in the prison. This is expressed mainly in the election of various committees, each responsible for handling a particular subject.²⁹ This organization sets rules and internal lists that define life within the prison cell, which includes everything from sleeping arrangements on the floor if necessary, quiet time in the cell, to television viewing.³⁰

With regard to relations with the prison administration, the prisoners fought to receive permission to elect a representative in each prison to serve as a contact to liaise between the prisoners and the prison authorities. In 1984 and 1986,³¹ the Palestinian prisoners initiated a general hunger strike to demand recognition for their representatives as spokesmen. In the wake of these hunger strikes, the prisoners succeeded in institutionalizing the role of the spokesman, and annual elections are held in which prisoners compete to serve as spokesman for their prison wing or the entire prison. The spokesman's role is to address the everyday problems of the prisoners and coordinate communication with the prison administration. Today, the status of the spokesman is even defined in the directives of the IPS Commission.³²

The difficult conditions of incarceration impelled the prisoners to work together to formulate strategies for their struggle against the prison authorities, out of collective rather than narrow, personal interests. The management of general hunger strikes is a central and salient characteristic of their shared struggles to improve their living conditions, for the release of prisoners or an expression of

identity with a particular political idea. Sometimes a hunger strike is declared as an expression of protest. Not infrequently, general hunger strikes have led to an improvement in the living conditions of Palestinian prisoners.³³

It would be natural to assume that relationships among Palestinian prisoners have also been accompanied by disagreements, disputes and rifts between the factions. Internal activities in the past were accompanied by competition and confrontation, which sometimes became violent.³⁴ However, these confrontations diminished over time, apparently due to the increased severity of the conditions of confinement. The success of the prisoners' struggles has influenced the development of the cultural movement and social action in the prison. The internal organization and cooperative ties between the prisoners have preserved the conciliation and mutual recognition of each of the factions, despite their ideological differences. According to Khaled al-Hindi, a Palestinian researcher who has himself been a prisoner, the way in which the prisoners worked to build their institutions within the prisons, their adherence to the norms they set, and their decisions to implement democratic electoral processes – which took place as scheduled – all provides an important indication of the strengthening of democratic values among the Palestinian factions. In his view, the prisoners have reached a higher level of democracy in their organization within the prison than any of the Palestinian political groups outside of the prison, from the PLO to the Muslim factions.³⁵ However, the democratic nature of the organization of Palestinian prisoners within the prisons has been interpreted by the state authorities, including the IPS, the State Prosecutor's Office, the courts and the legislature, in an entirely different way.

The Organization of Palestinian Prisoners Within the Prisons from an Israeli Perspective

Prisoner Muhammad Dahoud Darwish appealed to the Supreme Court³⁶ against the IPS and complained about many violations of his rights, including the IPS's refusal to provide him with a bed. The IPS argued before the court that a bed can be used by prisoners as a "dangerous weapon of destruction; and while this applies to any prisoner, it does even more so to security prisoners."³⁷ It was demonstrated to the court that prisoners in general – and not necessarily the "security" prisoners – use beds in an abusive way. However, the IPS decided to prevent the "security" prisoners from using a bed, while the other prisoners' right to a bed was recognized without exception.³⁸

The Supreme Court justices in 1980 in *Darwish* were divided over the question of whether or not a "security" prisoner has an inherent right to receive a bed. In the minority opinion, Justice Haim Cohen argued that a prisoner's request for a bed should be approved and that the IPS's concerns about the abuse of beds supplied to prisoners do not justify descending below minimum standards for the treatment of prisoners. Justice Cohen concluded his opinion with the following words: "*If we treat them as human beings, there is hope that they will also learn to act like human beings.*"³⁹ Justices Yehuda Kahan and Menachem Alon rejected the prisoner's appeal and accepted the position of the IPS.

For the purposes of the article, there is particular importance in the opinion of Justice Kahan, who addressed Darwish's argument that he was discriminated against vis-à-vis criminal prisoners who are not classified as "security" prisoners, because some criminal prisoners are violent people who have abused parts of beds or could do so, but have

nevertheless not been denied the right to a bed. Justice Kahan recognizes that this is indeed a case of discrimination, but explains that it is not invalid discrimination because he accepted the IPS's position. According to this position, this discrimination is justified because:

The security prisoners are an organized group that operates as a uniform ideological group and in accordance with the directives of an organizational mechanism that the prisoners maintain in every prison, and which decides on the activity of the prisoners, while imposing severe discipline and means of punishment that can culminate in the physical extermination of those who refuse [their orders]. The affidavit states, inter alia, that the security prisoners go to work often and conduct other collective activities indicative of discipline and leadership that is capable of imposing such discipline. It is also stated in the affidavit that security prisoners receive instructions and directives for action from various terror organizations and execute those directives.⁴⁰

We see here how the collective life of the Palestinian prisoners within the prison is perceived by the prison authorities. The organization of the prisoners and their subordination to their leadership and rules of discipline are seen by the IPS, with the backing of the Supreme Court, exclusively from the perspective of danger and violence. Darwish's argument – that he is not a violent prisoner and therefore poses no danger of abusing the bed – was not challenged by the IPS or by the court, but at the same time this argument did not constitute a sufficient reason for consenting to his request. Darwish's classification as a "security" prisoner and as a prisoner affiliated with a group that maintains an independent organization within the prison – without any connection to his individual dangerousness or the probability that he would make ill use of

the bed – is what prevented him from receiving a bed on which to lie.

In fact, by creating a separate group of prisoners, bearing the name “security prisoners,” and attaching patterns of collective behavior to that group, the IPS succeeded in convincing the court that what is relevant when discussing a prisoner’s array of rights is not the prisoner’s personal characteristics and behavior within the prison, but rather his or her group affiliation. Justice Kahan attempted to explain this approach by arguing that the self-organization of “security” prisoners leads to hostility being expressed towards the government and that this is sufficient to justify the adoption of severe measures against them. In taking this approach, the court rejected any other dimension characterizing these prisoners, preferring to view them as inanimate objects lacking personal characteristic. Hostility to the State of Israel is the only dimension that the court saw in Darwish, without relating to his other dimensions as a person entitled to be imprisoned in minimal conditions of dignity. The words of Justice Kahan at the conclusion of his opinion demonstrate this distorted and one-dimensional view, which borders on dehumanization, toward Palestinian prisoners:

My honorable colleague expresses hope that we will awaken human attributes in security prisoners – “if we act like human beings, there is hope that they will also learn to act like human beings.” I doubt whether we can “win” the hearts of security prisoners through various improvements in prison conditions. According to life experience, particularly in the case of prisoners who are guided by ideological, national motives, I fear that this is a false hope.⁴¹

As noted, this approach not only characterizes the court’s attitude, but also applies to state authorities in general, and finds expression in

the directives of secondary legislation. Regulation 22 of the Criminal Procedure Law⁴² explicitly stipulates a series of restrictions that erode the rights of any prisoner suspected of having committed a security offense. According to this regulation, in every detention cell there should be a table, chairs and shelves for storing the personal items, and there should be no more than four beds. However, a cell in which detainees suspected of security offenses are held does not contain any of these items, including beds.⁴³ Regulation 4 of this law states that the prison cell should be painted at least twice a year and that it should be disinfected and sprayed with insecticide at least once a year. However, the cells of “security” prisoner are painted at least once a year only and there is no directive requiring any disinfection or pest control in the cell.⁴⁴

Another restriction is the denial of the right of “security” prisoners to use the telephone and to have a daily walk, while criminal prisoners have acquired these rights by law.⁴⁵ The interesting point in this regulation is that in the case of criminal prisoners, the legislature took pains to adhere strictly to the principle that any violation of a prisoner’s rights should be proportionate, for a defined period of time, and accompanied by a written explanation. The regulation stipulates, for example, that sending a detainee to a cell that lacks a bathroom requires an explicit and written explanation,⁴⁶ and that denying certain prisoners the right to a daily walk should only be done for a limited period of time, for purposes of interrogation and with a written explanation for exceptions.⁴⁷ The logic guiding the wording of this regulation as it applies to criminal prisoners is that, as a rule, the prisoners should be allowed to fully enjoy all of their rights and that the rights of particular prisoners can be limited only in exceptional

circumstances, in accordance with the need, for a defined period of time, and without affecting other prisoners' abilities to exercise their rights. This logic is not applied to detainees suspected of having committed security offenses. According to Regulation 22, a suspicion of the commission of a security offense is sufficient to justify a sweeping violation against the rights of an entire population of detainees in a categorical way, without making any distinctions between them.⁴⁸

The Politics and De-Politicization that Hides Behind the Semantics

The definition of Palestinian prisoners as "security" prisoners has become a tool used by the state authorities to promote an ideological outlook that regards a Palestinian, as such, as an existential threat lacking any humanity or political existence, and whose only place is behind walls and fences.⁴⁹ The same outlook has served as the basis for all of the expressions of collective punishment imposed upon Palestinians, ranging from the family unification between Palestinians from the OPT married to Palestinian citizens of the state in Israel⁵⁰ and the attempt to prevent them from receiving compensation for damages caused by the Israel security forces,⁵¹ to confinement in their homes and a sweeping prohibition on movement, even for the purposes of studies and acquiring higher education.⁵² This collective punishment is based on a political and ideological stance that regards Palestinians as inanimate objects devoid of human characteristics.⁵³

Some view the term "security" prisoner as a means of de-politicizing the prisoners' actions, of blurring their political aspirations. According to Dr. Anat Matar, the term "security" erases the prisoners as subjects and

turns them into objects, like "a falling wall, like a burning roof, like a sling-short or knife or fingernails,"⁵⁴ which can constitute a security threat against which we must defend our lives. A subject, on the other hand, is always political. In her view, through the application of this label the entire Palestinian struggle is denied and Palestinian political existence becomes a dangerous object for the sole subject in the arena.⁵⁵ Many believe that the demand of Palestinian prisoners, and their brethren, to define them as "political" and not "security" prisoners derives from the desire to highlight the national and ideological motives behind the actions attributed to them. In an illuminating explanation, Walid Daka argues that the desire to be labeled as a "political" prisoner rather than a "security" prisoner is not at all related to the political motive behind the prisoners' actions or their failures. In his view, the political element in the attitude toward these prisoners is built into the definition "security," which seeks to conceal a discriminatory and racist approach toward Palestinian prisoners and to make an ugly reality look less unpleasant.⁵⁶

Summary

The Israel Prison Service is entitled, like any administrative authority, to conduct its administrative affairs as it sees fit, on condition that matters are conducted with transparency, in good faith, without extraneous considerations and while maintaining an equal approach toward all prisoners, without distinction as to religion, race, gender or nationality. This article does not express a view regarding the need to categorize prisoners into subgroups. I will suffice by saying that even if the management needs of the prison institutions require dividing the prisoners by particular definitions, these definitions should

be based on clear and convincing criteria designed to serve administrative needs only, while preserving the dignity and rights of the prisoners to a maximum extent. The attempt to justify the definition of prisoners as "security" prisoners on the basis of administrative needs is disingenuous, to put it mildly. A thorough examination of this definition reveals that it is primarily designed to violate the rights of Palestinian prisoners defined as "security" prisoners, while at the same time providing benefits to Jewish prisoners also defined as "security" prisoners. This objective, in part, is not evident to all, but the reality and everyday practice demonstrate it. The discriminatory and racist attitude at the base of this definition comes to serve a political, ideological agenda of concealing the dimensions of the Palestinian individual as a person, while portraying the democratic characteristics he expresses in conducting his life in the prison as no more than a security threat.

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End Notes

- 1 Walid Daka, "Security Prisoners or Political Prisoners," *Adalah's Newsletter* Vol. 24, April 2006.
- 2 Since 1967, Israel has arrested nearly 700,000 Palestinians. The number of the Palestinian prisoners shortly before the outbreak of the second Intifada in October 2000, was approximately 1,150. With the outbreak of the second Intifada in 2000 and in its wake, the number of Palestinian prisoners rose sharply. Data from the Israel Prison Service indicates that by the end of October 2006 the total number of Arab prisoners – Palestinians and citizens of Arab states – classified as "security" prisoners was approximately 9,140. Among them were 289 Palestinian citizens of Israel. The Palestinian National Center for Information reports that since 2000 Israel has arrested around 5,000 Palestinian children (below the age of eighteen). As of mid-August 2006, nearly 335 Palestinian children were still in prison. The number of Palestinian women arrested since October 2000 is 500. In October 2006, there were still over 100 women in prison. See, <http://www.pnic.gov.ps>; <http://www.addameer.org>; <http://www.mod.gov.ps> and the IPS's letter of response to Adalah: The Legal Center for Arab Minority Rights in Israel, of 30 October 2006.
- 3 In this article, the term "Palestinian prisoners" refers solely to prisoners classified as "security" prisoners.
- 4 Paragraph 1(A) of the IPS Commission directive of 4 May 2000.
- 5 *Id.*
- 6 Paragraph 1(B) of the IPS Commission directive of 3 February 2000.
- 7 See the appeal of Sheikh Raed Salah, the head of the northern branch of the Islamic Movement, seeking permission to have physical contact with his infant child during a prison visit. PPA 436/04, *Sheikh Raed Salah Mahajneh v. The Israel Prison Service* (not yet published) delivered on 1 August 2004. The appeal was rejected.
- 8 Paragraph 1(B) of the IPS Commission's directive, *supra* note 4.
- 9 Besides the restrictions pertaining to the use of telephones and furloughs, there are many additional limitations that are difficult to cover in this article, such as restrictions relating to the right to visitation, conjugal visits, education, social and medical treatment, and early release. However, I will emphasize that the very fact that these restrictions on fundamental constitutional rights are based on an administrative directive constitutes a basic constitutional flaw; such restrictions should only be instituted via or in accordance with primary legislation. However, rectifying this constitutional flaw via primary legislation would not lessen its violation of prisoners' rights; it would only make it harder to impose judicial review on these restrictions were they anchored in law.
- 10 Para. 1(C) 1 and 2 of the IPS Commission's directive of 3 February 2000.
- 11 *Id.* para. 1(C) 3. It should be noted that this article was amended in February 2007. The definition of a "hostile organization" according to the new amendment is now: "Every organization that has been declared a terrorist organization according to the Prevention of Terrorism Ordinance – 1948 or has been declared an illegal association according to the Defense (Emergency) Regulations – 1945, or against which a confiscation order has been issued according to the abovementioned regulation. An updated list of hostile organizations is held by the legal advisor to the IPS." It should be noted that the coinciding of the publication of the above amendment with the publication of this article has made it more difficult to examine the consequences of the amendment for the rights of "security prisoners" in practice. In addition, the author's attempts to obtain the list of "hostile organizations" from the legal advisor to the IPS were unsuccessful. Despite the new amendment, the contents of this article remain valid up to the date on which the new amendment comes into force, and may remain relevant thereafter, until the effects of the new amendment become clear.
- 12 IPS data indicates that there were twelve such prisoners as of 30 October 2006.
- 13 For information on Jewish organizations declared to be "terror" organizations see the background document entitled, "Political Violence by Jews in Israel," the Knesset Research and Information Center, August 2005 (Hebrew). See: <http://www.knesset.gov.il/mmm/doc.asp?doc=m01268&type=doc>.
- 14 Ayelet Verzer, *Security Prisoners Incarcerated in the Israel Prison Service*, (Israel Prison Service, Spokesperson's Office, 2005) at 8 (hereinafter: the "IPS report") (Hebrew).
- 15 Para. 14(J) of the IPS Commission's directive, *supra* note 6.
- 16 *Id.*
- 17 *Id.* para. 15.
- 18 See PPA (Tel Aviv District Court) 4714/04 *Yigal Amir v. Israel Prison Service* (not yet published) delivered on 7 March 2005; H.C. 2245/06 *MK Neta Dobrin v. The*

- Israel Prison Service* (not yet published) delivered on 13 June 2006.
- 19 According to statements by the IPS, Popper had been released on furlough 125 times as of January 2007. See Yair Ettinger, "Ami Popper Drove Without a License in the Arava; His Wife and Child Were Killed in an Accident," *Haaretz*, 19 January 2007.
- 20 Regarding the "results test", see H.C. 7052/03, *Adalah v. The Minister of Interior* (not yet published) delivered on 14 May 2006; H.C. 11163/03, *The High Follow-up Committee for Arab Citizens of Israel v. The Prime Minister of Israel* (not yet published) delivered on 28 February 2006 (hereinafter: "Follow-up Committee ruling").
- 21 On the constitutional principle and the explicit violation according to law, see the Follow-up Committee ruling; and H.C. 1437/02, *The Association for Civil Rights in Israel v. The Minister of Public Security*, P.D. 58(2) 746.
- 22 Paragraph 1(C) and 2 of the IPS Commission's directive, supra note 6.
- 23 It should be noted that the only evidence of this exception's discriminatory nature is in its practical results. The data presented herein does not preclude the need for a comprehensive and empirical study to examine the extent of the application of this exception to Palestinian prisoners, if at all.
- 24 According to data from the Palestinian National Information Center: <http://www.pnic.gov.ps/arabic/social/prisoners/9-2006.html>.
- 25 See the report written by the prisoner Mukhlis Burgal, available at: www.kibush.co.il.
- 26 For details of the facts of this case, see Criminal Appeal 747/86, *Hillel v. The State of Israel*, P.D. 42(3) 447.
- 27 See, Mazal Mualem, "Yoram Shkolnik, Who Murdered a Palestinian, Will Be Released in About Two and a Half Years," *Haaretz*, 4 February 1999.
- 28 "Those Who Threw a Hand Grenade in the Butcher's Market to be Released; Sentences of Four Others Commuted," *Haaretz*, 5 October 1997.
- 29 Khalid al-Hindi, *The Democratic Practice of the Palestinian Prisoners' Movement* (Mowaten - The Palestinian Institute for the Study of Democracy, Ramallah: Palestine, 2000) at 134 (Arabic) (hereinafter: "al-Hindi").
- 30 The information is based on a memorandum by al-Jama'a al-Islamiya, which was distributed in the central Gaza prison, entitled "Document of Understandings" between Hamas and the Islamic Jihad on 11 June 1991. See "al-Hindi", supra note 29, at 146.
- 31 IPS report, supra note 14, at 16.
- 32 Para. 3 of the IPS Commission's directive, supra note 6.
- 33 IPS report, supra note 14, at 18.
- 34 Al-Hindi, supra note 29, at 145-146.
- 35 Id. at 185.
- 36 H.C. 221/80, *Muhammad Daboud Darwish v. The Israel Prison Service*, P.D. 35(1) 536.
- 37 Id. at 537.
- 38 The facts presented in the Darwish ruling are relevant to the year in which the ruling was made. Today, there is no directive preventing a sentenced prisoner from receiving a bed, just as there is no directive requiring the provision of a bed. However, during the interrogation stage, prisoners classified as "security" prisoners have no inherent right to a bed. In Israel, there is great shortage of beds for prisoners and this shortage is attributed to a lack of funds. See a ruling of principle on this matter, delivered 12 February 2007. H.C. 4634/04, *Physicians for Human Rights v. The Minister of Public Security* (not yet published).
- 39 *Darwish* ruling, at 541 (emphasis added).
- 40 Id. at 544. The court reiterated these words in Leave for Prison Appeal 1076/95, *The State of Israel v. Samir Kuntar*, P.D. 50(4) 492, at 500-501. The paragraph quoted above is the only support to which Judge David Bar-Ophir refers in his book, *Prisoners' Appeals*, in presenting the legal source of the different approach toward prisoners classified as "security" prisoners. See, David Bar-Ophir, *Prisoners' Appeals* (Perlstein-Ginossar, 2003) at 1-2 (Hebrew).
- 41 *Darwish* ruling, at 545.
- 42 The Criminal Procedures Law (Powers of Enforcement – Detention) (Conditions of Holding in Detention) (1997) (hereinafter: "Criminal Procedures Law"). On 19 December 2004, Adalah wrote to the minister of public security demanding to overturn this regulation as being unreasonable in an extreme way. The minister rejected Adalah's demand. The letter to the minister can be viewed at: <http://www.adalah.org/newsletter/eng/dec04/7.php>.
- 43 A detainee's right to a bed is anchored in Article 9 of the Criminal Procedures Law (Enforcement Powers –

Detention) (1996). But as part of the minister of public security's authority (under Article 11(4) of the aforementioned law) to restrict the rights of detainees suspected of security offenses, the minister stipulated in the regulation that, unlike a criminal prisoner, a security prisoner does not have a right to a bed. This stipulation is consistent with the spirit of the *Darwish* ruling cited above. Regarding the right to a bed, see also: Article 19 of the UN Standard Minimum Rules for the Treatment of Prisoners, 1955; H.C. 4634/04 *Physicians for Human Rights-Israel v. The Minister of Public Security* (not yet published) delivered on 12 February 2007; H.C. 5678/02, *Physicians for Human Rights-Israel v. The Minister of Public Security et al.* (delivered on 24 June 2003); H.C. 7082/97, 3910/99, *The Central Committee of the Israel Bar Association v. The Minister of Public Security et al.* (not yet published); H.C. 545/02, *Physicians for Human Rights-Israel v. The Minister of Public Security et al.* (not yet published).

- 44 Planning for the cell's construction began after 1997. See, Regulation 3(E) Paras. 1-4, and Regulation 4, 22 (1)(B) and 22(2) of the aforementioned regulations.
- 45 See Regulation 22(2)(B) 3 of the Criminal Procedure Law. For a complete list of all of the restrictions on detainees suspected of having committed security offenses, see Adalah's letter to the Minister of Internal Security of 19 December 2004: <http://www.adalah.org/newsletter/eng/dec04/7.php>.
- 46 See Regulation 7(2) of the Criminal Procedure Law.
- 47 See Regulation 9(C) of the Criminal Procedure Law.
- 48 On the importance of an individual evaluation as a guarantee of meeting the proportionality test for the violation of constitutional rights, see H.C. 5627/02 *Abmad Seif et al. v. The Government Press Office et al.* P.D. 58(5), 70; Chief Justice Barak's words in H.C. 6778/97, *The Association for Civil Rights in Israel v. The Minister of Public Security et al.*, P.D. 58(2) 358.
- 49 See Yitzhak Laor, "Let Them Die," *Haaretz*, 18 April 2004.
- 50 H.C. 7052/03, *Adalah v. The Minister of Interior* (not yet published) delivered on 14 May 2006.
- 51 H.C. 8276/05, *Adalah v. The Minister of Security* (not yet published) delivered on 12 December 2006.
- 52 H.C. 8242/06, *Susan Salameh v. The Commander of IDF Forces in the West Bank* (petition pending).
- 53 A good example of the collective punishment is the Israel Prison Service's decision to prevent Palestinian prisoners from having physical contact with their

children during prison visits. The contention was that in some cases the prisoners had tried to smuggle forbidden items via their children. As punishment for this, all of these prisoners were denied the right to approach their children. The IPS allowed the parents to have physical contact with their children only after a Supreme Court petition, and conditioned this on the submission of a written request by the prisoner to prove that he indeed seeks to be close to his or her children. Adalah opposed this approach and the IPS retracted its demand for the submission of a written request. See H.C. 7585/04, *Hakim Kana'aneh et al. v. The Israel Prison Service* (petition pending). On 2 March 2005, the Supreme Court issued a ruling that requires the IPS to explain the reasons for preventing physical contact between children and their prisoner parents. On the restrictions during visits in general, see Anat Bar Sela, "Forbidden Visits: The Violation of the Right to Family Visits of Palestinians Imprisoned in Israel," Information Sheet, *B'Tselem* (September 2006).

- 54 Anat Matar, "Objects or Subjects? Theoretical Comments on the De-Politicization of the Issue," *Adalah's Newsletter*, Vol. 35, April 2007.
55. Id.
56. Daka, supra note 1.

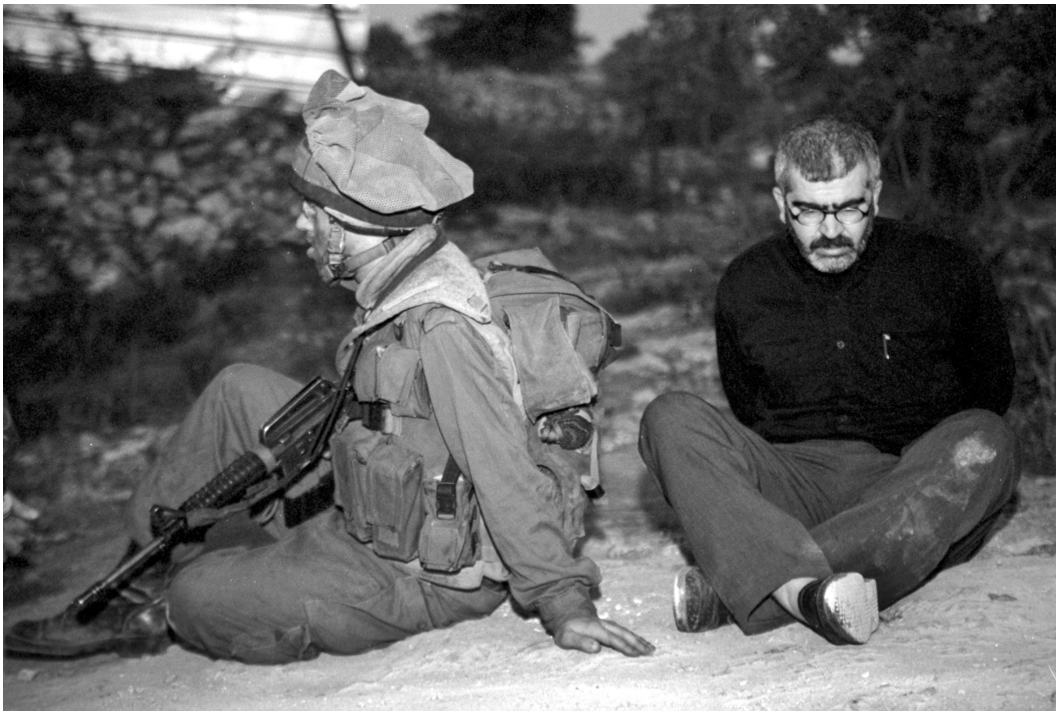
1996, Ramallah, Miki Kratsman

Many of those who until just a short while ago had thrown stones at the soldiers with him have tired and became spectators at a dangerous confrontation – one on one – between him and the soldier.



2002, Ramallah, Photographer's name confidential

Nighttime. Usually, at such proximity, the detainee is blindfolded. Since his hands are restrained, the soldier can just turn his back to him and avoid the Palestinian's gaze or what his own gaze might tell him.



The Expansion of Preventive Detention of Immigrants in America's "War on Terror"

Asli Ü Bâli

Farouk Abdel-Muhti, a Palestinian rights activist based in New York, was arrested without a warrant in his home at 6:30 a.m. on 26 April 2002.¹ Officers demanded to enter the apartment to question him about matters relating the attacks of September 11th, alleging that they were in possession of information concerning the existence of weapons or explosives in the apartment. However, once Farouk was detained, he was not questioned about September 11th and the premises were not searched. As with thousands of other such arrests, government officials falsely invoked September 11th in order to detain one more man of Middle Eastern origin on an immigration pretext.² The practice of the mass arrest and detention of men of Arab or Muslim background on pretexts of immigration has become the basis for a new system of administrative detention that is rapidly developing into what one commentator has called "American Gulags."³

In the immediate aftermath of September 11th, the United States government cast a wide dragnet to detain as many men of Middle Eastern or Muslim appearance living in the United States as possible. These arrests were most egregious in the New York area, but occurred throughout the country. Starting in January 2002, additional initiatives were introduced – first a "voluntary" interview program, followed by the Absconder Apprehension Initiative, NSEERS /Special Registration, and others – each of which generated new waves of arrests. By the end of 2004, nearly 20,000 men had been detained or deported as a result of immigration-enforcement initiatives adopted in the

aftermath of September 11th. In all of these immigration-based arrests, the government brought a total of only four terrorism-related charges, all of which were dismissed in 2004.⁴ While the pace of immigration enforcement initiatives related to September 11th slowed after 2004, the infrastructure for mass immigration-based arrest and detention was put in place to be redeployed whenever the government might next deem it expedient to round-up immigrant men pretextually.

The massive expansion of the system of immigration detention in the United States following September 11th marked the initiation of a scheme of preventive detention designed to evade constitutional prohibitions and generate a shadow legal system stripped of the basic procedural protections required under the rule of law. Rather than meeting the criminal justice system's "probable cause" requirements for detentions, the Attorney General preferred to invoke the pretext of minor technical immigration violations, which would not have resulted in detention prior to September 11th.

The relationship between this system of preventive detention and the normal criminal justice system is complementary.⁵ Where the criminal justice system would require proof beyond a reasonable doubt for conviction, the immigration detention system requires a lower standard of "clear and convincing evidence." Where criminal detention requires an individualized showing before a judicial officer that someone poses a risk to justify pre-conviction detention, the immigration system provides broad discretion to detain. Where the criminal system prohibits detention without

charge beyond forty-eight hours, administrative immigration detention can be prolonged without charge at the discretion of the Attorney General. Effectively, administrative immigration detention enables the Attorney General to bypass the rights of detainees by avoiding both evidentiary and procedural standards. The expansion of detention powers using the immigration rather than the criminal justice system enabled the Attorney General to place these detentions outside the realm of judicial review and within the purview of his own department's administrative discretion.⁶

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Administrative immigration detention provides the government with an alternative mechanism where regular channels of criminal justice – with such nuisances as the presumption of innocence and independent judicial review of detentions – prove too onerous for its purposes. Most of the post-September 11th detentions would have ended within forty-eight hours for lack of individualized evidence had they been brought under criminal law. Precisely to avoid this result, the Justice Department has misused immigration laws (and certain other laws, such as the material witness statute) to create a *de facto* preventive detention system where *de jure* preventive detention remains unconstitutional. The principal consequence has been an enhanced authority to detain individuals without affording a meaningful opportunity to challenge their detentions.

There are three complementary aspects of the post-September 11th policies adopted by the Bush administration: an expansion of the government's detention powers; a reduction in the rights and protections afforded to detainees; and a worsening of the conditions of detention. The first section of the article gives an overview of the expanded use of

powers of civil immigration detention and the construction of an administrative detention system holding an average of 22,000 people on any given day and over 200,000 people annually.⁷ The removal of basic procedural protections in the administrative detention system is considered in the following section. Next, the article turns to conditions of detention, and compares them to some of the scandals concerning American detention practices in Guantanamo Bay in Cuba, Iraq and Afghanistan. The striking similarity between standards at the extraterritorial detention centers that the United States has created since September 11th as part of its "global war on terror," and the detention conditions for the population of immigrant men detained within the United States suggests a deliberate policy of abusive practices rather than a coincidence of cruelty.

The principal focus of this article is the administrative detention system that has emerged in the United States since September 11th. The overview of that system in the first three sections also provides, however, a basis for comparison with the longer-standing use of administrative detention by Israel as a mechanism to control principally Palestinians from the Occupied Territory. An exhaustive comparison of the two systems is beyond the scope of this article. However, a summary comparison is sufficient to suggest the parallels in practices designed to circumvent the usual evidentiary standards, procedural protections and minimum detention standards afforded under the rule of law in democratic polities. While there are many significant differences between the American and Israeli uses and abuses of administrative detention, notably the context of belligerent occupation in the Israeli case, even a cursory comparison of the systems reveals the similarities in the policy ends served

by recourse to administrative detention, as discussed in the final section of this article.

Deprivations of Liberty ...

Within days of September 11th, the United States Department of Justice initiated a massive anti-terrorism offensive, which entailed sweeping arrests using ethnicity and religious identity as proxies for "suspicion"; neither terrorism-related information nor other criminal evidence formed a basis for detention. Rather, the majority of detentions were based on minor technical violations of immigration status. Within the first seven weeks after the attacks, over a thousand men had been caught up in this '9/11 dragnet.'⁸ While this first wave of arrests was carried out ostensibly under the general auspices of the September 11th investigation, subsequent detention initiatives were more narrowly tailored to focus on particular categories of predominantly Muslim or Arab immigrants, particularly at times when national security concerns were heightened.⁹

This section provides a brief glossary of the various mechanisms established to expand governmental powers of administrative detention beginning in 2001,¹⁰ along with a description of the effects of each new initiative.

A. The Absconder Apprehension Initiative: By late 2001, with the initial dragnet beginning to come under the scrutiny of civil rights groups, the Justice Department introduced a program designed to prioritize the detention/deportation of 6,000 men from Arab and Muslim countries.¹¹ These men were singled out from among the over 300,000 immigrants with outstanding deportation orders believed to be in the United States and treated as especially "suspect" not for any individualized reason, but on the basis of their national origin. The initiative targeted these men on the

grounds that their countries were thought to have a significant Al-Qaeda presence. The result was the detention of over 1,100 additional Arab and Muslim men by May 2003,¹² including Farouk Abdel-Muhti, mentioned above. The government has not claimed that any of these detained men were found to have an actual link to terrorism, and, while no additional information on "absconder" detentions has been published since 2003, the program has not been suspended as of 2007.

B. Material Witness Warrants: At least 50 individuals have been detained by the Justice Department through the use of "material witness" warrants since September 11th, 2001. Under federal law, an individual may be detained as a material witness if he or she has information material to a criminal proceeding and it would not otherwise be possible to elicit their testimony.¹³ This law was designed primarily for mafia cases in which witnesses were afraid to appear at hearings, and was never intended to authorize the prolonged detention of individuals. In the post-September 11th context, the law was used to preventively detain individuals who were neither witness to a crime nor expected to be brought before a hearing to provide testimony, but for whom no other detention pretext could be found because they were legally present in the country.

Use of the material witness statute enabled the government to expand its administrative detention powers to citizens, as no immigration pretext was required to hold individuals under the statute. Material witnesses were denied basic protections afforded by law and held under the harshest of conditions, often including solitary confinement, being held for twenty-three hours a day in lockdown, exposure to twenty-four hours of artificial

lighting a day, and shackling and subjection to cavity searches each time they were moved or permitted to leave their cells. Moreover, material witnesses are held without public information being available on their detention, often unable to contact lawyers and with their counsel subject to gag orders in instances where individuals are able to obtain legal representation. Further, the absence of a limitation on the duration of detention under the statute leaves those detained as material witnesses facing the serious prospect of indefinite detention.

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C. The FBI's Voluntary Interview Program: The government announced in December 2001 that it had identified 5,000 immigrant men for "voluntary interviews" with the FBI, and added another 3,000 men to the list in the following spring. It was not made clear whether the interviewees could be accompanied by legal counsel or what the consequences of declining a "voluntary interview" would be. The interviews involved questions ranging from personal finances, to religious affiliation, political beliefs and immigration status. The interviews were expanded in 2003 to cover Iraqi-born immigrants in the run-up to the American invasion and occupation of Iraq. The wartime interviews involved over 11,000 Iraqis with several dozen detained, but did not yield any terrorism-related information or arrests.¹⁴ The numbers of individuals detained and deported for their "voluntary" participation in the overall interview program is unknown.

D. NSEERS / Special Registration: During the summer of 2002, the Justice Department announced a program requiring foreign nationals from selected countries to undergo a process of registration, fingerprinting, photographing and interview in order to enter

or exit the United States. By the following spring, this initiative affected nationals from twenty-five countries, all of which (with the exception of North Korea) were Arab or predominantly Muslim.¹⁵ In addition to "registration" upon entering or exiting the country, nationals of these countries of sixteen years of age or above already present in the United States would have to register at immigration facilities. Failure to comply with this call-in registration requirement would result in immediate deportability. Immigrants' advocacy groups spent six months frantically trying to inform their communities of the new requirements and encourage compliance. Hundreds of arrests were made within the first weeks of the program. Ultimately, 13,000 of the over 80,000 men who complied found themselves facing deportation orders.¹⁶

E. Operations Tarmac, Flytrap and Gameday: In the fall of 2002, the government initiated three regionally-specific immigration enforcement operations, allegedly targeting prioritized illegal immigrants representing risks to national security. Operations Tarmac and Flytrap targeted illegal immigrants working in airports in Houston and Washington DC, and each yielded the detention of over 100 individuals, about whom no terrorism-related information was discovered. Operation Gameday involved a sweep of the San Diego area in advance of the 2003 American football Super Bowl championship and yielded dozens of detentions, again without terrorism-related leads or information.¹⁷

F. Operation Liberty Shield: Adopted just before the American attack on Iraq in March 2003, this operation was promoted as an initiative to "protect the homefront" during the war. It entailed the mandatory detention of all asylum-

seekers entering the United States,¹⁸ and another round of FBI interviews, targeting over 11,000 Iraqis and Iraqi-Americans,¹⁹ and leading to dozens of detentions.²⁰

With the escalation of tensions between the United States and Iran from 2005, reports periodically emerged that the United States may undertake another round of interviews, this time of individuals of Iranian origin living in the United States. While no official announcement of such a program has yet been made, reports have surfaced, particularly in California, which has the largest concentration of Iranians living in the United States, of isolated instances of requests for interviews. In light of heightened concerns over a confrontation between the United States and Iran, and given the many precedents of interview and detention initiatives over the last six years, particularly the wartime interviews of Iraqi-born immigrants discussed above, advocates of immigrants' rights are preparing for the possibility of a new wave of interviews and detentions.²¹

In total, the programs described briefly above have resulted in the administrative detention of thousands of Arab and Muslim immigrants in the United States since September 11th.²² The absence of any terrorism-related information, evidence, activities, or charges resulting from any of these initiatives notwithstanding, the government has sent a clear message to all Americans that its aggressive arrest and detention practices are designed to "secure the homeland." By virtue of the targeting of Arab and Muslim immigrants in almost all of these policies, the government also put the nation on notice that these groups pose a heightened risk to national security and are inherently suspect, reversing decades of progress in anti-discrimination laws prohibiting the use of ascriptive characteristics

like ethnicity, religion and national origin as a proxy for suspicion or guilt.

... Without Due Process of Law

The dizzying array of new initiatives designed to increase levels of immigration detention was exceeded by the acceleration of measures to restrict the rights of and reduce procedural protections for these detainees. Basic requirements of due process ranging from a presumption of innocence to the right to legal representation and hearings before an independent judiciary and the right to be released on bail would all potentially undermine the Justice Department's strategy of maximizing the numbers of Arab and Muslim men taken off the streets. As a result, Attorney General Ashcroft opted to engage in detentions under the supervision of administrative judges (who are part of the executive branch rather than an independent judiciary) and deny detainees the constitutional protections of due process provided by the criminal justice system. This section provides an overview of the various policies that were introduced to further restrict what little procedural protection might have been afforded to detainees in the immigration courts through regulatory changes made under the sole authority of the Attorney General.

An examination of the extent of the suspension of basic protections of due process in the post- September 11th system of administrative detention illustrates its role in supplementing criminal detention. The procedural protections afforded to criminal defendants under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States' Constitution include the rights to counsel; prompt access to trial by an independent court; a "probable cause" hearing within forty-eight hours of detention for judicial review of the

basis of the detention; a bond hearing; a public trial on the substantive charges; and to confront evidence. Those singled out for administrative detention are deprived of *all* of these constitutional protections by virtue of being detained outside the scope of the criminal justice system. Administrative detainees are also subjected to the uncertainty of prolonged, indefinite detention often under harsher conditions than those imposed on convicted criminals, even though they do not stand accused of any crime. Nor are these the collateral effects of the administrative detention system. Rather, the system appears to have been designed precisely for the purpose of supplementing the existing criminal justice system with the option of preventive detention affording few, if any, rights to detainees while imposing harsher conditions than those permitted under criminal law. The hallmarks of this system, reviewed below, include secrecy, obstruction of access to lawyers, a presumption of guilt, restrictions on administrative review of the basis for detention, and the possibility of deportation (or rendition) without due process of law.

Secrecy: Detentions, Evidence and Hearings

Perhaps the most striking hallmark of the Bush administration's conduct in its domestic "war on terror" was secrecy. In the case of immigration detention, this secrecy extended to conditions of detention, the evidence presented when (or if) detainees were brought before an administrative judge, and the conduct of the hearing itself. At each of these levels, the Bush administration undermined one of the key constitutional values on which the pre-September 11th American legal system was based: open and transparent governance under principles of democratic accountability.

As documented in a critical report released by the Department of Justice's own Inspector General on the treatment of the September 11th detainees, the government went to extraordinary lengths to limit information on the names of those detained, as well as the locations of their detention.²³ Although the identities of immigration detainees are traditionally a matter of public record, the Justice Department systematically refused to release the names of immigration detainees and material witnesses in the immediate aftermath of September 11th 2001. These measures exacerbated fears that the government was effectively "disappearing" individuals.²⁴

A new interim rule enabled the government to use secret evidence during immigration hearings in which no allegation of criminal or terrorist activity was involved.²⁵ In light of the absence of terrorism-related charges against any of the September 11th detainees, there is reason to believe that the use of secret evidence in immigration hearings is a sign that the government *did not* have sufficient evidence to charge individuals in an open hearing, rather than an indication of a national security-related basis for the secrecy.

Chief Immigration Judge Michael Creppy issued a memorandum in September 2001 allowing for certain immigration hearings to be held in secret for individuals deemed to be of "special interest" to the Attorney General.²⁶ The "special interest" designation, in turn, was often based on the nationality of the detainee, rather than any information particular to the detained individual. The arbitrariness of this designation is especially disturbing when juxtaposed against the serious implications of the designation – triggering both closure of hearings and the imposition of heightened clearance procedures, which amount to a presumption of guilt.

Obstruction of Access to Lawyers and Family Visits

The secrecy surrounding the September 11th detentions effectively served as an access barrier to detainees trying to alert their families to their whereabouts. For many detainees, the inability to communicate with their relatives often had the concomitant effect of the inability to find a lawyer. Technically detainees have the right to make telephone calls from detention facilities, both to contact their families and, crucially, to obtain legal representation. These rights were systematically violated in the case of the September 11th detainees. Without access to functioning telephones, provided with inaccurate lists of telephone numbers for *pro bono* legal services, and often permitted no more than one attempt at a telephone call per week, many detainees spent weeks, if not months, trying in vain to reach the outside world for legal assistance.

Presumption of Guilt: Detention without Charge, FBI "Hold" and "Clearance" Procedures

On 20 September 2001, the Attorney General issued an interim rule allowing immigrants to be detained without charge for an indefinite period of time in the event of an "emergency or other extraordinary circumstance."²⁷ The over 1,200 immigrants who were detained within three months of the attacks were subject to this interim rule. In his detailed report, the Inspector General found that there were serious delays in the charging of detainees.²⁸ The practice of detaining immigrants without charge remains in effect today, although the Department of Homeland Security issued guidelines in April 2004 to restrict to some degree the use of indefinite detention in response to criticism from the Office of the Inspector General.

The Attorney General's interim rule was

accompanied by another measure which, by design and effect, prolonged the detention of immigrants picked up after September 11th: "special interest" detainees were subjected to "FBI holds," whereby they could not be released from detention or deported until their record had been "cleared" of any link to terrorist activity by the FBI.²⁹ Since the basis for the "special interest" and "FBI hold" designations was often nothing more than national origin, these practices replaced the presumption of innocence for these detainees with a *presumption of guilt* until their records had been cleared. None of these FBI holds ultimately resulted in terrorism-related charges being filed.

The Absence of Meaningful Judicial Review

Another important element of the strategy of prolonged detention involved restricting the administrative review of the September 11th detentions. Firstly, the government adopted a policy of denying bond in all cases related to September 11th.³⁰ Secondly, it gave its own lawyers unilateral authority to override bond determinations made by immigration judges and to apply an "automatic stay" on the release of any September 11th detainee, thereby stripping immigration judges of the authority to release detainees being held without a basis.³¹ Thus, detentions that fall outside of the scope of independent judicial review and may only be reviewed by administrative courts, which are part of the executive branch (and hence under the authority of the Attorney General), are subjected to further procedural restrictions, with detainees denied a meaningful opportunity for administrative review of the basis of their detentions. These measures constitute clear violations of the substantive rights of immigrants to due process under the

Fifth Amendment, which extends its protection to all *persons* present in the United States (and is therefore not restricted to citizens). In a recently-issued decision, a federal court in California ruled that the "automatic stay" provisions created a serious risk of the erroneous deprivation of liberties, while impermissibly eliminating the discretionary authority of immigration judges.³² Whether or not this decision will withstand appellate review remains to be seen.

Renditions

Evidence is mounting that the United States has, under what it terms an "extraordinary rendition" program, abducted and detained individuals in foreign countries and "rendered" them to countries willing to interrogate and torture them. The fate of certain September 11th immigration detainees demonstrates the existence of a domestic analog to this system of extraordinary rendition.

Perhaps the most widely-reported rendition of an individual detained within the United States is that of Maher Arar, a Canadian citizen who was detained in the transit lounge at Kennedy International Airport in New York by immigration officials, despite holding a valid Canadian passport.³³ He was interrogated for over a week within the United States before being deported on around 7 October 2002 to Syria on a private flight, accompanied by American officials.³⁴ Arar has alleged that he was interrogated and tortured while being detained in Syria, before being ultimately released without charge on 6 October 2003, over a year after his initial detention in New York. Estimates of the numbers of individuals who have been subjected to "extraordinary rendition" put the figure at 150, without a breakdown of the numbers into those detained within the United States and those abducted

abroad.³⁵ It is known, however, that Arar was not the only individual detained within the United States to be "rendered" for torture abroad.³⁶

Conditions of Detention

Since the images filtered out of the Abu Ghraib prison in Iraq, it has become clear that the practices of torture used in Abu Ghraib were also systematically applied at other American detention facilities abroad.³⁷ What is perhaps less well known is the extent to which similar abuses have occurred to individuals being held in preventive administrative detention at facilities *within* the United States.

With 200,000 individuals held in immigration detention annually, administrative detention in the United States has become a sprawling system of immigration service processing centers, local jails, federal prisons and facilities owned and operated by private prison companies, operating at the margins of the law.³⁸ Minimum standards nominally exist for the conditions of immigration detention, but they have not been promulgated as regulations and so do not operate as enforceable law.³⁹ Administrative immigration detention occurs in a regulatory gray zone with respect to the conditions of detention. The broad discretion afforded to personnel operating detention facilities and the lack of meaningful mechanisms of accountability creates a permissive atmosphere for the abuse of detainees by their captors.

Some detention centers reportedly engage in a "beat and greet reception" for new detainees in order to establish "discipline" in the facility. In one detention facility in New Jersey, this routine involved:

[K]icking, punching ... plucking detainees' body hairs with pliers, forcing detainees to place their heads in toilet bowls, encouraging and ordering

detainees to perform sexual acts upon one another, forcing detainees to assume unusual and degrading positions while naked, and cursing at and verbally insulting the detainees.⁴⁰

As will be detailed in this section, practices such as the use of nudity and sexual humiliation as well as the use of dogs to threaten and even attack detainees have all been documented within the *domestic* administrative detention system operated by the American government in its own territory.

In his research, Mark Dow found instances of numerous abuses reminiscent of Abu Ghraib. In one facility in New Hampshire, female detainees were forced to shower in the full view of male correctional officers. The use of solitary confinement for disciplinary and non-disciplinary reasons was extremely common, as was the locking of detainees in storage units, toilets and shower stalls in lieu of units designed for solitary confinement. Dow also documents institutionalized anti-Arab bias in detention facilities, predating even the attack on the World Trade Center in 1993.⁴¹ The overall picture that emerges from the world of administrative detention which Dow describes is one in which widespread acts of brutality and humiliation designed as crude measures of discipline are inflicted by detention officers, who dehumanize detainees or captors, indulging their sadistic, voyeuristic and sexual impulses in an atmosphere of impunity.

When in June 2003, the Office of the Inspector General of the Department of Justice ("OIG") issued a report that was scathingly critical of the treatment of the September 11th detainees, it was the first suggestion that any official standards of accountability might pertain to the government's largely secret detention of thousands of men after September

11th. The OIG's finding that little effort was made to distinguish between immigrants with alleged ties to terrorism and individuals randomly swept up in the dragnet vindicated the claims of immigrant communities and advocates for immigrants' rights that most of the detentions served no purpose in terrorism-related investigations.⁴²

The most crucial contribution of the report, however, concerned the conditions of detention of the September 11th detainees. Specifically, the OIG's report documented the detention of regular immigration detainees in high security units, in which they were subjected to the most punitive conditions of detention in the American prison system. The report found that a "total communications blackout" was imposed on the September 11th detainees for several weeks after September 11th. Thereafter, special "witness security" procedures were applied, obstructing the ability of relatives and lawyers to locate the detainees and frustrating the detainees' ability to contact counsel. The report noted that some detainees were kept in "lockdown" for 23 hours a day, that the lights were kept on in their cells for 24 hours a day, and that they were shackled with leg irons, handcuffs and heavy chains whenever they were permitted to leave their cells. The report also cited a "pattern of physical and verbal abuse by some corrections officers" against September 11th detainees.⁴³ The abuses catalogued in the report include instances of detainees being slammed into walls, dragged by their arms, of the chains between ankle cuffs being stepped on by guards to force a fall, of their arms, hands, wrists and fingers being twisted to inflict pain, and the use of slurs and threats against them.

The initial report produced shockwaves throughout the country as the media decried the excesses of the September 11th

detentions.⁴⁴ The OIG issued a supplemental report in December 2003, collecting additional evidence specifically about the abusive conditions of detention.⁴⁵ In addition to providing further evidence of the kinds of physical and verbal abuse documented in the first report, the supplemental report exposed in particular the systematic use of strip searches, multiple invasive cavity searches and sleep-deprivation techniques on detainees. By viewing video documentary evidence, the report confirmed the following practices: Unnecessary strip searches conducted minutes after a prior thorough search with the detainee shackled and accompanied by an officer for the intervening period; strip searches performed or observed by officers laughing at detainees and verbally abusing them; strip searches conducted in multipurpose rooms clearly visible from the corridor or other cells in the facility; the filming of strip searches and of naked detainees; the use of strip searches as punishment; and the strip searching of male detainees in the presence of women.⁴⁶

The OIG reports have been complemented and corroborated by testimonies provided by September 11th detainees themselves in public statements made following their release or deportation. Most testimonials relate to conditions at one of four detention facilities: the Metropolitan Detention Center (MDC) (Brooklyn, New York), Passaic County Jail (New Jersey), Hudson County Jail (New Jersey) and the Metropolitan Correctional Center (MCC) (Manhattan, New York). For instance, beatings and the punitive use of solitary confinement were widely reported among detainees at Passaic.⁴⁷ Farouk Abdel-Muhti, the Palestinian detainee described at the beginning of this article, was held at the Passaic facility, where he reported being beaten by guards, despite his age and poor health.⁴⁸

He was also held in solitary confinement for over eight months as a result of his efforts to organize detainees to demand improved conditions.⁴⁹

Circumstances at the principal detention facilities which housed the September 11th detainees were extremely abusive, beyond the use of cavity searches. In the case of the Passaic County Jail, one of the more disturbing practices widely reported was the use of dogs to threaten detainees, as detailed in an investigative report aired on *National Public Radio*.⁵⁰ The report included official documents from Passaic and confidential medical records showing that "at least two prisoners have been taken to the hospital [in 2004] for treatment for dog bites."⁵¹ After widespread media attention to the use of dogs at the Passaic facility, *National Public Radio* reported that the Department of Homeland Security had directed Passaic and other detention facilities to stop using dogs around detainees.⁵² When public scrutiny falls on the largely secretive world of administrative detention, minor changes are adopted to address specific instances of abuse reported to the public. Unfortunately, however, adequate policies have not been adopted to address in a systematic manner the wider pattern of abuse to which Arab and Muslim men detained after September 11th have been subjected.

From the arbitrariness of the post-September 11th dragnets, to the specific forms of abuse to which the detainees were subjected – sexual humiliation, sleep deprivation, solitary confinement, the use of dogs and physical abuse – the parallels to recent revelations about conditions of detention in America's overseas detention facilities at Abu Ghraib and Guantanamo Bay are striking. The parallels also reveal that, in spite of the difference in scale, a similar strategy and tactic is being

employed in the domestic "war on terror" as that used in the conduct of operations abroad.

Administrative Detention in the United States and Israel

Some commentators have suggested an actual link between American administrative abuse of detainees and the tactics developed by the Israeli government to control Palestinian resistance to the Israeli occupation, insinuating an "Israelization" of American policies in the "war on terror."⁵³ Whether such a direct connection exists or not, there are significant similarities to the strategy of the United States in using administrative detention to hold large numbers of individuals without charge during periods of heightened national security alert.

The then President of Israel, Moshe Katsav, once remarked in reference to administrative detention that, "To protect democracy, sometimes undemocratic steps must be taken."⁵⁴ When democratic regimes resort to such means, they apparently do so in similar ways. Many of the practices documented in the American context in this article have an equivalent in Israel, including the forms of abuse detailed above.⁵⁵ A comparison of specific suspensions of basic protections of due process in the two countries – the presumption of guilt based on ethnicity and national origin, the use of incommunicado detention, the transferring of detainees between facilities in order to prolong detention, and abusive conditions of detention – suggests an alarming convergence in the violation of basic rights inflicted by both governments through the mechanism of administrative detention.⁵⁶

Israeli, Palestinian and international human rights organizations have extensively documented the use of administrative detention to hold large numbers of Palestinians in custody without charge and often without

timely hearings to review the grounds for their detention.⁵⁷ As in the case of immigration detention within the United States, these detentions are authorized by administrative rather than judicial order, and exact grave harm to the rights to due process of those detained.⁵⁸ While the Israeli authorities typically do not deport administrative detainees outside of the area in which it exerts effective control (including the Occupied Palestinian Territory), there have arisen instances in which the Israeli authorities have expelled or "transferred" prisoners without due process of law as a punitive measure.⁵⁹ This tactic is comparable to the deportations and renditions through which the United States has sought to expel large numbers of Arab and Muslim men from its territory.

During the period from September 1993 to May 1997, the Israeli human rights organization B'Tselem documented the detention of an estimated 800 Palestinians without charge and often for extended periods.⁶⁰ Beginning in 1998, B'Tselem noted a "gradual decline in the numbers of Palestinians held in administrative detention," with as few as twenty administrative detainees in the period from 1999 until October 2001.⁶¹ While the actual practice declined in this period, the legal infrastructure enabling the state to engage in widespread administrative detentions remained in place, and was reactivated at the beginning of the second *Intifada*. There were reportedly over 9,000 Palestinians incarcerated in Israeli prisons as of September 2006, 801 of whom were being held in administrative detention.⁶² While the Israeli government claims that these administrative detentions are only used when necessary as a security measure, human rights organizations have argued that administrative detention is in fact being used as an alternative

to criminal proceedings, for the detention of political opponents and to restrict the procedural protections afforded to individuals held on the basis of classified evidence. For instance, B'Tselem has argued in a report on administrative detention that, "The authorities use administrative detention as a quick and efficient alternative to criminal trial, primarily when they do not have sufficient evidence to charge the individual or when they do not want to reveal their evidence."⁶³

The deprivation of liberty for indefinite periods without charge, incommunicado detention and the denial of basic procedural protections – through the use of secret or classified evidence and the denial of meaningful appellate mechanisms to challenge detention – are obvious common features in the uses of administrative detention in Israel and the United States.⁶⁴ So, too, is the invocation of national security-related considerations to justify collective forms of administrative detention. The detention systems in both countries reverse one of the most basic procedural protections required by the rule of law, by adopting a presumption of guilt based on ascriptive characteristics, specifically ethnicity.⁶⁵ The failure to promptly charge an individual or indicate the grounds for their detention provides another parallel between the two systems.⁶⁶ There are also similarities in the methods of physical and psychological abuse associated with administrative detention in Israel and the United States. Israeli, Palestinian and international human rights organizations have reported that administrative detainees are routinely denied visits from relatives, access to lawyers, proper medical treatment, that they are transferred from one detention facility to another and from one status to another in order to prolong detention, and subjected to serious physical abuses,

including torture.⁶⁷ A final parallel between the American and Israeli systems is the evident use of administrative detention in both countries as an alternative to criminal prosecution where reduced evidentiary standards and a presumption of guilt expedite the governments' desire to keep "suspect" categories of individuals off the streets.⁶⁸

Administrative detention in both the United States and Israel has given rise to shadow legal systems which operate, for the most part, outside the scope of the regular judiciary, enabling the executive to suspend basic rights and protections with little recourse for detainees, and to use preventive detention as a substitute for criminal trials. The worrying trend towards the expansion of executive authority to detain, the contraction of the judicial review of detention powers, the weakening of procedural protections and the abrogation of rights all heralds a convergence in the erosion of the rule of law in the United States and Israel.

The Price of Scapegoating

This article began with the circumstances surrounding the arrest as an "absconder" of Farouk Abdel-Muhti. Farouk's case is depressingly representative of the harm wrought by the scapegoating of Arab and Muslim men after September 11th, as well as an eerie symbol of the parallels between American policies and tactics in the "war on terror" and Israeli strategies in enforcing the occupation of the Palestinian Territories. A Palestinian rights activist with deep roots in New York, Farouk was detained on an immigration pretext in a warrantless arrest. His detention was needlessly prolonged as he was shuffled between five different facilities during his two-year detention, often held in punitive conditions of solitary confinement to deter his

efforts to organize detainees to demand better conditions. He was beaten and deprived of proper medical care. When his case finally received the attention of an independent court, he was released.

However, Farouk was only able to enjoy the hard-won victory in his case for three months before the combined effects of poor health, two years of beatings and the lack of medical attention took their toll: he collapsed and died in July 2004, at the age of 56, after delivering a lecture on the rights of detainees in Pennsylvania.⁶⁹ The American civil liberties community lost an important champion of rights. That Farouk was a Palestinian activist, possibly singled out for detention as a result of his political advocacy, is a particularly resonant reminder of the parallels between the evolving administrative detention system in the United States and the established legal infrastructure of administrative detention in Israel. The dangers of engaging in arbitrary deprivations of liberty are acute in both societies. The suspension of liberties, particularly of those of vulnerable communities, in the name of security quickly degenerates into systematic patterns of violations of due process which undermine the rule of law. When the rationale of "prevention" takes the form of the suspension of basic rights, the correct balance between liberty and security has been lost.

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End Notes

- 1 Information about Farouk's arrest and case can be found at: Center for Constitutional Rights, "CCR Secures Release of Palestinian Activist Farouk Abdel-Muhti," available at: <http://www.ccr-ny.org/v2/legal/justice/justiceArticle.asp?ObjID=6JmiF5tIkY&Content=375>.
- 2 Farouk's arrest and detention might differ from the thousands of others due to his outspoken activism. He had begun working with left-leaning Pacifica radio station in March 2002 and within one month, officials began coming to his home in search of him. See: "Palestinian Freedom Fighter Farouk Abdel-Muhti: 1947-2004," Pacific Radio (Democracy Now), available at: <http://www.democracynow.org/static/farouk.shtml>.
- 3 Mark Dow, *American Gulag: Inside U.S. immigration prisons* (Berkeley: University of California Press, 2004).
- 4 The course of the few cases where terrorism charges were filed is instructive. The procedural protections of the criminal justice system resulted in the exposure of evidence to scrutiny, resulting in the collapse of the cases. See David Shepardson, "Feds Admit Errors, Ask to Toss Terror Verdicts," *Detroit News*, 1 September 2004. Others against whom terrorism charges have been filed in the investigation into the attacks of September 11th were not picked up through the immigration dragnet or any other immigration program; those cases all came to light through ordinary police work.
- 5 The "immigration detention" system in the United States, particularly as it has been applied since September 11th, is, in effect, a system of preventive administrative detention. Because of the elision in the United States between immigration, administrative and preventive detention, the terms will be used more or less interchangeably.
- 6 Indeed, even broader powers were made available to the Attorney General under the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (H.R. 3162, the "USA PATRIOT Act"), which permits the indefinite preventive detention of non-citizens under the sole discretion of the Attorney General (§412). There is no public record of this power having yet been invoked by the Attorney General, since the Justice Department was able to craft an extensive administrative detention system without resorting to the USA PATRIOT Act's provisions.
- 7 Dow, *supra* note 3, at 9 and *Kareem Shora et al.*, "Invitation to join DWN (Detention Watch Network)," 7 February 2005 (on file with author).
- 8 The Justice Department held regular press conferences to announce the numbers of "suspected terrorists" who had been detained, until the numbers got large enough to trigger concerns over civil liberties. The last such public announcement, made in early November 2001, revealed that 1,182 individuals had been detained. See Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post*, 9 November 2001, A16.
- 9 For detailed information about the programs described in the following overview, see David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York, NY: The New Press, 2003); Barbara Olshansky, Michael Ratner, Rachel Meeropol and Steven MacPherson Watt, *America's Disappeared: Secret Imprisonment Detainees and the "War on Terror"* (New York, NY: Seven Stories Press, 2005). For a more general overview of U.S. immigration detention, see, Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* (Berkeley, CA: University of California Press, 2004). For details on the use of administrative detention since September 11, see, *Muzaffar Chishti, et al., America's Challenge: Domestic Security, Civil Liberties and National Unity After September 11* (Migration Policy Institute, 2003) ("MPI Report"); *A Year of Loss: Reexamining Civil Liberties Since September 11* (Lawyers Committee for Human Rights, 2002); *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties* (Lawyers Committee for Human Rights, 2003); *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (Human Rights Watch, 2002); *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (Lawyers Committee for Human Rights, 2003); and *Ending Secret Detentions* (Human Rights First [formerly the Lawyers Committee for Human Rights], 2004).
- 10 The majority of these measures were put into place between 2001 and 2005. The second term of the Bush administration saw a different emphasis in its orientation towards immigration, with the focus shifting away from the alleged terrorist threat posed by immigrants to illegal immigration from Mexico. This shift reflected the passage of time from the attacks of September 11th, the success with which the Bush administration had expanded the detention powers of the Executive and the replacement of John Ashcroft as Attorney General by Alberto Gonzalez. By 2005, the Bush administration had put in place the necessary administrative mechanisms to transform the nation's immigration system into a massive preventive detention facility exempt from judicial scrutiny, and could afford to turn its attention back to other, more mundane aspects of immigration reform. For an account of the immigration agenda of Bush's second term, see Julia

- Gelatt, "Bush Puts Immigration Reform Back on Agenda, Approves Funding for DHS," in *Migration Information Source* (Migration Policy Institute), 1 November 2005, available at: <http://www.migrationinformation.org/USfocus/display.cfm?id=346>.
- 11 Memorandum from Deputy Attorney General to the Commissioner of the Immigration and Naturalization Service (INS), Director of the Federal Bureau of Investigation, Director of the United States Marshal Service, and U.S. Attorneys, "Guidance for Absconder Apprehension Initiative," 25 January 2002.
- 12 Cole, *supra* note 9, at 25.
- 13 18 U.S.C. § 3144.
- 14 See, e.g., "Wartime Probes of Iraqis End, FBI Interviews 11000, Finds No Spies," *CBS News*, April 17, 2003, available at: <http://www.cbsnews.com/stories/2003/04/17/iraq/main549841.shtml>; see also, Maia Jachimowicz and Ramah McKay, "FBI, BICE Interview Iraqi-Born Immigrants," *Migration Information Source* (Migration Policy Institute), April 1, 2003, available at: <http://www.migrationinformation.org/USfocus/display.cfm?ID=111>.
- 15 The full list, published in four groups through announcements in the Federal Register between September 2002 and January 2003, included the following countries: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Syria, Sudan, Tunisia, the United Arab Emirates and Yemen.
- 16 Anastasia Hendrix, "Registration ends; suspicions linger," *San Francisco Chronicle*, 3 December 2003.
- 17 For details on all three of these operations, see Ashl Ü. Bâli, "Changes in Immigration Law and Practice After September 11: A Practitioner's Perspective," 2 *Cardozo Public Law, Policy and Ethics Journal* 170 (2003).
- 18 Department of Homeland Security Press Release, "Operation Liberty Shield: Increased Security at Borders – Asylum Modifications," March 2002, available at: http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml.
- 19 These were the "priority" of 11,000 from a wider pool of 50,000 Iraqis in the United States originally compiled by the FBI. "FBI Interviewing Iraqis Living in the U.S.," CNN, 20 March 2003, available at: <http://www.cnn.com/2003/LAW/03/20/fbi.war.preps/>.
- 20 "FBI Manhunt Targets Al Qaeda Suspect," *CBS News*, 24 March 2003, available at: <http://www.cbsnews.com/stories/2003/03/24/attack/main545808.shtml>.
- 21 See, e.g., ACLU Campaign Against Racial Profiling, "Highlights in Arab, Muslim and South Asian News," 16 February 2005.
- 22 Combining the known figures of those detained in the first dragnet of arrests and in the particular operations described in this section, the minimum number of administrative detentions as a result of post-September 11th-related policies is over 5,000. This number is likely to underestimate the actual total, perhaps by as much as half, since all figures are based on the limited information made public by the Bush administration by May 2003.
- 23 U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003, released to public on 2 June 2003) ("OIG Report"), available at: <http://www.fas.org/irp/agency/doj/oig/detainees.pdf>.
- 24 A federal challenge to the government's refusal to release basic information about the detainees was brought by a coalition of civil liberties and media groups under the Freedom of Information Act. The federal court which initially heard the case held that, "the public's interest in learning the identities of those arrested and detained is essential to verifying whether the government is operating within the bounds of the law." *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94, 106 (D.D.C.2002). On appeal, the government won a reversal of the lower court's decision. *Center for National Security Studies v. United States Department of Justice*, 331 F. 3d 918 (D.D.C.2003), which remains in effect after the Supreme Court declined to review the case. *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *cert. denied*, (12 January 2004).
- 25 The interim rule authorizes immigration judges to issue protective orders and seal records where information related to national security might be at issue. Protective Orders in Immigration Administrative Proceedings, 67 *Federal Register* 36, 799 (21 May 2002).
- 26 Memorandum from Michael J. Creppy, Chief Immigration Judge, to All Immigration Judges and Court Administrators (21 September 2001), available at: <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>.
- 27 *Custody Procedures*, 66 Fed. Reg. 48,334 (20 September 2001).
- 28 OIG Report, *supra* note 23, at 27-36.

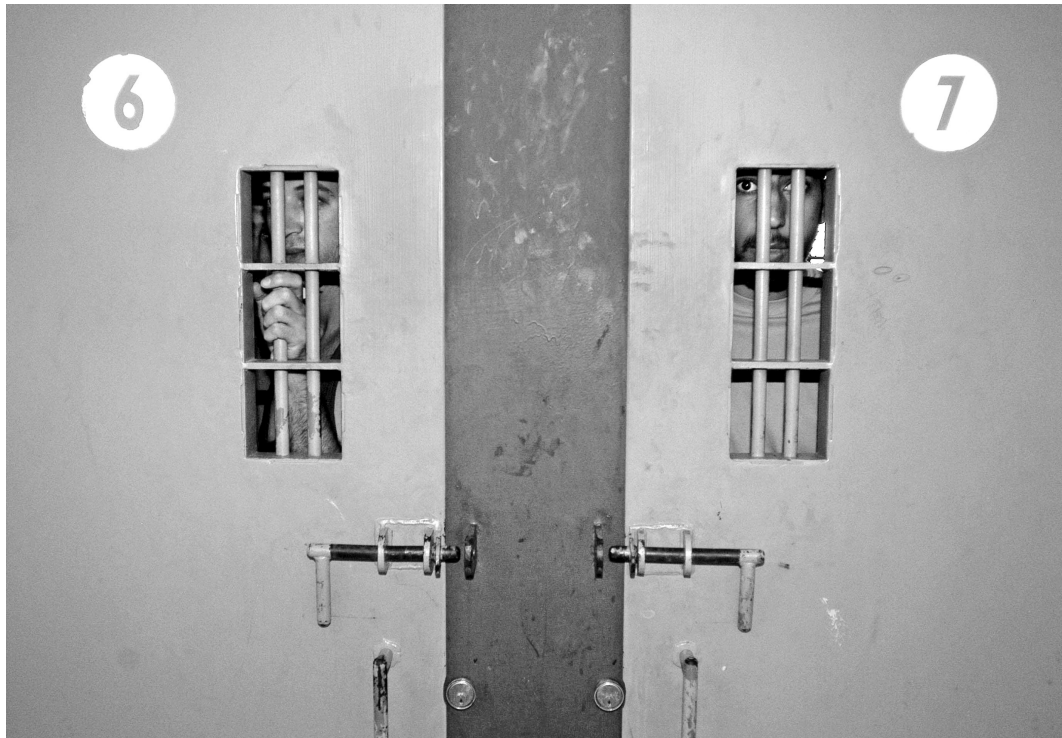
- 29 See, OIG Report (Chapter 4), supra note 23, at 37-69.
- 30 For a detailed discussion of the "no bond" policy, see, OIG Report (Chapter 5), supra note 23, at 72-90.
- 31 Custody/Bond, 8 C.F.R. § 1003.19(i)(2) (2003).
- 32 *Zavala v. Ridge and Ashcroft*, No. C 04-00253 JSW (Order Granting Writ of Habeas Corpus) (ND CA) (1 March 2004).
- 33 Details about Arar's case are available through the Center for Constitutional Rights (CCR), a New York-based legal services non-profit organization providing pro bono legal services to Arar, available at: <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=NydViALvVC&Content=300>.
- 34 Jane Mayer, "Outsourcing Torture: The secret history of America's 'extraordinary rendition' program," *The New Yorker*, 14 February 2005, available at: http://www.newyorker.com/fact/content/2050214fa_fact6.
- 35 This estimate is taken from the findings of a co-authored report: Committee on International Human Rights, the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University Law School, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions,'" December 2004, available at: [http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf).
- 36 For instance, Mark Dow documents the case of an Egyptian detainee, Nabil Soliman, deported to Egypt by U.S. authorities and transferred directly to Egyptian custody, with Amnesty International noting that he was held incommunicado for several weeks by Egyptian authorities before being moved to the Tora prison. Dow, supra note 3, at 225-226.
- 37 For a review of the memoranda and other official documents chronicling the shifting U.S. policy on the use of torture see, Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005); Mark Danner, *Torture and Truth: America, Abu Ghraib and the War on Terror*, 51(10) *New York Review of Books*, 10 June 2004; and ACLU, "Records released in response to torture FOIA request," available at: http://www.aclu.org/torturefoia/released/FBI_010505.html.
- 38 Dow supra note 3, at 9-10.
- 39 The standards cover attorney visitation, media interviews, law libraries, detainee grievance procedures and other aspects of prison life. The BICE detention standards are available at: <http://www.ice.gov/graphics/dro/opsmanual/index.htm>.
- 40 Dow supra note 3, at 143-44.
- 41 Dow supra note 3, at 227, 234-237 (on the New Hampshire facility); at 105, 115, 135, 157, 167, 182, 194, 203 and at 242 (on the use of solitary confinement); at 59 (testimony of Calejo on locking detainees in toilet units); and at 93 (on the use of a shower unit as a segregation cell); at 211 (on institutionalized anti-Arab bias).
- 42 OIG Report, supra note 23. The Report was prepared on the basis of interviews conducted with a sample of 762 of the September 11th detainees – a statistically significant proportion to which only the OIG had access.
- 43 OIG Report, supra note 23, at 186 (on the communications blackout); at 186 (on witness security procedures obstructing access to family and counsel); at 111-157 (Chapter 7) (on conditions of detention); and at 142 (on pattern of physical and verbal abuse).
- 44 See, e.g., "The Abusive Detentions of Sept. 11," *The New York Times*, 3 June 2003; "Troubling Truth: Search for terrorists steamrolled other people," *Dallas Morning News*, 6 June 2003; and "Sledgehammer justice," *Denver Post*, 5 June 2003.
- 45 OIG, "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," U.S. Department of Justice (December 2003), ("OIG Supplemental Report") available at: <http://www.usdoj.gov/oig/special/0312/>.
- 46 All of these examples concern searches conducted on detainees held in the Special Housing Unit of the MDC facility. OIG Supplemental Report, supra note 45, at 33-34.
- 47 See, e.g., Irum Sheikh, "Abuse in American Prisons," 1 *Muslim World Journal of Human Rights* (2004) at 8-11; Michelle Goldberg, "The prison abuse scandal at home," *Salon.com*, 19 May 2004, available at: <http://dir.salon.com/story/news/feature/2004/05/19/maddy/index.html>.
- 48 "NJ officers assault detained Palestinian activist, confiscate 'anti-government' publications," Committee for the Release of Farouk Abdel-Muhti (Press Release), 24 November 2003.
- 49 Center for Constitutional Rights, "Case Synopsis: Farouk Abdel-Muhti," July 2004, available at:

- <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=MGvRXc7PZB&Content=422>.
- 50 Daniel Zwerdling, "Jailed Immigrants Allege Abuse: Immigrant Detainees Tell of Attack Dogs and Abuse," *National Public Radio* (All Things Considered), 18 November 2004, available at: <http://www.npr.org/templates/story/>.
- 51 Detainee Rosendo Lewis, age 29, says he was bitten by a dog and beaten during a confrontation with a group of guards." See, Zwerdling, supra note 50. Sheikh interviewed a detainee who alleged similar abuse in 2002 and published his testimony regarding the use of dogs and other abuses at Passaic. Sheikh, supra note 47, at 9-10 (see also, nn. 26-28) "Interview with 'Raheem' (pseudonym)." See also, Eva Sanchis (transl. by Chris Brandt), "Use of dogs in Passaic jail raises alarm," *El Diario*, 19 November 2004, available at: <http://www.indypressny.org/article.php3?ArticleID=1769>.
- 52 Daniel Zwerdling, "Government Halts Use of Dogs Around Detainees," *NPR*, 30 November 2004.
- 53 See, e.g., "Israeli interrogators in Iraq," *BBC*, 3 July 2004, available at: http://news.bbc.co.uk/2/hi/middle_east/3863235.stm; Wayne Madsen, "The Israeli Torture Template," *Counterpunch*, 10 May 2004, available at: <http://www.counterpunch.org/madsen05102004.html>; "Israeli interrogators in Iraq – An exclusive report," *Jane's Foreign Report*, 7 July 2004, available at: http://www.janes.com/security/international_security/news/fr/fr040707_1_n.shtml; and Lisa Hajjar, "Torture and the Future," *Middle East Report*, May 2004.
- 54 Cited in *Mideast Mirror* (Section A: Israel), 14 February 2005.
- 55 In suggesting this equivalence, there are two important points that should be emphasized. The first point relates to a disparity in the international legal status of the American and Israeli administrative detention systems. Israel invokes a state of emergency to justify its resort to administrative detention and the Palestinians detained under these conditions are neither citizens nor immigrants, but subjects under a system of belligerent occupation, which represents a significant distinction from the American case. To the extent that Israel is holding residents of the Occupied Palestinian Territory as administrative detainees it is doing so as a belligerent occupier, and its actions are subject to the Geneva Conventions. For instance, by transferring individuals detained in the Occupied Palestinian Territory into Israel for detention, Israel is acting in violation of Articles 49, 76 and 147 of the Fourth Geneva Convention. By contrast, the domestic administrative detention system developed in the United States using immigration regulations is not subject to the requirements of the Geneva Conventions. A second significant point relates to what the United States and Israel have in common with other democracies that have also developed a system of administrative detention in the context of a national security crisis. Indeed, Israel has more in common with these other democracies than the United States. Specifically, in responding to the challenge of political violence associated with Northern Irish separatism, the United Kingdom evolved an administrative detention system for members of the Irish Republican Army (IRA) as did the Spanish government in response to similar separatist claims by the Basque nationalist group Euskadi Ta Askatasuna (ETA). Unlike Israel, the United Kingdom and Spain, the United States is not in a militarized conflict involving a territorial dispute. Rather, the United States has developed its domestic administrative detention system by using ethnicity and religious background as a proxy for suspicion of involvement in an amorphous and generalized conflict under the rubric of the post-September 11th "global war on terror." Thus, the nature and potential scope of both the domestic and extraterritorial administrative detention systems developed by the government of the United States are in important ways distinct from the Israeli system, which, with the exception of a very small number of Israeli Jewish citizens who have also been held in administrative detention, is specifically targeted at Palestinians.
- 56 The principal focus of this article is to analyze the comparatively less well-known American administrative detention system. This analysis should provide a basis for a thorough comparison with the Israeli administrative detention system in subsequent research. While a preliminary comparison of the two is provided herein, a more complete consideration of Israeli administrative detention practices and an in-depth comparison of the two systems is beyond the scope of this article.
- 57 See, e.g., Amnesty International, "Administrative detention: despair, uncertainty and lack of due process" (Israel and the Occupied Territories) (1997); Amnesty International, "Administrative Detention," (2004), available at: <http://web.amnesty.org/pages/isr-action-detention>; Addameer, "Administrative Detention" (1999) available at: <http://www.addameer.org/administrative/>; B'Tselem, "Prisoners of Peace: Administrative Detention During the Oslo Process," (1997); and B'Tselem, "Barred from Contact: Violation of the Right to Visit Palestinians Held in Israeli Prisons," (September 2006), available at: http://www.btselem.org/Download/200609_Barred_from_contact_Eng.doc.
- 58 In one interesting instance, the Israeli Supreme Court did hear a case with respect to the legality of the

- administrative detention. The case involved Lebanese detainees who were being held in administrative detention after the completion of their sentences as "bargaining chips" to be exchanged at a later date with Lebanese groups holding Israelis. The Israeli Supreme Court ultimately held that detaining an individual solely as a "bargaining chip" was impermissible. While the decision did not lead to the immediate release of the detainees who were ultimately released in a subsequent bargain struck between the government of Israel and the Hezbollah militia, it demonstrated the willingness of the Israeli Supreme Court to permit recourse to an independent judiciary to challenge administrative detention. FCrA 7048/97, *Anonymous Persons v. Israeli Minister of Defense*, P.D. 54(1) 721 (12 April 2000) (majority opinion by Justice Aharon Barak). A case from 2002 in which the Israeli Supreme Court reviewed the conditions of detention at the Kziot detention facility in the Negev desert also stands for the proposition that some degree of review is available, although the petition was denied. See: H.C. 5591/02, *Halel Yassin et al. v. Commander of the Kziot Detention Facility and the Minister of Defense* P.D. 57(1) 403.
- 59 On the history of Israeli expulsions of Palestinian detainees, see, Al-Haq, "An Illusion of Legality: A Legal Analysis of Israel's Mass Deportation of Palestinians on 17 December 1992" (1993).
- 60 B'Tselem, "Prisoners of Peace," supra note 57.
- 61 B'Tselem, "Administrative Detention," available at: <http://www.btselem.org/english/Administrative-Detention/>.
- 62 B'Tselem, "Barred from Contact," supra note 57. The number of administrative detainees, 801, is as of January 2007, and is provided in the regularly updated statistics on administrative detainees on the B'Tselem website, available at: <http://www.btselem.org/english/Administrative-Detention/Statistics.asp>.
- 63 B'Tselem, supra note 61. Amnesty International reports that "Administrative detention has at times been used by Israeli authorities to detain prisoners of conscience, held for their non-violent exercise of the right to freedom of expression and association." Amnesty International, supra note 57.
- 64 For a detailed description of these features of the Israeli administrative detention system as employed against Palestinians of the Occupied Territories, see, Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley CA: University of California Press, 2005) at 3-5. On the parallels between U.S. and Israeli tactics in the post-September 11th period see, Hajjar, *Courting Conflict*, at 235-252.
- 65 On the presumption of guilt with respect to Palestinian detainees, see generally, Hajjar, supra note 64. On the application of a "double standard" by Israeli civil and military courts to actions by Israeli Jewish citizens and those of Palestinians of the Occupied Territories or Palestinians with Israeli citizenship, see, Martin Edelman, *Courts, Politics and Culture in Israel* (Charlottesville: University Press of Virginia, 1994) at 111-121.
- 66 See, e.g., B'Tselem, "Detained Without Trial: Administrative Detention in the Occupied Territories Since the Beginning of the Intifada," (1992) at 14-15.
- 67 B'Tselem has recently issued a detailed report documenting the techniques used to deny visitation to Palestinian detainees held in Israel. B'Tselem, "Barred from Contact," supra note 57. The report notes that from September 2000 to March 2003, family visits were systematically denied (at 3). Amnesty International, supra note 57; on the denial of family visitation, see: Case of Ahmad Qatamesh; on the denial of access to counsel see, Cases of 'Abdullatif Gheith and Burhan Khaled; on the denial of medical treatment, see: Case of Asma Muhammad Suleiman Saba'neh Abu al-Hija; and on subjection to serious physical abuse see, Cases of Tali Fahima, Daoud Dir'awi and 'Abd al-Salam 'Adwan. See also, Human Rights Watch, "Administrative Detention," available at: <http://www.geocities.com/onemansmind/jc/HRW01.html>. On the use of transfers to prolong detention, see, Addameer, supra note 69, "Section III: Transferring Administrative Detainees to Interrogation".
- 68 B'Tselem, "Detained Without Trial," supra note 66, at 12. See also, Edelman, supra note 65, at 100-118.
- 69 Center for Constitutional Rights, "CCR Mourns the Loss of Freedom Fighter Farouk Abdel-Muhti," July 2004, available at: <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=MGvRXc7PZB&Content=422>.

2004, Hadarim prison, Nir Kafri

"Security" prisoners.



2005, Ramla prison, Nir Kafri

Because of the depth of the tiny peephole in the cell doors, the prisoner cannot see what goes on in the corridor unless someone actually stands facing him. A small mirror between his fingers allows him a slightly larger field of vision. When the prisoner's portrait is reflected in the mirror and seen by the photographer, the portrait of the photographer patrolling the hallway is at that moment seen by the prisoner.



Book Review: *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*

Richard Falk

The Case of Ariel Sharon and the Fate of Universal Jurisdiction

John Borneman, (Editor)

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181 pages.

Since his massive stroke in January 2006, former Israeli Prime Minister Ariel Sharon has no longer been a living reality. Yet his life and career persist as a high profile reminder that raw power often trumps truth and justice when it comes to political reckoning. Nothing has illustrated the pro-Israeli media spin in the United States more clearly than the ability of Sharon while holding high office to avoid being tarnished as a civilian political leader by his extensive military record of brutality and abuse, which includes well-documented terrorist attacks against Palestinian civilians.¹ Of course, the foremost blemish on Sharon's reputation stems from his connection with the notorious massacres carried out by the Lebanese Christian Phalange in the refugee camps of Sabra and Shatila in the immediate aftermath of the 1982 Israeli invasion and occupation of Lebanon.² Whilst it is perhaps not so surprising that Sharon was internally rehabilitated in Israel as part of the Likud surge at the beginning of the 21st century, it is, however, rather startling that Sharon should have received such a clean bill of health from the international community following his election as Prime Minister in early 2001.

However, Sharon went even further than effectively exempting himself from scrutiny

and criticism of his controversial past. Despite his tarnished reputation, Sharon managed, with the help of Washington, to have his Palestinian counterpart, Yasser Arafat, utterly humbled and discredited as a legitimate political leader on the basis of alleged links to terrorism. This was achieved despite the fact that the allegations of wrongdoing leveled at Arafat were far flimsier than those that had been ignored with respect to himself. At most, during his years as PLO leader, Arafat was accused of speaking inconsistently on the role of violent resistance before different audiences. Even if accurate, this accusation must be balanced against Arafat's well-documented efforts, often undertaken at great personal and political risk, to seek accommodation with Israel within a diplomatic framework adverse to Palestinian interests. By contrast, during Sharon's tenure as Israeli Prime Minister, the raising of doubts over the legitimacy or suitability of Sharon's formal representation of the state of Israel has been deemed by the mainstream media in the US as anti-Israeli, if not anti-Semitic.

The international legitimization of Sharon as the Israeli head of state was, of course, forged by bipartisan American efforts. There was a deferential media and an unconditional governmental acceptance by Washington of the outcome of free and fair Israeli elections in what was incessantly proclaimed as the only democratic government in the region. Nevertheless, the total rehabilitation of Sharon remains surprising, especially given the wider international climate of opinion relating to criminal accountability for crimes against humanity and other forms of official

wrongdoing. The 1990s came to a close with a dramatic renewal of international efforts (which had lapsed since the Nuremberg Judgment in the aftermath of World War II) to hold government officials, including military commanders, individually responsible for crimes of states, and in particular crimes against humanity, torture, and genocidal policies. In 1998, with great drama, the former Chilean dictator, Augusto Pinochet, was indicted in Spain and detained for extradition proceedings in Britain.³ In the following year, 1999, the former President of Yugoslavia Slobodan Milosevic was indicted by the Ad Hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) for his alleged criminal involvement in ethnic cleansing and crimes against humanity in Bosnia, and later in Kosovo. These developments reached a climax with the successful establishment by a global movement of governments and civil society groups of a permanent International Criminal Court (ICC), which came into being in 2002 in the face of vehement opposition from the United States. In other words, a consensus was emerging at the dawn of the 21st century, in relation to the international criminal accountability of leaders, around the idea that there existed a higher law than that decreed by a sovereign state, even during wartime. Further, there were signs that this law was finally now beginning to be implemented, and not just by victors in relation to the defeated. Indeed, it seemed that individuals – former leaders – would be at risk of being prosecuted in the manner of Augusto Pinochet if this trend were to continue.

There were three strands to this accountability movement. The first, following the lead of Nuremberg, emphasized formal initiatives of the international community, including the ad hoc international criminal

tribunals for the former Yugoslavia and for Rwanda (ICTR), established by the authority of the United Nations Security Council in the first half of the 1990s, and whose work continues to this day. As mentioned, the ICC now regularizes and normalizes this approach, although, given the vigor of American governmental opposition, it is uncertain whether or not this new tribunal will be able to function as was intended, namely, by providing the international community with a regular mechanism with which to indict, prosecute, and punish individuals found guilty of international crimes. Reluctantly and after much hassling, the US government agreed to an arrangement by which those alleged to be responsible for the killings in Darfur might be prosecuted for crimes against humanity before the ICC.

The second strand was associated with initiatives of national courts, and has been linked to what is termed by lawyers as ‘universal jurisdiction.’⁴ ‘Universal jurisdiction’ is an old concept in international law, most commonly used to explain the illegal status of piracy. It allowed any court in any country to capture pirates anywhere, seize their possessions, and prosecute them for their crimes. These crimes were likely to have occurred on the high seas against foreign interests; that is, without a link to a particular court. A national court was regarded as an agent of world order, serving the common interest in the suppression of piracy, and its proceedings were not considered an encroachment upon the sovereign rights of any state. Universal jurisdiction is controversial as it allows national courts to indict and prosecute individuals who acted outside of the territory of the court to reach foreign acts and actors, including those who might have been thought to be acting within the rule of the law. The

Israeli prosecution of Adolph Eichmann back in 1961 for his role in overseeing the transportation system that carried Jews to the death camps during the Nazi period was a landmark case in national efforts to extend criminal accountability to foreign acts committed on foreign territory. The Spanish indictment of Pinochet was a more recent breakthrough with respect to this kind of dramatic extraterritorial role for a domestic or national court, especially as the prominence of the defendant and his former status as a head of state gave the case global salience.⁵ Subsequent extradition requests for Pinochet made by several other indicting national courts in Europe were a further indication of a definite trend toward expanding this approach to the enforcement of international criminal law.

The third strand is associated with civil society initiatives lacking in governmental imprimaturs or the backing of the United Nations. These 'tribunals' have been established in various places and under a range of auspices in order to gather evidence relating to an individual or situation that is declared to shock the moral and legal conscience, and yet where political realities block formal legal action. This form of juridical inquiry was initiated in 1967 by the fabled British philosopher, Bertrand Russell, in relation to the alleged criminality of the Vietnam War. Prominent figures of moral authority, including Jean-Paul Sartre and Simone de Beauvoir, formed the jury of the Russell Tribunal, which delivered a decision condemning the American role in Vietnam under international law.⁶ The experience of the Russell Tribunal has given rise to numerous other tribunals dealing with a wide range of issues, including the Permanent Peoples Tribunal, which has been in operation

continuously since its foundation in Rome 1976 by the Lelio Basso Foundation. To date, at least fifteen citizens' tribunals have been set up in countries around the world to assess the legality of the Iraq War and the criminal accountability of the civilian and military leaders who planned and oversaw the war and subsequent occupation. This process culminated in the session of the World Tribunal on Iraq held in Istanbul in June 2005, which received worldwide attention.

The Case of Ariel Sharon illustrates an effort of the second strand variety to impose criminal accountability on an individual accused of complicity in the 1982 massacres at the Sabra and Shatila Palestinian refugee camps. The case was initiated in Brussels by survivors of the massacres, taking advantage of a 1993 Belgian law that allowed such criminal actions to proceed on the basis of universal jurisdiction; that is, in the absence of any link between the country where the court is situated and the locus of the crime and its victims. In this instance, Palestinians of varying nationality resident in Lebanon in 1982 were using the Belgian legal system to charge Israeli individuals with crimes committed on Lebanese territory more than ten years before the Belgian law was adopted. Israel was formally and officially outraged by the idea that the behavior of their elected leader (at the time) would be legally challenged in a foreign court of law, disrupted diplomatic relations and threatened Belgium with adverse economic consequences if it persisted with the legal proceedings. Despite these rumblings, the proceedings went forward. It is not irrelevant to recall that Israel itself initiated such a use of national judicial tribunals for the prosecution and punishment of individuals for war crimes committed in a foreign country by

a non-Israeli citizen in the previously aforementioned Eichmann case. Whilst it is true that many of the victims of Eichmann's crimes were either Jews or Israelis, it should also be noted that the crimes in question were committed more than fifteen years prior to the trial, and that the defendant was brought before the Israeli tribunal after being illegally abducted in Argentina by Mossad agents.

Furthermore, other controversial initiatives were launched in the Belgian legal system during this period, including indictments brought against American high-level officials then still in government for their roles in both the First Gulf War of 1991 and the Iraq War. The indictment of George H.W. Bush and American military and political officials in Brussels in particular induced an explicit American backlash that included a threat by Secretary of Defense Donald Rumsfeld, "to teach Belgium a lesson." More specifically, Rumsfeld threatened to move the headquarters of NATO away from Brussels and to take punitive economic action if Belgium did not immediately abandon criminal proceedings against foreign leaders. As was widely reported in 2003, Belgium backed down, amending Belgian law to severely restrict its application regarding accountability for such crimes, and duly terminated proceedings against American and Israeli officials.

John Borneman's book addressing the case of Sharon remains of great interest both in relation to the impunity of Israeli leaders for crimes committed against the Palestinian people, and in relation to the faltering efforts of international criminal law to establish meaningful ways of addressing grievances arising from the international crimes of political and military leaders, especially those committed by leaders of powerful countries. It can be read both as a rationale for the legal

proceedings in Belgium and as a debate over whether such an undertaking was ever plausible given the nature of world order as presently constituted.

It is of interest that the convener of the workshop of invited participants that led to the publication of the book was John Borneman, a distinguished anthropologist with a strong interest in securing justice in the context of the post-catastrophic aftermath of the commission of crimes against humanity.⁷ Borneman, a professor at Princeton University, recounts the political difficulties encountered in carrying out this project, including the reluctance of colleagues and invited officials to become associated with such a contentious issue. One unnamed professor contacted Borneman a day after agreeing to participate to withdraw from the workshop, reportedly stating that, "She was told not to speak publicly about the case - influential alumni would be certain to threaten to withdraw funds" (p.7). Borneman lists criticisms he received from other Princeton faculty members who questioned the propriety of even holding a workshop on the topic of Sharon's criminal accountability. This opposition is a further indication of the existence of a coordinated and extensive campaign in the United States to prevent open academic debate and inquiry, however seriously conducted, whenever the results might embarrass the state of Israel. It must be considered in the light of efforts made at Columbia University and other academic institutions to attack faculty members perceived to be pro-Palestinian or critics of Israel. Borneman therefore deserves support and admiration for going ahead with the workshop, as does the Princeton Institute for International and Regional Studies for publishing revised versions of the workshop papers as a book.

I do find it somewhat odd, therefore, that Borneman did not acknowledge the prior role played by Princeton in providing the auspices for a high-level project on universal jurisdiction, which produced a set of supporting guidelines for the application of international criminal accountability, including a framework for national courts.⁸ It is odd because many participants in this process were influential jurists, including judges, who lent credibility to the status of universal jurisdiction in the period leading up to the Sharon case. It is also odd that there is no discussion in Borneman's book of the bearing of the extremist leaderships of Ariel Sharon and George W. Bush, nor the intervening significance of the attacks of 11 September 2001. This combination of circumstances defers, if not altogether derails, the encouraging developments of the 1990s with respect to re-establishing post-Nuremberg expectations of holding leaders accountable for international crimes.

Nonetheless, from an academic perspective the publication of revised versions of the presentations given at the workshop is a most welcome addition to the scholarly literature dealing with issues of international criminal accountability. The contents of the volume sustain a high academic standard, and are by no means dismissible as anti-Israeli propaganda. Indeed, the burden of the discussion was directed more toward the viability of this kind of prosecution and the jurisprudential issues raised than towards the guilt of Ariel Sharon, or even the culpability of Israel. As the book's full title suggests, the discussion of the various authors centers on an exposition and evaluation of the concept of 'universal jurisdiction' as a means of imposing accountability for crimes against humanity. Borneman's perceptive introduction

sets the tone, especially by locating the quest for accountability for crimes against humanity within the larger effort by human rights' advocates to establish authoritative universal standards against which to judge behavior and as a guide for the protection of victims. As might be expected, four of the contributors, Borneman included, are anthropologists: Laurie King-Irani, Dan Rabinowitz and Sally Falk Moore. The remaining contributors are lawyers: Chibli Mallat and Luc Walley (both of whom were directly involved in the Sharon case as lawyers for the complainants), Paul Kahn (a professor at Yale Law School), and Reed Brody (a specialist in prosecuting the most serious offenses and offenders who has been long associated with Human Rights Watch, and then served in a high-level position in the UN Human Rights Commission in Geneva). Overall, it is a distinguished group of authors, each of whom raises important questions and provides insights into the basic issues at stake.

Moore's chapter includes a lucid examination of the background of universal jurisdiction, and a useful, brief narrative of the development of international criminal law since Nuremberg. King-Irani offers readers an illuminating discussion by grounding the case against Sharon in the wider context of the struggle against impunity associated with crimes against humanity. King-Irani further demonstrates how the combination of American leverage and the absence of a broader transnational mobilization of support for this pursuit of justice by this particular class of victims, which might have balanced the geopolitical pressures, heightened the political vulnerability of the proceedings. She notes in particular the disappointing failure of Arab governments to lend any support to the Belgian law when it came under attack (p.98). Her

concluding point is a fascinating one, which raises many questions, including whether or not the concept of universal jurisdiction presupposes the existence of a functioning 'international community.' Bringing to bear an anthropological emphasis, as well as the engagement of an activist, uncommon among legal analysts, King-Irani insists that such a community, if it is to be other than what she describes as "an occasionally useful abstraction... must begin in and through embodied relationships between actual people in real, not just virtual, spaces" (p.98). That is, an effort organized through the Internet, while useful, cannot get the necessary work done. In this anthropological sense, the challenge posed by the failure in Belgium is a matter of concern with respect to the agency of global civil society, as well as a reflection of the rather timid inter-governmental engagement with the struggle against impunity. Support for universal jurisdiction as a mechanism for such a politics of accountability is currently too fragile to overcome any determined show of geopolitical opposition to its exercise in specific instances. This is perhaps the lesson that most observers will draw from the Sharon case.

In some ways, the most striking essay in the book is that written by the well-regarded legal scholar Paul Kahn. It is striking, in part, because it provocatively contests the viability of universal jurisdiction in a world of sovereign states, and exhibits a sympathetic understanding of the moves made by Israel and the United States to oppose proceedings that would impose criminal accountability on their leaders. Kahn writes in a mode that contrasts sharply with that of Sally Falk Moore, who regards the Belgian effort as a noteworthy move, despite its failure in this instance. She views the Sharon case as prefiguring the sort

of moral community on a global scale that Kant projected long ago as the foundation of 'perpetual peace' (p.129).

Kahn also diverges from the main thrust of Borneman's contention that a *political* community that identifies victims and wrongdoers is in the process of constituting itself as a *moral* community, and that it is this process that lends interest to the claims of universal jurisdiction and to the specifics of the Sharon case. What Kahn insists is that any argument for *international* accountability is solely a moral argument at this stage of history, and that the effort to impose legal standards is doomed because it is insensitive to the political realities of a national polity, which is bound together by its own affinities based on emotion and a sense of legal authority limited to the procedures of national lawmaking. He associates this idea of legitimate law with some specifically American perspectives, including Abraham Lincoln's stress on the authority of popular sovereignty of the citizenry as channeled through Congress and the Supreme Court, and as opposed to the outlook of Thomas Jefferson, who derived legal authority from universal principles of justice. Kahn has harsh words for the rationale underlying the initiative: "The Belgian claim of universal jurisdiction simply ignored the reality of politics" (p.135), and reverting to the distinction between Lincoln and Jefferson: "This, then, is my complaint about universal jurisdiction. It is all justice and no legitimacy" (p.145).

For Kahn, the United States (and Israel) have taken a decisive Lincolnian turn, and thus it is to be expected that they would turn their backs on universal jurisdiction, seen as a purely 'moral' challenge, lacking any foundation in the legitimating processes of national lawmaking. Kahn does qualify his

comments by noting that the European turn toward internationalism in law and politics is a reflection of their disastrous experience with popular sovereignty over the course of the 20th century, which contrasts with an American sense of self-satisfaction over its self-sufficient *national* standards of accountability.⁹ Israel, without the benefit of Lincoln's authority, shares the American orientation. Israel's position was illustrated by its defiant rejection of a near unanimous Advisory Opinion by the International Court of Justice (ICJ) on the illegality of the security wall being built on Palestinian territory, and its simultaneous compliance with an Israeli Supreme Court ruling that required the government to re-route several segments of the wall, at considerable expense, to avoid some of the harm being inflicted on Palestinian communities. Israel's rejection of international standards with respect to its conduct reflects a somewhat paranoid view of the outside world's hostility to the existence of a Jewish state. Israeli security policy, initially shaped by the traumas of the Holocaust, was premised on the necessities of self-reliance in order to survive. Over the years, as Israel has gained in strength, this outlook has fused with an ultra-realist sense of the world as well as with expansionist national and territorial ambitions, according to which the powerful do what they will, and the weak do what they must.

There is an important zone of insensitivity in Kahn's presentation. His analysis blandly assumes the adequacy of the state system for representing the peoples of the world. Such insensitivity helps explain Kahn's inattention to the fact that the Palestinian experience unfolds outside of the protective structures of sovereign states. What is a stateless people supposed to do in such a world order? The issue also pertains to minority nations enclosed

within a hostile state. It is not possible to suppose that the fifteen million Kurds living in Turkey can be adequately represented or protected by the Turkish government. This issue of sensitivity to the Palestinian circumstance, with its multi-faceted urgency, might have been mitigated if one or more Palestinians had contributed chapters to Borneman's book. It is probable that a Palestinian, especially if living under occupation, would be actually aware of the representational inadequacy of the international structure of authority from the perspective of upholding minimal legal entitlements and human rights.

Why, though, should Kahn reinforce these expressions of militant nationalism at this historical moment? On one level, Kahn is telling readers not to be disappointed. This is the way things are, and other expectations are naïve and misleading. I disagree. It has never been more important to resist militant nationalism, even from the American and Israeli perspective of self-interest. American federalism carries this nationalist logic to extremes, with the state of Texas recently insisting, for instance, that its sovereignty supersedes that of the ICJ over the treaty rights of Mexicans condemned to death to a hearing in the presence of a representative of their consulate.¹⁰ The dynamic of globalization, which has gathered force in recent decades, will generate perpetual war if not conditioned and constrained by the emergence of an effective international criminal law that is binding on all actors, large and small. As I think Kahn argues, and Borneman indirectly acknowledges, the prospects for universal jurisdiction in high profile cases will be dismal until the underlying norms of accountability have been internalized by the elites of the world's major societies. Such a development,

if forthcoming, will be slow and contested at every stage. Even so, there is no good reason why the United States and Israel cannot live within the constraints on behavior established by the global rule of law. These constraints are the constraints that were imposed after World War II on those leaders who had represented Nazi Germany and Imperial Japan, and more recently on those who acted officially on behalf of the former Yugoslavia, Rwanda, and Sierra Leone. Further, there is very good reason why *all* leaders should be subject to international standards of accountability. The pretense that such procedures are *political* rather than *legal* when applied to a superpower is a feeble excuse for international lawlessness. The alleged anxiety is not at all borne out by the practice of international judicial procedures, whether exercised by international or national courts. This practice has been consistently responsible.

What makes Kahn's views especially disturbing is the failure to address the factual grounds of concern associated with the Sharon case, the point of which was to struggle against bland assumptions of political realism and militant nationalism. It is not surprising that Belgium backed down under pressure, but it is notable that the concept of the criminal accountability of leaders around the world is gaining in credibility.¹¹ In the 18th and 19th centuries, it would have been quite plausible to have made Kahn's argument as a justification for the US Supreme Court's deference to slavery in the American south. It required decades of struggle to make political projects of moral imperatives. So, too, is it likely to be with the spread of universal jurisdiction and the emergence of effective international procedures for imposing criminal responsibility on leaders charged with committing crimes against humanity and other international crimes that cause massive human

suffering. That there will be ebbs and flows in this struggle is certain. John Borneman may well be right when he concludes that "[t]he Sharon case may in fact signal the end of a short period in which the doctrine of universal jurisdiction was extended and possibilities of international accountability were developed" (p.6). When and if that day eventually arrives, when the promise of international accountability is fulfilled, I am confident that the opening of the Sharon case will be remembered, along with the earlier Pinochet case, as one of the landmark efforts, in Reed Brody's words, "to destroy the wall of impunity behind which the world's tyrants had always hidden to shield themselves from justice" (p.149). Borneman's small volume, with the exception of Kahn's contribution, can be read as an endorsement of and rationale for this historic effort. A further observation is that, although this wall of impunity has started to crumble, for now it provides ill-deserved shelter from legal prosecution to the most dangerous political actors in the world, namely, the political and military leaders of the strongest sovereign states.

As matters currently stand, the fight against impunity is being conducted with an implicit exemption of the geopolitical actors who control global policy, especially the United States. The selective prosecution of war criminals highlights a reliance on a double standard in the present shaping of world order. In such a surreal atmosphere, Saddam Hussein was prosecuted to the full extent of the law by the new Iraqi regime in a show trial, received the death penalty and was executed, while George W. Bush has been received in capitals around the world without the slightest reluctance. What challenge to his impunity exists is of a purely symbolic and ethical character, made incarnate only by protesters

in the streets, kept at a safe distance by police. While such demonstrations keep the struggle alive to an extent, they offer little solace to such victims as those of Sabra and Shatila, who were hoping, however innocently, for some kind of formal judicial acknowledgement of the severe injustices and barbarous crimes they endured over twenty years ago.

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End Notes

- * I would like to thank Lisa Hajjar and Maivan Clêch Lam for their illuminating suggestions made in response to an earlier draft of this book review.
- 1 See Avi Shlaim, *The Iron Wall: Israel and the Arab World* (New York: W.W. Norton, 2000) at 90-92, 406-417.
- 2 The Kahan Commission, established by the Israeli government to investigate the massacres, issued its report on 7 February 1983. The Kahan Commission found Sharon (along with several high-ranking military officers) “indirectly responsible” for the massacres. Sharon was not held criminally responsible on the grounds that he played only a “facilitative” role. According to the Kahan Commission, no Israeli was directly responsible for the events which occurred in the camp; however, it recommended that Sharon be removed as Minister of Defense. This recommendation was followed in a literal sense, but Sharon was immediately rehabilitated by being retained in the government as a Minister Without Portfolio. See also the report of “The MacBride Commission,” *Israel in Lebanon: The Report of the International Commission to Enquire into Reported Violations of International Law by Israel during its Invasion of Lebanon* (London: Ithaca Press, 1983) at 162-186 on the massacres; and BBC Documentary “Panorama,” broadcast in 2002, which recounts the role played by Sharon and other Israeli officials in the 1982 events at Sabra and Shatila.
- 3 Although the House of Lords eventually approved of extradition for Pinochet’s relationship to torture during part of his tenure as Chilean leader, he was nevertheless finally allowed to return to Chile after being found by the British Foreign Secretary unfit to stand trial. For an overview, see Richard Falk, “Assessing the Pinochet Litigation: Whither Universal Jurisdiction?” in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press 2004) at 97-120.
- 4 It is somewhat misleading to believe that universal jurisdiction is the only means by which national courts can deal with crimes committed outside national territory. Under international law, national courts can also deal with international crimes on the basis of other jurisdictional doctrines such as links to the victim or perpetrator, or on the basis of the impact that a given act may have on the state where the prosecution takes place. For a broad general discussion, see Macedo, *supra* note 3, at 15-35.
- 5 See also the important extension of American national legal authority to address international crimes committed in Paraguay. *Filartigia v. Pena-Irala*, 630 F.2d 876 (2d Cir, 1980).
- 6 For the full record, see John Duffett (ed.), *Against the Crime of Silence: Proceedings of the International War Crimes Tribunal* (New York: Simon and Schuster, 1968).
- 7 See John Borneman, “Reconciliation after Ethnic Cleansing,” 14 *Public Culture* 281 (2002); see also responses, “Reconciliation and Response,” 15 *Public Culture* 181 (2003). This discussion pertains directly to the issues raised by the still open wounds of the Sabra and Shatila massacres.
- 8 For a description of the project, see Macedo, *supra* note 3, for the ‘Princeton Principles’ governing reliance on universal jurisdiction, at 1-35.
- 9 In reviewing Anatol Lieven’s, *America Right or Wrong: An Anatomy of American Nationalism*, Walter Russell Mead makes a typically chauvinistic remark: “But although these [criticisms] are interesting (if not completely original) insights, one awaits Lieven’s explanation of why a state with such a deeply dysfunctional culture has succeeded so brilliantly on the international stage for so long.” Published in 84(2) *Foreign Affairs* 157 (2005). The whole point of universal jurisdiction is to challenge ‘success’ measured by power and wealth alone. Incidentally, Lieven’s book is notable because of its critique of the sort of nationalistic absolutism that has been espoused in recent years by both the United States and Israel, generally at the expense of weak adversaries, and, as Borneman points out, unrepresented Palestinian victims, stateless from the perspective of international law.
- 10 Adam Liptak, “U.S. Says It Has Withdrawn From World Judicial Body,” *New York Times*, 10 March 2005, A14. A Texas state official is quoted as saying, “The state of Texas believes no international court supersedes the laws of Texas or the laws of the United States.”
- 11 See the Princeton Principles as presented and discussed in Macedo, *supra* note 3, at 18-25.

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We do not know her name. She appears in their lists as "wanted". Arrest instructions demand handcuffing prior to blindfolding. The moderation which the soldiers show the detained woman, like the gentlemanliness as it were with which the soldier holds the flannel-strip blindfold, as if it were some shawl he was about to wrap around her head, attest to the fact that they do not see her as a source of danger. Apparently they sense some discomfort at handling her as violently as they usually do male detainees. The photographer, a Machsom Watch activist, perceived this and promised them not to photograph their faces. How ironic that in order to be true to her word, I was obliged to black-out the soldier's eyes.

In the second photograph, once more we see the same woman who a moment ago was standing erect. Here she is hunched over, her head bent, dependent on the soldier leading her, that same soldier from whom until a moment ago she tried to keep her distance. This is only the beginning of her arrest. After being swallowed into the army jeep taking her to the GSS installation, she will be swallowed into the sinister land from which few verbal and fewer visual testimonies have as yet been exposed.



