

Criminal Trials in an Age of Terror

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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

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.

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.

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).