# *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.



**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.



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. Bali 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 account ability 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.