Political Criminal Trials in an age of Terror

Leora Bilsky

1. Introduction

My paper deals with the question of boundaries. What is the relationship between the boundaries of a political community and the scope of the applicability of criminal law? These questions are part of a broader inquiry I have been engaging in during the last few years, considering the political criminal trial through the prism of liberal theory. In particular, I am interested in the relations between the development of International criminal law and national criminal law. Elsewhere I have criticized the broad definition of universal jurisdiction as creating new risks for political trials.[1] In this essay I would like to consider the other side – the role of national courts in criminalizing political conflicts. In particular, I present the question from the perspective of the changing boundaries of criminal law. I address the issue of boundaries with the help of two borderline cases that were tried recently by Israeli courts. The one case, the trial of **Azmi Bashara**, an Arab-Israeli Member of the Israeli Parliament (the *Knesset*), dealt with a speech given by Bashara in Syria in favor of the Palestinian right to "resist". The second case, the trial of **Marwan Barghouti**, a Member of the Palestinian Parliament and a political leader in the *Fatah* faction and the military *Tanzim* faction, revolved around speeches he made in support of the violent uprising against the Israeli Occupation and of supplying weapons and financial support to the executors of terrorist acts by members of his organization. In both cases, the path to the criminal trial passed through the category of "terror", which was translated into specific criminal offenses. I will argue that in both cases, the trials were not regular criminal trials, but, rather, political trials in which the very legitimacy of the use of criminal law was at issue. It must be stated in the outset that my identifying the trials as 'political' does not mean that they should be forbidden, rather, that we have to engage the unique problems they are raising in an honest way, and to devise ways to address these difficulties. Accordingly I will attempt to point to the

[1] Leora Bilsky, *Territory, Community and Political Trials: A New Challenge for International Law*, 27(2) Tel Aviv Univ. L. Rev. 655 (in Hebrew)(2003).

difficulties that emerge when terrorism is brought into the scope of the criminal law, as well as to the particular difficulty of a court identified with one side of the conflict to adjudicate in such cases. I also identify, the unexpected risks these trials carry for the political authorities and weight their potential as a (limited and confined) space for hearing the Other's story.

2. Friend and Foe

Liberal criminal law is based on the rejection of an identity-based approach to crime and replacing it with an action approach.[2] This popular view was the subject of criticism by the German jurist Carl Schmitt (who under the Third Reich became an adovacte of Nazism). Schmitt pointed to a contradiction within liberal legal system. On the one hand, it is committed to an action 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 *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.[3]

According to Schmitt whoever is considered a 'friend' is regarded as residing within the internal circle of the law—she can be a law-abiding citizen who might get into a political argument over the basic values of society, or she can be someone who takes the law into her hands and thereby breaks it. She is than considered a criminal, regardless of whether the action stemmed from an opposing political or ideological value system. Someone

[2] George E. Fletcher, Rethinking Criminal law (Boston: Little, Brown, 1978) 343-349 (Fletcher explains the difference in terms of 'tainting' versus 'blaming').
[3] Carl Schmitt, The Concept of the Political 26-27 (Rutgers Univ. Press, New Brunswick, NJ: 1976).

outside the circle of the polity, on the other hand, can be either a friendly outsider, which we have no problem with, or, and this is more important, can be turned into the "enemy". With the enemy we do not use criminal law. We might resort to violent conflict, called war, and then there is a whole different set of applicable laws: the laws of war.[4] In other words, violence is a permissible tool, depending on the definition of the actor (as 'friend' or 'foe').

What we have seen 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, and this has been done through the concept of 'terror'. We hear expressions such as the "War on Terrorism" and, at the same time, expressions of regarding terrorists as mere criminals. This confusion indicates that there is a desire to distinguish terrorists from the community, from the ordinary ways of protesting and breaking the law (treating them as the 'enemy'). But at the same time, we want to depoliticize the actions of terrorists and do so by criminalizing them, by resorting to ordinary criminal trials against them. But by resorting to the criminal law in these cases, we in fact indicate that the accused belong to the internal circle of the polity, and he has to answer it according to the community's laws. On the other hand, by using the framework of criminal law, we no longer recognize his right to resort to violence as a 'collective right' between warring states, a right still recognized under certain conditions by international law.[5] In other words, we deny the accused the right to rely on his 'political motive' as part of the general rejection of such a move by liberal criminal law.[6] Thus the distinction between the internal and the external, the citizen and the enemy, is blurred through the use of criminal law.[7]

---

[4] 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 Guilty*, 111 Yale L.J 1499, 1518 (2002).

[5] *Id.* at 1522.

[6] 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 35-58 (2nd ed., Butterworths, 2001). For a response see, Anthony Duff, *Principle and Contradiction in the Criminal Law: Motives and Criminal Liability, in* Philosophy and the Criminal Law 156, 179-184 (Duff ed., 1998). For an interesting American case in which the judge's

3. Kirschheimer: Political Trials and the Element of Risk

Traditional liberal response to this difficulty was one of boundary drawing. Liberal theorists developed a binary structure that sharply distinguishes between criminal law and international law, and discuss under which rubric we should deal with the 'terrorist'.[8] But this solution only avoids the problem I am raising here since it does not acknowledge the process through which one is defined as 'friend' or 'foe' in criminal trials. Perhaps a new conceptual framework is necessary, one that is capable of honestly acknowledging the existence of political trials, while drawing the limits of their legitimacy. I submit that such clarification lies in a liberal theory of political trials.[9] The concept of the political criminal trial is useful since it retains both the ordinary (the criminal act) and the extraordinary (the political deed) senses of the trial. The question of how to assess the legitimacy of a political trial (as opposed to a "show trial") has been examined in the past by various liberal authors. I would like to rely here on the writings of Otto Kirschheimer in order to assess the new development of criminalizing terror in national courts.

Kirschheimer identified a double role to the criminal political trial. On the one hand, it is a criminal trial—that is, we are locking away someone who has breached the criminal code. When this is done to a political figure, we are also removing him from the political game. We delegitimize him because we no longer need to discuss and argue with his political views, since he broke the "social contract" by resorting to criminal activity. On the other hand, using criminal law against a political adversary legitimizes the-powers-that-be because their own political motivation is camouflaged by the trial and the

---

attempt to take into account political motive in order to exculpate a defendant, a clergyman who broke a court order restraining him from protesting in an abortion clinic, was categorically rejected as an error of law. See, United States vs. Lynch 162 F.3d 732 (2d Cir. 1998).

[7] There is a third way, the US government view, according to which the laws of war apply only between sovereign states, thus making the terrorist something like Schmitt's famous exception: the person who is placed outside the social order and the law (both the laws of war and the criminal law) by the arbitrary decision of the sovereign. Military Order of November 13, 2001 (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism) 66 Fed. Reg. 222 (two months after the 9/11 attacks and one months after the bombing in Afghanistan began, President George Bush declared that the 9/11 attacks were an "Act of War" and that all non-US citizens detained by the United States in relation to terrorism would be tried by *military commission*.) The US position is different from the stance expressed by the Israeli authorities in the Barghouti trial, according to which "illegal combatants" do not enjoy the status of "war prisoner" and thus can be subject to *criminal trials. See* TP.H 1158/02, State of Israel v. Barghouti (Tel Aviv District Court, Jan. 19, 2003).

[8] Ronald Dworkin, *What the Court Really Said*, Vol. 51, Num. 13, N.Y. Rev. Books (August 12, 2004).

[9] For elaboration see, Leora Bilsky, Transformative Justice: Israeli Identity on Trial (2004).

move is presented as an ordinary act of criminal prosecution—especially in light of the fact that domestic criminal law does not distinguish in general between different motives for murder and it does not recognize "collective self defense" as opposed to individual self defense. A successful political trial for the authorities is one that transforms a legitimate political adversary into a criminal whose criticism the authorities no longer have to address politically. The risk here is that in the framework of this process, the defendant might manage to expose the political motivation of the trial and use the trial to delegitimize the authorities. The trial is then revealed as not a criminal prosecution but rather as a political persecution. This is a kind of a high-risk game, and the entirety of Kirschheimer's writings on this issue is directed at identifying this game and considering the constitutional possibilities of expanding the space of opportunity for the defendant and in this way expanding the risk for the authorities and the space for political debate.

Deliberative democracy writers have devoted great effort to showing how the breadth of political discourse can be widened and thereby strengthen the concept of citizenship in liberal democracies. Resorting to criminal law threatens to narrow the political space in which conflicting groups debate the basic values of society. In the political criminal trial, the defendant is portrayed as the Other to the community, since he broke its most fundamental values, and the group that he claims to represent is thus also delegitimized. However, when we deal with terrorists who are considered as the Other to society, it might be that by deciding to conduct a criminal trial against them (as opposed to administrative detention or political assassination), the authorities also contribute to the possibility of a political debate, although in a very constrained and a-symmetrical manner.

4. Political Trials and Radical Difference

Every political trial begins 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 substantive law that governs the dispute (and in extreme situations not even on the evidentiary and procedural rules that can be legitimately applied to

resolve it.) The controversy cannot be resolved solely by legal means since it does not concern a legal question such as the interpretation of the law or a factual situation. 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. Put differently, even if the defendant committed the alleged crimes, there is a question whether the defendant should be answerable to the adjudicating court. In effect each side calls for the recognition of a different historical narrative, and to a different court capable of adjudicating the case accordingly. In such cases, the triad structure of the trial collapses into a binary structure of two opposite parties facing each other in a power struggle without 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 give legitimacy to its ruling. In cases of radical difference**,** there is no such third party, because the court itself is deemed by one of the parties as its adversary, and the legitimacy of the court is therefore called into question.

Aware of these difficulties, Kirschheimer tried to justify these trials from a liberal perspective by pointing out the space of opportunity opened up to the defendant in a criminal political trial. He explained that this space of opportunity is allowed to enter into the political criminal trial not because of the good will of the authorities but rather because it serves their long-run interests. True, the political authorities have the power to use the criminal trial as a completely sham persecution of the regime's political enemies, and give no independent discretion to the court. However, the court's ruling in such a case will fail to provide the authorities the legitimacy that they seek since it will be viewed as a mere political instrument. So in such a case there is no reason for the authorities to turn to the court in the first place to neutralize their political enemies. The authorities could use the tool of assassination or martial law, for example, as a more efficient mode for dealing with political adversaries (especially when the violent conflict between the groups is still going on). Therefore the very decision of the authorities to conduct a criminal trial is indicative of their interest in gaining legitimacy from the court's ruling, and this can be done only if a certain degree of separation of powers is upheld**.** According to this analysis, the powers-that-be, because of their self-interest, will guarantee the court some margin of autonomy. The interesting question for Kirschheimer

is, therefore, not whether the trial is political, but whether and how the court can take the opportunity to expand its independence, and whether and how the political defendant can make use of the opportunity to expand this margin of opportunity. Under this analysis, the goal of the political defendant is not simply to win the case, but to reintroduce the political element into the criminal trial by causing the risks to the authorities to materialize.

5. 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 try to play according to those rules, the existing 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 complete non-cooperation: delegitimizing 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 the rules … your rules." The problem with this strategy is that it does not really allow the defendant the opportunity to present a different narrative in court and usually she just loses the case.

These two strategies were adopted by Bashara and Barghouti, respectively. In order to understand their different choices, we need to delve into some of the details of the political backgrounds to the cases, to identify the points in which “radical difference” was manifested. In both cases, the State of Israel decided to conduct a criminal trial in the regular, civilian courts. In the Bashara case, it had to overcome the political immunity enjoyed by Knesset members, in the Barghouti case it could have opted for a military court instead. In choosing to conduct the trial under regular procedure and general criminal code, the conflicts were further removed from their political context. Choosing civilian courts in the Barghouti case was the first step in the legitimization of the authorities, because if the case is deliberated in the military courts, it does not enjoy the allure of the ‘rule of law’. Nevertheless, unlike in ordinary criminal trials, in such

political trials the court's legitimacy is called into question because there is a collision of narratives about the basic values of the State and the court is committed to one particular narrative in advance.

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 Bashara is an Israeli citizen, a Member of the *Knesset*, and a political leader of a party that is identified with the ideology of turning 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*, and an elected member of the Palestinian Parliament. He promotes and supports a political platform that denounces the Israeli occupation of the territories and advocates military 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 resistance actions legitimate under international law.[10] This narrative collides with the Israel's narrative in its own recent "war on terror", a narrative that does not distinguish acts of violent resistance and defines them all as acts of terror.

In both cases, the underlying theme of the two competing narratives is, of course, the ongoing conflict between Jews and Palestinians in the region. The one important difference between the trials is that Bashara 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. In his trial, therefore, he chose not to question the very competence of Israeli courts to judge his actions. However, he claimed that, under existing law, he was answerable only to the *Knesset*, since political speeches of members

[10] The International Law has recognized gradually in self-determination situations where 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 to 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 Decleration. *See* Malcolm N. Shaw, International Law 1036-1039 (5th ed, 2003).

of parliament enjoy immunity. Bashara 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—and making Arab opposition a criminal activity.[11] 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 Bashara crossed the line when he advocated violent actions of resistance by Palestinians to the Israeli occupation. Legally the cases also differ in degree of legitimacy because the charges brought against Bashara concern "speech" that creates a risk of materializing in the future, whereas in the case of Barghouti, the risk had already materialized and he is therefore accused of murder and of being an accomplice to murder.

6. The Barghouti Trial

Has any risk to the Israeli political authorities materialized in this trial? Barghouti' trial is particularly interesting because, within Israel, there is an ongoing debate about whether assassinations of Palestinian military and political leaders are lawful. The Israeli Supreme Court has not ruled yet on this matter.[12] Opponents of assassinations in Israel advocate criminal trials instead of resorting to assassinations (as was done, for example, with Hamas leader Sheich Yassin). So in a sense, it is difficult for those in Israel who criticize the lawfulness of the assassinations to really condemn the Barghouti trial. The State, on the other hand, has had a choice between resorting to the political/violent action of assassination and conducting a criminal trial. It also had a choice between military court

[11] At the time of writing this question is still pending before the Israeli Supreme Court sitting as a High Court of Justice. *See* H.C.J. 11225/03 MK Azmi Bishara, et. al. v. The Attorney General, et. al. (case pending). A summary of the claims posed by the petitioner is *available at* http://www.adalah.org/eng/legaladvocacypolitical.php#11225. *See also* Election Confirmation 11280/02 Central Elections Committee v. Ahmed Tibi 57(4) ILR 1 (Israel Supreme Court, 15 May 2003), in which the Israeli Supreme Court has reversed the Central Election Committee's decision to withhold Bashara's party, NDA (National Democratic Assemley), from participating in the general elections because of its policy of turning Israel into 'a state of all its citizens'.

[12] *See* H.C.J 769/02 The Public Committee Against Torture in Israel, et. al. v. Government of Israel et. al. (case pending). The petition by attorney Avigdor Feldman in English *available at* http://www.stoptorture.org.il/eng/images/uploaded/publications/76.pdf. Opponents to assassinations also refuse to see the act of assassination as a legitimate mean of self-defense under the laws of war. For a discussion about international law and the use of assassinations (called also "preventive killing" or "targeted killing") in the light of United States' and Israel's policy see, George Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5(1) Theoretical Inq. L. 111 (January, 2004).

and civilian court.[13] It is clear, therefore, that by resorting to civilian court proceedings, the State has tried to achieve legitimacy in the eyes of the world. But this introduces a political element to the trial and makes it a very questionable process, since it is based on a situation of "radical difference" and since the court belongs to the political community that is currently engaged in a military conflict with the group represented by the defendant. The trial thus has the potential of criminalizing an ongoing political conflict.

In order to assess the space of opportunity opened by the court we should consider two questions: First, 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 *Intifada*? Second, did the trial create any risk for the Israeli authorities?

One big risk did materialize in the trial, and this was the 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 is found guilty for all the terror acts committed by subordinate members of his organization. The trial thus 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 advocated and supported the *Intifada*, any terror action taken by 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 resort to Israeli criminal law. This body of law, like many criminal codes in liberal democracies, is based on individual responsibility and rejects the concept of collective responsibility.[14] In order to convict Barghouti for all the terror attacks committed by members of his group the prosecution had to provide an expansive interpretation of who is an accomplice to a crime. The prosecution claimed that the mere fact of being a high political leader advocating acts of violent resistance and providing financial support and weapons to the

[13] The Israeli Prosecution claimed that the choice of conducting the trial within the civilian or military court is under its own discretion. The court accepted this argument, ruling that regulation 2 of the Act of Jurisdiction and Legal Assistance that establishes the jurisdiction of Israeli courts over Crimes committed in the occupied territories by Israeli citizens while explicitly excluding Palestinian residents, does not override the Criminal Penal Code that establishes territorial jurisdiction over the case. Compare to the case of H.C.J. 10519/04 Razawi v. Israeli Police and others [petitioner who was a resident of east Jerusalem asked to be arrested and tried in Israeli courts according to the general criminal code since it is believed to better protect due process rights of criminal defendant. State claimed discretion over Palestinian residents and preferred military option in this case.)

[14] For elaboration on the tension between collective guilt and criminal law see, Fletcher, *supra* note 5.

people conducting the violent resistance, makes the leader personally responsible as an accomplice for all the terror activities committed by the group he leads. Furthermore, the prosecution claimed that not only was Barghouti an accomplice to murder, he could also be considered a principle actor.

The court rejected the prosecution's line of argument, undermining it's most important political message. How can we explain this fact according to political trials' theory? Here we must pay attention to the dynamics of resorting to national courts according to domestic criminal law. Accepting the argument put forth by the prosecution threatened to destroy a cornerstone of Israeli criminal law, the need to prove individual responsibility. In order to convict Barghouti the court will have to erase the distinction between principle actor and accomplice, between political leader and criminal actor. The judges refused to allow for such an expansion of the law. This is exactly what Kirschheimer talked about: 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 according to the general criminal code. But trying him under domestic criminal law meant that the proceedings were subject to the judges' eternal concern with precedents and therefore could not afford to accept such an expansive interpretation of the law. Just as an aside, the judges in the Eichmann trial faced the same dilemma, with which they contended by relying on the "special law" of the Nazis and Nazis Collaborators Law, 5710-1950, and applying the special category created in the Law of "crimes against the Jewish people" and "crimes against humanity".[15] By so doing, it safeguarded ordinary criminal law from undesirable expansion. Yet, the Eichmann's court choice to rely on the special law against Nazis and their collaborators, did carry the potential to undermine the legitimacy of the trial since it was harder to show that Eichmann had been judged like "any other criminal".[16] The judges in the Barghouti trial, in contrast, could not resort to this special law, since "crimes against the Jewish people" and "crimes against humanity" have never been incorporated into the criminal code and these categories were reserved for crimes

[15] C.A. 336/61 Eichmann v. State of Israel 16(3) ILR 2033 (Supreme Court of Israel, 29 May 1962).
[16] See criticism by Hannah Arendt on the court's reliance on "Crimes Against Jewish People" as opposed to the universal category of "Crimes Against Humanity". Hannah Arendt, Eichmann in Jerusalem: A Report On The Banality Of Evil (N.Y., The Viking Press)(1963).

committed during the Nazi period. The judges therefore dismissed thirty-three of the thirty-seven counts of murder Barghouti was charged with as irrelevant and found him guilty of accessory/incitement to murder and murder in only four instances. In each of these events, the court found that direct involvement on the part of the defendant had been proven. Thus, the principle of individual responsibility was kept. The mere political activity such as political speech encouraging military resistance, or of providing financial support to terrorists, did not suffice in the court's view to turn Barghouti the political leader into a murderer. 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 only due to his general awareness that his people are executing attacks using weapons and funds that he secured for them."[17]

In terms of criminal law, Barghouti was convicted for murder in four instances, 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 agreement and choosing the path of violent resistance. The court therefore found a way of maintaining its partial- autonomy from the political authorities.[18]

Where politics did gain the upper hand, however, was in the preliminary stage of the trial in which the court's jurisdiction was deliberated. The Barguouti trial proceeded in two separate stages. During the first stage, dealing with the court's authority to judge Barghouti, whether he is at all subject to the jurisdiction of an Israeli court, the defendant cooperated with the proceedings and raised several grounds of legal objections.[19] But

[17] TP.H 1158/02 State of Israel v. Barghouti (Tel-Aviv-Jaffa Dist. Ct., May 20, 2004), para. 171.
[18] For elaboration on the concept of 'partial autonomy' in political trials see Robert Gordon, "Some Critical Theories of Law and Their Critics" in *The Politics of Law* 641-61 (ed., David Kairys, 3d ed., 1998)(New York: Basic Books).
[19] Barghouti was represented during the detention proceeding, in which the claim against the court's jurisdiction was raised by his lawyers. However, it was not resolved by the court at this stage. *See* B.SH. 92134/02 State of Israel v. Baghouti (Tel-Aviv-Jaffa Dist. Ct., Dec. 12, 2002). At the opening of his trial, Barghouti's preliminary claims against the court's jurisdiction were presented by him already without legal representation, in his 'speech' he declared that "the court and the Public Defense represnts the Israeli occupation and are here to defend it. … There is an indictment against me. I havn't read it nor heard it … I do not recognize it". The court's decision that it has jurisdiction over the case refered to Barghouti's legal

once Barghouti lost in this matter, he ceased to cooperate with the proceedings. The entire trial was then conducted without his cooperation, which is in essence how he tried to de-legitimize the Israeli court.[20] This was an interesting move because the judges, who are used to playing the role of umpire in a trial, ruling above the two adversaries, had to try and 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 tribunal and not just with the prosecution. As Barghouti declared to 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."[21] The defendant, who was obligated by the court to be represented by the Israeli General Public Defender, refused to advance a legal defense. With this performative act of refusal he was able to expose the rule of force underlying this trial.

[maybe drop

Did Barghout managed to use the trial to advance an alternative narrative to the Official Israeli one? As explained, the defendant, who was obligated by the court to be represented by the by the Israeli General Public Defender, refused to advance a legal defense. However, the court did allow him to use the courtroom from time to time as a stage for advancing his political narrative. Thus, the trial became one of the most interesting meeting points between the Israeli and Palestinian narratives regarding the collapse of the peace agreement. According to the prevailing Israeli narrative, Barghouti represents the Palestinians' betrayal of the principles of Oslo. Criminalizing him was, above all, clearing the Israeli political leadership of all responsibility for the collapse of the peace process and the violence that had ensued. Barghouti, in contrast, advanced the (missing) story from a Palestinian point of view. According to him, it was Israel that had

---

arguments that were presented in the detention proceeding and rejected them. TP.H 1158/02 State of Israel v. Barghouti (Tel-Aviv-Jaffa Dist. Ct., Jan. 19, 2003).

[20] The defendant refused to appoint a lawyer to himself. The court ordered the Public Defense to represent Bargouti. TP.H 1158/02 State of Israel v. Barghouti (Tel-Aviv-Jaffa Dist. Ct., March 27, 2003). However, lawyers from the public defense office did not supply an active defense since it would thus act against its client's wishes. For elaboration see K. Mann and D. Weiner, *Creating a Public Defender System in the Shadow of the Israeli – Palestinian Conflict*, 48 N.Y.L. Sch. L. Rev. 91, 111-122 (2003).

[21] Globes, "Intifada at Sirota's Trial" [author's translation], 9 October 2002.

broken its promises and had continued to build settlements after Oslo and to make the life of the ordinary Palestinian harder and harder:

> "I am a person who lived and was born under Israeli occupation, and I know what occupation is. Maybe for you it is dominating another people, and you are proud that you conquer and 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.].

The audience Barghouti was addressing in his court speeches was very clearly the Israeli people. Thus, for example, in his closing speech, he said, "How can Jews who suffered and underwent the Holocaust ... how do they allow themselves to use such unacceptable ways against another people?" [author's translation].

At the level of competing narratives, the court was unwilling to accept Barghouti's narrative as a relevant defense to his criminal actions. Deciding on the matter of jurisdiction, the court rejected Bargouti's contention that he should be subject to the rules of Public International law and enjoy the status of a 'prisoner of war' since he was in essense a 'freedom fighter' for the Palestinian right of self-determination. In response, the court distinguished between 'legal fighter' and 'illegal fighters' and explained that the later cannot enjoy the status of 'prisoner of war' and therefore are legitimate subjects to criminal law.[22] Bargouti further claimed that he enjoyed the protection of International Criminal Law since he restricted his people to target only military targets and Jewish settlers within the occupied territories.[23] The court rejected the distinction between different categories of civilians (settlers and israelies within green line.). In effect, once the argument against Israeli jurisdiction over Barghouti had been dismissed, the court ignored the collective and political aspects of the crimes and focused on determining the

[22] Judge Tal, TP.H 1158/02 State of Israel v. Barghouti (Tel-Aviv-Jaffa Dist. Ct., Jan. 19, 2003).
[23] *See, e.g.*, TP.H 1158/02 State of Israel v. Barghouti (Tel-Aviv-Jaffa Dist. Ct., May 20, 2004) 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 delivered that Barghouti told him that military targets are to be preferred over civil ones).

individual responsibility of the defendant, as required by the criminal law. Thus, having dismissed the "political motive" as irrelevant, the court then turned to examine Barghouti personal responsibility to acts of murder. The final result is a legal narrative that is not different from any other criminal case.]

7. The Bashara Trial

I will devote much less space to discussing the Bashara trial, as the decision in the case is still pending.[24] Dr. Azmi Bashara is one of the founders of *Balad*, the National Democratic Assembly, and a member of the Israeli Parliament since 1996. On November 7, 2001, the *Knesset* voted to lift Bashara's parliamentary immunity, and on November 11, 2001, the Attorney-General filed two indictments against him. The first indictment charged Bashara with violating the Prevention of Terror Ordinance **[1948]** in two public speeches he made, one in the city 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 Hizbulla party. The indictment claimed that Bashara's speeches were a call for committing terrorist acts against Israelis. He was indicted for supporting a terrorist organization.

The speech by Bashara 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

[24] Bashara was brought to trial in two cases: one for facilitating visits to Syria for Arab-Israeli citizens (the case was dropped); the second for political speeches he made, in which the preliminary decision from the Israeli Supreme Court as to whether the law of political immunity covers these speeches is still pending. The combination of the cases was meant to create better legitimacy for the criminal prosecution (since it showed an 'action' basis for prosecution that goes beyond 'speech'. However this legitimacy was undermined when court rejected the first case. For elaboration on the politics of these trials see, Nimer Sultany and Areej Sabbagh-Khoury, Resisting Hegemony: The Azmi Bishara Trial (in Arabic and Hebrew) (Mada, October 2003).

> 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"…[25]

With the Bashara trial, there is what I believe to be an irony, which I want to identify. It was much more difficult to try Bashara 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 the Hizbulla model of violence, or it could be seen as supporting the conditions for civil disobedience of various sorts. This question is left to be resolved by the court (once the immunity issue is decided). The irony is that the speech for which Bashara was indicted talked about expanding the space of political action, of creating a third path of resistance, between complete submission to Israel's demands and total war. While the criminal charges against him demanded that his speech obey the logic of a binary system – of 'free speech' or 'supporting terror' – completely erasing the possibility of interpreting 'resistance' as a civil disobedience option.[26]

The question to be deliberated by the court is what Bashara 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 or, at least in his speech, spoke about expanding the political space. The reaction of the political authorities in Israel to

---

[25] The translation of this speech was taken from Bashara's website: http://www.azmibishara.info/. The speech in Hebrew translation appears in H.C.J 11280/02 Elections Committee v. Ahmed Tibi 57(4) ILR 1 para. 31 (Israel Supreme Court, 15 May 2003).

[26] Such a 'third way', for example, is claimed to be practiced in the last few months in the Biliin village, demonstration against the construction of the wall.Yehonatan Liss, "Lies and exssesive power over protesters"[author's translation], ha'aretz, 28 July 2005. יהונתן ליס, שופטים נגד מג"ב: שקרים וכוח מופרז מול מפגיני הגדר (28 ביולי 2005)

this was to reduce the political space by taking away Bashara's political immunity, symbolically removing his views from the Israeli Parliament's agenda, the forum where he can 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" is thus singled out as a non-political option, made into a criminal speech-act, and therefore, an option the Israeli public does not have to contend with. So this trial is fraught with irony, and I am sure that Bashara will take full advantage of it. Indeed, he began by retaining a lawyer from *Adalah*, the Center for the Legal Rights of Arab Citizens for Equality, to represent him – thus stressing the collective aspects of his trial. Currently, the trial judges are awaiting the decision of the Supreme Court on the preliminary matter of the lifting of his parliamentary immunity.

How does this trial stand in relation to Supreme Court decisions regarding freedom of speech in recent years? Interestingly, the freedom of speech question of Arab citizens has been discussed in the Israeli not only as a 'liberty' issue but also as an 'equality' issue. This dimension has not been an integral part of the court deliberations, but was imposed externally by the comparison between 'twin cases'. Thus, for example two important decisions regarding freedom of speech, the Kahana[27] case and Jabareen[28] case, considered two inciting speeches colored by racist colors by a Jewish and Arab citizens. Legally the cases were decided according to different statutes, and in the former the court convicted while in the later it acquitted. And yet, in the press, and in the juridical reviews both cases were considered together, thus adding the equality dimension to the debate.[29] This equality consideration is even more manifest in the election cases in which article 7a of basic law: Haknesset is interepreted.[30] Against this background, it is important to notice that Bashara was indicted in a period in which speeches from right wing leaders, and Rabaies calling for civil disobedience and seemingly inciting to violence, have proliferated. Yet, the Attorney General has so far avoided bringing

[27] H.C.J. 1789/98 State of Israel v. Kahana 54(5) ILR 145 (Supreme Court of Israel, 27 November 2000); H.C.J. 6696/96 Kahana v. State of Israel 52(1) ILR 535 (Supreme Sourt of Israel, 2 March 1998).
[28] H.C.J. 8613/96 Jabareen v. State of Israel 54(5) ILR 193 (Supreme Court of Israel, 27 November 2000).
[29] For further debate on the Jabareen case see Eyal Benvenisti, *Regulating Freedom of Speech in a Divided Society* (30)29 Mishpatim 51. For more on the different aspects of the Kahana trial see Mordehai Kremnitzer and Liat Levanon-Morag, *Limiting Freedom of Speech for the Prevention of Violence*, 7(1) Mishpat uMimshal 305.
[30] refer to law and to 'twin cases'

criminal charges against these leaders (adopting a policy of trying to channel these cases to the political rather than the legal domain).[31] It is also indicative that in a recent reform to the Law of Immunity of Knesset members, in which the General Attorney was given the power to indict without prior Knesset approval, a specific option was added for the M.K to bring the issue before Knesset committee in cases of alleged discrimination against him.[32]

<u>סיכום</u>

עם סיום הרשימה ברצוני לחזור אל נקודת המוצא. הליברליזם המשפטי ניצב היום בפני אתגר לא פשוט אליו חושף אותו הטרור. מחד, המחויבות לשלטון החוק של הגישה הליברלית התבטאה בניסיון להכפיף כל ביטוי של אלימות למרות המשפט. מאידך, היכולת לתחם את ה'אלימות המותרת' לזמנים ומצבים קיצוניים של מלחמה במסגרת כללי המשפט הבינלאומי שעדין מכירים בלגיטימיות השימוש באלימות בקונפליקטים בין קבוצות – לא עוזרת כאשר מדובר בפעילות טרור כלפי אזרחים. התגובה הראשונית של מדינת ישראל אשר מעורבת בכיבוש רב שנים ואשר נחשפה לפעילות טרור מתמשך ואלים במיוחד, היתה להפעיל תגובה צבאית, ולפתח דרכים אשר חוקיותם מוטלת בספק כמו 'חיסולים ממוקדים' ועניישה קולקטיבית. הפניה אל מערכת בתי המשפט הרגילים והפעלת המשפט הפלילי נחשבת על כן כ'התקדמות' בעיניים ליברליות. אבל כפי שהראיתי, הסכנה של המשפט הפלילי הפוליטי היא גדולה באשר היא תורמת לטישטוש הבסיס הפוליטי של הקונפליקט ולמחיקת ההבדלים בין הנאשם הפוליטי לנאשם הפלילי הרגיל. הקרימינליזציה של הסיכסוך, משמעותה מחיקת הקונטקסט הפוליטי והקבוצתי של הסיכסוך והיכולת לקיים שיפוטים נורמטיביים לאורו. בקצרה, המשפט הפלילי המהותי לא ערוך להתמודד עם מצבים אותם כיניתי 'שוני רדיקלי'. בנוסף, כאשר טרור נכנס לבית המשפט של מדינה המעורבת במאבק פוליטי עם אותם טרוריסטים, אבן יסוד של המשפט הפלילי – הניתוק של השופטים מן הסכסוך הנדון, לא מתקיימת. לאור בעיות אלו רבו הקריאות לשלול את הלגיטימיות ממשפטים פוליטיים פלילים. אחד מן הפתרונות שנוצרו בשנים האחרונות היה להעביר סכסוכים מסוג זה אל שופט צד ג' – שופט במדינה שלישית (דוגמת בלגיה) או שופט בערכאה בינלאומית (האג). אופציה זו, כפי שטענתי במקום אחר, יוצרת בעיות של פוליטיזציה מסוג אחר (הנובעת משרירותיות וחוסר עיקביות באכיפת החוק הבינלאומי), ואינן פותרות באופן מהותי את הקושי.[33] האופציה השניה, אותה בחנתי במאמר זה, היא להכיר בהיותם של משפטים פליליים אלו גם משפטים פוליטיים – אך לנסות ולבחון מהי מידת הלגיטימיות

[31] This a-symetery was pronounced since the debate over 'hitnatkut' (disengagement) has erupted. See for example report on the long deliberation of Attorney General whether to indict Rav Shmuel Eliyahu who seemed to incite to violence against the Arab and for civil disobedience regarding hitnatkut (see Haaretz, 10 August 2005).

[32] The Parliament Members Immunity Law, The Rights and Obligations of Parliament Members (33rd Amendment), 2005.

[33] Bilsky, *supra* note 1.

שלהם וכיצד ניתן להגבירה. ברשימה זו ניסיתי להראות כיצד גם בנסיבות הקשות ביותר – של קונפליקט אלים בין קבוצות – עדין שופטים של בתי משפט לאומיים מסוגלים לרכך את הפוליטיות של התביעה בשל שיקולים פנים משפטיים (דרישות החוק, תקדים מחייב), וכן שיקולים מוסדיים (עצמאות מערכת משפט ביחס לרשות מבצעת, מעמד בתי המשפט ביחס לקהילת משפט בינלאומית וכיו"ב). קראתי לתופעה זו בעקבות קירשהיימר 'מרחב הסיכון.' דווקא מאחר שמשפט פלילי קשור בחבל הטבור להגדרת גבולותיה של קהילה פוליטית – מתן מעמד (אפילו של נאשם פלילי) יוצרת אופציה לנאשם לאתגר את השיטה מבפנים. ברשימה זו רציתי בעיקר להצביע על קיומו של מרחב תימרון ולזהות את הפוטנציאל הטמון בו עבור הנאשם הפוליטי. לאחר שזיהינו את הדינמיקה ראוי לחשוב על יצירת דרכים משפטיות להרחיב מרחב זה ולחזקו. אחת מן האופציות היא של פיתוח תורת משפט של סמכות שיפוט, ופיתוח הגנות חוקתיות מפני תביעה פלילית, מן הסוג של הגנה מן הצדק. ואולם לכך מן הראוי להקדיש רשימה נפרדת.[34]

[34] Leora Bilsky, *Between Criminal Law and Constitutional Law: The Cases of Bargouti and Bashara* (unpublished manuscript, on file with author).