

State Power, Violence and Political Justice:
The Case of the Barghouti Trial in Israel

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The rationale of the exercise of legal power by the state is to protect citizens by using its powers to penalize those who defy the law by means of violence. Unlike ordinary cases of criminal prosecution, however, the prosecution of political figures invokes a larger context to the application of the law. Inherent to procedures that target political rivals of the state is a tension between concrete facts of the individual case and the larger political context in which the trial takes place. A political trial differs from the average criminal trial in various ways. This does not necessarily affect the legal procedures itself, but rather the particular way in which political power is distributed and channeled through the legal institution to achieve a broader political goal.

The boundaries between the legal and the political are difficult to draw. Some trials have consequences that go beyond the individual case, effecting social groups widely. A trial can ultimately be the manifestation of a struggle about broader political power even when all procedural requirements are met and individual guilt is firmly established. This is evident in situations of conflict, when both the state and the accused employ strategies of action that involve large segments of their respective constituencies. The case gets more complicated when violence is not directed at individuals, but targets broader social groups. Crimes committed against civilians and violations of human rights and international law are then at stake, but the state's legal framework is often unable or reluctant to fully address their scope. This paper addresses the question of how legal procedures contest the boundaries of democratic polities. While normally one can expect the legal prosecution of violence to sustain and safeguard democratic procedures, political trials often have the opposite effect.

Here I address these questions by examining the case of Marwan Barghouti, one of the leaders of the Palestinian Fatah movement prosecuted by the state of Israel on charges of direct responsibility to attacks that killed 26 Israeli citizens. The Barghouti case demonstrates the tension between the political and the legal in prosecuting crimes against civilians in conflict situations. Political responsibility, crimes, and complicity in crimes, unlawful state actions, and spectacles of trauma and violence loom over the criminal prosecution of this prominent Palestinian leader. These are likely to be addressed only

partially in the contested terrain of the Israeli court. I argue that the prosecution of Marwan Barghout is seriously flawed, for reasons that go beyond the particular facts of the case that may or may not be sufficient to incriminate him. The Barghout case shows that situations of prolonged conflict require different political remedies. Under the current conditions, mechanisms of justice cannot be fairly administered by the state of Israel, even if formally it reserves the right to try those who pose a threat to its citizens. In the following I discuss the theoretical concepts of violence, state power, and political trials before I turn to the Israeli/Palestinian context to look at the axis of the political and the legal in the Barghout case and its political implications.

Violence, State Power and Political Trials

Weber's famous formulation that modern states have been constituted through the gradual process of attaining a monopoly over the means of violence is inverted by Hannah Arendt, who clearly distinguishes between state violence and power.¹ Instead of thinking about violence and power as complementary aspects of political affairs (violence as means to power), Arendt in fact argues that they are opposites. The power of states rests first and foremost on civil adherence to the law and its institutions. Power requires legitimacy, a wide base in any given political community. Its opposite, rule by sheer violence, can only emerge when power is lost, a process that is evident in totalitarian regimes. Violence is instrumental and can very well threaten power, but can never grow out power. According to Arendt violence is always self defeating in political affairs. This notion also applies to the oppressed, or the "bad losers", whose violence is often excused or defended as their only choice, "the weapon of the weak". Always significantly inferior in means to the dominant power, Arendt insists that the weak cannot attain power until the stronghold, the civil base that is the source of power, crumbles from within. Any violent attacks on civilians hit and aim at that very civil base. According to Seyla Benhabib by allowing no normal life to continue under the unfavorable conditions

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suffered by those resisting power, violence seeks to disrupt and tear the social fabric that constitutes and sustains power.² Following Arendt, violence is self-defeating in the sense that more often than not it achieves the opposite political goal. It rather strengthens the resistance of the civil base to give up power that is perceived as essential to contain or eliminate the threat of violence itself.

The rule of law and state power are closely linked: as long as institutions derive their authority from a political community, they represent power based on popular legitimization that violence defies. Nevertheless, state power and its legal mechanisms do not entirely overlap. In democratic polities, courts ostensibly occupy a unique position as the guardians of law. Their separate and independent position is regarded essential to a well-functioning democratic culture. The principle of independence of courts and the judiciary is supposed to guarantee protection of rights and freedoms, often against abuses of state power. This principle is enshrined in international law -- the 1985 UN declaration on the basic principles of independence of judicial bodies reads:

the independence of the judiciary shall be guaranteed by the state [...] Judicial authorities shall decide cases committed to them based on evidence and in accordance with law, without any restrictions, illegal influence, coercion, pressure, threats or interventions, whether direct or otherwise [...] there shall be no illegal or unauthorized intervention into the process of justice, and decisions made by the courts shall not be subject to review by other state authorities.³

However, this essential dissociation of the legal from the political is compromised in two main respects. First, the political balance of power is always apparent in legal institutions even when they present profound ambiguity towards the state. Second, legal institutions are in paradoxical relations to political power. They are reluctant to adjudicate on “political” matters. At the same time, these institutions also decide what constitutes a

¹ Arendt Hannah, *Reflections on Violence*. In *Violence, A Reader* (ed. Catherine Besteman), New York University Press, 2001.

² Benhabib Seyla. “Unholy Politics,” social Sciences Research Council website (ssrc.org), 2002. In *SS Reader*.

³ www.un.org

“political matter” and this in itself can be a politically motivated decision, or can serve political interests.

Let us examine the first argument, that political power is evident in the legal institutions of the state. Following Arendt’s argument, all institutions of the state, including the judiciary are manifestation of the power invested in them by the citizenry. Therefore, they are political at least in the minimal sense, that they represent, defend and prosecute in accordance to laws shaped by political elites in a public arena which they are part of. To take the maximalist approach, in some legal systems judges have a clear political association and political power is balanced in the courts in a parallel process to the general election process as in the US case. An op-ed in the New York Times recently complained that the nomination of judges for the electoral race in New York, rather than being an expression of the voters preference is usually decided by a “tiny group of party insiders”, “political clubhouses” that exert much control over the nomination of state civil court and supreme court judges.⁴ This position does not question the premise that the judges have loyalties to political parties, but rather that the democratic principle of their election is jeopardized when a limited political base exerts too much power. Allowing party officials to effectively appoint the judiciary therefore compromises a fair and open procedure that should reflect broader political consent. In Israel, judges are appointed by the President upon the nomination of the Judges Nomination’s Committee, comprised by judges, ministers, members of Knesset, and representatives of the Bar Association. Since the President only has symbolic authority in Israel, the appointments are made by the political and the judicial elites in power.⁵

The second argument points at the paradoxical relations between the legal and the political that seriously challenges the notion of separate spheres. Constitutions and laws that bound legal systems in decision making capacities are never severed from the political reality. According to Taylor, this is bound to be simply because “universalist principles of constitutional democracy need to be somehow anchored in the political

⁴ Dorothy Samuels. New York’s Long and Sorry Tradition of Judicial Elections, New York Times, Nov. 14, 2002.

⁵ www.court.gov.il

culture of each country.”⁶ If the legal system is playing a role of socializing every citizen into a common political culture as Taylor suggests, then it is necessarily tied to the national project. In that case, problems of ensuring structures of mutual recognition, respect and equal protection to all members of the political community, arise when ethnic, national or cultural identities conflict. Then there is the question of who decides what constitutes political conflict and what can or cannot be subject to legal arbitration. For Habermas, this problem can be solved by a civil and procedural unity of a political community that is not bound to national identity. Yet an entirely neutral procedural unity is still a remote possibility considering current structures of power and political contestations stemming from the dominant nation-state model.⁷

The judiciary is an extremely complex and dynamic system in any political community and it can display profound ambiguity on matters of political debate. In line with the principle of separation and independence, courts tend to adopt a doctrine of abstractionism, while at the same time they consistently function as one of the public arenas where conflicting political claims are made by non state actors. State authorities, on their behalf regularly turn to courts to validate and legitimize their policies. Otto Kirchheimer’s study of the use of legal procedure for political ends focuses on the question of the role of courts in political struggles. He makes the provocative claim that in modern democracies engulfed in political strife sometimes the function of courts is simply to allow states to “eliminate a political foe of the regime according to some prearranged rules”, and the complicity of the courts to repressive programs that serve particular political aims is not rare:

In the face of drastic changes in the courts’ operating conditions and, concomitantly, in the structure of national consciousness, the limits have narrowed within which courts today may decide political issues. By the same token, the possible effect of their action has widened. Beyond their power to authenticate official actions [...], the courts have become a new dimension

⁶ Charles Taylor, “the Politics of Recognition”, in Amy Gutmann, ed. *Multiculturalism*: 25-73. In SS reader.

⁷ Jurgen Habermas, “Citizenship and National Identity,” in Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*: 491-515. In SS reader.

through which many types of political regimes, as well as their foes, can affirm their policies and integrate the population into their political goals.⁸

Here, Kirchheimer refers to the contestation that emerges when courts become the battle field of political foes and to the struggle over power ensuing in situations when both the state and the political foe use court proceeding as a platform for social and political mobilization.

For Kirchheimer this contestation distinguishes political trials from other criminal proceedings. Unlike other cases, in political trials “courts action is called upon to exert influence on the distribution of political power” in an effort to affect changes on a broader front. The classic form of political trials according to Kirchheimer is when “the regime attempts to incriminate its foe’s public behavior with a view to evicting him from the political scene.”⁹ Though aware of the limited concept of power struggle that this distinction presents, Kirchheimer nonetheless emphasizes that the particular political motivations of the state in prosecuting its enemies is a distinct manifestation of the intersection between the political and the legal realms.¹⁰ The analysis of political trials should therefore take into consideration the political setting and the possible mobilizing effects that agents of state power and agents of violence may derive from it.

The Barghouti Trial

Biographical Background¹¹

Marwan Barghouti, a 43 year old Palestinian leader was born near Ramallah and joined the Fatah movement at the age of 15. In 1978 he spent four and a half years in Israeli prison for charges of membership in Fatah, an illegal organization at the time. In 1983 he entered Birzeit University to pursue a BA in history and political science. In 1985 he was placed under administrative detention for six months and was banished by Israel in 1987

⁸ Otto Kirchheimer, *Political Justice, The Use of Legal Procedure for Political Ends*, Princeton University Press, 1961, 17.

⁹ Ibid, p. 47.

¹⁰ Foucault and others developed a more encompassing analysis of relations of power. Power struggles are not only waged in conflicts between the state and political enemies, but are an integral part of our social life, and are manifest in all aspects of our social behavior.

for charges of inciting the first Palestinian Intifada. From his exile in Amman, Jordan he played an important role as a central liaison officer between the PLO (in its Tunis exile) and the Fatah movement in the West Bank. In 1994, after the signing of the Oslo agreement he was allowed to return to Ramallah and was elected in 1996 to the Palestinian Legislative Council. An enthusiastic supporter of Oslo peace process he was one of the most popular moderate Palestinian leaders, who fostered strong relations with key figures in the Israeli political elite. He completed his MA in international relations from Birzeit University in 1998.

Gradually disillusioned with the Oslo peace process, Barghouti famously said: “we tried seven years of intifada without negotiations, and then seven years of negotiations without Intifada; perhaps it is time to try both simultaneously.” Barghouti became an outspoken advocate for a full fledged struggle against the Israeli occupation and a leader of the Al-Aqsa Intifada, calling for escalating the Intifada to convince Israel that peace cannot be achieved with occupation. According to his website, he narrowly survived an Israeli assassination attempt in August when a missile hit his bodyguard’s car, severely injuring him. Barghouti was apprehended by the Israeli army in Ramallah on April 15, 2002. He has been held in detention since and appeared in court for the first time at the end of August this year.

Barghouti is a key figure in the Palestinian leadership, according to some sources the second most popular figure among Palestinians, often cited as a potential successor to Arafat. For the Israeli public, Barghouti is a symbol of the failure of Palestinians to come to terms with what most consider Barak’s generous plan to end the conflict in Camp David 2000, the turning point that marked the break of the Al-Aqsa Intifada. The case seems to affirm a popular sentiment that even Palestinian moderates, who supported the peace process, cannot be trusted not to turn against Israel. Barghouti, a charismatic, fluent Hebrew speaker who is well versed in Israeli culture and politics is the most likely Palestinian that Israelis could imagine living in peace with. Unlike Arafat, the paradigmatic enemy and a demonic figure from a bitter past who spent most of his career

¹¹ www.freebarghouti.org

in exile, Barghouti and other moderates raised hopes in Israel for a new generation of local Palestinian leadership: educated, young, secular and pragmatic. Barghouti's "betrayal" since the break of the Intifada turned him into a symbolic "enemy from within" in the eyes of the Israeli public, far more dangerous than the militant, fundamentalist Islamic leaders of the Hamas and Islamic Jihad, who resisted Oslo from the very beginning.

The Prosecution and the Politics of State Power

The State of Israel vs. Marwan Ibn Hatib Barghouti

The state of Israel is bringing Barghouti to trial on murder charges (murder, attempted murder, conspiracy to murder) and membership and activity in a terrorist organization. The terrorist organizations are identified as the Fatah, the Tanzim and the Al-Aqsa Brigade (the last two are military factions of the Fatah movement).¹²

Barghouti is accused of direct responsibility to the death of at least 26 Israelis in terrorist attacks by supervising, managing and assisting others in particular cases. In the case of a shooting spree at a Tel-Aviv restaurant, the state charges that Barghouti was notified in advance of the terrorist intent. He then asked his field commanders to avoid attacks inside Israel and to review the text with which the organization planned to take responsibility for the attack. In another case Israel charges that Barghouti agreed to assist a suicide bomber volunteer by providing weapons to be used against settlers and soldiers. He then directed him to one of the lower ranking field officers who he knew was operating a terrorist cell and the man was sent on his mission. Barghouti allegedly provided weapons and explosives to lower ranking activists of the Tanzim and the Al-Aqsa Brigades and authorized applications for financial aid for militants involved in terrorist attacks against Israeli civilians. Finally, Barghouti is accused of inciting and provoking terrorist attacks in public demonstrations and in private occasions, as well as recruiting militants to the terrorist organizations he headed.

¹² The indictment specifies five items in Israel's penal codes, and the charge on membership in terror organization is prosecuted under the Israel terror prevention ordinance of 1948. The realm of state security is regulated by "emergency laws" instituted at the early stages of the establishment of the state and its "war of independence" in 1948.

The prosecution of Barghouti is a unique and sensational event unfolding at a very low point in the history of the Israeli Palestinian conflict. No Palestinian leader of such prominence has ever been brought to an Israeli court. It is the first case of a defendant, charged with terrorist offences not to be tried by a military tribunal, but at an ordinary civil court. The immediate political background for his prosecution is the vocal campaign of Ariel Sharon's government against the Fatah leadership. "A murderous regime that must be removed and replaced" said Sharon,¹³ whose political doctrine dismisses Arafat as "irrelevant", vigorously seeking to exile him from the occupied territories, while refusing to negotiate with other Palestinian leaders "under fire". The intent to link the Palestinian leadership with terrorism, particularly between Arafat and the violence of the Fatah military factions is openly stated by state officials. A Justice Ministry official said that in planning a well-publicized trial Israel hopes to persuade the international opinion that the top Palestinian leaders are intimately involved in fermenting terrorism:

"Barghouti was the central partner in the decisions made by [Fatah] organizations that in the last two years carried out a series of attacks against Israeli citizens."¹⁴ Entirely adhering to Kirshheimer's definition of the classic political trial the prosecution's intent is to exert an influence on the distribution of political power by incriminating the state's enemy behavior with a view to evicting him from the political scene was not at all kept a secret.

As state officials rushed to "make the case" against the Palestinian Authority (PA) in the international press, the prosecution was careful to downplay and obscure political intentions so as not to discredit the impartiality and fairness of the legal proceedings. The focus turned to the victims. Daniel Taub, an Israeli spokesman insisted that the case was not about Mr. Barghouti's political views, but about the killings, "what is important to us is to ensure that the world understands what it is to be a democracy fighting terrorism".¹⁵

¹³ New York Times, October 15, 02.

¹⁴ New York Times, August 15, 02.

¹⁵ New York Times, September 6, 2002.

Namely, to show how a functioning democratic institution such as the Israeli judiciary is perfectly capable to deal with terrorism through its normal legal proceedings.

Indeed, at this stage the case is adjudicated by a district court in Tel Aviv as a common criminal case. The indictment text itself shows that the state chose to narrow the legal framework: Barghouti is brought to trial as if he is an Israeli citizen prosecuted under the state criminal law.¹⁶ No special tribunals or legal provisions were considered in this case, and no reference to international law or human rights law are found in the indictment – the state was evidently not interested in framing Barghouti as war criminal who committed crimes against foreign citizens. The state's charges of membership in terror organizations are a curious relic from the past. Barghouti was already charged of membership in a terrorist organization as early as in 1978, when Israeli law applied this definition to the PLO. The indictment disappointed many observers: the charges are not particularly elaborate (only 11 pages in Hebrew) or sensational, and yet their reading instigated a scuffle outside and inside the court room as the politically charged atmosphere exploded.¹⁷

The attempt to establish responsibility for the killings that the indictment refers to is limited to only a few incidents, a fraction of civilian casualties out of hundreds who were killed in similar circumstances. It is unclear why the state chose to disclose information regarding these few cases and not others. A significant body of evidence is kept out of public view, and is brought by the state only at the discretion of the court for state security reasons. However, most victims' relatives whose cases are heard in public are politically close to the Kakh movement, an outlawed racist radical right wing group. In the last hearings, following a closed meeting of security officers with the judges in the presence of representatives from the Prime Minister Office, the court's security guards and police officers forcefully pushed the waiting crowd away from the entrance to the court room. Only few TV, radio and printed press teams and a group of relatives, whose

¹⁶ Barghouti is obviously not an Israeli citizen, but his indictment mentions his Israeli "identity number" – Palestinians in the occupied territories are forced to carry identity cards with serial numbers issued by the state. These cards are subject for inspection when they cross the numerous military check points in the West Bank and Gaza.

names were read from a prepared list, were allowed in. Relatives of other victims, known for their solidarity with their Palestinian counterparts were among the rest, whose entrance to the courtroom was denied. Attacks against Israelis do not distinguish between leftists and rightists, but victims' justice is conceived quite differently from the other side of the political map. Despite that, the politics of Israeli victimhood was quickly suppressed in favor of a unified front: the trial was "first and foremost about justice for the victims of terrorism" [...] "We need to tell the story of the Israeli population and what it has been through in the last two years" said the deputy director general for information at the Foreign Ministry.¹⁸

Curiously, the three Judges panel of the Tel-Aviv District court were more alarmed by the defense arguments and the defendant contemptuous behavior than by the crowd scuffles that erupted.¹⁹ Judge Tzvi Gurfinkel said he would not permit the defense to "turn this court into a political stage."²⁰ Affirming the alleged neutrality of the legal setting, Judge Gurfinkel reverted to the doctrine of abstractionism. In the following section I discuss the position of the office of the Attorney General on this matter to show how the Israeli implementation of the doctrine of abstractionism can shed light on particular aspects of the Barghouti trials.

State Prosecution and the Doctrine of Abstractionism

In April 2002, a day before Barghouti was apprehended, Elyakim Rubinstein, Israel's Attorney General, gave a public lecture at Bar Ilan University titled "public law in times of crisis and war".²¹ It is worthwhile analyzing in some details the main points in his lecture that discusses major intersections between the political and legal in the context of

¹⁷ www.Indymedia.org.il

¹⁸ Associated Press, August 14, 02.

¹⁹ Judge Sara Sirota, president of the panel, intervened and said: "you are shouting and not behaving like a leader, but like someone from the shuk (open air market). In response to his proclamation that he is a freedom fighter, she said "someone fighting for peace doesn't turn people into bombs and kill children". Member of Knesset Mohammad Barakeh appealed to the Supreme Court president to disqualify Sirota for this statement. Ha'aretz, September 3, 02.

²⁰ Associated Press, August 14, 02

²¹ www.justice.gov.il.

the conflict. Rubinstein's lecture unravels the political background against which the Barghouti trial takes place.

The proximity of national days of remembrance for the Holocaust the Memorial Day for Israeli soldiers reminds Rubinstein that Holocaust victims, the Israeli fallen soldiers and the victims of Palestinian terror attacks are the bloody price Israel is still paying for its existence. National victimhood is weaved throughout the speech, and serves as the moral justification for the actions of the state.²² Israel faces a challenge to ensure its survival as a sovereign Jewish and democratic state, for "we do not have another country".²³

According to Rubinstein, Israel bears no responsibility to the current wave of hostilities. Crisis and war set the framework against which the struggle to maintain Israel as a just and democratic society is waged. This war has been forced upon Israel with no legitimate grounds, morally, politically, historically and legally. There is no symmetry in the suffering of civilian populations between Israelis and Palestinians. There is only one who bares the ultimate responsibility for the bloodshed, the war criminal Jasser Arafat. War crimes committed by Arafat force Israel to act according to its right to self defense as recognized by international law.

Interestingly, Rubinstein recounts pressures to arrest and prosecute Arafat, and yet, he concedes, these demands should not be put on the legal table. The decision to prosecute Arafat should be taken by the executive power. Had the opportunity to do so existed, as he wished, it would have had serious international and political consequences. Rubinstein is skeptical that prosecuting Arafat in the near future is a tenable option, emphasizing the need to separate the political risks of such an endeavor from the legal possibilities, thus maintaining an abstractionist stance on the matter.

²² Israel does not have a day of remembrance dedicated to the memory of victims of terror attacks yet, but they are gradually alleviated to the sanctimonious stature of fallen soldiers and victims of the Holocaust in public discourse.

²³ "We have no other country" refers to a popular Israeli song and its political connotation is the right wing slogan that Palestinians have 22 Arab countries to live in.

This point is useful to understand the motives behind the prosecution of Barghouti. Barghouti is a local and not an international leader, a widely recognized symbol of the Palestinian cause and people as Arafat is. Not targeting Arafat for prosecution is a political decision in line with Sharon's "Arafat is irrelevant" stance. Barghouti, on the other hand, is the closest possible aid and a link between Arafat to lower ranking Fatah militants. He is therefore in a perfect position to incriminate the entire Palestinian leadership, and particularly Arafat, while not risking the same anticipated level of international indignation. Barghouti's prosecution can pass as a strictly legal matter and a domestic affair the way an attempt to target Arafat could not.

Rubinstein continues by describing the work of the Attorney General office in providing legal defense to the state and its security forces against international scrutiny. The Israeli security forces, according to Rubinstein one of the most humane and sensitive to humanitarian concerns in the world, operate with an entirely different ethos than their enemy, whose war tactics constitute crimes against humanity. The State Attorney office, he says, devotes much attention to preparing the legal ground to clear the Israeli security forces from false allegations of violations of international law and war crimes. Not surprisingly, Rubinstein objects to Israel ratifying the International Criminal Court in The Hague. The objection then again stems from an abstractionist stance. He realized that "there is ample ground to fear the *politicization of the court*, especially because its constitution contains a clearly *political item* that defines the settlements in the occupied territories after 1967 war crimes" [my Italics]. The settlements are a matter of political dispute that has nothing to do with international law. The great danger that the ICC poses to Israel is in the stakes that political pressure will yield criminal prosecution of its conduct in the occupied territories. That explains why, despite the fact that Rubinstein uses the language of war crimes and crimes against humanity with reference to attacks on Israeli civilians, this language is not utilized by the state prosecution in Barghouti's indictment. Rubinstein is well aware of the fact that the human rights discourse is a double edged sword that may eventually turn against Israel.

Rubinstein's legal and political stance is entirely indistinguishable considering the terms he uses to define his legal role, through the unequivocal defense of politically controversial actions of the state and finally, considering the various ideological underpinnings of a rightist Israeli nationalism manifest throughout his lecture. The doctrine of abstractionism so central to his rhetoric paradoxically reaffirms the inseparability of the legal and the political implied in his position as the defender of the state.²⁴

The Politics of the Israeli High Court of Justice

Barghouti's trial is likely to be appealed to the Israeli High Court of Justice (HCJ – the Israeli Supreme Court) the highest legal instance in Israel. Relentless efforts by human rights organizations to appeal to the High Court of Justice seeking protections against the state had made Rubinstein their staunch adversary. In his lecture he recounts the numerous cases in which the HCJ affirmed the positions of the state against these anti patriotic and unnecessary appeals. He mentions some notable cases: administrative detention of thousands of Palestinian prisoners held indefinitely without a trial and denied legal representation have been consistently appealed to the HCJ. Accepting the state position that the conditions of war do not allow the detainees to meet with lawyers, the HCJ refused to hear arguments on individual cases. Physicians for Human Rights appealed against the IDF policy of denying humanitarian and medical relief, and halting the movement of medical personal and ambulances in the occupied territories but were rejected by the HCJ. The state position that the IDF is committed to humanitarian principles instructed “at the level of the individual soldiers in the field” sufficed to reject the appeal. Adalla, an Arab Israeli minority rights organization, appealed to halt mass house demolitions in the Jenin refugee camp. The state declared the camp a military zone, and argued that a warning was given to evacuate houses within an hour, and that this action was necessary to the conduct of the battle sufficed. The HCJ rejected the appeal.

²⁴ A highly respected legal expert, Rubinstein is also known to be close to settler's circles and the political elites of the Zionist orthodox parties that constituted the right wing coalitions of the Sharon government.

It is important to note that the HCJ accepts the legal definitions of the Attorney General's office, that the Palestinian Intifada is not a popular uprising, but rather an "armed confrontation." As such, the state successfully advocates the notion that its actions in the occupied territories fall outside the purview of Israeli laws and regulations, although by international law Israel is responsible for the civilian population under its military control. For Rubinstein the courts function as a buffering mechanism entirely in agreement with his logic of abstractionism: case by case, the HCJ rejects politically motivated attempts by human rights organizations to force legal intervention to protect human rights. All matters concerning state actions in the occupied territories fall under this broad definition as "political." Abstractionism is therefore used not to protect the court against the political, but to defend the political against the legal.

HCJ proceedings regarding state policy of "targeted killings", the execution of Palestinians "wanted" by the Israeli security forces is a particularly glaring example of the convoluted logic of Israeli court abstractionism. As I mentioned before, Barghouti alleges that he is a victim of a failed assassination attempt. Israel does not take responsibility for specific actions, but declares its "long hand will get terrorists wherever they are."²⁵ In January 29, 2002 the HCJ rejected a petition submitted on behalf of member of Knesset Muhammad Barakah against the government's policy of "targeted killings"²⁶:

Plaintiff: "Israel is executing people without a trial. Israel is using lethal means against the individual in his home, his office, and his vehicle, at a time when he is not presenting a clear and present danger."

²⁵ Israel began the targeted killings policy of the current Intifada in Nov. 2000. Since then it has assassinated an unknown number of Palestinians, estimated in dozens, using highly sophisticated and powerful military means such as helicopter missiles, air raids and explosives planted in cellular and public phones used by its targets. The state argues that those killed are illegal fighters who are not entitled to the protection of international law. As such, it is permitted to harm them in order to prevent 'future hostile acts.' But, some of these actions resulted in the killing of scores of civilians and bystanders as well. www.btzelem.org. This quote is the latest by Sharon, responding to the recent Kenya bombing that killed three Israelis and ten Kenyans in Mombasa, New York Times, December 1, 2002. It remains to be seen if Israel intends to use similar methods outside of the conflict borders.

²⁶ The Middle East Media Research Institute website, www.memri.org, February 18, 2002. Excerpts from the court hearing were also reported in Israeli newspaper Ma'ariv, January 30, 2002 and the IDF Radio, January 30, 2002.

Justice Eliyahu Mazza: “There is another element here called terror, and it is the enemy of all humanity and not of one particular country. We are talking about the killings of innocent people and [terror] attacks. All countries view terror as a joint shared enemy.”

Plaintiff: “and who is to determine who is a terrorist?”

Mazza: “Certainly not the court.”

Plaintiff: “but the occupying force in the territories, Israel, is responsible for the lives of the inhabitants.”

Mazza: “According to our knowledge, there is intelligence on the individuals who are being targeted. And even then [this is done] only due to lack of other means [to prevent terror attacks]. MK Barakah does not need the platform of Israel’s High Court of Justice if he wishes to raise *political reservations*. We are not conducting the war here... the conduct of [Israel’s] war against terror is outside the sphere [of this court].” [my Italics]

The ruling in this case was that “the high Court of Justice will not intervene in the choice of fighting methods to be used by the security forces in order to foil terror attacks in advance.”

The HCJ positions on “targeted killings” and other state actions have crucial political consequences. The court legitimizes state actions and shields it from scrutiny, both legal and public, over controversial actions that involved serious violations of international law. Multiple appeals to the HCJ consistently fail to discredit the legal system, but rather strengthen its abstractionist stance projecting to the Israeli public a “clean”, “non-political” image. Jurisprudence in the realm of state security has been systematically censored by the courts. Thus, in the context of the Israeli Palestinian conflict, Israeli courts display consistent protectionism of state policies, accommodating its political and military needs.

Abstractionism a la Rubinstein reeks of hypocrisy: A department of justice press release announced that the office of the Attorney General discussed and then rejected proposals to institute the death penalty in Israel for apprehended terrorists.²⁷ With the Barghouti

²⁷ www.justic.gov.il, Press Release October 9, 2002

trial no doubt in mind, legal experts from different governmental agencies seriously considered the option. The death penalty is not an issue on the public agenda in Israel. Since the prosecution and execution of Adolf Eichmann, it remained a legal option never pursued by Israeli courts, and this policy was never challenged. Administered outside the courts in the absence of public debate, death penalties have nonetheless been effectively applied in the current Intifada since November 2000 through the “targeted killings” policy. The HCJ is at least partially responsible for this absence of public debate. Its censorship impinges on the democratic culture in Israel, impaired by the continuous efforts to align a deeply divided society along a consensual nationalist mold in lieu of state authorities’ interest to project a united front against the enemy.

The Defense and the Politics of Violence

Marwan Ibn Hatib Barghouti vs. The State of Israel

Initially refusing legal representation, Barghouti declared that he does not recognize the right of the Israeli court to try him: “I am a freedom fighter, fighting for the freedom of my people and peace between the two people,” he said.²⁸ An attempt to reject the jurisprudence of the Israeli court over Barghouti has been the focus of his defense team efforts which by now includes prominent Palestinian, Israeli and international lawyers.²⁹ The attorneys argue that the state of Israel has no right to try Barghouti because he was seized on Palestinian territory, in what constitutes Area A, under Palestinian legal jurisdiction according to the Oslo accords. Moreover, the defense argues, Barghouti is an elected member of the Palestinian Legislative Council and is therefore entitled to parliamentary immunity. Barghouti’s web site also detailed allegations of physical and psychological abuse by the Israeli General Security Services through sleep deprivation, position abuse and intimidating threats at the Israeli detention center, the “Russian

²⁸ New York Times, September 6, 02.

²⁹ among them Gisel Halimi, a Tunisia born Jewish lawyer whose famous for defending Algerians fighting French rule. Ha’aretz, September 3, 02.

Compound” in Jerusalem where he is held.³⁰ Attorneys also maintained that his lengthy detention without any judicial hearing (from April to August) is yet another breach of international conventions pertaining to prisoners rights.

The circumstances surrounding Barghouti’s apprehension and the public turmoil it caused resonate with that of another famous case, namely the case of Abdullah Ocalan, the leader of the Kurdish Workers’ Party (PKK) who in 1999 was apprehended in Kenya and transported to Turkey.³¹ Obviously, these are two distinct cases in disparate political circumstances, but it is interesting to follow some of the convergences. Ocalan was kept in the prison Island of Imrali and his trial was held before the Ankara State Security Court, a relic of the infamous martial law courts established by the Turkish military junta in 1982. Ocalan was tried under the article of the Turkish Penal Code, which carries a mandatory death sentence. Like in Israel, Turkey has never executed a prisoner sentenced by a State Security Court, but the prosecution demanded to apply it in Ocalan’s case. Allegedly responsible for PKK killings of hundreds of unarmed villagers during their violent campaign against the Turkish State, Ocalan was nevertheless charged with “crimes against the state” under Turkey’s Anti-Terror Law. Human Rights organizations monitoring the case disclosed irregularities that fall short of international law standards in the proceedings. However, Ocalan astonished everyone, when in his testimony he commended the state’s respect for freedom of opinion and political liberty, criticizing it only for its failure to recognize cultural rights and language of the Kurdish people. He proclaimed he is ready to serve his punishment to the “democratic republic” and called upon his man to lay down their arms. It is unclear whether this testimony was indeed sincere in light of Turkey’s reputation for torture and ill treatment of political prisoners.³²

³⁰ The long history of the HCJ systematic approval of methods called by Israel, “moderate physical pressure”, which constituted torture by all international standards, was assumed to be over when the HCJ finally declared the GSS methods illegal in 2000. The current Intifada brought new allegations on the continuing practice of investigation torture methods. The Russian compound detention center in Jerusalem is infamous for its ill treatment and abuses of prisoners’ rights and is the subject of many human rights reports.

³¹ Sources on Ocalan: www.hrw.org/backgrounder/eca/turkey/security.htm, www.wsws.org/articles/1999/jun1999/ocal-j08.html, as well as AFP and Reuters news agencies.

³² Turkey has its own impressive record of human rights abuses. Like Israel it has been practicing torture methods against political prisoners. Thank you for Seda Kalem for providing materials on the Ocalan case.

Unlike Ocalan, who admitted committing crimes while pleading for amnesty, Barghouti denies personal involvement in violent actions. His supporters portray him as the Nelson Mandela of the Palestinian struggle held by “the court of the occupation.”³³ Michael Tarazi, an American Lawyer for the Barghouti family read out Barghouti’s list of charges against Israel and the Israeli occupation that he was not allowed to read in court.

Addressing the Israeli public, the statement concluded: “I say to the Israeli people that I only want for the Palestinians what you Israelis want for yourselves, peace, security and above all, freedom.” Khader Shkirat, a member of the defense team said that the defense intends to use the proceedings to show “the entire Palestinian suffering.” Another defense attorney Jawad Bulus said that “we will try to convince the world that the one that has to be brought to trial is the occupation”, and finally, the Israeli Lawyer, Shamai Leibowitz stole the show when he compared Barghouti to Moses who freed the Hebrew people from Egyptian rule.

The defense team hopes to prove that procedural breaches impede Israel’s right to hold the trial. It has not yet addressed the substantive allegations brought against Barghouti. In the meantime, Barghouti and his defense team consistently address the Israelis, the Palestinians and the international community – in an effort to turn the spot light on the number one item in the trial, the Israeli occupation. The political motivation of the defense is to use the event as a public spectacle of the Palestinian oppression. Although the substance of the indictment might prove to be too weak to convict Barghouti on murder charges even in the skewed setting of the Israeli court, the defense is clearly opting for a much more ambitious goal than proving Barghouti innocent.

The politics of violence

Barghouti may or may not be found guilty on the charges put forward by the state of Israel, but a close examination of his public statements demonstrates the politics of violence he pursued taking a leadership role in the current Intifada:

³³ The Guardian reported that Mandela will closely follow the trial proceedings. Khader Shkirat, the defense lawyer said that Mandela told him “what is happening to Barghouti is exactly the same as what happened to me. The government tried to de-legitimize the African National Congress and its armed struggle by putting me on trial.” The Guardian, August 15, 2002.

The Intifada has established a new basis for any future Palestinian-Israeli talks. We can negotiate but we have to continue our action on the ground. [...] The Intifada proved to Israel that we are not slaves to the negotiations. We have other options on the ground like continuing our struggle. [...] I think that we must continue the Intifada and the resistance on the ground if the negotiations are to succeed [...] it will be a disaster for the Palestinians to end the Intifada as a condition for returning to the negotiating table and the shortest way to stop the intifada will be Israel's full withdrawal from the Occupied Territories – like what happened in Lebanon.³⁴

Clearly, Barghouti advocates violence and considers it necessary to advance the goals of Palestinian nationalism -- self determination and freedom from Israel's 35 year old regime of military occupation. Barghouti prefers violence directed against Israeli citizens and soldiers within the occupied territories, but his strong support for the current Intifada effectively legitimizes and justifies attacks on civilian populations anywhere else.

Barghouti had a choice. The moral and practical implications of suicide bombings and attacks against civilians are subject to fierce debates in Palestinian circles. He could have joined key figures in the Fatah leadership and the Palestinian intellectual elite who took a stand against it, such as Sari Nuseiba, Hanan Ashrawi, Chaider Abd al Shafi and others. He could have lead the numerous local initiatives, peace marches and non violent solidarity activities held by hundreds of Palestinians together with their Israeli counterparts, an increasingly visible alternative to the dead lock of the military struggle.³⁵

³⁴ www.freebarghouti.org. Barghouti's reference to Lebanon is interesting. After decades of occupying southern Lebanon the Israeli forces withdrew from it during Barak's term as Prime Minister in 1999. Palestinians attribute this to the persistence resistance of the Hizbullah militias, backed by Syria and Iran. The IDF, nevertheless, faced tremendous pressure from the Israeli public, who grew impatient with the number of casualties this campaign claimed, and fiercely debated this as an unnecessary and costly presence.

³⁵ The Journalist Akiva Eldar argued that these local initiatives are the new trend in the occupied territories that the security forces attributes to its own "strong fist" policies, thereby advocating it should be allowed to continue the operations in full force. The peace marches and non violent solidarity actions are nonetheless suppressed and denied to avoid the international pressure they might exert on Israel. Palestinian, on their part, maintains Eldar, need someone that is able to lead these initiatives, because Arafat can never be their Mahatma Gandhi. Eldar quotes a Tel-Aviv University poll that shows that every

Barghouti may not be guilty of actually killing civilians in his campaign against the Israeli occupation, but he will be held responsible for those who did it under his leadership, should violence against civilians in the Israeli/Palestinian conflict ever be prosecuted by international law.

The politics of International Law

International human rights organizations have begun to frame attacks against Israeli citizens in the language of international law. The Israeli Palestinian conflict has been a “hot” topic on the human rights agenda in the past few decades. Israel has been the subject of numerous Amnesty International and Human Rights Watch reports since the early days of the first Intifada in the late 1980s, a time when the international human rights movement expanded and grew in influence. Within a few days time Amnesty and HRW published reports (Amnesty, Nov 1, 2002, HRW, Nov. 3, 2002)³⁶ containing strong language against policies of the Palestinian leadership and Israel, holding them responsible for war crimes and atrocities committed against civilians.

The 170 pages long Human Rights Watch report focuses on the responsibility of the Palestinian Authority (PA) for “the scale and systematic nature of [attacks against Israeli civilians] in 2001-2002 that meet the definition of a crime against humanity.” Based on research, interviews with Palestinian leaders, and analysis of the same documents that the IDF seized in one of the raids on Arafat’s compound in Ramallah and are now used by the prosecution in the Barghouti case, HRW blames PA officials for not halting suicide attacks. The PA “contributed to an atmosphere of impunity”, and was “unwilling to deploy the criminal justice system decisively to stop the suicide bombings.” The authors of the report could not find decisive evidence that Arafat or other senior PA officials ordered, planned or carried out such attacks, but it suggests that they ultimately bare responsibility for the actions of military factions of the Fatah against Israeli citizens.

other Israeli (57%) supports Palestinians right for non-violent protest against Israel, but this is not translated to political action that might bring an end to the violence, such as taking part in solidarity marches.

³⁶ www.amnesty.org, www.hrw.org.

The implications of HRW findings to the Barghouti trial are, however, minor, at least as far as the prosecution is concerned. Israel has no need or interest to utilize the language of crimes against humanity and international law in this case. The state already presented to the discretion of the court other sources of information. These intelligent sources will be far more incriminating in the eyes of the court than the HRW findings. Barghouti's defense can probably cite the report's failure to establish clear involvement of PA officials in military activities against Israel, but that entails changing the defense strategy by addressing the particular charges, thus playing the game in "the occupation court." Undoubtedly, though, the report is a major PR victory for Israel, and will be extensively used to defend state policies internationally.

Amnesty's report contends that Israeli forces committed war crimes in Jenin and Nablus this spring – killing Palestinians unlawfully, blocking medical care, using people as human shields and bulldozing houses with their residents still inside. The report, titled "Shielded from Scrutiny" also blames Israel for failure to bring to justice the perpetrators of serious human rights violations. Israel's right to prevent unlawful violence (an Amnesty report in July called attacks by Palestinian militants on Israeli civilians crimes against humanity), does not grant impunity from prosecution of the state unlawful violence. Amnesty particularly objects to the ex-IDF Chief of Staff Shaul Mofaz's appointment as defense minister, because he could be charged with war crimes for his role as commander of the army during the incursion. And yet Mofaz's central position on the Israeli political map in the upcoming elections is almost guaranteed. Former Foreign Minister Shimon Peres dismissed this recent addition to the pile of human rights reports on his desk, saying Israelis need not place too much weight on the report: "Amnesty is an organization that tries to create ... a better world, but they are not a court and not judges," he said.³⁷

Amnesty concludes that "it is imperative that the international community stops being an ineffective witness of the grave violations that take place in Israel and the Occupied Territories. Meaningful, urgent and appropriate action is long overdue." Indeed the axes of state power and unlawful violence against civilians continue uninterrupted, subject to

³⁷ Ha'aretz, November 4, 2002.

the internal logic of perpetrators on both sides. With the international community's reluctance to take the position of courts or judges in this case, it is of little surprise that politically motivated, limited and seriously flawed legal retributions also take place. In the end, Israel may score some short term political points with the Barghouti trial as no doubt so will Barghouti, who already secured his enduring presence on the Palestinian political map. But these are self defeating and short sighted political goals that obscure the immediate and urgent needs for more genuine and comprehensive mechanisms of justice and reconciliation for both the Israeli and the Palestinian societies.

Conclusion: Barghouti in Tel-Aviv

The Barghouti trial had only begun to unfold and its course may take surprising twists and turns to become one of the more remarkable events in the history of the conflict. Then again, the trial could also sink to historical oblivion as an odd farce, once the media frenzy surrounding it subsides. Yet, the question of what "Meaningful, urgent and appropriate actions" are needed to address the endemic nature of the crimes committed against civilians on both sides, and the expansive complicity of entire societies in these crimes remains open. Because these crimes fall beyond the scope of one individual's actions, a truly encompassing redress to them will have to transcend selective criminal prosecutions by the parties involved aimed at achieving dubious short term political aims. But, can a meaningful process of pursuing justice against perpetrators of crimes be achieved by others outside of the political communities in this conflict? What are the implications of such prosecutions to the prospect of reconciliation in the Israeli/Palestinian case?

Arendt's criticism of Israel's prosecution of Adolf Eichmann is an interesting attempt to address some of the questions that arise from the tension between narrow political interests and international jurisprudence. Arendt discusses other options that could have been more suitable to address the gravity of the indictment of genocide and crimes against humanity and could avoid serving the shortsighted and limited Israeli national interest in the Eichmann case. Eichmann, according to Arendt should have been tried by an international criminal court, because prosecuting him by only one nation "minimized"

his offence against humanity and mankind. It would not have prevented the impairment of justice rendered by holding the trial in “the court of the victors, but it would have been a practical step in the right direction.”³⁸

Barghouti in Tel-Aviv is however no Eichmann in Jerusalem. No one in Israel can seriously consider the comparison, because Barghouti is too much like us Israelis. His violence is ours. The prospects of an international tribunal for Israelis and Palestinians are dim not only because of the obvious impotence of the international community in this case, but also because Israelis and the Palestinians refuse to face the consequences of their actions. Dragging the Palestinian Authority and Israel to an international court on charges of crimes against humanity and war crimes can achieve the positive effects of punishing perpetrators. But, this might prove to be a shortsighted goal, because at this stage, it is more likely to solidify the political communities’ resistance to political change and strengthen entrenched victimization that thrives on both sides. The political consequences of criminal prosecutions in this case may do less justice, and more disservice to the real needs of Israelis and Palestinians in reconciling and coming to terms with past and present atrocities. The question then is what mechanisms can be applied to break the impasse and bring down power from within. The first obvious step in the right direction is to ensure and open a genuine public debate and scrutiny of state and semi-state authorities’ actions by the procedures and mechanisms of democratic institutions, the courts included. So long as political elites are shielded from public scrutiny because no debate, dialogue and negotiation can take place “under fire,” there is little hope that nihilism and resort to power and violence will not persist.

Epilogue: The War on Terrorism

The Barghouti trial in Israel can be read within a larger context than the Israeli Palestinian conflict. Since 9/11 the war on terrorism has been the focus of the international community agenda. Recent attacks on civilians in Bali, Indonesia and Mombasa, Kenya already heightened security alarms and will further exacerbate

³⁸ Hannah Arendt, *Eichmann in Jerusalem, A report on the Banality of Evil*, Penguin Books, 1963, 1992, p. 271

impeding infringement of international law on a global scale. The method of “targeted killings” inspired by Israel, have been recently applied by the US to hunt down Al-Qaeda suspects in Yemen. The New York Times reported that the Central Intelligence Agency used a missile fired by an unmanned predator aircraft to kill a senior leader of Al Qaeda and five low-level associates traveling by car. This action extends military operations far beyond the Afghan battlefields, where a war on Al-Qaeda was declared. “we’re at war with Al Qaeda.” a senior Pentagon official was quoted, “if we find an enemy combatant, then we should be able to use military forces to take military action against them.”³⁹

Elsewhere, there were new developments in the case of Zacaria Moussaoui, the only person prosecuted by the Justice Department in a federal court on charges of involvement in the 9/11 attacks. The White House is considering a proposal to abandon the prosecution of Moussaoui, remove him from the United States and place him before a military tribunal in Guantanamo Bay, Cuba, where hundreds of prisoners from the war in Afghanistan are kept in administrative detention. The proposal was raised because of legal problems faced by the Justice department in pursuing the case, particularly their refusal to meet Moussaoui’s demands for access to witnesses and evidence that could aid his defense. His court appointed lawyers said that without this access he will be deprived of his Sixth Amendment right to prove his innocence. In a military tribunal Moussaoui will most certainly have fewer procedural rights to seek testimony from witnesses. The Bush administration also expressed its desire to end “the chaos created at recent court hearings, which Moussaoui has used as opportunities for tirades denouncing the United States and its criminal justice system” the article reads.⁴⁰

The war on Terrorism, and its US centered rhetoric and methods, has been taken by many other nation-states to mean international leniency to extreme measures against real and imagined foes, including “enemies from within”, foreigners, refugees, asylum seekers. The violence perpetrated by global terrorism sparked a surge of state Power crackdown that has deteriorated international and national politics significantly. Seyla Banhabib

³⁹ New York Times, November 5, 2002.

⁴⁰ New York Times, November 10, 2002.

interesting response to 9/11 argues that violence even if it seeks to achieve particular political goals, as in the Palestinian case, nevertheless reduces politics to an apocalyptic and nihilist symbols, blurring the lines between acts of crime and acts of war. Global terrorism is a new and extremely dangerous form of totalitarian regimes according to Benhabib, but, she warns, democracies on their part “cannot fight holy wars.” Kofi Anan’s call to declare terrorism a “crime against humanity” and to try the terrorists before an international tribunal should be endorsed. The effort to put internal constraints upon the legitimate use of violence should be carried over from the national to the international realm to ensure the principle that the use of violence be subject to the rule of law and to democratic legitimation by the citizenry. That, however, is a complicated supposition. It remains to be seen whether the war on terrorism will not destroy the international rule of law along with its enemies, and whether the global citizenry, if it exists at all, will give it legitimization and allow this to happen.