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Creating a Public Defender System in the Shadow of the Israeli – Palestinian Conflict

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CREATING A PUBLIC DEFENDER SYSTEM IN THE SHADOW OF THE ISRAELI – PALESTINIAN CONFLICT

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INTRODUCTION

This article discusses the creation of the Israeli Public Defender System and its role in representing Palestinians charged with crimes committed in Israel, including terrorist offenses. We chose to write about the creation of the Office of the Public Defender in Israel (OPD) because it is close to our hearts. Each of us worked in the OPD during its formative years and observed it closely since its establishment in 1996. We believe that the experience of the OPD yields valuable insights about the role of government in protecting the value of due process in its judicial system during a period of intense conflict.

Different societies approach the right to counsel in different ways, and the task of comparing this particular legal right in diverse judicial systems is highly problematic. In Israel, the right to counsel for indigent defendants in criminal proceedings has not been extended as far as it has been in the United States. Although this seems to imply that there is less due process in the Israeli judicial system, that conclusion is simplistic because it does not take into account other distinctive attributes of criminal procedure in Israel. The question of how different societies protect human dignity and fairness in their systems of criminal sanctions is beyond the parameters of this article. Our goal here is limited to showing how one of those due process rights, the right to counsel, has developed in Israel. We will also describe how the OPD, which was invested with the responsibility of administering that right, has dealt with providing defense counsel for Palestinians living in the Occupied Territories. This task has been difficult because many of these individuals

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today see Israel not only as an occupying power, but also as an enemy.

A government agency providing legal aid in a situation of violent political confrontation might arguably deny such aid to persons who view the state as an enemy. In such circumstances, eligibility for legal aid might be conditioned upon citizenship or place of residence. In Israel, no such preconditions have been imposed upon legal aid in criminal cases. Since its establishment, the OPD has been authorized to provide defense services to suspects and defendants, regardless of their nationality and place of residence. The OPD has provided legal representation to tens of thousands of Palestinian clients, including Palestinians suspected of committing ideologically motivated acts of violence. To date, no governmental agency or political organization has sought to curtail the OPD's mission of representing Palestinian individuals charged with committing crimes in Israel. Ironically, the most serious challenge faced by the OPD emerged in the widely publicized and highly controversial case of Marwan Barghouti, a Palestinian leader who denied the court's legitimacy and refused to accept court ordered representation. Barghouti's case posed a very special problem for the OPD because it raised fundamental questions about due process and the role of public defense in a society enmeshed in violent conflict.

The Barghouti case does not represent the norm. In our experience working for the OPD, defense attorneys working for an office funded by the Israeli Government have managed to achieve cooperation with Palestinian clients, including those charged with terrorist crimes. Public defenders funded by the State of Israel have created enclaves of trust, loyalty, and confidentiality with Palestinian clients charged with all types of crimes. In this article we will try to give some legal and sociological sense to the island of cooperation that has been sustained in an overwhelmingly hostile political environment.

This article is comprised of three parts. The first part provides historical background by tracing the development of the right to state-funded defense counsel in Israel. We describe the impact of the nascent OPD, which has served as an important vehicle for change. The second part of the article addresses the availability of

state-funded defense counsel for Palestinian defendants from the West Bank and Gaza. We highlight the major disparity between the legal aid available in military courts located in the Occupied Territories and the civilian criminal courts located within the pre-1967 boundaries of Israel. We also discuss two recent cases in which the OPD provided defense counsel for Palestinians charged with participation in terrorist actions that caused massive civilian casualties. The third part of the article discusses the difficult challenge faced by the OPD in the case of Marwan Barghouti. We explain how the OPD dealt with this special challenge, which could have undermined the fragile foundations of professional trust built between the OPD and its clients.

I. The Right to State-Funded Defense Counsel in Israel

A. *Historical Background*[1]

The State of Israel inherited its legal system from the British Government, which administered the area out of which Israel was created from 1918 until the Declaration of Independence in 1948. Shortly thereafter, the interim government declared that almost all of the British legal system would continue to apply to the new state's governmental structure.[2] There was no time to create all of the many government institutions anew. There were also serious divisions within the political community of the new state, resulting in the decision to postpone the task of adopting an original constitution that would set out government powers and individual rights. The Israeli Declaration of Independence did contain a statement of

1. *See generally,* Daniel Friedman, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 Isr. L. Rev. 192 (1975); Daniel Friedman, *Infusion of the Common Law into the Legal System of Israel*, 10 Isr. L. Rev. 324 (1975); Daniel Friedman, *Independent Development of Israeli Law*, 10 Isr. L. Rev. 515 (1975); Yoram Shachar, *History and Sources of Israeli Law*, *in* Introduction to the laws of Israel 1-10 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995). For the institutional organization of the Israeli legal system and its constitutional history, *see* Ruth Gavison, *Forty Years of Israeli Law: Constitutional Law*, 24 Isr. L. Rev. 431 (1990); David Krestzmer, *Constitutional Law, in* Introduction to the laws of Israel, 39-58 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995); Asher Maoz, *The Institutional Organization of the Israeli Legal System, in* Introduction to the laws of Israel 11-38 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995); Asher Maoz, *Constitutional Law, in* The Law of Israel: General Surveys 3 (I. Zamir & S. Colombo eds., 1995).

2. *See* Law and Administration Ordinace, 1948, 1 L.S.I. 7.

the new state's aspirations and fundamental values.[3] However, instead of creating a binding legal source in a comprehensive constitution, the legislature undertook to make special legislative arrangements for matters of governmental institutional capacity, such as the powers of the legislature, cabinet ministers, president and judiciary.[4] These laws, whose constitutional status is still not completely developed, are called "Basic Laws."[5] The Supreme Court of Israel has interpreted three of these basic laws as giving the Court the right to overturn contradictory regular laws, thus granting it the power of judicial review.[6]

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3. *See* Israeli Declaration of Independence § 11, 1948 1 L.S.I. 3 (1947-48) ("The State of Israel will be open for Jewish immigration and for the gathering of the Exiles; It will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; It will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.").

4. *See* H.C. 7/48 Al Karbutally v. Minister of Defence 2 P.D. 5, 12; H.C. 10/48, Zeev v. Gubernik, 1 P.D. 85 (translated in 1 Selected Judgements Sup. Ct. Isr. 68, 70 (1948)).

5. The Basic Laws that were enacted to date are: Basic Law: The Knesset, 1958, 12 L.S.I. 85 (1957-58); Basic Law: Israel Lands, 1960, 14 L.S.I. 48 (1959-60); Basic Law: The President of the State, 1964, 18 L.S.I. 111 (1963-64); Basic Law: The State Economy, 1975, 29 L.S.I. 273 (1974-75); Basic Law: The Army, 1976, 30 L.S.I. 150 (1975-76); Basic Law: Jerusalem, Capital of Israel, 1980, 34 L.S.I. 209 (1979-80); Basic Law: Judiciary, 1984, 38 L.S.I. 101 (1983-84); Basic Law: The Comptroller, 1988, 1237 S.H. 30 (Hebrew); Basic Law: Freedom of Occupation, 1994, 1454 S.H. 90 (Hebrew); Basic Law: Human Dignity and Liberty, 1992, 1391 S.H. 150 (Hebrew) (English version available in 33 Isr. L. Rev. 718 (1999)); Basic Law: Government, 2001, 1780 S.H. 158.

6. These Basic Laws are: Basic Law: The Knesset, 1958, 12 L.S.I 85; Basic Law: Freedom of Occupation, 1992, 1454 S.H. 90 (Hebrew); Basic Law: Human Dignity and Liberty, 1992, 1391 S.H. 150 (Hebrew) (English version available in 33 Isr. L. Rev. 718 (1999)). For cases in which the Israeli Supreme Court acknowledged its power of judicial review of legislation, *see generally* H.C. 98/69, Bergman v. Minister of Finance, 23 P.D.(I) 693, abriged in 4 Isr. L. Rev. 577 (1969); C.A. 6821/93, United Mizrachi Bank plc v. Migdal Cooperative Village, 49(4) P.D. 22 (1995), abridged in 31 Isr. L. Rev. 764 (a full translation of the opinion of Chief Justice Barak in this case also appears in Towards a New European Ius Eommune- Essays on European, Italian and Israeli Law 381-539 (A. Gambaro & A.M. Rabello eds., 1999)). *See also* H.C. 6055/95 Tzemach v. Minister of Defence, 53(5) P.D. 241.

For a discussion of the enactment of the Basic Law: Human Dignity and Liberty and its implications, see *infra*. For a discussion of judicial review before the enactment of Basic Law: Human Dignity and Liberty, *see* David Kretzmer, *Judicial Review of Knesset Decisions*, 8 Tel Aviv U. Stud. L. 95 (1988); Amos Shapira, *Judicial Review without a Constitution: The Israeli Paradox*, 56 Temp. L. Q. 405 (1983).

For the foregoing reasons, criminal procedural law in Israel during the first years of statehood was British in content, with some important exceptions.[7] In criminal as well as civil trials there are no juries. Instead, professional judges issue reasoned findings of facts. The legislated system of criminal procedure is, however, an adversary system, similar to the British and American systems. The legal presumption of innocence has been adopted; proof beyond reasonable doubt is required for criminal convictions;[8] and cross-examination of witnesses holds a central place in the trial process. Although these characteristics have remained part of the fundamental legislated structure of criminal procedure, the system has been equally shaped by practices in courts, some of which go against the grain of the adversary system,[9] such as proactive questioning of witnesses by judges.

The *en bloc* reception of British legal principles under Israeli law has meant that the right to representation in criminal trials was a legislative right, not a constitutional right. There are two principle legislative rules. First, a defendant in a criminal case has the right to be represented by private counsel of his or her choice at any stage of a criminal proceeding.[10] Second, certain limited classes of defendants have the right to be represented at trial by a "state appointed" defense counsel.[11] During the Mandate period the right to appointed counsel attached only to crimes for which the death penalty could be imposed. In the mid-sixties, this right was broadened to include mandatory appointment of counsel for defendants charged with crimes bearing a potential maximum

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7. *See* Kenneth Mann, *Criminal Procedure, in* INTRODUCTION TO THE LAWS OF ISRAEL, *supra* note 1, at 267; Eliahu Harnon, *Criminal Procedure and Evidence*, 24 ISR. L. REV. 592 (1990).

8. Section 34 (Kaf-Bet) of the preliminary part of the penal law states: "One shall not bear criminal responsibility for an offence unless it is proven beyond a reasonable doubt." An English version of the preliminary part was published in 30 ISR. L. REV. 5 (1996).

9. *See* Mann, *supra* note 7, at 267-268.

10. This right arises from Section 22 of the Chambers of Advocates, 1961, 15 L.S.I 74 (1960-61), which states "a person who grants a power-of-attorney to an attorney is entitled to be represented by that attorney before all organs of the State . . . ."

11. *See* The Criminal Procedure Law [Consolidated Version], § 15(a), 1982, 36 L.S.I 35 (1981-82).

prison sentence of ten years or more.[12] There was no legislated right to appointed counsel for most defendants charged with lesser crimes or defendants appearing at pretrial bail hearings or postrial appellate proceedings. However, judges were invested with a discretionary authority to appoint counsel. Over the years, judges moderately increased their use of this power. As a result, some suspects and defendants were represented by state-funded counsel in cases for which there was no mandatory appointment.

At the beginning of the 1990's, it was evident that many defendants were still unrepresented in criminal trials in Israel. The per-

12. The earliest mandatory law controlling the right to counsel was the Poor Prisoners Defense Ordinance, 1926. *See* Courts Ordinance, 1924, Laws of Palestine (1818-1925), Vol. I, 199, Official Gazette, August 1, 1926). This Ordinance granted *discretion* to the President of the Court of Criminal Assize to certify that a certain defendant ought to have legal aid. This applied primarily to offenses carrying a potential penalty of death. Like most other British legislation, the Poor Prisoners Defense Ordinance remained in force after the establishment of the state of Israel. It was only abolished with the enactment of the Criminal Procedure Law, 1965, 19 L.S.I 158 (1965-66), which broadened the right to counsel substantially. The amendment of 1965 established a *duty* to appoint counsel (as opposed to a discretionary *power* to do so) with regard to three categories of defendants: defendants who are charged with an offence punishable by imprisonment for ten years or more; defendants under sixteen years of age who are brought before a court other than a Juvenile Court; and dumb, blind, or deaf defendants. The mandatory appointment applied to any such defendant who was unrepresented, regardless of indigence. In addition, the new statute granted full discretion to any court to appoint a defense attorney to destitute defendants and to defendants who are suspected of being mentally ill. The next expansion of the right to counsel appeared in the Youth Law (Trial, Punishment, and Modes of Treatment), 1971, 25 L.S.I. 128 (1970-71). This law, which established the Juvenile Court system, also established that the court "is authorized to appoint a defense counsel to a minor, if it thinks that the benefit of the minor requires it." The next expansion of the right to counsel came in 1974, in the context of an amendment to the law of criminal procedure. Criminal Procedure (Amendment No. 4) Law, 1974, 29 L.S.I 8 (1973-74) was the first piece of legislation to grant power to appoint counsel in pre-trial and bail proceedings. In 1981, in the context of another amendment to the law of criminal procedure, the right to counsel was expanded to include suspects and defendants in special pretrial proceedings for the preservation of testimonial evidence, and defendants "suspected of being intellectually deficient." *See* Criminal Procedure (Amendment No. 15) Law, 1981, 35 L.S.I 224 (1981-82). In 1988, the law of criminal procedure was amended once again, and judges were required to appoint defense counsel in bail hearings in which the prosecution moves to deny bail for the entire duration of a criminal trial. *See* Criminal Procedure (Amendment No. 9) Law, 1988, 1261 S.H. 184 (1987-88). For a comprehensive survey of the historical development of the right to counsel in Israel, *see* Yitzhak Sapir, The Rise (and Fall) of Public Defense in Israel: Legitimation, Institutionalization, and Deradicalization (unpublished S.J.D. dissertation, Harvard University) (on file with author).

centage of defendants not represented was not known with any degree of certainty because no data was kept and no research existed on the topic. At that time, the state was only required to fund defense counsel for persons charged with a crime that carried a maximum prison term of ten years or more, or where judges used their discretionary power of appointment. Because the vast majority of criminal cases brought to court bore potential prison sentences of less than ten years, the main way that indigent defendants could get counsel was through judicial appointment. The problem was that judges were hesitant to use this power to provide representation for the large numbers of indigent defendants appearing in court without attorneys. This was the result of three factors: a tradition in the courts of hearing cases without counsel, inadequate funding in the court's budget for appointed counsel, and a relative scarcity of competent counsel willing to take appointments from the court within the very low fee schedule set for remunerating appointed counsel.[13]

B. The Creation of a Public Defense System in Israel

The precursors of reform emerged in the early 1980's. Following several critical media reports on the low quality of legal aid attorneys, the Minister of Justice appointed a Study Commission to examine the problem of legal aid in criminal cases and to make recommendations.[14] The Ministry commissioned empirical research on legal aid in Israel, requesting information on the nature of legal aid in Europe and North America. The empirical study showed that judges in Israel were dissatisfied with the competence of court-appointed attorneys.[15] The study revealed that Israel was at the bottom of the list of countries surveyed for per-capita expenditure on legal aid for criminal defendants. The Commission also indicated dissatisfaction with the low likelihood of getting appointed

13. *See Report of the Commission for Investigating the Issue of Legal Aid in Criminal Proceedings* (Jerusalem 1985) (Hebrew) ("The Bechor Report").

14. *See id.* The chairman of the commission was Supreme Court Judge David Bechor and it is known as "The Bechor Commission."

15. Eliahu Harnon, Legal Aid in Criminal Proceedings – Theory and Practice in Comparative Perspective (The Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1983) (Hebrew).

counsel if the case did not fall within the rule of mandatory appointment.

Despite opposition from the Israeli Bar Association, the Commission recommended the establishment of a national public defender system, along the lines of the public defender programs found widely in the United States.[16] In addition, the Commission recommended expansion of the population of defendants entitled to publicly funded defense attorneys in criminal trials. Shortly after the Commission published its report, the Institute of Criminal Law at Tel-Aviv University published empirical data on the actual rate of non-representation in criminal trials in Israel.[17] Many in the legal community who did not practice criminal law refused to believe that over half of the criminal defendants were tried without counsel. The report gained public attention and emphasized the serious effects flowing from lack of representation in criminal trials.

The legislature also contributed to the expansion of the right to representation by enacting "Basic Law: Human Dignity and Liberty" in 1992.[18] This Basic law sought to provide better protection to the individual from arbitrary and unreasonable actions by the state. It contained a declaration of principle and enumerated certain rights that were aimed directly at protecting due process in criminal proceedings. The Basic Law stipulated that individuals could not be detained or imprisoned unless such actions bore "a reasonable and proportionate relationship to a justified goal." This Basic Law served as a source for legal norms and new applications of procedural due process,[19] which advocates have used to press the courts to expand the right to counsel.

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16. The Bechor Report, *supra* note 14, at 15.

17. Kenneth Mann, *Report on Criminal Defendents and their Representation by Lawyers* (Jerusalem Institute for the Research of Israel, 1983) (Hebrew).

18. 1391 S.H. 150 (Hebrew). The English version appears in 33 ISR. L.REV. 718 (1999).

19. This formulation of substantive due process became a rich source for judicial review of administrative action and eventually, as a source for judicial review of legislation. The enactment of this Basic Law and Basic Law: Freedom of Occupation was considered by many, including Supreme Court Chief Justice Aharon Barak, as a "constitutional revolution". See his opinion in *United Mizrachi Bank plc v. Migdal Cooperative village case, supra* note 6. *See also* Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law*, 31 ISR. L. REV. 3 (1997). *But see* Ruth Gavison, *A Constitutional Revolution?*, *in* TOWARDS A NEW EUROPEAN IUS COMMUNE-ESSAYS ON EUROPEAN, ITALIAN AND ISRAELI LAW

The Supreme Court sent a message to the larger legal community about the inadequacy of legal aid in a landmark criminal appeal in the late 1980's. In State v. Abargil,[20] a trial court rejected appointment of counsel for a defendant in a burglary prosecution after the defendant had pled not guilty. When the government presented its witnesses, the defendant refused to conduct any cross-examination. On appeal, the Supreme Court criticized the lower court's decision not to appoint counsel, but also understood the court's decision as a reflection of the lack of adequate legal services for indigent criminal defendants. In its concluding remarks, two of the judges called for the establishment of a new criminal legal aid system.[21]

A final factor was a law reform initiative that originated in the Faculty of Law at Tel-Aviv University. In 1990, the Faculty established a clinical program to train attorneys in criminal defense and provide legal aid to indigent defendants. In the context of the clinic, staff and students represented many defendants who would otherwise not have had counsel. The students conducted research on the needs of indigent defendants, paying special attention to the

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517 (A. Gambaro & A.M. Rabello eds., 1999); Ruth Gavison, *Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 219 (1999); Michael Mandel, *Democracy and the New Constitutionalisation in Israel*, 33 ISR. L. REV. 259 (1999).

See Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substative Criminal Law*, 31 ISR. L. REV. 3 (1997); Eliahu Harnon, *The Impact of the Basic Law: Human Dignity and Liberty on the Law of Criminal Procedure and Evidence*, 33 ISR. L. REV. 678 (1999).

20. C.A. 134/89, Abargil v. State of Israel, 44(4) P.D. 203 (Hebrew). For a critical view of that decision see: Note, *The Israeli Gideon?*, 26 ISR. L. REV. 373 (1992)

21. In the early Nineties, in another important case, this one involving a defendant's detention before conviction, the Supreme Court declared that it was setting out as one of its agendas an enhanced recognition of defendant's rights in criminal cases. Here the President of the Supreme Court relied on the Basic Law: Human Dignity and Liberty as the source of its decision limiting the authority of the state to detain defendants during their criminal trials. The President of the Supreme Court said that suspects and defendants in criminal cases would be entitled to more "due process" than they had enjoyed up until that time in the criminal justice system. This declaration was received in the legal community as a kind of road marker to a new era in which criminal law and procedure would come under greater scrutiny. Many expected that there would be a "constitutionalization" of criminal procedure. This declaration of intent seems to have had an impact on the readiness of legislators and government civil servants to increase funding of legal aid in order to establish the public defender organization. *See* H.C. 2316/95, Ganimat v. State of Israel, 49(1) P.D. 589, abridged in 31 ISR. L. REV.754 (1997). *Cf.* Barak, *supra* note 19.

question of how institutionally to provide more representation in the criminal courts. The staff of the clinic viewed the law reform program in the clinic as a prototype of a public defender office. A critical turning point in the efforts to establish a public defender system occurred when the faculty and students in the clinic drafted the text of a law designed to establish a nationwide public defender system.

The proposed law envisioned an independent government office, with a chief public defender in a position parallel to the chief state prosecutor, and in-house as well as privately contracted attorneys, who would provide legal aid in all criminal cases in which the suspects and defendants would be eligible. Special emphasis was put on the creation of supervisory staff that would both train attorneys and monitor the quality of defense services provided. The proposal also called for an expansion of the right to appointed counsel.

After a lengthy legislative process, the Knesset passed comprehensive legislation in 1995, establishing the OPD and expanding the right to counsel in criminal cases.[22] The law passed by the Knesset, based on the draft proposed by the Tel Aviv law faculty legal clinic, set a timetable of three years for the establishment of the OPD throughout the country. The law vested the OPD with the responsibility of ensuring effective assistance of counsel for all suspects and defendants who were entitled to legal aid.

The first local office of the OPD opened in Tel-Aviv in 1996, with a staff of three attorneys and two administrators. Private attorneys were chosen by interview and during the first year, they handled almost all of the cases, including mandatory and discretionary appointments of counsel. As the OPD achieved success in its first district office, eligibility was expanded, the staff and budget was increased, and training and supervision became professionalized. By the year 2000, the entire system had been established. There were five district offices of the OPD covering all criminal courts in Israel. The in-house staff had grown to 75 staff attorneys and 120 adminis-

22. The Public Defender Law, 1995, 1551 S.H. 8. The new law expanded the right of public defense to indigent defendants charged with crimes carrying a maximum prison term of five years or more. Art. 18 of the law also extended the right of a publicly funded defense counsel to indigent detainees at bail hearings.

trators. State expenditure for criminal legal aid had grown over ten fold and approximately 700 private bar attorneys were on contract to provide representation. The Minister of Justice called the OPD a "legal empire." Activists in the Bar Association of Israel complained that the Public Defender was taking over the entire market of criminal defense. The Supreme Court granted the OPD the status of *amicus curiae*,[23] recognizing for the first time the very idea of amicus standing in Israeli law, while giving the OPD an important representative role before the Supreme Court.[24]

With the establishment of the OPD, there was a significant expansion of the class of defendants who were provided attorneys, and the quality of legal representation improved. In the past, suspects in bail hearings were represented only rarely; by 2000, almost all were represented. The percentage of unrepresented defendants in criminal trials went down significantly as well. In the past, most minors in juvenile court were not represented by counsel; now, most were represented by public defenders.[25] The level of practice and competence of attorneys went up sharply due primarily to the attorney selection policy and the supervision by staff attorneys. This

23. R.T. 7929/96, Kusli v. State of Israel 53(1) P.D. 529, 553-54 (Hebrew).

24. Several issues that were discussed in this legislative preparation period had a substantial impact on the institutional integrity of the office of the public defender, and in turn, on the ability of the office to provide legal counsel without interference from the government or its agencies. The first was whether its chief personnel would be given civil service ranks equivalent to those in parallel positions in the state prosecutor's office. Eventually the decision was taken to grant the chief public defender the same rank as the chief state prosecutor. The second was the question of the relationship of the chief public defender to the attorney general. The attorney general supervises and has the power to override decisions made by the chief state prosecutor, as well as all executive decisions by ministers and their staffs in respect all questions of legal rights and obligations arising in the administration of government. If this principle were to be applied to the chief public defender, then the attorney general, who ultimately directs the public prosecution, would also direct the public defender. This arrangement was found be unsuitable for the mission of the public defender. It was thus decided that the public defender would be entirely independent in making decisions about how to handle its cases. The attorney general would not be able to override a decision made by public defender as to how to defend clients. The attorney general would also not be able to intervene in the public defender's decision to represent a person who was entitled to representation under the public defender law.

25. Shortly after the establishment of the OPD the legislature extended the right to a public defender to any minor who is arrested or indicted for a crime. *See* Public Defender Regulations (Representation of Additional Defendants), 1998, 5917 K.T. 1096 (Hebrew).

was the first time that any attorney handling a legal aid case had to submit written reports on his or her activities, consult with supervisors, and get express permission to take certain steps in cases.

As the activities of the office of the OPD gained momentum, the caseload grew rapidly. Under the old system of legal aid, two to three thousand defendants were represented each year. By the third year of the OPD's operation, after district defender offices with full time staff members were opened in Tel-Aviv, Jerusalem, Nazareth, Haifa, and Beersheva, public defenders represented twenty thousand defendants in criminal cases and ten thousand suspects in bail hearings annually.

Different strands of professional and political support had joined forces to rectify a widely recognized problem and to bring about significant reform in indigent criminal defense. The key to this transformation was twofold. First, an independent organization was created, staffed by attorneys committed ideologically to the notion of due process and the right to representation. Second, the salaries, fees, and status of the staff attorneys were established and guaranteed by law. What had been a lose amalgamation of lonely and under-motivated attorneys in the pre-OPD period had become, in the new organizational setting, a group of highly interacting attorneys who found professional support and moral energy in their commitment to the idea of public defense.

Success, however, is not the full story. Although the Public Defender Law brought significant changes, in 2004, four out of ten defendants in criminal cases remain unrepresented in some of the non-metropolitan lower trial courts.[26] The Israeli Supreme Court still denies appeals lodged by indigent defendants whose main claim for overturning a conviction is lack of representation at trial.[27] The OPD currently faces severe budgetary pressures, which have led to the reduction of fees for public defenders. There have also been several legislative efforts, albeit unsuccessful, to scale back the number of defendants entitled to representation.

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26. *See* Kenneth Mann, *Research: The Scope of Representation of Defendants in Criminal Proceedings*, 58 HaSanegor 3 (2002) (Hebrew).

27. C.A. 2469/00, Perets v. State of Israel Dinim Mehozi, 32(9) 898 (Hebrew) (denying a request for permission to appeal). *See* Yitzhak Zamir, *Human Rights and National Security*, 23 Isr. L. Rev. 375 (1989).

II. State - Funded Representation of Palestinians in Israeli Courts

A. Criminal Prosecutions of Palestinians and the Role of the OPD

Thousands of Palestinians residing in the West Bank and Gaza are prosecuted each year in Israeli courts. The charges leveled against Palestinians in Israeli courts run the entire gambit of criminal offenses, including among others, murder, burglary, assault, drug and sex offenses. Regulatory offenses relating to illegal presence in Israel and offenses against state security are the two main categories of offenses that relate to Palestinian residents in the Occupied Territories.

Israeli law enforcement authorities administer a complex set of regulations to identify Palestinians and restrict their presence in Israel.[28] Palestinian residents of the West Bank and Gaza are not allowed to enter Israel unless they fall within a category of persons for whom entry permits are issued.[29] The entry permits generally forbid the person from staying overnight in Israel. Many Palestinians violate these provisions and commit regulatory offenses, such as the use of false identity documents and illegal presence in Israel. Most of the widespread violations stem from simple disregard of regulations or from economic motivations, not security offenses. Many Palestinians who do not hold permits attempt to enter Israel for days or weeks at a time, in order to work as laborers in Israeli businesses. Such regulatory violations are widespread. When discovered, most of these persons are simply returned to the Territories. Repeat violators are arrested and charged, and some may receive a prison sentence for up to one year. A significant proportion of the defendants represented by the OPD are Palestinians charged with regulatory violations.

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28. The issue of legal status of the West Bank and Gaza strip is very complicated and unclear. The existing law is a combination of the Pre-1967 Jordanian law, Israeli Regulations for Protection During Emergency Times and ordinances of the military commander of the area. *See* Moshe Drori, *Legal system in Judea and Samaria: a review of the previous decade with a glance at the future*, 8 Isr. Yearbook on Hum. Rts. 144 (1978). For a more recent review, *see* Yoram Dinstein, *International Legal Status of the West Bank and Gaza Strip – 1998*, 28 Isr. Yearbook on Hum. Rts. 37 (1998).

29. During the present (second) Intifada, entry permits occasionally are cut off completely. At other times, permits are issued to ten to twenty thousand workers whose security backgrounds are adequate for issuance of an entry permit.

Crime against state security is the other type of offense that relates predominantly to Palestinians represented by the OPD. These offenses include ideologically motivated attacks against civilians and soldiers, ranging from juveniles throwing rocks at a passing vehicle, to terrorists carrying out suicide bombings in crowded restaurants. Israeli institutions and Israeli citizens have coped with security offenses since the establishment of the state. Offenses against state security are committed by individuals acting alone and by groups of persons supported by complex organizational structures. Perpetrators use a wide variety of weapons, including rocks of different sizes, Molotov cocktails, handguns, rifles, bombs, and rockets to assault, kidnap, and kill individuals. Human targets are sometimes soldiers, sometimes unarmed civilians. Property may also be targeted, for example, in cases of houses destroyed by arson. Security offenses are committed by children acting spontaneously, as well as by suicide bombers who are recruited, trained, videotaped in a declaration of their mission, and delivered to a site through a network of cell members.

Before the creation of the OPD, Palestinian suspects and defendants who were charged with crimes other than state security offenses would generally be unrepresented at pretrial bail hearings and at trial. The absence of representation did not result from a special rule applied to Palestinians; it reflected the general rule in the criminal courts that most indigent persons were not represented. As indicated, judges tended not to appoint counsel for unrepresented defendants when there was no mandatory rule of representation. In the serious cases, including offenses against state security, court-appointed attorneys would often represent defendants. Some of the attorneys who handled these cases, particularly the Jewish attorneys, were identified with the political left. Because of the low fees paid and the political identification of attorneys in these cases with a certain type of political ideology, many defense attorneys refused to be involved. Although there were a handful of highly skilled and committed attorneys, the level of representation for Palestinian defendants charged with serious crimes was not satisfactory. A dominant theme during this period was absence of representation in the less serious cases and substandard representation in the more serious cases. The available attorney

pool, including Arabs and Jews, was very small. It included perhaps two-dozen attorneys out of the twenty thousand members of the bar. Once established, the OPD would change much of this, not because it was established to deal with Palestinians or security offenses in particular, but because it sought to enlarge the right to representation and raise the quality of representation throughout the criminal justice system. Cases involving Palestinian defendants were "caught-up" in the wave of basic criminal justice reforms that the OPD sought to institute and institutionalize throughout the court system.

The leadership of the OPD believed it was important to have Arab attorneys on staff as a statement of its commitment to a multicultural environment and affirmative action in hiring. Arab citizens are significantly underrepresented on the staffs of most governmental agencies in Israel, including the various branches of the Ministry of Justice. This situation reflects underlying social problems in Israeli society, including barriers raised by civil service employment processes to Arab applicants and distrust of government in the Israeli Arab community. The former constitutes an external barrier to entry, the latter an internal subjective resistance to identifying with the authority of the Israeli government. The leadership of the OPD believed it was important to stand out as an exception to the general rule of under-representation in agencies funded by the government. The OPD had a clear advantage in pursuing this goal; for potential Arab recruits, applying to an organization dedicated to helping individuals prosecuted by officers of the state removed much of the stigma attached to taking a civil service job.[30]

The chief administrators of the OPD believed that it was symbolically important to have Arab attorneys in large proportion representing Arab defendants in the criminal courts. Because very few Jewish attorneys speak Arabic fluently, it was clear that bringing Arab attorneys onto the staff could increase the standard of legal services. Under OPD policy, Jewish attorneys would also be assigned to represent Arab defendants and Arab attorneys would be

30. At present, seven years after the creation of the OPD, approximately 15% of the staff attorneys are Arabs, and 30% of the contract attorneys are Arabs. Arabs constitute approximately 18% of the population of Israel, excluding the Occupied Territories.

assigned to represent Jewish defendants. In spite of this policy, however, there was a natural pull toward assigning Arab attorneys to Arabs and Jewish attorneys to Jews. It was unclear whether the combination of Arab and Jew in the attorney-client relationship would undermine client confidence in the attorney or frustrate adequate representation because of language and cultural barriers. A balance had to be struck between the commitment to multiculturalism and the best interests of the client.

B. Civilian and Military Prosecutions for Offenses against State Security

The manner in which Israeli police and military authorities respond to security offenses varies widely. Palestinians taken into custody on suspicion of committing an offense against state security are subject to one of two different institutional legal processes. One is a military system where the nature of the legal process is determined by laws issued by the military authorities in the Occupied Territories. The other is a civilian system where the nature of the legal process is determined by the general state law applicable to all criminal offenses, with special provisions for security offenses.[31] A security suspect taken into custody by the army for an offense allegedly committed in the Occupied Territories is most likely to be brought before a military court. He may, however, be put into the civilian system, requiring a transfer to civilian police custody. A suspect charged with committing a security offense within the pre-1967 boundaries of the State of Israel is most likely to be tried in the regular criminal courts. In the military courts, most of which sit in the Occupied Territories, the legal procedures employed are similar to those used in the civilian courts. Judges preside over an adversary system. Suspects and defendants have the right to be represented by counsel, including counsel appointed by the court. There is a presumption of innocence and procedural rules limit the admissibility of hearsay evidence.

31. For a discussion of the military courts in the occupied territories, and their specific rules of jurisdiction and procedure, see Emanuel Gross, *Trying Terrorists – Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights*, 13 IND. INT'L & COMP. L. REV. 1, 1-97 (2002).

There are important differences, however. For instance, in the military system suspects can be held in custody for extended periods before procedural rules compel the state to bring the suspect before a judicial officer. Under military rules, the security suspect may be held in custody following initial and periodic judicial reviews, but without a full trial. Detention without trial can last for months and sometimes for years. Another distinctive characteristic of the military judicial system is the frequent use of administrative detention. While there is a separate statute in the civilian legal system providing for the administrative detention of Israeli citizens, it is used very infrequently. Military administrative detention is used in two distinctive situations. The first is when intelligence information indicates that the detained person is likely to commit a serious security offense in the future. Here, detention is used as a preventive measure only, as there is no completed offense that would provide the basis for a trial. The second is when the evidence against a security suspect cannot be produced at trial without exposing an important intelligence source or without creating a high risk that an informant will be murdered.

Another difference between the military and civilian systems of justice is the form of legal aid for suspects who do not retain private attorneys. There is no public defender system for security suspects or defendants charged in the military courts. The military defender system provides legal defense only for soldiers charged with military offenses. Many security suspects and defendants are represented by private attorneys, paid by family members or by organizations connected to various Palestinian factions. Although some of the suspects and defendants are unrepresented, only in a small number of cases does the military judge appoint a specific private bar attorney to serve as defense counsel.

We have observed proceedings in these courts. While military judges and prosecutors appear well-trained and astute, the defense attorneys seem inadequately trained for the task. Many of the attorneys representing security suspects and defendants in military courts are Palestinians who have studied law in neighboring Arab countries, making them generally less familiar with important nuances of Israeli law. Some are Arab or Jewish attorneys trained in Israel. With several notable exceptions, the level of defense legal

practice in these courts is not high. To date, there has been no organized attempt to rectify the weak nature of legal aid for security suspects in the military courts. Attorneys working in these courts are severely underpaid and are often distracted by their own problems of survival in the Occupied Territories. They can be inaccessible due to the complicated problems associated with travel in the Occupied Territories or with gaining physical access to military court compounds. The problem of representing Palestinian defendants in the military courts, which was not addressed by the legislature in creating the OPD, remains a serious impediment to providing due process in that forum.

C. Representation by Public Defenders of Palestinians Charged with Terrorist Offenses

Since its creation in 1996, the OPD has represented Palestinians charged with terrorist crimes. Some of these defendants have been charged with participation in suicide bombings that resulted in massive civilian casualties. Some of these cases have gone to trial; others have ended in plea agreements. In our view, the public defenders handling these cases have provided effective legal defense. The public defenders have generally managed to establish relations of trust with Palestinian clients charged with security offenses, and have invested very substantial efforts in providing high quality legal representation. The following cases illustrate the OPD's approach.

In 2002, the OPD represented four residents of Silwan, a neighborhood in the eastern part of Jerusalem.[32] The four Palestinians were charged with murdering a large number of Israeli civilians in a string of attacks. The attacks included the bombings in a cafeteria at the Hebrew University of Jerusalem, in a nightclub in the town of Rishon Letzion, and in a cafe in the center of Jerusalem. The four suspects claimed responsibility for all of the attacks attributed to them. They each gave full written confessions and videotaped explanations of the details of each attack. At the bail hearings, they spoke with pride in open court about their actions, not expressing any remorse for the loss of civilian lives.

The members of the Silwan Hamas cell were indicted in the District Court of Jerusalem for a wide range of offenses, including

32. *See* C.C. (Jerusalem) 5071/02, State of Israel v. Kassem (unpublished).

twenty-six counts of murder. The OPD office in Jerusalem assigned the case to Abed Assli, a prominent Palestinian attorney with extensive experience in defending Palestinians in the military courts of the West Bank. Assli's reputation within the Palestinian community as an effective advocate for defendants charged in the military courts of the West Bank enabled him to foster a strong attorney-client relationship with the defendants. Although the State of Israel funded the defense, the defendants had no difficulty in accepting the representation of this public defender. The indictment resulted in a plea agreement.

It is noteworthy that the OPD was able to appoint as a deputized public defender, a Palestinian attorney who had a track record of representing Palestinian defendants in Israeli courts. It is likely that in this case a Jewish or Israeli attorney would not have been able to establish rapport with the defendants or render effective assistance of counsel. This case highlights the value of flexibility in appointing attorneys that is characteristic of the system of legal aid institutionalized in the Israeli Public Defender Law. In a time of intense social and political conflict, this flexibility appears to be crucial for the effective administration of public defense.

Another case handled by OPD involved the bombing of the Dolphinarium discoteque in Tel Aviv in June, 2001. The defendant in the case was Mahmoud Nadi,[33] a Palestinian from the town of Kalkilya, who transported the suicide bomber from the West Bank to Tel Aviv. Certain basic facts are undisputed. The defendant picked up the suicide bomber in the West Bank town of Kalkilya. The suicide bomber was wearing an orthopedic belt packed with explosives. The explosives were lined with nails and screws, designed to intensify the lethal effects of the explosion. The defendant transported the suicide bomber to the seaside promenade in Tel Aviv, where hundreds of teenagers were waiting to enter a discoteque. The suicide bomber walked into the middle of the crowd and detonated the bomb, killing himself and twenty-one teenagers. Most of the deceased were Jewish immigrants from the former Soviet Union.

The key question in this case was whether the defendant knew he was transporting a suicide bomber. The prosecution had stipu-

33. *See* C.C. (Tel Aviv) 1121/01, State of Israel v. Naddi (unpublished).

lated that the defendant was initially unaware that his passenger was a suicide bomber. But, the prosecution also insisted that during the fifty-minute trip from Kalkilya to Tel Aviv, the defendant gradually realized that he was transporting a suicide bomber. Relying on this factual assumption, the prosecution charged the defendant as an accomplice to the murder of twenty-one individuals. The defendant adamantly denied these charges, insisting he was unaware of the suicide bomber's intentions. He claimed that he believed that his passenger was either a car thief or an illegal worker.

The Chief Public Defender in the Tel Aviv District assigned two Jewish defense attorneys to handle the case, Leah Tzemel and Ronit Robinson. Tzemel, who speaks Arabic fluently, is a well-known private defense attorney and advocate of Palestinian rights, with extensive experience representing Palestinians defendants both in the military and civilian courts. Robinson, a permanent staff attorney of the OPD, also has substantial experience representing clients charged with terrorist offenses. The two defense attorneys reported that they created an excellent working relationship with each other and with their client.

The prosecution's case was based upon circumstantial evidence regarding the defendant's state of mind during the ride to Tel Aviv, and a series of confused and allegedly self-incriminating statements that the defendant gave to investigators shortly after he was arrested. The prosecutors pointed out that the suicide bomber was wearing a bulging shirt and had acted suspiciously during the trip. They argued that the defendant must have known that he was transporting a suicide bomber, or alternatively, should be deemed culpable under the doctrine of willful blindness. During the trial, the defense produced its own circumstantial evidence to demonstrate the defendant's innocence, including the presence of the defendant's daughter in the car, a risk the defendant would not have taken had he known he was transporting a suicide bomber. The defense also presented expert testimony regarding the defendant's psychological makeup and cognitive abilities. The defense attorneys argued that this evidence tended to show that the defendant could not have had the requisite *mens rea*.

Despite the vigorous defense presented at trial, the defendant was convicted of aiding and abetting murder on all the numerous

counts of the indictment. At the sentencing stage, the three-judge panel imposed a prison term of fourteen years, including the time spent in detention during the trial. One of the judges on the panel recommended a sentence of twelve years in prison. The defense has appealed the verdict and the sentence.

The Dolphinarium case is different from the Silwan case in two important respects. First, the defense attorneys were Jewish, and one of them was a permanent staff member of OPD. Second, the Dolphinarium case went to trial. These differences exemplify the wide variations in attorney-client relationships and case histories that characterize the OPD's involvement with Palestinian defendants. The Silwan case illustrates the importance of flexibility in the appointment of counsel in achieving client loyalty and effective assistance. The Dolphinarium case exemplifies two additional virtues of the institutionalized public defense system in the context of the Israeli-Palestinian conflict: the willingness of the state to provide substantial resources for an effective defense when the case so requires; and the capacity of Jewish-Israeli attorneys, committed to professionalism and sensitive to their client's needs, to create an effective attorney-client relationship with Palestinian defendants.

III. The Prosecution of Marwan Barghouti

In the Barghouti case, the OPD had to decide how to respond to a court order to defend a client who refused representation. This was the first time such a dilemma arose for the OPD.[34] When brought to trial in the District Court of Tel-Aviv, Marwan Barghouti not only refused to be represented by counsel, but also denied the Court's authority to conduct a criminal case against him. This case was important because it posed a serious threat to the Israeli Public Defender's self-definition as a purely professional and non-political agency for legal services. In order to understand the Israeli court's handling of the matter, it is necessary to look at two principles of criminal procedure the Israeli Supreme Court announced long before Barghouti was brought to trial.

34. *See* C.C. (Tel Aviv) 1158/02, State of Israel v. Barghouti (unpublished).

A. Right to Self Representation

The Supreme Court of Israel addressed the question of whether a defendant has a right to self-representation in a case in which the law required mandatory appointment of defense counsel. Zion Amiel had been tried and convicted in the District Court of Jerusalem.[35] During his trial, Amiel was not represented by defense counsel, in spite of the fact that he had been charged with a crime carrying a maximum penalty of more than ten years of imprisonment. The Court had attempted to appoint a private bar attorney from the small pool of private defense attorneys who were then willing to accept court appointments during the pre-OPD era, but Amiel insisted on representing himself.

When asked why he didn't want a court-appointed attorney, Amiel explained, "court-appointed attorneys often mess up the case."[36] The Court accepted Amiel's request and allowed him to proceed *pro se*. Amiel conducted his own defense vigorously, making objections, cross-examining witnesses, and putting defense witnesses on the stand. Nevertheless, at the end of the lengthy trial he was convicted.

Amiel retained counsel to file an appeal. In the appeal, his defense attorney argued that the trial court erred in allowing Amiel to conduct his own defense. The prosecution claimed that a Court should not impose a defense attorney upon a defendant who insists on representing himself at trial. Amiel's appeal was denied. The Supreme Court ruled that the trial court must appoint counsel when there is a mandatory rule of representation, but held further that if a defendant does not want a court-appointed attorney and refuses to cooperate with the attorney actually appointed and funded by the state, the trial court may allow the defendant to represent himself. The Court emphasized that the defendant at trial had taken real steps to defend himself; this was not a case where the defendant refused appointment of counsel and then failed to put on any defense whatsoever.

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35. C.A. 307/72, Amiel v. the State of Israel, 28(1) P.D. 28, 622 (Hebrew).

36. *Id.* at 628. When the Court asked Amiel why he would not accept a court-appointed attorney, he responded, "I don't need an attorney. I don't need an attorney for my defense. If I need one, I will appoint an attorney with my own money. I don't want the court to appoint an attorney for me." *Id.*

B. Appointment of Counsel without Client's Consent and Cooperation

Twenty-five years after Zion Amiel's case was adjudicated and five years before Bharghouti's case came to trial, the Supreme Court of Israel addressed the question of whether a trial court can compel defense counsel to represent a client who has not formally consented to representation. In the case of Eyal Buskila,[37] a trial court had directed the OPD to represent a defendant whose whereabouts were unknown, making it impossible for the public defender to obtain the defendant's agreement to representation or carry out any pretrial consultation. According to the writ of indictment, Buskilia had participated in a violent crime committed against a foreign worker from Romania. It was alleged that he and an accomplice had assaulted the foreign worker and taken his wallet. At the time the indictment was filed, the foreign worker needed to return to Romania and it was unlikely that he could subsequently travel back to Israel to testify against Buskila and his co-defendant. Consequently, the prosecution invoked the "early hearing rule," a special procedure for the preservation of testimonial evidence.[38] This procedure allows the court to hear the testimony of a witness before the beginning of the trial itself, even if the defendant cannot be located.

Although Buskila's alleged accomplice was present and represented by a private bar attorney at this special hearing, Buskila was not present. The police explained that Buskila had apparently gone underground and was therefore unlikely to be located quickly. In order to give the foreign worker's testimony more credibility and potentially greater weight with the trial judge when the full trial commenced, the prosecutor asked the court to appoint a public defender as defense counsel for Buskila. The public defender was to participate in the special hearing and cross-examine the foreign worker, thereby undercutting the likely defense argument at trial that the testimony should be disregarded or discounted due to the absence of cross examination and argument by defense counsel at the early hearing.

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37. C.A. 5628/97, State of Israel v. Public Defense Organization, Dinim Elyon 52, 817(Hebrew).

38. *See* Law of Criminal Procedure [Consolidated Version], 1982, §117, 36 L.S.I. 35 (1981-82).

In its initial decision, the trial court asked the OPD to provide counsel for Buskila. After assessing the implications of this type of appointment, the District Public Defender of Tel Aviv asked to be dismissed from the case. Her position was that a public defender could not represent a client who was unavailable to consent to representation and unavailable to discuss the nature of the legal service contemplated. The OPD stated that compelled representation violated the fundamental principle that an attorney is a client's agent, and that no such agency could be established without the express consent of the client. The OPD also argued that representation of the defendant at the early hearing, without consulting the client about his version of the facts, might damage his interests in the long run, thus violating the OPD's ethical loyalty to its clients. The OPD further argued that representing Buskila under these circumstances would serve primarily to strengthen the prosecution's evidence against him by enhancing the evidentiary weight that would be attributed to the testimony of the prosecution's primary witness. It appeared likely that representation of Buskila by the OPD would damage the client's interests and increase his chances of being convicted. For all the above reasons, the OPD challenged the appointment of counsel and asked to be discharged from the case.

The OPD's arguments against compelled representation were accepted by the trial court, but rejected by the Supreme Court. In a unanimous decision by a panel of three Justices, the Supreme Court decided that the OPD was obligated to represent Buskila. Although the Supreme Court recognized the difficulty of representing a client in these circumstances, it concluded that the appointment of defense counsel was necessary for safeguarding the defendant's rights and facilitating the adversarial process of justice. Non-consensual representation in these difficult circumstances, according to the Court, was better than no representation at all. Discounting the possibility that the representation was not in the best interests of the defendant at this proceeding, the Supreme Court transformed the Public Defender into a servant of the public good. The OPD was expected to facilitate a trial procedure that was inconsistent with the defendant's apparent interest and that could not be conducted without the cooperation of the OPD. The OPD viewed

this decision as a defeat for its view that the public defender was bound by the same codes of effective representation as a private defense attorney. Here, the asymmetry was obvious: A private defense attorney could never be compelled to represent an unavailable and non-consenting client.

C. The Barghouti Trial

In the spring of 2002, the Israeli army launched a massive military operation in the West Bank. The operation followed a series of lethal attacks by Palestinian militants against the civilian population of Israel, including an attack on a hotel in the coastal city of Netanya, during which thirty guests were killed while participating in a traditional Passover Seder. A suicide bomber entered the dining room of the hotel and detonated a bomb attached to his body.

Immediately following the attack in Netanya, the Israeli army mobilized reserve units and sent tanks and armored personnel carriers into the cities and towns controlled by the Palestinian Authority in the West Bank. Hundreds of Palestinians were injured and killed, and thousands of Palestinians were arrested in these incursions. None of the arrests were more significant than that of Marwan Barghouti, a charismatic figure regarded by many Palestinian Arabs as a potential successor to Yassir Arafat. At the time of his arrest, Barghouti served as the Secretary General of the Fatah movement and was a member of the elected Palestinian legislature.

Barghouti's arrest was based on allegations that he served as the head of a miltary organization responsible for a series of lethal attacks against Israeli military and civilian targets. In August of 2002, the State Attorney's Office filed a detailed indictment charging Barghouti as both a principal and accessory in a series of crimes, including murder, attempted murder, incitement to murder, facilitation of murder, conspiracy to commit a crime, membership in a terrorist organization, and participation in activities of a terrorist organization. The indictment was unusual because the defendant was not charged with direct participation in any violent crime. Rather, Barghouti was indicted for his role as the leader of three "terrorist organizations:" the "Fatah," the "Tanzim," and "Al Aksa Brigades." These organizations had publicly claimed responsibility for a series of attacks that had taken place between December,

2000 and April, 2002. The attacks caused the death of twenty-six persons, including twenty-two civilians and four members of the Israeli police forces. The attacks outlined in the indictment took place both in the occupied West Bank and within the pre-1967 boundaries of the State of Israel.[39] According to the indictment, Barghouti also made public statements that incited his followers to commit murder.

Upon filing the indictment, the prosecution petitioned the court to detain Barghouti in custody for the duration of the criminal proceedings. Barghouti opposed this motion and asked to be released on bail. At the bail hearing, Barghouti was represented by a team of private defense attorneys, headed by Jouwad Boulous, a prominent attorney from the Palestinian Arab community with extensive experience in representing defendants charged with terrorist crimes. Barghouti's defense attorneys argued at the bail hearing that the indictment should be dismissed because the State of Israel had no authority to bring criminal charges against an elected Palestinian official. They also claimed that the indictment was a violation of the Oslo Peace Accords,[40] signed by representatives of the State of Israel and the Palestinian Authority. These arguments were rejected by the District Court. Barghouti was remanded to custody for the duration of his trial. The formal arraignment procedure, which Israeli law defines as the official commencement of a criminal trial, was scheduled for September, 2002. The trial was assigned

39. One of the attacks outlined in the indictment occurred in a wedding hall in the Israeli town of Hadera. Six guests at the wedding were gunned down while sitting next to the dance floor. Another attack was launched in a crowded seafood restaurant in Tel Aviv. (Customers eating dinner were attacked by a gunman, who used an automatic assault rifle, and also lobbed hand grenades into the restaurant.) In one of the attacks, a sniper, who mistook the bearded Priest for an Orthodox Jewish settler, killed a Greek Orthodox Priest driving his car on the West Bank. In another attack, a woman sitting in her car at a gas station was gunned down in the presence of her baby son, after the attacker ascertained that she was Jewish.

40. Barghouti's attorneys argued that, in accordance with the Interim Israeli-Palestinian accord regarding the West Bank and Gaza, the State of Israel had granted exclusive jurisdiction to Palestinian National Council regarding the prosecution of criminal acts committed in the West Bank. This argument was rejected by the District Court of Tel Aviv in a detailed decision, which cited various clauses of Israeli domestic law and the Israeli-Palestinian accords, which sustain and affirm Israel's authority to indict and try persons who allegedly committed crimes against Israeli citizens on the West Bank and within the pre-1967 boundaries of Israel.

to a panel of three experienced judges, headed by Justice Sara Sirota.

At the arraignment hearing, Barghouti was not represented by defense counsel. His private attorneys sent a representative to observe the proceedings, but the representative insisted that he had no "power of attorney" to act as Barghouti's defense attorney at trial. The District Court then ordered the OPD to arrange for Barghouti's defense, but Barghouti adamantly refused to be represented by a Public Defender.[41]

The OPD responded by requesting not to be appointed. It argued that the Supreme Court's ruling in the Amiel case held that when a defendant refused representation and refused to cooperate with an appointed defense counsel, the defense attorneys should be

41. The dialogue between Barghouti and Justice Sirota, as recorded in the court protocol, speaks for itself:

> Barghouti: "First of all, I want to say clearly, with all due respect, the Public Defender does not represent me. I represent myself, and there is a mistake here. It is not me that should be sitting on the defendant's chair, but the State of Israel.
>
> I do not recognize this Court. This Court represents the occupiers. This is the Court of the occupiers. This is not a personal matter."
>
> Justice Sirota: "Do you want to be represented by counsel?
>
> Barghouti: I said no."
>
> Justice Sirota: "In my opinion, you need an attorney. And I am obligated, and in accordance with the law, to explain this to you."
>
> Barghouti: "This is unacceptable. I decide, not you."
>
> Sirota: "The law states that we have to read the indictment to the defendant, and if he has any objections, like the preliminary objections you have raised about the authority of the court, the defendant should raise the objections after we read the document of indictment. Now, if you have an attorney, then he can read the indictment, and it saves time. But, since you don't have an attorney, I am obligated to read the indictment to you."
>
> Barghouti: "I don't want to hear the indictment."
>
> Sirota: "Sir, you don't have a choice. If you had an attorney, you wouldn't have to listen to the reading of the indictment. . . Excuse me, there is an attorney here from the office of Advocate Boulous, who represented you at the bail hearing. He certainly read the document of indictment to you."
>
> Barghouti: "No, no, I didn't see the indictment, and I will not relate to the indictment at all. I won't relate to it at all. The indictment does not interest me. This is an indictment of an occupying government."
>
> Sirota: "All right, but you have to hear. I could spare you this if you had an attorney. The law says. . ."
>
> Barghouti: "I don't have an attorney. He does not represent me. Nobody, I represent myself."

released. The OPD senior staff also believed that it would be unethical to represent Barghouti, given his lack of consent and unwillingness to discuss the case. The OPD emphasized that adversarial representation of Barghouti would undermine the defense strategy chosen by the defendant. The District Court, however, believed that the *Buskila* precedent, in which the Supreme had required the OPD to represent a client it never met, rather than that of *Amiel*, governed the Barghouti case and refused to dismiss the OPD. The District Public Defender of Tel Aviv was ordered to meet with Barghouti and to try to arrange for his representation. Thereafter, the District Public Defender made a series of attempts to locate counsel that Barghouti would find acceptable. Although some of the most experienced private-bar attorneys in Israel expressed their desire to defend Barghouti on behalf of the OPD, Barghouti politely turned down all of these offers. He also refused to accept the assistance of the most experienced defense attorneys on the OPD's staff.

Barghouti made no secret of the reasoning behind his position. He stressed that his decision to forego any trial defense was adopted after careful consultation with his privately retained attorneys. He emphasized that he held no personal resentment against the public defenders who were prepared to assist him. Nevertheless, he explained that he regarded the OPD as an extension of the occupying powers of the State of Israel. It would be impossible for him to accept any kind of representation from the OPD. Barghouti demanded that no public defender should speak in his name in court or try to mount a defense in his behalf.

In light of Barghouti's position, the OPD re-petitioned the District Court and asked to be dismissed from the case. The District Court denied the request and ordered the OPD not only to represent Barghouti, but also to "mount a vigorous defense of the defendant." Over the District Public Defender's protests, the Court insisted nonetheless that the OPD must represent Barghouti like any other client, making legal arguments on his behalf and cross-examining the prosecution's witnesses. Underlying the Court's decision was the assumption that an adversarial system of justice cannot function properly if the defendant does not offer a defense. In

the interests of due process and justice, the Court held that a criminal defendant must be defended at trial, regardless of his wishes.

D. Resolving the Dilemma of Compelled Representation

The OPD now faced a serious dilemma. How could a defense attorney represent a client who would not talk about the indictment? May a defense attorney ignore the explicit request of a mentally competent client who asks the attorney not to cross-examine the prosecution's witnesses? Does a criminal defendant's right to challenge the court's authority imply a right to refuse to be represented by counsel at trial? Does the public defender's role in the administration of justice include the representation of defendants who refuse to be represented?

Under the applicable ethics rules, it is unclear whether an attorney may represent a mentally competent defendant who refuses to be assisted by counsel. The Israeli Bar Association's ethical rules stipulate that "in fulfilling his role, an attorney shall act for the benefit of his client with loyalty and dedication, and shall assist the court in administration of justice."[42] This rule expresses the classic tension between the attorney's loyalty to the client on the one hand, and his role as an officer of the court on the other. Relying on this rule, one could argue that a public defender is ethically bound to assist the court in "doing justice," thereby protecting the defendant from a possible false conviction, even when a recalcitrant defendant wishes not to be represented. But the OPD was reluctant to accept this view because it lent too much weight to the defense attorney's role as an officer of the court and undervalued the defense attorney's loyalty to the client and the defendant's right to control his defense at trial.

Beyond questions of law and ethics, there was a powerful political subtext underlying the issue of representing Barghouti at trial. Marwan Barghouti was unwilling to accede to the rules of the game that the State of Israel was imposing on him. He did not want to accept the role of a criminal defendant. Barghouti preferred to concentrate his efforts on undermining the very legitimacy of the criminal proceeding initiated against him. He wanted to portray himself as a political prisoner and a martyr, unjustly prosecuted by

42. Rule 54 of the Chambers of Advocates Law (Professional Ethics), 1986.

an immoral legal system. He did not want his trial to look like a fair proceeding.

Barghouti's decision to forego the assistance of counsel was anything but irrational. In the absence of counsel, Barghouti could speak directly to the court, in front of an audience of media representatives from around the world. The absence of counsel would underscore Barghouti's defiance and his posture as an underdog. It would also make it difficult for the State of Israel to portray Barghouti as an alleged criminal who was receiving a fair trial. Given this defense position, representation by the OPD would undercut Barghouti's interests, as he perceived them.

One can further argue that Barghouti's decision not to defend himself at trial was the most intelligent decision he could make under the circumstances. While Barghouti's trial was taking place, the Government of Israel was engaged in discussions with the Palestinian Authority about the implementation of an internationally brokered peace initiative known as "the road map to peace." It was widely assumed that the implementation of this peace initiative would include the release of Palestinian prisoners from Israeli prisons. In this context, Barghouti could hope to be released, if the international community would apply sufficient pressure on the Israeli Government. It would be more difficult to garner support to release Barghouti if he were convicted in a full-fledged criminal trial with due process of law. The international community would be more likely to pressure Israel to release Barghouti if he could portray himself as a political prisoner, prosecuted unfairly in a bogus criminal trial.

Another layer of political and social subtext underlying the dilemma of representing Barghouti relates to the OPD's perception of its role in Israeli society. Since its inception, the OPD had emphasized its independence from the organs of the state. Public defenders had sought to establish their credentials as zealous advocates of individual defendants, enabling them to establish relations of trust with their clients. Although the OPD was funded by the state and some of its attorneys were directly employed by the state, the individual defense attorneys strove to portray themselves as independent actors bound by an undivided loyalty to their clients. Eventually, this message registered with the relevant segments

of the Israeli public, Jews and Arabs alike. The OPD gradually earned the trust of clients from all sectors of the population, including Palestinian Arabs from the West Bank and Gaza. The Barghouti case threatened to upset the delicate position of the OPD; representing Barghouti against his wishes under court order would appear to be a manifestation of disloyalty to the client and loyalty to the state. This would certainly have a deleterious effect on the covenant of professional trust between the public defenders and their future clients.

Notwithstanding its understanding of Barghouti's position, the OPD staff knew that it had to make an effort to comply with the District Court's instruction because it was an official court order and the OPD was a state agency. Thus, the District Public Defender appointed a team of experienced defense attorneys to represent Barghouti at trial. The defense attorneys prepared for trial by studying all of the voluminous investigative material in the prosecutor's file. They made a concerted effort to be well prepared and poised for action in court.

But OPD compliance stopped short of actual representation. The staff attorneys deftly refrained from active participation in the trial, constantly measuring and assessing the response of the judges in the courtroom setting. To the dismay of the judges, the attorneys sent by the OPD did not cross-examine the witnesses; nor did they make any legal arguments on Barghouti's behalf. Their inaction did not, however, bring them into open conflict with the court. Paradoxically, the public defender's passivity did not stimulate censure of the attorneys, nor renewed calls for proactive representation. Instead, the judges attempted to fill the role of the defense. Uncharacteristically, they abandoned their attitude of moderate aloofness toward the parties and adopted a critical, if not suspicious, posture toward the prosecution. The judges were constantly interrupting the prosecutor with questions from the bench, openly expressing their doubts about certain parts of the evidence.

Ultimately, the public defenders' inaction in court was dictated by the practical difficulty of defending a client who would not cooperate with counsel. Because criminal defense requires active consultation with the client, genuine cross examination of the prosecution's witnesses was impossible. The prosecution's case

against Barghouti was based on transcripts of his interrogation by the General Security investigators and a wide variety of statements made by field operatives of the Al-Aksa Martyr's Brigade, who allegedly acted as Barghouti's deputies. The prosecution also introduced documents seized in various Palestinian offices on the West Bank, as well as taped interviews that Barghouti gave to the news media. The OPD believed that a defense attorney could not construct a proper line of defense without hearing the client's version of the events described in the indictment or his comments on the prosecution's evidence.

In order to mount a proper defense, the defense attorneys needed the client's cooperation and participation. What were the circumstances surrounding Barghouti's confession? What approach should be used with the testimony of Barghouti's alleged accomplices? Who would constitute good witnesses for the defense? What documentary evidence should be used to create an alternative view of events? It was impossible to build a defense based on speculation, imagined factual scenarios and fishing expeditions. To do so would run the risk of strengthening the prosecution's case. The judges seem to have silently acknowledged and accepted the view that counsel could not mount a proper defense, and decided to challenge the prosecution's case on their own.

Despite the client's wish to remain unrepresented, it could be argued that the OPD's passivity was detrimental to the due process of law. Barghouti's refusal to mount a defense undermined the Court's ability to conduct a full-fledged trial. The system of justice could not function properly without vigorous cross examination and adversarial legal argument. This point was dramatically and explicitly made by Barghouti himself. After the prosecutor finished her summation speech, Barghouti declared to the Prosecutor, "You are lucky that I didn't conduct a defense, because I would have shown that your whole case is based on lies." Many months later, the court has not yet given its judgment in the case.

Conclusion

The right to publicly funded defense counsel in criminal proceedings in Israel has always been limited. In the early 1990s, a national average of over fifty percent of the defendants went unrep-

resented at criminal trials. The creation of the OPD in Israel did much to change this. Eligibility for appointed counsel was expanded, the nature of bail hearings before indictment was radically changed due to the use of "on duty" public defenders and representation among defendants in the juvenile court increased dramatically. Most importantly, the quality of defense services rose through a refined system of attorney selection and active OPD staff supervision of attorneys. The OPD also greatly expanded the role of Arab defense attorneys in providing legal services to Palestinians in all criminal cases, including cases of terrorism and security offenses. These institutional changes in legal aid meant that Palestinians could now receive due process in Israeli courts, even in the shadow of the Israeli-Palestinian conflict.

The OPD had committed itself to a mission of professionalization, in which ideology and politics were kept outside of the arena of legal services. This did not mean that the Office was blind to the role of ethnic and national identity in the quest to establish attorney-client confidence and loyalty. Rather, the OPD appointed Jews to represent Arabs and Arabs to represent Jews, so long as the commitment to zealous representation in the case of Palestinian defendants was not compromised. To a large degree, this policy has worked. A strong bridge has been created between an institution funded by the State of Israel and Palestinian clients who find themselves swept up into the legal system of a state for which many of them feel nothing but enmity and disdain. Our observations indicate that a significant degree of trust and reliance can be created in this climate. When skilled professionals offer help in a genuine way, individuals in trouble seem willing to accept it. Within the enclave of confidentiality, public defenders are able to communicate to Palestinians that their good-faith efforts to act in the best interest of their clients and their professional values are stronger than attorney-client political or ideological conflicts. In this important sense, commitment to professional values among public defenders today is strong enough to weather the storm of the Palestinian-Israeli conflict.

The case of Marwan Barghouti posed a threat to the professional mission of the OPD. If the OPD had represented Barghouti against his will, it would have communicated that the OPD has cho-

sen allegiance to the court over the client's own perception of his or her best interest. While allegiance to a court of law and rejection of a client's choice of action is sometimes dictated by the ethics rules, finding a balance between these competing dictates is problematic when the court is viewed by the client as an instrument of state oppression. In this context, OPD representation of Barghouti would certainly have damaged the foundations of trust between public defenders and many Palestinian clients. On the other hand, refusing to represent Barghouti would have placed the OPD in direct violation of a court order, which the court believed would further due process of the law. This dilemma was ultimately sidestepped because both the OPD and the Court acted cautiously and with deference to the complexity of the situation. While the OPD accepted the court's order, the public defenders present in court continued to explain that the circumstances made it impractical to cross examine witnesses or make procedural arguments. While the court stood behind its order as a formal statement of procedural law, it did not insist that the public defenders comply with it. The court and the OPD silently negotiated a standoff. The principle that the OPD had an obligation to represent a recalcitrant client was preserved, while the practical impossibility of actually presenting a defense received informal acknowledgment.

Although the OPD arrived at a solution in the Barghouti matter, the possibility of the same situation arising in the future with greater frequency is troubling. If more Palestinians refuse representation and reject the authority of the courts, public defenders will progressively become unable to make a contribution to the due process of law. This would be a signal that the politics of violence and hatred had breached a fundamental structure of law and democracy in Israeli society. In our view, the best way to avoid this result is to strengthen the pursuit of highly professional legal representation and to bolster due process in criminal proceedings. As long as public defenders are perceived by their clients as loyal and zealous, and the courts remain loyal to fundamental notions of due process, it will be possible for the law to retain its integrity and authority, even in the extremely difficult circumstances posed by the Palestinian-Israeli conflict.