UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 13-20772
Hon. Gershwin Drain

RASMIEH YUSEF ODEH,

Defendant.

MOTIONS IN LIMINE AND BRIEF IN SUPPORT

NOW COMES Rasmea Odeh, by her undersigned counsel and respectfully moves this Court to issue orders *in limine* to bar prejudicial evidence, as enumerated below, which is irrelevant and/or more prejudicial than probative under the Federal Rules of Evidence,. In support of this motion Ms. Odeh states the following:

Background

Pre-trial motions in response to the original indictment were ordered by this Court to be filed on December14, 2016. On December 13, 2016, the government filed a superseding indictment, and the Court set a new motion schedule, requiring all motions to be filed by February 14, 2017.

On January 29, 2017, Ms. Odeh filed a Motion to Dismiss the Superseding Indictment, now scheduled to be heard by this Court on March 21, 2017. Until the Motion to Dismiss the Superseding Indictment is ruled upon, Ms. Odeh is placed in the complex procedural posture of having to file *limine* motions in response to the prospect of a trial on either the original and superseding indictments. As described in the Motion to Dismiss, the original and superseding indictments are significantly different and raise substantially different issues to be addressed *in limine*.

Defendant's motions are separated in two groups, below and in the Brief.

I. Motions in *Limine* Regarding the Original Indictment

Accordingly, the Defendant moves for Orders precluding introduction of various materials and issues by the government, as follows:

1. Evidence or mention of defendant's alleged guilt or innocence of the 1969 Israeli charges.
2. Evidence or mention of her alleged past affiliation with the Popular Front for the Liberation of Palestine (PFLP) or any other pro-Palestinian group.
3. Evidence or specific mention of the 1969 charges by the Israeli security police, the specific allegations in the Israeli military court indictment or the specific alleged "crimes" for which she was convicted by the military tribunal
4. Evidence or mention of her attempted escape from an Israeli prison in 1975

5. Mention or use of the word "terrorist" in referring to Ms. Odeh, and the use of the word "terrorism" in describing her alleged activities in Israel, or the Israeli charges, or her military court conviction.

6. Regardless of the MLAT, in order to preserve the issue, Ms. Odeh seeks to preclude the introduction of any documents generated by the illegal Israeli Military Occupation.

II. Motions in *Limine* to Superseding Indictment

The Superseding Indictment adds additional allegations in which the government seeks to prove as fact that Ms. Odeh was a member of or affiliated with a "terrorist group" (the PFLP) and engaged in "terrorist activities." In the event that this Court allows the government to proceed on the superseding indictment, a whole series of additional irrelevant evidence and highly prejudicial issues are implicated by the superseding indictment, in addition to the *limine* requests listed above.

As to the Superseding Indictment, Ms. Odeh moves for preclusion of the following:

7. Evidence or mention that the PFLP was designated by the United States Secretary of State as a foreign terrorist organization, which occurred in 1997.

8. Evidence or mention about the PFLP that presents "political questions" of the right of the Palestinian people to oppose illegal occupation of their country with actions deemed unlawful by the Occupation authorities.

9. Evidence from the Record of the military occupation court proceeding in which Ms. Odeh was convicted and imprisoned in Israel in 1969. Since the government now seeks to prove that she was in fact involved in "terrorist activities," the finding of an Israeli military court is not admissible to prove such fact. The government must be required to prove any claims of alleged criminal acts which they characterize as terrorism with admissible evidence, beyond a reasonable doubt.

10. Further, any Israeli police reports, or other documents, now almost 50 years old, and generated by the Israeli military government involved in enforcing the illegal occupation of Palestinian land must be precluded as hearsay and unreliable.

Finally, defendant wishes to reserve the right, once the government has identified its "experts" to fully challenge the qualifications, relevancy and justified basis for their proposed testimony.

WHEREFORE, defendant Rasmieh Odeh maintains her prayer that this honorable Court will grant her companion motion to dismiss the Superseding Indictment so wrongfully filed herein, and that, there and here, it will fully explore and carefully consider what fair and righteous limitations ought to be imposed on the evidence in the trial of this long-suffering woman, for obtaining American citizenship "contrary to law."

Dated: February 14, 2017

Respectfully submitted,

/s/ Michael E. Deutsch
Michael E Deutsch
1180 N. Milwaukee Ave.
Chicago, Ill. 60642 773-235-0070

Michael Deutsch

Dennis Cunningham

James Fennerty

William Goodman

Huwaida Arraf

Attorneys for Rasmea Odeh

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BRIEF IN SUPPORT OF RASMEA ODEH'S MOTIONS IN LIMINE

Introduction

Rasmea Odeh has filed several requests *in limine,* intended to limit the retrial of her case to relevant contested issues, and to prevent the introduction of highly prejudicial, collateral matters. Since there is now a superseding indictment, and since the defendant's Motion to Dismiss the superseding indictment will not be heard until March 20, 2017, Ms. Odeh's motions *in limine* address highly prejudicial and irrelevant evidence which the government may seek to introduce at trial under either indictment.

Under the original indictment, Ms. Odeh does not contest that she was arrested by Israeli security police in 1969, charged and convicted by an Israeli military tribunal and imprisoned by the Israeli government. Ms. Odeh's defense is not based on a challenge to the government's evidence that the "no" answers to her arrests, conviction or imprisonment were false, but rather whether or not she "knowingly lied" when answering those questions. As in the first trial, evidence that repeatedly focuses attention on the fact that she was indicted and convicted of a bombing in which two civilians were killed and several others injured, is guaranteed to prejudice even the most open-minded juror and distract from the issues that are rightfully in dispute. The defense urges this Court not to let the new trial be hijacked by manipulation of the specter of "terrorism"---in fact if not specifically in name---which will again be the clear the intent and only coherent purpose of the prosecution's repeated reference to bombings and deaths and injuries.

As to the superseding indictment, the government's terrorism-mongering strategy is clearly front and center. Under this new indictment, the government seeks to prove that Ms. Odeh lied about membership in or affiliation with a "terrorist organization"--- the Popular Front for the Liberation of Palestine

("PFLP") --- and that she engaged in "terrorist activities," which would have precluded her from obtaining legal resident status and barred her from becoming a citizen. These two additional allegations of terrorism, focused on proving that the PFLP was a terrorist organization Ms. Odeh was a member of, and that she did in fact engage in terrorist activities, present additional serious and highly prejudicial *limine* issues.

Limine Issues for Trial Under the Original Indictment

Ms. Odeh respectfully moves for Orders under #403 FRE precluding various matters the government will or may seek to introduce in evidence in a trial of the original Indictment herein, as follows:

1. Evidence of the Defendant's Supposed Guilt or Innocence of the 1969 Israeli Charges.

Following a theme this Court has articulated from the beginning of this case, that "we are not going to try the defendant's guilt or innocence of the crimes charged in 1969", the defendant moves that any and all evidence that directly or indirectly seeks to show her guilt or innocence of her Israeli charges

Importantly, Prior to the first trial, the government specifically moved *in limine* to

preclude the defense from raising any claims of innocence. See Doc# 34 Pg. ID 150. The government argued that "[e]vidence of defendant's factual guilt or innocence for crimes of which she was convicted in a foreign country (Israel) *is irrelevant to the question of whether or not she truthfully answered questions on her U.S. naturalization application* about whether she ever had been arrested, convicted or imprisoned." at Pg. ID 151; see also Doc #66 Pg. ID 502-3 (Emphasis added)

The Court specifically granted this motion to preclude the defense from raising claims of innocence. Doc#117 Pg. 1245-46. "The Court has already concluded that Defendant's factual guilt or innocence for the crimes for which she was convicted is irrelevant to whether or not she truthfully answered questions on her Naturalization Application." *Id.* at 1246

Faced with a new trial in which the defendant's past trauma has now been held relevant and admissible, the defense anticipates that the government will attempt to argue that the defendant's alleged guilt of the bombing charge in 1969 is relevant to whether or not she was tortured. This argument is specious and should be rejected. Whether Ms. Odeh was guilty or innocent has no relevance to whether or not she was tortured. The Israelis security police (*Shin Bet*), then and now,

would systematically torture all detainees believed to be involved in acts of resistance to their occupation, guilty or innocent, before and after they were (are) forced to confess. Wherefore, any evidence which is intended to show that Ms. Odeh was guilty or innocent of the "crimes" charged by the Israelis in 1969 should be precluded from the trial.

2. Evidence of Defendant's Alleged Membership or Political Affiliation with a Terrorist Organization.

Prior to the first trial, the government also conceded that it "purposefully" did not charge that she [Ms. Odeh] falsely answered" the questions concerning whether she was ever a member of or in any way associated with a terrorist organization. Doc# 34 Pg. ID 164; see also Doc # 66 Pg. ID 606-07

Since the (original) indictment does not charge her with lying about her alleged past political affiliations, any evidence of such affiliations is irrelevant, without probative value, and highly prejudicial. R.403 FRE

Further, Ms. Odeh moves that this Court order that any reference to her alleged membership in an "illegal organization" as testified to by Douglas Pierce[1] ,

[1] Doc #181 Pg. ID 2110

or any other witness, or in any argument, should be precluded. If defendant's Israeli military conviction for membership in an "illegal organization" based on illegal efforts of the government of Israel to repress Palestinians from organizing resistance to the illegal occupation of their country were introduced, the jury would have to be told further that, under international law, people have the right to resist foreign occupation, and that under the U.S. constitution membership, by itself, is protected by the First Amendment. Further, the defendant's evidence would also have to include that participating in a peaceful protest, or displaying a Palestinian flag, is also illegal under Israeli law, and can be made the basis for arrest and charges of belonging to an illegal organization.

3. Description of the Specific Israeli Charges Contained in the Indictment and Conviction Documents.

Ms. Odeh will testify that she interpreted the criminal history questions to apply to her time in the United States, which was nine years at the time of her naturalization. Expert testimony will explain that Ms. Odeh suffered from chronic PTSD, as a result of her torture following her arrest by the Israelis in 1969, which caused her to narrow her understanding of the scope of the questions, to avoid recollection of her past trauma.

In this context, the charges in the indictment and conviction by the Israeli military occupation legal system alleging bombings, civilian deaths and injuries, have no relevance at all to the issues at trial, and efforts must be made to limit their likelihood to prejudice and distract the jury from what is in dispute and must be determined. In the first trial, in opening and closing statements and in the testimony of witness Douglas Pierce, the prosecution repeatedly referred to the bombing and the death and injuries. No defendant can withstand such a deluge of flagrantly prejudicial, irrelevant argument and testimony, and have any hope for a fair trial. Ms. Odeh therefore moves that the Israeli indictment and the specific charges for which she was convicted not be presented to the jury.

Rather, Ms. Odeh moves that the jury be instructed that she was charged, convicted and imprisoned for "serious crimes." On appeal, two of the Circuit judges agreed that it was an abuse of discretion for this Court to allow the reference to the names of the two victims of one of the bombings and a Jewish prayer for their souls.[2] More significantly, Judge Batchelder in her partial dissent

[2] The third judge, Judge Rodgers, stated also implied that if he were the trial court he may have also excluded this language, but added, "To say that members of this court might have redacted the names of the victims and the Jewish blessing is far different from saying the district court's conclusion to the contrary was an abuse of discretion." *United States v. O*deh, 815 F.3d 968, 983 (6th Cir. 2015)

believed it was unnecessary, an abuse of discretion, and reversible error, to allow the objected to portions of bombings, deaths and injuries in the Israeli indictment to go before the jury. United States v. Odeh, 815 F.3d 968, 986 (6th Cir. 2015) (Batchelder, dissenting).

The defendant urges this Court to adopt Judge Batchelder's reasoning, and her interpretation of 1425(a) that the statute does not require proof of unlawful procurement, (i.e., that if the defendant had answered the questions accurately it was not likely she would have "procured" naturalization), and that proving "that the lie was 'material' would not require evidence that she [Ms. Odeh] was charged with 'placing evidence in the hall of the Super Sol in Jerusalem . . . with purpose of causing death and injury." *Id.* at 986.

As Judge Batchelder concluded, "[t]he risk of unfair prejudice from this evidence was enormous." *Id.* at 986 "I would have held that the district court abused its discretion in allowing the objected to portions of the Israeli indictment to go before the jury and this error was not harmless." *Id.* at 987

There is absolutely no evidentiary need for the jury to be informed that Ms. Odeh was charged with bombings in which two died and others were injured.

Although the Court has previously barred the use of the word "terrorism" to describe the charges and conviction of the defendant,[3] the charges of bombs placed in a grocery store killing and injuring civilians, blares out "terrorism" regardless of whether the specific word "terrorism" is used.

4. Mention of the Defendant's Attempted Escape From an Israeli Prison in 1975.

There is no even arguable basis to put before the jury the fact that Ms. Odeh attempted to escape for an Israeli prison in 1975. Since the government has documents that shows she was in an Israeli prison after in arrest in 1969, and, by her own admission to Homeland Security officer, Stephen Webber, she served 10 years in an Israeli prison, there is no evidentiary basis to put in evidence of her 1975 escape attempt. Again, its clear purpose is more prejudicial than probative, and it should be excluded under Rule 403.

5. The Government Should Be Barred from Using the Words "Terrorist" or "Terrorism" in the Prosecution of this Case.

This Court has previously barred the use of terms "terrorist" and "terrorism"

[3] The Court also barred witness Pierce from also referring to "terrorism" in testifying why Ms. Odeh via application would have been denied if she answered the questions truthfully.

in describing the defendant, her actions or affiliations. "These terms are highly prejudicial and create a danger if improperly influencing the jury's verdict." Doc #117 Pg. ID 1245. Wherefore, reference to Ms. Odeh as a terrorist or her alleged acts in Israel as terrorism should be precluded from the trial.

6. The Israeli Military Court Documents Should Not Be Admitted into Evidence, Regardless of the MLAT Treaty

Ms. Odeh asserts that the actions of the Israeli police and military occupation "judicial system" operate in violation of international law, fundamental fairness and due process, and the documents created by such a system should not be admitted and credited in a U.S. court. Ms. Odeh recognizes however that the Sixth Circuit in the appeal of this case has ruled that the MLAT treaty with Israel allows for the admission of such documents. However, the point is not that admission of the documents is allowed under the treaty, but that the documents prove little, and are basically irrelevant, and, like the other materials, hopelessly prejudicial. The defendant recognizes that this Court is bound by the Appeals Court decision but she asserts this claim again so it is not waived for further appeals.

Limine Requests Applied to Superseding Indictment

In the event the Court denies defendant's pending motion to dismiss the superseding indictment, whereby the Government seeks to prove that Ms. Odeh was a member or affiliate of a "terrorist group" and engaged in "terrorist activities", defendant asks the Court for a further order under Rule 403 precluding introduction of addition matters,[4] as follows:

7. Evidence or Mention that the PFLP was Designated by the United States Secretary of State as a Foreign Terrorist Organization in 1997.

The designation by the U.S. Secretary of State in 1997 that the PFLP is a foreign terrorist organization (FTO) is completely irrelevant to whether or not it was a terrorist organization in 1969. This Court has already addressed this issue prior to the first trial. "To rely on the 1997 designation of the PFLP as a 'terrorist' organization when there is no evidence in the record to suggest that Ms. Odeh was a member of that organization when she applied for her immigrant visa is highly prejudicial and will have an undue tendency to improperly influence the jury's verdict by appealing to its fears of terrorists and terrorist activities." Doc #117

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[4] The sequence of numbers on the various requests is continued from Section I above, so the numbers are consistent with those in the Notice of Motion.

Pg.ID 1243 The Court ruled that although her long-past alleged membership may have some probative value, this is "substantially outweighed by the danger of unfair prejudice to the defendant. Fed. R. Evid. 403; *Schrock*, 855 F.2d at 355." Id at Pg ID 1244.

In addition, the Secretary of State's designation determination is done *ex parte*, in secret, without the right of any aggrieved part to intervene or appeal. Such designation can be based on hearsay, and even unsubstantiated news reports. Clearly, such a designation does not comport with due process for the purposes of proving beyond a reasonable doubt an element of a criminal offense.

8. Evidence or Mention that the PFLP is a Terrorist Organization, which Presents a "political question" Not Properly Justiciable in a U.S. Court.

Whether or not the PFLP is a terrorist organization raises complex political questions about whether or not people have the right to resist the illegal military occupation of their country. Under international law, foreign occupation is a crime and numerous declarations and resolutions of the United Nations have declared that people living under an illegal occupation have the right to resist. Israel has been under a U.N. mandate since 1967 to remove its troops from the West Bank and East Jerusalem. Rather than comply with this directive they have not only

aggressively maintained control of Palestinian land with brutal military force, arbitrary killings, arrests and torture, but have promoted the permanent occupation of these lands by importing hundreds of thousands of Israeli "settlers." Whether or not, a Palestinian group who organizes to resist such illegal and brutal occupation can be considered a "terrorist organization," in light of the tens of billions of dollars the U.S. government provides to the Israeli occupiers to maintain their illegal control, is beyond the competence of the American legal system, Again, these are political issues that cannot be fairly and objectively litigated in the U.S courts

9. The Verdict and Findings of the Israeli Military Court are Not Admissible to Prove Ms. Odeh "Engaged in Terrorist Activities."

The government must be required to establish that any claims of alleged criminal acts which they characterize as "terrorist activities," is based on admissible evidence and proven beyond a reasonable doubt. The verdict and findings of the Israeli military tribunal is not admissible evidence to prove guilt of specific conduct as their procedures do not conform with Due Process or Fundamental Fairness. (See Affidavit of Lisa Hijjar, attached).

Unlike in the trial of the original indictment, in which the Israeli military court documents were not introduced to prove that Ms. Odeh was in fact guilty of the

charges for which she was arrested, indicted and convicted. Rather they were introduced to prove only that she was arrested, indicted and convicted. Now the government wants to prove that she was in fact engaged in "terrorist activities. To do so, the government must prove these allegations of terrorist activities beyond a reasonable doubt, based on reliable, non-hearsay evidence.

Further, any Israeli police reports, or other documents, now almost fifty years old, and were generated by the Israeli government while it was involved in enforcing the illegal occupation of Palestinian land, must be precluded as hearsay and unreliable.

CONCLUSION

In a fair and dispassionate prosecution of a violation of Section 1425a, it can readily be seen that none of the above-listed matters are significantly probative of any of the issues in the case. Where there is no dispute as to the facts of the defendant's arrest, charge, conviction and imprisonment in Israel in 1969, or that these facts clearly would have been material to a decision to grant naturalization if she had answered the questions accurately; and where these facts are a half-century old, and altogether at odds with the facts of Ms. Odeh's life since she was released, and particularly since she came to this country twenty-two years ago, the potential

for multiple violations of Rule 403 is glaring.

Moreover, where the government's own psychological expert, after a forty-four hours of examination, has confirmed the diagnosis of PTSD, and found that the defendant was not malingering, the only real and relevant question at issue is whether or not the PTSD could cause or prompt the defendant, in this Court's words, "to cognitively process questions about the past to avoid recalling traumatic experiences,… which are at the root of one's disorder?"

In this circumstance, the wholly politicized character of the government's approach to the case---even if it is limited to the original indictment---is manifest, as clear as it is reprehensible. The Court must be vigilant to prevent such a perverse, remorseless, and constitutionally deficient co-optation of the criminal justice process.

Dated: February 14, 2017

Respectfully submitted,

/s/ Michael E. Deutsch
Michael E Deutsch
1180 N. Milwaukee Ave.
Chicago, Ill. 60642 773-235-0070

Michael Deutsch

Dennis Cunningham

James Fennerty

William Goodman

Huwaida Arraf

Attorneys for Rasmea Odeh

CERTIFICATE OF SERVICE

I herby certify that on February 14, 2017, I electronically filed or caused to be filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF filers.

/s/ Michael E. Deutsch
People's Law Office
1180 N. Milwaukee Ave.
Chicago, Il 60642
773-235-0070

Dated: February 14, 2017

Dr. Lisa Hajjar
Sociology Department
University of California-Santa Barbara
Santa Barbara, CA 93106
805-236-4144; lhajjar@soc.ucsb.edu

RE: Statement about Israeli military courts in the occupied territories

I am a full professor in the Sociology Department at UCSB. I have been asked to provide an expert statement about the Israeli military justice system in the occupied territories for a case involving Rasmea Odeh, who was arrested in 1969 and convicted in 1970. This statement is based on my extensive research on the Israeli military court system. My book, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (University of California Press, 2005), is the only book-length scholarly study on the subject.

Historical Background and Basics

The Israeli military court system in the West Bank and Gaza was established three days into the Six Day War in 1967. It is the criminal/legal component of the military administration that Israel has used to govern Palestinians in these regions occupied during the war with the surrounding Arab states. After the 1967 war, one-third of the population living under Israeli rule was Palestinians from the occupied territories.

For the first several years of the occupation, there was little resistance to the occupation among Palestinians. Nevertheless, as early as 1969, the Israeli military employed militarized violence and collective punishment across the territories (see http://unispal.un.org/UNISPAL.NSF/0/7813B07830BDC77705256560006A7CB0). In 1970 – 1971, the Israeli military undertook a "pacification" campaign. The imposed quiescence provided the authorities with the latitude to expand the use of the military court system.

Three bodies of legislation are enforced through the military courts: original Israeli military legislation, the British Defense (Emergency) Regulations of 1945 (promulgated during the British Mandate of Palestine), and local criminal laws (Jordanian in the West Bank and Egyptian in Gaza). Israeli military orders constitute the main body of law regulating the operation of the military courts. They also designate specific offenses. Between 1967 and the early 1990s, the Israeli military had legislated over 1,300 orders for the West Bank and over 1,000 for Gaza. The criminal provisions of the British Defense Regulations outlaw membership in an "illegal organization," which, in this context, has included all Palestinian nationalist organizations.

Military courts of the first instance are distinguished by the number of judges (one or three) and the maximum sentencing power. Three-judge courts are empowered to pass sentences up to the maximum of life in prison or the death penalty. There are also

military courts attached to prisons and detention centers to handle hearings for extension of detention and appeals against administrative detention. There was no military court of appeals until 1989; prior to that, convicted Palestinians' only recourse was to appeal to the military governor of the region (West Bank or Gaza). No decision of a military court has status as a legally binding precedent. Consequently, there is a great deal of disparity in the sentences issued for similar crimes.

In terms of its function as a *legal* system, the military courts have never met the baseline standards of due process, and certainly not during the first years of the occupation. Problems include the use of soldiers in a policing capacity, and the complexities, contradictions, and vagaries of the laws enforced through the courts. Moreover, there is no basis in law or practice for the presumption of innocence. Rather, the three-pronged practice of arrest, interrogation and prosecution is premised on a presumption of guilt. This is evident in the fact that any soldier can arrest any Palestinian for the slightest suspicion or cause without warrant, and once arrested, people can be held for prolonged periods incommunicado before being granted access to an attorney. There is no legal requirement that a Palestinian's arrest be preceded by a detention order, or that a person be informed of the reason for arrest at the time he or she is taken into custody.

The presumption of guilt is further confirmed by the pervasiveness of torture and abuse, as well as a general pattern of prolonged denials of lawyer-client meetings, judicial concession to prosecutors' requests for extension of detention, and refusal to release detainees on bail. While, technically, there is a provision for *habeas corpus* (challenging the lawfulness of an arrest and the necessity of detention), in practice this is treated by Israeli military authorities as a request for release on bail, and bail is almost never granted. In most cases, people are detained throughout the entire duration of proceedings until their case is concluded.

A Palestinian who is arrested can be held in custody for up to 18 days without charges before being brought before a judge. This breaks down as follows: 96 hours of detention on the order of any soldier, and two seven-day extensions of detention on the order of police officers, usually at the request of the GSS. Following the initial 18 days, detention can be extended by order of a judge. Extension-of-detention hearings usually take place at court facilities in prisons, although sometimes extension hearings take place in regular military courts. Typically, prosecutors request an extension of detention when the interrogation has not been completed (i.e., the person has not confessed), or when the authorities have not had time to act on the confession (e.g., arresting people implicated in the detainee's statement).

Although in principle, detained Palestinians have the right to meet with a lawyer, lawyer-client meetings tend to be prohibited as long as the person is undergoing interrogation. Provisions in military legislation can prohibit detainees from any access to lawyers for up to 90 days. Interrogators have the authority to prevent a lawyer-client meeting for up to 30 days (two 15-day periods, the second on the order of someone of higher rank than the person who ordered the first period). Following that, a military judge

can issue another 30-day order barring the meeting, and a third 30-day order can be issued by the president or acting president of a military court.

Since 1967, hundreds of thousands of Palestinians have been arrested by the Israeli military. Not all Palestinians who are arrested are prosecuted in the military court system; some are released following interrogation, others are administratively detained without trial. According to a widely acknowledged rule-of-thumb, approximately fifty percent of Palestinians who are arrested are released or administratively detained without charges, and the other fifty percent are charged with crimes and prosecuted. Of those who are charged, approximately 90-95 percent are convicted. Over 97 percent of all cases in which charges are brought are concluded through a plea bargain rather than a trial.

While plea bargaining is common in many criminal justice systems, in this system it must be understood in light of the interrogation process and the evidentiary weight of confessions. The primary or only evidence in the vast majority of military court convictions are confessions (first- and/or third-party) extracted during interrogation. The Israel Defense Forces and the police conduct some interrogations, but the main agency responsible for interrogation of Palestinians is the General Security Service (GSS, also known by its Hebrew acronyms Shin Bet or Shabak). Interrogations feed the legal process by procuring confessions that are then turned over to police and prosecutors.

Israeli torture and cruel treatment in the interrogation process

With the expansion of the military court system after the "pacification" campaign, demands for forms of evidence that would hold up in court increased. Consequently, interrogation was increasingly aimed at producing confessions. By 1970, the complete isolation—and thus effectiveness—of interrogation as a component of the legal process had been achieved.

Since 1968, Israeli and Palestinian defense lawyers working in the military court system reported claims by their clients of beatings, electric shock, death threats, position abuse, cold showers, sexual abuse, sleep deprivation, and denied access to toilets. In 1970, the Israeli publication *Zu Ha-Derech* reported a new policy to discourage military courts from investigating the conduct of interrogators: "Noting the importance and vitality of [the GSS's] security responsibilities in this area, it is the duty of the court to avoid disturbing them in their tasks" (quoted in Amad 1973: 19).

Reports about Israeli interrogation methods that claimed the routine use of torture and ill-treatment were condemned by officials as anti-Israel lies and smears, and refuted by arguing that such claims were based on pernicious fabrications by Palestinians and other "enemies of the state."

Although the number of Palestinian women and girls who have been arrested and interrogated is miniscule in comparison to the number of men and boys, it nevertheless numbers in the thousands (see Antonius 1980; Fahum 1984; Ghanem 1995). Palestinian females who are arrested are subjected to many of the same interrogation methods as

males. They also can be subjected to special methods that capitalize on their gender, such as sexual harassment and abuse, rape, and techniques that manipulate notions of "female honor" and women's feelings for their family members, especially their children (Thornhill 1992). From the beginning of the occupation, the threat of interrogation as a "dishonoring" experience was exploited by the Israeli military authorities to inhibit Palestinian women's participation in national politics. Many incidents have been reported of women and girls being detained and brought to interrogation centers where they are threatened or abused to pressure male family members to confess.

Women prisoners also have been used instrumentally in the interrogation of male prisoners. Torturing women in front of men is a means of pressuring men to confess to "save" women from further abuse. This dates back to the early resistance by *feday'in*. Fadl Yunis, in his prison memoir titled *Cell Number 7*, describes an experience of a Palestinian woman commando, stripped naked being interrogated in front of him. He writes, "Tears came to my eyes, but she said, addressing me in a collected voice: 'Don't worry brother. It doesn't matter that you see me naked. After all, you're my brother…and I'm your sister'" (quoted in Harlow 1992: 36).

Both the discourse and practices of interrogation underwent a qualitative change following the 1977 publication in *The Sunday Times* (London) of a detailed inquiry into "Arab allegations and official Israeli denials of the use of torture." The *Times* reported, "Torture of Arab prisoners is so widespread and systematic that it cannot be dismissed as 'rogue cops' exceeding orders. It appears to be sanctioned as deliberate policy." The Israeli government, through its embassy in London, ridiculed the findings and conclusions of the article as "fantastic horror stories" in a response on July 3, 1977. But Prime Minister Menachem Begin ordered a curtailment of violent interrogation tactics in Israeli prisons and detention centers. As a result, for the next several years, allegations of torture declined. To compensate, beginning around 1979 the GSS developed a new technique to gather information and extract confessions: the procurement and use of Palestinian collaborators (*'asafir*, literally "birds") in prisons.

In 1987, new and conclusive information about the history of Israeli interrogational torture came to light. It began in the aftermath of two scandals involving the GSS—the summary execution of captured Palestinians who had hijacked a bus, and a charge by a Circassian Israeli soldier that he had been tortured to elicit the confession that had been used to prosecute him (for treason). These events prompted the government to appoint an official commission of inquiry to investigate illegal activities by the GSS. The commission was headed by Moshe Landau, a retired justice of the High Court of Justice (HCJ). Among its findings, the Landau Commission report confirmed that GSS agents had used violent interrogation methods routinely on Palestinian detainees since at least 1971, and that they had routinely lied about such practices when confessions were challenged in court on the grounds that they had been coerced. The Landau Commission was harsh in its criticism of GSS perjury, but adopted the GSS's own position that coercive interrogation tactics are necessary in the struggle against "hostile terrorist activity." The Landau Commission accepted the broad definition of terrorism utilized by

the GSS, which encompasses not only acts or threats of violence, but virtually all activities related to Palestinian nationalism.

The Landau Commission argued that Israeli penal law could be interpreted to give interrogators license to continue the use of "moderate amounts of physical pressure" as well as various forms of psychological pressure as part of the fight against terrorism. The legality of such "pressure," the Commission reasoned, could be justified under the "necessity defense," which permits people to use violence in "self-defense," thereby mitigating criminal liability on the grounds that they are acting to prevent grievous harm. The specific interrogation methods that the Landau Commission recommended were contained in a classified appendix to the report.

In November 1987, the Israeli government adopted the Landau Commission's recommendation to authorize the use of "moderate physical pressure," making Israel the first state in the world to publicly sanction interrogation methods that constitute torture according to international law.

Following the publication of the Landau Commission report in 1987, lawyers mounted a protracted litigation campaign in the HCJ to challenge the legality of violent interrogation tactics used on Palestinians. In 1990, a group of Israeli lawyers and human rights activists formed the Public Committee against Torture in Israel (PCATI) to spearhead a campaign to end the use of torture. This litigation, along with the hundreds of petitions by lawyers representing Palestinian prisoners, forced the state to admit or acknowledge that permissible methods included the routine use of threats and insults, sleep deprivation, hooding and blindfolding, position abuse, physical violence (including "shaking" which produces a whiplash effect and leaves no physical marks), solitary confinement (including in refrigerated or overheated closet-like cells), and subjection to excessively filthy conditions. In 1993, in response to the litigation, the Israeli government reported that the GSS had modified its longstanding interrogation procedures, although these changes remained classified.

In January 1998, the HCJ combined a number of petitions pertaining to interrogation tactics, and convened a panel of nine justices to consider the matter. On September 6, 1999, the HCJ rendered a decision in *PCATI v. State of Israel* (HCJ 5100/94) prohibiting GSS agents from routinely using physical "pressure," although the decision neither called these tactics "torture," nor completely closed the window of opportunity for their continued use under exceptional circumstances. After the ruling, some methods all but disappeared (e.g., violent shaking, covering a detainee's head with a thick cloth sack, exposure to extremely loud and constant music, and tying to small tilted chairs). But other methods, including sleep deprivation, position abuse and painful shackling, exposure to extremes in temperature, and intense pressure applied to various body parts remain common practice.

Approximately 85 percent of arrestees are interrogated, and interrogation places Palestinians into conditions of discomfort, pain, humiliation and threats, from which there is no exit until the interrogation ends or the detainee provides information to the

interrogators' satisfaction. In 1993, the Gaza Community Mental Health Programme published findings of a survey study based on a sample of 477 ex-prisoners who had spent between six months and ten years in prison. Of this total, 91.7 percent had spent five years or less in prison, meaning that they were convicted of minor crimes. The findings revealed the incidence of specific interrogation methods on the following percentages of the sample: beatings (95.8); exposure to extreme cold (92.9); exposure to extreme heat (76.7); prolonged standing (91.6); applied pressure on the neck (68.1); food deprivation (77.4); solitary confinement (86); sleep deprivation (71.5); intense noise (81.6); verbal humiliation (94.8); threats against personal safety (90.6); forced witnessing of torture of other detainees (70.2); applied pressure on testicles (66); electric shock (5.9); tear gas (13.4); pushing instruments into the penis or rectum (11.1); witnessing torture of family members (28.1); threats of torture or rape of female family members (27.9). Other studies and investigations of interrogation tactics have generated similar findings.

Prosecution

Once the interrogation is finished, if there is a confession and/or other forms of evidence to charge the detainee, the prosecutor prepares the charge sheet and the legal process begins. If a confession is the main evidence, the prosecutor needs an additional scintilla (*dvar ma* in Hebrew). In this court system, the scintilla could be the protocol of the extension of detention hearing; if a detainee did not tell the presiding judge that s/he is "innocent," the prosecutor could use this as an admission of guilt. Given that detainees often are not represented by counsel at extension-of-detention hearings, many are unaware that declaring their innocence is an option. Corroborating evidence also can include the testimony of an arresting soldier, general information that a particular event for which the defendant is being charged actually occurred, or secret evidence.

Whereas in the domestic Israeli criminal justice system a confession must pass certain logical tests to ensure that it was not "invented" by the accused, such as a scintilla that the accused had the opportunity to commit the crime, or that the confession does not contradict other types of evidence, in the military court system the scintilla does not have to corroborate the confession or even to implicate the accused directly. All it has to show is a *possible* connection between the accused and the crime. Even if a defendant subsequently rescinds a confession on the grounds that it was coerced, or other exculpatory information becomes available, according to the rules of evidence that apply in this system, the court has the option to retain--and prefer--the confession over other evidence.

In principle, a defense lawyer can challenge a confession that a client claims was coerced by calling for a *zuta* (*voir dire*; often called a "mini-trial" or a "trial-within-a-trial"). This entails a hearing *in camera* in which a judge hears testimony from the defendant, the interrogators, and any others who might have relevant information (e.g., police, prison guards and doctors). But for such a challenge to succeed, the judge would have to consider the testimony of the defendant more credible than that of the interrogators. Since 1967, there are almost no instances in which a judge threw out a confession as a result of a *zuta*, and most defense lawyers are disinclined to utilize this

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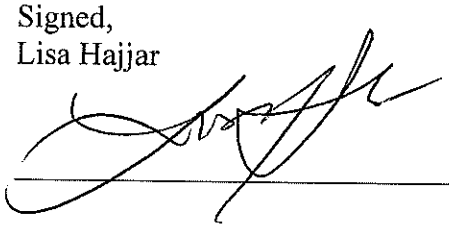
procedure because the client can face greater punishment as reprisal for "wasting the court's time."

Secret evidence is always the basis for extra-judicial incarceration (i.e., administrative detention). Within the military court system, prosecutors can use secret evidence as a basis for charges. Much of the evidence classified as "secret" comes from Palestinian collaborators. The collaborator network forms an integral part of the state's resources to gather incriminating information that can be used to detain, charge and prosecute suspects. Secret evidence is unavailable to either the defense lawyer or the defendant, which means that the defense is afforded no opportunity to know the contents or contest the veracity of the evidence directly.

Overwhelmingly, the legal work that transpires in the military court system involves plea bargaining. Defense lawyers and prosecutors negotiate over the charges and the merits of evidence in a case in an effort to come to an arrangement on the sentence. For the defense, the incentive to plea bargain is a negative one: it assumes the likelihood of defeat at trial with the consequence of a higher sentence. For the prosecution, the incentive is a positive one: it provides an assured conviction of the accused, saving the time, effort and resources that a trial would entail. In many criminal court systems, plea bargaining is the routine and predominant way to resolve most cases. However, the prevalence of plea bargaining in this system must be understood to derive, in large part, from the myriad advantages that prosecutors enjoy. These advantages include administrative and legal provisions that permit the holding of detainees incommunicado for prolonged periods and impede lawyer-client meetings, the prevalent and routine use of coercive interrogation tactics to obtain confessions, the evidentiary weight of confessions and difficulties in challenging them in court, the use of "secret evidence" that is unavailable to defense lawyers or defendants, and a general tendency on the part of judges to accept prosecution evidence and prefer it to exculpatory evidence or contradictory testimony from defendants and defense witnesses.

In my expert opinion, during the period between 1967 and 1975, the Israeli military courts in the occupied territories did not operate in a manner consistent with basic due process or fundamental fairness.

Signed,
Lisa Hajjar



Date

7/22/14

Subscribed and sworn to before me
this 22nd day of July 2014

Tamica C. Goodson
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
TAMICA C. GOODSON, Notary Public
Susquehanna Twp., Dauphin County
My Commission Expires October 6, 2014

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