



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	No. 03 CR 978
v.)	
)	Judge Amy J. St. Eve
MOUSA MOHAMMED ABU MARZOOK, <i>et al.</i>)	

GOVERNMENT’S RESPONSE TO DEFENDANT SALAH’S MOTION TO SUPPRESS

The United States of America, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, hereby responds to defendant Muhammad Salah’s Motion to Suppress and states as follows:

I. BACKGROUND

A. Introduction

Muhammad Salah is charged with racketeering conspiracy, in violation of 18 U.S.C. § 1962(d), material support of terrorism, in violation of 18 U.S.C. § 2339B, and obstruction of justice, in violation of 18 U.S.C. § 1503. All charges relate to Salah’s support of the Hamas terrorist organization both before and after its designation by the United States as a Specially Designated Terrorist Organization and a Foreign Terrorist Organization. A core body of the evidence the government intends to present at trial to establish Salah’s relationship to and material support of Hamas are statements Salah made to Israeli authorities while in Israeli custody in 1993. Most prominent among these (and presumably the immediate subject of Salah’s present motion¹) are

¹ Salah’s motion does not specify which statements he seeks to suppress and, consequently, does not distinguish between those he is claiming were the direct product of unlawful coercion, and those that were the fruits of unlawfully coerced statements. In the absence of such specificity, the government must presently respond generally. Thus, reference to specific statements in this memorandum is made for background purposes and is not intended as a limitation on statements that the government may introduce at trial.

statements Salah made during his initial interrogation period following his arrest January 25, 1993 arrest and continuing through March 1993.

Those statements include, *among others*:

- (1) oral statements Salah made to agents of Israel's General Security Service² ("GSS") during his period of interrogation;
- (2) a statement Salah gave to Israeli National Police (INP) Officer Meron Suleiman on January 27, 1993, that was at that time reduced to writing by the officer and signed by Salah;
- (3) a statement Salah gave to INP Officer Hezi Eliahu on January 30, 1993 that was at that time reduced to writing and signed by Salah;
- (4) a statement Salah gave to INP Officer Meron Suleiman on February 21, 1993 that was at that time reduced to writing, but which Salah refused to sign;
- (5) a handwritten, signed agreement negotiated by Salah with his GSS interrogators in which Salah agreed to provide Israel with the burial location of the body of off-duty Israeli soldier Ilan Sa'adon, who on May 3, 1989 was abducted and later murdered in a Hamas operation, in return for, among other things, the release of certain prisoners in Israeli custody and the return of approximately \$97,000 in cash found in a court authorized search of his hotel room in East Jerusalem in the early morning hours of January 26, 1993, hours after his arrest;
- (6) Salah's handwritten map roughing out the approximate location of Sa'adon's burial site;
- (7) a 53 page handwritten account generated by Salah between March 1 and March 4, 1993, at the request of people Salah believed to be Hamas activists, that details in narrative form Salah's relationship with and activities in support of Hamas, certain of its members, and aspects of Hamas' existence and operation in the United States;
- (8) oral (tape-recorded) statements Salah made during a March 18, 1993 interview with a GSS interrogator, during which Salah authenticated his handwritten accounting and restated many of the details contained therein.

² The GSS is also publicly referred to as Shin Bet, and its present official name is the Israel Security Agency or ISA. For purposes of this motion, the government will refer to it by the official agency name in effect at the time of Salah's arrest and interrogation.

In the present motion, Salah claims that his statements should be suppressed because they were made involuntarily, having been adduced, he asserts, through unlawful coercion at the hands of his Israeli interrogators. The government disputes this claim and, accordingly, opposes Salah's motion. However, the government acknowledges that Salah's sworn affidavit tendered in support of his suppression motion raises material issues that necessitate an evidentiary hearing on his claims. A thorough presentation at this time of the evidence the government intends to introduce at what may be a lengthy suppression hearing would be voluminous and serve little present purpose insofar as many of the critical determinations to be made by this court will center on credibility determinations of live testimony presented by both the government and the defense. The government therefore limits its pre-hearing written response to summarizing (1) the general chronology of Salah's interrogation; (2) the evolution of Salah's claims of Israeli mistreatment and coercion over the past twelve years; and (3) the law governing this court's consideration of Salah's present claims. The government believes that testimony and other materials introduced at the suppression hearing will reveal Salah's claims of torture and mistreatment to be fictional in that the claims are, in various instances, either total falsehoods or gross exaggerations. Relatedly, the government believes that its evidence will establish that Salah's statements to his Israeli captors were made voluntarily and support a finding by a preponderance that any and all such statements and the fruits derived therefrom are admissible at trial in the government's case in chief.

B. General Chronology of Salah's Arrest and Interrogation

Salah was arrested by Israeli Defense Force officers at a road block in Erez, in the Gaza Strip on the night of January 25, 1993. In what would be the first of many noteworthy aspects to the ensuing case, the GSS notified State Department officials in the U.S. Embassy in Tel Aviv of

Salah's arrest when, as characterized in State Department cables, it was still pending--i.e., *before* it even happened.³ Once arrested, Salah was placed into a military vehicle and transported to a detention facility in Ramallah in the West Bank, arriving in the early morning hours of January 26, 1993. Once there, Salah began the first in a running series of interrogation sessions overseen by the GSS.

Salah was initially interviewed by GSS interrogators in multiple sessions conducted in the first 36 hours following his arrest. He was first seen by someone other than IDF soldiers and GSS interrogators on the afternoon of January 27, 1993, when he was interviewed by INP Officer Meron Suleiman. Suleiman took a statement from Salah which Suleiman reduced to writing, in Hebrew, after advising Salah that he was suspected of working for Hamas, he was not obligated to give a statement, and that any statement he provided could be used against him,⁴ Suleiman read the written summary back to Salah in Arabic. After permitting Salah to make any changes or corrections he deemed necessary, Suleiman asked Salah to sign the statement, which Salah did,. During that session, Salah made no claims of mistreatment to Officer Suleiman, nor did Suleiman observe any signs of mistreatment of Salah. Any such claims or indications of mistreatment would have obliged Suleiman to document his observations and report his suspicions or concerns of possible abuse for independent inquiry.

³ Official State Department communications reflect that Salah's relatives informed consular officials of Salah's arrest on the night it occurred. Israel provided official confirmation of the arrest to the State Department on January 27, 1993, at which time an initial consular visit was scheduled for January 31, 1993.

⁴ The same warnings also were given to Salah in the two subsequent INP interviews detailed below.

In the immediately ensuing three days, Salah had further interview sessions with GSS interrogators. On January 30, 1993, Salah was again interviewed by an INP Officer, Hezi Eliahu, who likewise documented in summary form Salah's statements to him. Like Officer Suleiman three days earlier, Eliahu wrote his report in Hebrew, and read it aloud to Salah in Arabic, making any changes requested by Salah, before he asked Salah to adopt the report by signing it. Again, during this session, Salah neither complained nor manifested signs of mistreatment.

On the following day, January 31, 1993, Salah received the first in what would become a series of regularly occurring visits from State Department representatives, including, most specifically, consular service employees stationed in the East Jerusalem consulate. In this initial meeting with American consular officials, Salah neither complained of nor manifested any signs of having been mistreated by his captors. Additionally, State Department records reflect that on the same day, Salah was permitted to consult with an attorney. January 31, 1993 was a particularly busy day for Salah in one other respect. Salah signed a written agreement with GSS under terms previously negotiated between Salah and his GSS interrogators, under which Salah agreed to provide GSS with the burial site of Israeli soldier Ilan Sa'adon, who was kidnaped by Hamas on May 3, 1989, and then murdered.⁵ The agreement further provided that upon location and identification of Sa'adon's body, GSS would (1) release certain female prisoners who were not leaders and had not been involved in military activities; and (2) return the funds confiscated from Salah's hotel room following his arrest (totaling approximately \$97,000 in cash) by transmitting the

⁵ Hamas abducted and murdered Sa'adon close in time to a similar operation involving the abduction and murder of another Israeli soldier, Avi Sasportas. Hamas founder Sheikh Ahmed Yassin was arrested, convicted and sentenced to two life terms for hatching the plot that produced these two operations as part of an effort to exchange the bodies of the murdered soldiers for the release of Hamas prisoners by Israel.

money to one of Salah's Chicago bank accounts.⁶ Salah notably did not disclose his negotiations, the agreement, or his knowledge of the Sa'adon burial site to the U.S. consular officials who visited him the very day he signed the barter agreement he had negotiated with GSS.

Two days later, on February 2, 1993, Salah made his first public court appearance following his arrest. Salah was photographed smiling and waving and was otherwise observed to be at ease and demonstrating no signs of mistreatment as he entered the courthouse and appeared in court for a probable cause hearing regarding an extension of his interrogation period. The court extended Salah's interrogation period for an additional 18 days, during which he could be held without formal charging. Before doing so, however, the court held a hearing in open court that was observed by American consular officials. The court also held an *in camera* meeting in chambers which an American consular official also was permitted to observe. State Department records reflect that at that meeting, the judge asked Salah about his health and well-being and offered him a chance to speak. Salah responded that he was fine, but that he wished to meet with consular officials as soon as possible and further requested books. Salah made no claim of mistreatment to the inquiring judicial officer.

Salah was again visited by American consular officials on or about February 7, 1993 and February 12, 1993. During the third consular visit, on February 12, 1993, Salah described his treatment to that point in time. He specifically informed the visiting consular officials that he was examined twice daily by prison medical personnel and was being provided ample medication to treat

⁶ In accordance with the terms of the agreement, Salah soon thereafter provided GSS with a rough hand-drawn map of what Salah understood to be Ilan Sa'adon's burial location. Salah also took at least two trips to assist the Israelis in pinpointing the burial site. The body was not located exactly where Salah took the Israelis to search, but it was ultimately found not far from the location specified by Salah .

an ulcer. Salah said that he was left alone in solitary confinement most of the time without being questioned. He further related that he had three interrogators, one of whom was always courteous and considerate, while the other two were more verbally aggressive with him, threatening physical punishment if he is not forthcoming with information and claiming that they had “needles” to accomplish their goals. Salah further related that in the first two days of imprisonment, he was often hooded, tied with his hands behind him and occasionally forced to sit on a low stool, but that since that time he had been alone in a room, relatively comfortable, provided with a copy of the Koran, paper and pencil, and fed, including, sometimes, prison staff food. During that session, Salah asked consular officials to step up their pressure on the Government of Israel to permit more regular consular visits because, according to Salah, he feared that his interrogators might start to mistreat him in the coming weeks.

On February 17, 1993, American consular officials attended a second court hearing for Salah at which time his interrogation was further extended by the court. Two days later, on February 19, 1993, State Department representatives made a fourth consular visit to Salah. By that time, Salah’s arrest had received significant media treatment in the United States and elsewhere, including a February 17, 1993 article in a national print media outlet which, among other things, detailed information Salah was purported to have given to Israeli officials during his prior interrogations and interviews. During the February 19, 1993 consular visit, American consular officials described the article to Salah. In response, Salah confirmed some of the details published in the article and denied others.⁷ Salah also told consular officials that he did not understand the statement that he signed,

⁷ What neither Salah nor the consular officials meeting with him knew was that the article they were discussing was based, in part, on the news reporter’s own observation of a February 11, 1993 interrogation session between the GSS and Salah.

as it was in Hebrew, and that he signed after being threatened with a beating while naked by the GSS officer in charge of his interrogation. Finally, during this visit, Salah related details of his then current conditions, stating that he was being visited twice daily by prison medical personnel to monitor his ulcer condition, for which he stated he was still being provided medication. Salah also related that he spent most of his time alone in an interrogation room, but that he spent his weekends in a small closet-like enclosure he referred to as “the refrigerator.” He asked the visiting consular officials only that he be provided with the Koran and books to read.

Two days after this visit, Salah had a third and final interview with the Israeli National Police, specifically, Officer Meron Suleiman, who had conducted and recorded the January 27, 1993, with Salah. Suleiman again received no complaints of or otherwise observed signs of Salah having been mistreated. As with the prior session, Suleiman summarized in writing, in Hebrew, various details provided by Salah during the interview, read it back to Salah in Arabic, making whatever changes Salah may have requested, and asked Salah to sign the statement. On this occasion Salah *refused*. Some days after this session, Salah’s rooming arrangements were changed, and he was placed in a unit with individuals who Salah understood to be Hamas activists who, like Salah, had been arrested and detained. In early March 1993, Salah provided a 53 page handwritten narrative or accounting of his activities for and with Hamas to these believed activists, who were, in fact, Palestinian cooperators employed by Israeli authorities.

On March 18, 1993, Salah sat for a lengthy interrogation session with “Nadav,” the GSS interrogator Salah previously had described to American consular officials as unfailingly courteous

and considerate.⁸ During this session, which was audio recorded, Salah acknowledged the 53 page hand-written accounting to be his own statement and further confirmed and occasionally elaborated on many of the details set forth in his lengthy handwritten accounting.⁹ Salah would provide additional information in follow up interview sessions conducted by GSS in the weeks immediately following the March 18, 1993 session with Nadav.

During this follow-up period, Salah also was visited by American consular officials. In fact, Salah received his sixth consular visit on March 19, 1993, the day after the audiotaped session with Nadav. While Salah did mention that he had been in a lengthy interrogation session the previous evening, he misrepresented to the consular officials the true nature of the matters discussed, claiming that the session was devoted mostly to the still unfound burial site of abducted and murdered IDF soldier Ilan Sa'adon. During that visit, Salah also told consular officials he was in good condition, although he complained that he had yet to be informed of the results of some medical tests previously performed and that he had a backache. Additionally, Salah asked the visiting consular officials to pass a message to his wife. The State Department assessed the message to be a coded message and, accordingly, did not pass it on to Salah's wife.¹⁰

⁸ Salah was observed by consular officials in court about a week after he had provided the 53 page accounting. Specifically, he was seen in court on March 9, 1993 and during that appearance complained to the presiding judge that his toothbrush and Koran had been taken from him. The judge ordered that they be returned.

⁹ Salah is recorded on audiotape joking, laughing, and even chastising his interrogators during portions of this session.

¹⁰ Consular officials visited Salah again on March 29, 1993. At that time, Salah related that the Israelis were willing to make eyeglasses for him if he had an appropriate prescription. Salah also stated that he had been visited by the Red Cross the previous week and that he was planning a hunger strike.

Later that spring Salah was formally charged with numerous crimes related to his association with and provision of various forms of support to Hamas and members of its military wing. In the ensuing pre-trial proceedings, Salah moved to suppress statements he had given at various times during his interrogation, including, among others, the 53 page accounting that he authenticated in the audiotaped session with Nadav in March of 1993.

B. Salah's Evolving Claims of Mistreatment

Salah's supporting affidavit to the present suppression motion does not constitute his first articulation of claims of mistreatment at the hands of his Israeli interrogators. Nor is Salah's present offering even his first sworn statement on this subject. In 1994, Salah testified before an Israeli military tribunal receiving testimony in response to a motion by Salah to suppress statements he gave during his period of interrogation. As reflected in the preceding general chronology, that testimony came after a series of interactions with attorneys, court personnel, American consular officers and personnel, and Israeli medical personnel, as well as public appearances. Collectively, these interactions provide at least a topical record of Salah's treatment and conditions of confinement prior to his 1994 testimony. Since that sworn testimony to the Israeli military court, Salah has, in other contexts, asserted that he was mistreated. Each new offering in the sequence contains claims of new forms of mistreatment not previously asserted, and varying degrees of embellishment of the original claims advanced in the Israeli military court. However, it is Salah's present motion and affidavit, filed more than 12 years after the events in question, that constitutes the most elaborate offering to date on the subject of his treatment while in interrogation, notwithstanding his claim of an inability to recount (or possibly remember) many of the details. *See* Salah Affidavit (hereinafter "Aff.") at ¶¶ 6, 31. As detailed below, Salah's Israeli testimony,

offered over ten years ago, in close proximity to the events in question, as part of an effort to obtain precisely the same relief he seeks in his present motion, in a judicial proceeding at which he had the representation of counsel, is notably void of many of the more dramatic claims Salah now advances before this court. The constantly evolving nature of Salah's claims, which manifest a clear and pronounced trend toward greater detail and theater suggests that Salah's current version of events is on its face not credible.

2. Salah's 1994 Suppression Hearing Testimony

Salah testified under oath during a contested pre-trial hearing conducted before a military court panel sitting in periodic sessions during 1994. In his testimony, which was preceded by a written submission from his attorney¹¹, Salah made the following representations regarding his treatment during his interrogation:

- Following his arrest at the Erez roadblock in Gaza, his hands were bound, he was hooded, and placed in a military transport that made a series of stops over the course of a 4-5 hour trip, arriving eventually in what he understood to be the investigation unit within the Ramallah Prison;
- He was told during initial interrogation that he could be held for up to five years without being charged and up to 20 years if convicted of charges;
- In the first couple of days following his arrest, he was periodically hooded and bound when not being questioned, but unhooded and untied while being questioned;
- There were breaks between interrogation sessions during which he was able to sleep for short periods, for which he was provided, at times, with blankets and a mattress;
- During the first day he spent approximately 45 minutes in a 3x3 dark cell hooded and with hands bound until being returned to an interrogation room;

¹¹ This filing summarizes only statements that the government can presently confirm were made by Salah himself rather than by or through a representative.

- Upon resumption of the interrogation by two GSS officers, one told Salah to get undressed, but the second directed the first to stop at a point when Salah had removed no more than his jacket and sweater;
- Aside from being told he could be held for five years and sentenced up to twenty years, Salah remembered no other threats being made;
- At approximately 7:00 a.m on the first full day of his detention, (January 26, 1993), Salah was then taken to see a prison doctor after which he was placed in a holding cell;
- Later that morning and continuing through to the evening, Salah was interrogated by a GSS interrogator named “Nadav” during which time he was neither bound nor hooded and he was permitted to sit;
- During the night of January 26, 1993, he was briefly interrogated by two more GSS interrogators, but afterward was permitted to sleep in the interrogation room for a couple of hours, having been provided with a mattress and three blankets;
- As time went on, he was left alone in an interrogation room, undisturbed, for very long periods, and was only occasionally interrogated.
- Although he was often tired, he could not sleep after 7 a.m. because of the general work day activities and noise, including the playing of music, within the facility.
- He did not have an attorney visit for 15 days;
- He did not have a consular visit for 18 days;
- At times, his interrogators deferred to his wishes not to answer questions because he was tired;
- He offered to provide to GSS and assist in their location of the burial site of the body of kidnaped soldier Ilan Sa’adon;
- He negotiated a written agreement with his interrogators in which he agreed to trade the location of the body for the release of certain Palestinians from Israeli custody and that he himself would be released only after the body was located;
- He traveled to the believed burial location with his GSS interrogators and several soldiers, where the group spent approximately 12 hours digging in the area;
- He traveled with the group on a second occasion to further assist in their location of the body;

- In or about February 20-21, 1993, he was directed by the main GSS interrogator to give a statement to the police and was told that if he refused that he would be kept in prison indefinitely. He refused to sign the resulting statement, which was written in Hebrew, because it contained falsehoods;
- Sometime in the last 10 days of his interrogation, he was threatened with being stripped naked and that at the time there was a camera sitting on a file cabinet that he assumed would be used to photograph him, but that the threat was not carried out;
- No violence was ever used against him and he was never struck;
- He was not able to get enough sleep.

3. Salah's 1995 Affidavit in Assistance to Co-Defendant Mousa Abu Marzook's Defense of Extradition to Israel from the Southern District of New York

In August 1995, Hamas political leader Mousa Abu Marzook (a co-defendant in this case) was arrested at JFK International Airport in New York upon entering the United States. The arrest was based on a warrant for his extradition to Israel to face charges relating to, among other things, his authorization of violent attacks in his capacity as a Hamas leader. In challenging the extradition, Marzook tendered among other things an affidavit from Muhammad Salah, dated November 7, 1995 and thus made while Salah was in prison in Israel, in the midst of serving his five year Israeli prison sentence following his January 1995 guilty plea to charges related to his association with and activities on behalf of Hamas. Salah's affidavit added new claims to his prior accounts of mistreatment, including, notably, that he had been hit by his interrogators. More specifically, Salah alleged that he was subjected to the following mistreatment by Israeli authorities:

- All statements he made in Israel were the product of "a systematic employment of physical and mental torture, terror and coercion;

During his period of interrogation, he was:

- Ordered to undress completely and to remain in the interrogation room for a long time, and was threatened with being photographed naked if he did not cooperate;

- Forced to sit on a child's chair and bound to it for long periods of time causing him severe, uninterrupted pain and discomfort;
- Struck repeatedly;
- Imprisoned in a small cell for a long time with only light clothing in freezing conditions;
- Forced to lie on a cold floor without any mattress, blanket or covering of any kind;
- Subjected to deafening music in his cell which kept him from sleeping and in a constant state of agitation and anxiety;
- Subjected to sounds of crying and pain from persons nearby undergoing actual or simulated violent interrogation lasting over hours and overnight;
- Prevented from sleeping by various techniques for periods as long as 48 hours at a stretch;
- Subject to having his head covered with a sack for long periods
- Interrogated for many hours at all hours of the day;
- Imprisoned in a cell for long periods that led him to suffer from sensory deprivation;
- Threatened with violence against his family in the United States, including threats that the FBI would harm his wife and children;
- Threatened with unlimited imprisonment without judicial supervision if he failed to confirm allegations against Mousa Abu Marzook and others;
- Told to that if he cooperated with his interrogators and confessed, he would be released immediately or within a short time;
- Denied access to a lawyer or legal counsel of any kind for much of the time he was under arrest and undergoing interrogation;
- Subjected to screaming threats, intimidation and threats of violence and death to himself and his family by people who identified themselves as " Hamas members " unless he proved to them that he was not a collaborator; and
- He was subjected to all of the same physical and mental torture techniques in the summer of 1995 when, after the arrest of Mousa Abu Marzook in the United States, he (Salah) was subjected to additional interrogation in Israel.

4. Salah's 1998 Statements on National Public Radio

On June 9, 1998, the United States filed a civil forfeiture action against assets controlled by Salah on the grounds that they constituted the proceeds of money laundering conducted in support of Hamas. Salah contested the action.¹² Less than three weeks after the action was filed, Salah and his attorney sat for a radio interview that aired on the June 29, 1998 edition of "Worldview," a daily news program airing on Chicago National Public Radio affiliate WBEZ. At this time Salah launched allegations of new and previously undisclosed forms of mistreatment by his Israeli interrogators. Most notably, Salah now claimed to have been threatened with rape, deprived the use of a bathroom and threatened with poisoning. More particularly, Salah stated, among other things, that during his interrogation, he was:

- Physically hit;
- Chained to a small chair;
- Hooded for hours at a time with a foul, dirty sack;
- Subjected to very loud music that prevented him from sleeping;
- Deprived of the use of a toilet;
- Threatened with poisoning;
- Kept in a room he referred to as "the refrigerator" that was very cold;

Salah additionally stated that while in interrogation:

- Individuals were sent to rape him;

¹² The forfeiture case, *United States v. One 1997 E35 Ford Van, et al.*, 98 C 3548 (N.D. Ill.) was stayed at Salah's request, among other claimants, because of his belief that he was under criminal investigation for related matters. The stay remains in effect and the case remains pending before Judge Andersen in the Northern District of Illinois.

- He told American consular officials that Israeli officers were hitting him, beating him and threatening him; and
- While he told American consular officials many of the things done to him, he did not tell them everything because he came to learn that the more he revealed, the more he would be pressured by his Israeli captors.

5. Salah's Current Affidavit

Salah's affidavit in support of his motion to suppress again raises new details and claims of mistreatment not advanced in his prior sworn and unsworn public statements. Most notably is Salah's dramatic claim that upon his arrest and while being transported from Gaza to Ramallah, he was blindfolded, forced to lie face down on the floor of a Jeep and over the course of many hours subjected to soldiers in boots "repeatedly stomping on" him and striking him with rifle butts in his head and groin area, all the while laughing at him and subjecting him to insults about his mother and his race. Aff. ¶ 3. Salah's affidavit revises prior sworn and unsworn accounts of his first day of interrogation to now include being stripped naked, ridiculed while crying, and threatened with harm to his family. Aff. ¶ 7. Salah revises the prior accounts of his first 48-72 hours in interrogation to now include being forced to remain awake and, at all times when not being interrogated, being handcuffed from behind to a small slanted child's chair or being placed in a dark, freezing refrigerator cell only 3 x 2 feet in which he could neither stand upright nor sit or lie down. Aff. ¶ 9. He now claims that during this expanded time in the refrigerator cell he was handcuffed from behind to a metal bar and covered with a hood reeking of urine, vomit and other unpleasant substances that limited his ability to breathe. Aff. ¶¶ 9 & 10. He also newly claims that when seated hooded in the small chair, someone would hit or slap him in the head and in the face and that he recognized the footsteps and the feel of the hand striking him as that of the chief interrogator. Aff. ¶ 10. Similarly, Salah's current affidavit gives a radically new account of the means by which

his 53 page handwritten accounting was obtained. Salah now claims the prisoners who claimed to be Hamas members: held a razor to his face; threatened to kill him; tied his hands and feet to two bed posts; covered his head; repeatedly hit him and kicked him in the groin; threatened to rape him; and forced him to sit on an object that caused permanent damage to his bowels. Aff. ¶ 24 & 25.

Left unsaid by Salah is that all of the foregoing occurred between visits by attorneys, American consular officials, and medical personnel, as well as occasional court appearances, and was apparently done in a fashion that left no outward manifestations of these horrors such as to be recognized by professionals trained and poised to identify such things. Also left unsaid by Salah is that these newly detailed horrors did not stop him from refusing to sign at least one statement on February 21, 1993, did not hinder him from negotiating an agreement with his captors to trade information on the Sa'adon burial site for special considerations, and apparently did not impair him such as to prevent him from taking a couple of field trips to locate the dead and buried Hamas kidnap victim.

II. GOVERNING LAW¹³

The Fifth Amendment's prohibition against compelled self-incrimination and guarantee of due process are fundamental trial rights. Due process does not bar the use of a confession unless government officials employed coercive interrogation tactics that rendered the defendant's confession "involuntary" as a matter of law. *Colorado v. Connelly*, 479 U.S. 157 (1986). "Under

¹³ Notably, Salah does not move to suppress the physical evidence seized from him at the time of his arrest. Nor would such a challenge be successful, as the Seventh Circuit has noted that the Fourth Amendment does not apply to searches conducted on foreign soil by foreign officials to further a foreign investigation. *United States v. Marzano*, 537 F.2d 257, 269-271 (7th Cir. 1976). Similarly, because the Fourth Amendment does not apply to foreign arrests and searches, Salah's argument that his confessions must be suppressed as the product of a warrantless arrest is without merit. *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980).

the due process approach . . . courts look to the totality of the circumstances to determine whether a confession was voluntary.” *Withrow v. Williams*, 507 U.S. 680, 693 (1993). The test of voluntariness is generally whether, given the totality of the circumstances, the defendant’s “will has been overborne and his capacity for self-determination critically impaired.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *Watson v. Detella*, 122 F.3d 450, 453 (7th Cir. 1997).

Among the factors relevant to a voluntariness inquiry are “the nature and duration of the questioning used to secure the confession, whether the defendant was prevented from eating or sleeping, and whether the defendant was under the influence of drugs or alcohol.” *Detella*, 122 F.3d at 453. Other relevant factors include “the defendant’s age, intelligence, education, and experience with the criminal justice system.” *Id.*

In determining whether a confession is voluntary, the Seventh Circuit has found that “the police are allowed to play on a suspect’s ignorance, fears and anxieties so long as they do not magnify these emotionally charged matters to the point where a rational decision becomes impossible.” *United States v. Sablotny*, 21 F.3d 747, 752 (7th Cir. 1994). The Seventh Circuit has noted, “[c]ustodial interrogation is permitted even though inherently coercive and doubtless responsible for many a confession, and in addition the courts allow interrogators in these already coercive custodial settings considerable latitude in playing on the guilt and fears of the person interrogated in order to extract a confession that he will shortly regret having given.” *Johnson v. Trigg*, 28 F.3d 639, 641 (7th Cir. 1994). Further, the “law permits the police to pressure and cajole, conceal material facts, and actively mislead.” *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990); *see also Holland v. McGinnis*, 963 F.2d 1044 (7th Cir. 1992) (finding police officer’s misrepresentation to defendant that a witness observed defendant’s car at the scene of the crime was

only slightly coercive).

It is not impermissibly coercive to suggest to a defendant that he is going to jail when the evidence suggests that very prospect. *See Sablotny*, 21 F.3d at 752-53 (finding threat of jail not impermissibly coercive since defendant was aware of prospect). Likewise, suggestions of leniency are not unduly coercive. *See Cole v. Lane*, 830 F.2d 104, 105 (7th Cir. 1987)(finding confession voluntary notwithstanding a “firm promise of leniency made by police while attempting to induce [the defendant’s] cooperation”).

The government need only show that a confession is voluntary by a preponderance of the evidence. *United States v. Haddon*, 927 F.2d 942, 945 (7th Cir. 1991). In addition, “[a]t a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.” *United States v. Raddatz*, 447 U.S. 667, 679(1980).

Courts have found confessions voluntary in a variety of different circumstances. *See Pagan v. Keane*, 984 F.2d 61, 63 (2d Cir. 1993) (finding confession voluntary although defendant in hospital after being shot, had undergone four hours of surgery, had been given morphine less than three hours before his statement, had five tubes or catheters protruding from his body, had a high fever, and had to wear an oxygen mask); *United States v. Church*, 970 F.2d 401, 404-05 (7th Cir. 1992) (finding statement voluntary although defendant suffered pain from handcuffs, had witnessed S.W.A.T. team storm house and order everyone to the floor, and had allegedly seen police beat another suspect); *McCall v. Dutton*, 863 F.2d 454 (6th Cir. 1988) (finding confession voluntary despite the fact the defendant was shot four times (once in the head), was handcuffed, was lying on the ground, appeared to be moving in and out of consciousness, was surrounded by police yelling at him and pointing their guns, and had ingested cocaine and beer prior to his statement).

Further, in the context of confessions taken by foreign officials, courts have consistently held that “statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary.” *United States v. Yousef*, 327 F.3d 56, 145 (2nd Cir. 2003); *see also United States v. Cotroni*, 527 F.2d 708, 711 (2nd Cir. 1975); *United States v. Trenary*, 473 F.2d 680, 681-82 (9th Cir. 1973); *Kilday v. United States*, 481 F.2d 655, 656 (5th Cir. 1973).¹⁴ Non-*Mirandized* confessions are admissible under the premise that the exclusionary rule is intended to induce a respect for the Constitution by the police of the United States, and, therefore, has little if any deterrent effect upon foreign police. *Cotroni*, 527 F.2d at 711.

III. ANALYSIS

Salah has filed an affidavit alleging a variety of coercive techniques were used against him during his detention in Israel. Amazingly, despite the coercive conditions Salah describes, he claims he never provided the information contained in the statements attributed to him. Rather, Salah claims to have signed two statements he did not understand, *refused* to sign a third statement, and handwrote a lengthy document that contained information provided to him by others but was not of his own personal knowledge. Aff. ¶¶ 13, 14, 18 & 27. In short, Salah states he was never coerced into admitting his guilt. Rather, he was forced to sign or author documents that contained false information made up by the Israelis.

As noted at the outset of this pleading, despite the fact that Salah states he never confessed to any crimes, his affidavit is sufficient to require a hearing on the admissibility of the statements the government intends to offer against him at trial. Given that a suppression hearing appears

¹⁴ As Salah notes in his motion, there is a “joint venture” exception to this rule, but the evidence will demonstrate this exception is inapplicable to the instant case.

necessary, the government does not intend in this filing to provide extensive detail rebutting Salah's allegations. The suppression hearing will provide that opportunity and the evidence elicited in the hearing will make clear that most if not all of Salah's affidavit is false.

At base, the ultimate legal issue the Court must determine is the voluntariness of Salah's statements. The law on the issue of voluntariness is set forth above and the burden is on the government, by a preponderance of the evidence, to prove all or some of Salah's statements were voluntarily provided. Salah's memorandum in support of his motion sets forth a variety of other grounds to suppress his confessions. Salah Mem. at 4-11. Most of these other grounds, however, will be resolved by the Court's voluntariness inquiry. For instance, Salah argues his statements should be suppressed because they violate treaties on torture. Salah Mem. at 4-7. Putting aside the fact that Salah does not cite a single case in support of a position that violations of treaties are grounds for suppression, if the Court finds the statements were voluntarily provided then the Court has, in essence, concluded that Salah was not tortured.¹⁵ Likewise, Salah's argument that the techniques used to elicit his statements "shock the conscience" is likely also resolved if the Court finds the statements voluntarily provided.

¹⁵ In addition, suppression is not an appropriate remedy for a violation of international law. See *United States v. Lawal*, 231 F.3d 1045 (7th Cir. 2000) (motion to suppress confession denied where exclusionary rule is not an appropriate remedy for Vienna Convention Article 36 violation because there is no general exclusionary rule for international law violations; suppression of evidence is appropriate only when the treaty in question provides for that remedy); *United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000) (same); *United States v. Sainsbury-Suarez*, 797 F.2d 931, 933 (11th Cir. 1986) (violations of international law do not require exclusion); *United States v. Hensel*, 699 F.2d 18 (1st Cir. 1983) (search violated international law, but exclusionary rule should not be invoked because "[t]he rule of international law in the case at bar is a rule designed to secure peace among nations, not to protect the privacy of individuals").

Salah also argues that his statements were the product of a “joint venture.” The evidence presented will prove that there was no “joint venture” between Israel and the United States of America. Indeed, the standard for a defendant to meet regarding proof of a “joint venture” is exacting and cannot be met in this case. *See Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980) (finding fact DEA agent was present with pistol showing while defendant was interrogated by Mexican authorities not sufficient to prove “joint venture”); *United States v. Schmidt*, 573 F.2d 1057, 1063 (9th Cir. 1978) (finding no “joint venture” despite interaction between Peru and DEA on investigation of drug case); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976) (FBI’s provision of information to foreign government that led to defendant’s arrest and FBI’s presence during portions of investigation and search not sufficient to prove “joint venture”); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1969) (finding no “joint venture” where FBI provided foreign officials background on defendants that led to search, several search meetings were held with FBI, and one of the search locations was searched based on FBI’s suggestion).

Legal arguments to the side, the facts elicited at the suppression hearing will demonstrate that Salah’s confessions were voluntarily provided and that he has presented a false affidavit to the Court.

IV. CONCLUSION

Defendant Salah's suppression motion lacks merit, as will be demonstrated at the suppression hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that in accordance with FED. R. CIV. P. 5, LR5.5, and the General Order on Electronic Case Filing (ECF), the following documents:

GOVERNMENT'S RESPONSE TO DEFENDANT SALAH'S MOTION TO SUPPRESS

were served pursuant to the district court's ECF system as to ECF filers, if any, and were sent by first-class mail on November 14, 2005 to the following non-ECF filers:

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