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The construction of Palestinian death as an exceptional repetition in Israel

Revital Madar 

Robert Shuman Centre for Advanced Studies, European University Institute, Fiesole, Italy

ABSTRACT

This article delves into a military court's quest to determine the nature of one Palestinian death by an Israeli soldier as exceptional or banal. The court's rejection of selective enforcement claims in Azaria's trial for Al-Sharif's killing allows unpacking Israeli settler society's indifference to Palestinian deaths. As I show, the logic of open fire regulations strips these deaths of their singularity and political meaning, constructs them as an exceptional repetition, and sets them aside even when soldiers are prosecuted for killing Palestinians. Exploring whether a different epistemology could account for the singular yet repetitive nature of Palestinians' deaths in Israel, I turn to Deleuze. His understanding of repetition as the maximality of differences and reversal of the order of trauma lead me to conclude that the state of Israel does not repeat (killing Palestinians) because it represses (the death of Palestinians). It represses because it repeats.

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Introduction

2022 was the deadliest year for Palestinians living under Israeli control since 2004. Israeli forces killed 182 Palestinians in the West Bank, Gaza, and Israel (B'tselem 2023). Considering the lack of international sanctions and the widespread indifference of Israeli-Jewish society to these deaths, which include the killing of the Palestinian-American journalist Shireen Abu-Akleh, that, unlike the majority of Palestinian deaths, received extensive media attention worldwide, we can affirm that these deaths can be designated a 'non-event' easily transformed into a 'quasi-event'. As such, despite the high toll of Palestinians killed by Israel in similar circumstances, their deaths do not unfold to the status of an event, such as a crisis or a catastrophe, 'that seem to demand [...] an ethical response' (Povinelli 2011a, 13–14).

CONTACT Revital Madar  revital.madar@eui.eu  Robert Shuman Centre for Advanced Studies, European University Institute, Villa Schifanoia - Villino, Fiesole, Ferney-Voltaire 01210, France

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To explore how Palestinian deaths are denied the status of an event deemed an ethical and political response, this article goes back to the 2016 extrajudicial killing of Abd al-Fattah Al-Sharif by Elor Azaria in Hebron. Several reasons render this event pertinent here. Unlike other extrajudicial executions of Palestinians by Israeli forces, this one was caught on camera, disseminated worldwide and led to the prosecution and conviction of Azaria for manslaughter. More importantly, during the trials, Azaria's defence team claimed this was a case of selective enforcement, stating that in '15 cases involving the killing of Arab residents of Judea and Samaria by IDF soldiers and police officers of the Israeli police', they considered either similar or harsher than the extrajudicial killing of Al-Sharif, no criminal investigation was opened, and no indictment was submitted (MAG v Sergeant Elor Azaria, 2017, 28).¹ This line of defence opened up the question of exceptionality in relation to the death of Palestinians killed by Israeli forces. It forced the courts hearing Azaria's case to address the death of Al-Sharif from two opposing perspectives: was it a banal death (non-event, quasi-event) or an exceptional one.

The rejection of this claim by the military court of appeals is the focus of this article. As I show, unpacking how the court rejected the claim for selective enforcement unveils how Palestinian death is constructed in Israel as an exceptional repetition. Opening a third space of analysis (Bhabha 2004), the objective is to pinpoint the epistemic conditions that render an ongoing repetition of deaths into single and exceptional events that are then buried as non-events. It is about pursuing the military courts' construction of the rejection of the claim for selective enforcement and, against the courts' decision, situating the death of Al-Sharif within a series of Palestinian deaths, thus gaining a better understanding of how Israeli-Jewish indifference to Palestinian deaths persists despite the high number of deaths cited above.

Within this framework, I make two interrelated theoretical arguments. The first is that Azaria's trial is a trial of repudiated violence and should be analysed as such; it is a violent act involving state security agents whose actions during their service led the state to prosecute them. These events do not follow a regime change or occur in a post-conflict situation. Instead, they mark a moment in which the state prosecutes itself. Whether or not media and public debate translate to harsh sentences or policy changes, these events are often considered watershed moments in a state's history. In that sense, Azaria's trial is remarkable in pinpointing the limits of formal accountability procedures. Despite being depicted by the media as a national shame, the numbers cited earlier show that it did not reduce Israeli violence against Palestinians. Even from a narrow legal perspective, Azaria's 18 month sentence did not reflect the judges' harsh tone.

Within the assumed, acclaimed, and denied exceptionality of acts of repudiated violence, selective enforcement opens up the question of repetition and difference, enabling us to track how a court predetermines and constitutes difference and repetition and what this means for

the question of Palestinian death in Israel as a whole. It is on this basis that I build my second argument: the court's constitution of difference and repetition is not unique to the 2016 shooting of Al-Sharif but is a sign of a pathological epistemology in which it is the repetition over the killing of Palestinians that drives Jewish-Israeli indifference to these deaths.

In what follows, I first offer a short discussion of exceptionality in the Israeli/Zionist context, bringing it together with the specific nature of trials of repudiated violence and the basic requirements of selective enforcement. The latter is a legal claim marking the prosecution as exceptional, not the death in question. The article then closely analyses the military courts' deliberation on the claim for selective enforcement in the Azaria case. Focusing on the court's search for radical sameness between the cases allowed for the examination of selective enforcement, I show that Israel's open-fire regulations reduce the act to the perpetrator's perspective, a prerequisite for setting Palestinian death aside while deliberating on the matter.

Looking for a different repetition that can conserve the singular and private aspect of each Palestinian death in the hands of Israeli forces while accounting for its political meaning and thus repetitive nature, I turn in the third section to Deleuze. His conceptualization of repetition as the maximality of differences (Deleuze 1968 [2015], 12) enables considering the court's denial of the claim for selective enforcement as inherent to the law's epistemology in general and in settler colonial spaces in particular. It allows understanding the military legal system's ignorance of Palestinian death as inherent to it because Palestinians, and other colonized subjects, are subject to the law that adjudicates their deaths while also being external to it. In that sense, to account for their deaths, we need an extra-legal repetition that does not rely on the representation of the object of repetition but rather on its origin, the first Palestinian death.

What's more, following Deleuze, my analysis shows that the possibility of both keeping on killing Palestinians while setting their deaths aside requires reversing the series of trauma and repression. Instead of considering the killing as a repressed trauma then rendered irrelevant, Deleuze's definition of repetition posits violence as the action leading to repression. This means that beyond the working of open-fire regulations, Israel continues to ignore Palestinian deaths, even when it prosecutes its soldiers for their killings, because it does not stop killing Palestinians. The court's discussion of selective enforcement and how it rejected this possibility are expressions of the ongoing repeatability of exceptionality that marks the body as disposable, here performed through (another) Palestinian death.

Exception, exceptionality, and legality: within the triangle of repudiated violence

Exception and exceptionality are political battlefields allowing states to feather their violence with legitimacy. While the exception entails the state's right to suspend law at moments identified as states of emergency, its sense of exceptionality adheres to its ethical right to be exempted from the law (Hardt and Negri 2004, 7–9). This state of affairs is based on the Gordian knots of law and violence that render the exception an inherent aspect of any mode of governance (Agamben 1998). As much as that description is compatible with any state, scholars have identified the specific workings of the exception in colonial and settler settings that blur the clear-cut distinction of the state of exception from the norm. This allows the exception to be an integral part of the law at any moment and beyond the constraints of the state of emergency (Alam 2009; Ballas 2020; Hussain 2006; Kolsky 2015; Lloyd 2012; Nesiah 2009; Rifkin 2012; Shenhav 2012; Zreik 2008).

Within this body of work, Israel receives considerable attention. Israel's self-claimed exceptionality is based on achievements, moral superiority, and unique history (Alam 2009, 3–6) whilst the exception is present in the emergency legislation it inherited from the British (Berda 2020). To that is added Israel's perception as a liberal democracy that, until not long ago, allowed it to escape unflattering comparisons with colonial states (Puar 2013; Robinson 2013; Said 1985).

This combined situation has led scholars to debate the extent to which Agamben's state of exception can apply to Israel. Liberal Zionists, right-wing scholars and organizations adopted Agamben's theoretical frame of analysis to describe Israel as a state whose democracy is deteriorating while disregarding the fact that Israel's democracy is based on an 'ideology of difference' (Said 1985, 41–43, 52–53), at best available only to Israel's Jewish population (Pappe 2008). Arguing against the applicability of Agamben's state of exception to Israel, Pappe (2008) claimed this model describes a rupture that never took place in Israel. Svirsky (2012) adopted a similar position, claiming Agamben's model describes a state of mourning over the loss of democratic values, which does not apply to Israel and other settler colonial states where these values never existed and as such cannot be lost.

As much as this understanding of the state of exception is indeed inapplicable to the Israeli case, both Pappe (2008) and Svirsky (2012) address Europe and the imagined West as democratic entities with neither a colonial past nor any practices of internal colonialism (see Guénif-Souilamas 2010). In that sense, an adequate analysis of Israel as an exceptional case does not regard the state of exception as an event or a break but as a sovereign precondition and expression of the law's violence.

Scholars who took this path have shown that within settler colonial states, Israel is indeed no exception but is an exemplary case of a situation in which 'what appears as an exception [is] actually a norm' (Lloyd 2012, 72). Accordingly, emergency regulations adopted by the United States, France, and England as part of the so-called War on Terror are continuations of these states' colonial control (Shenhav 2012). When Israel is not cut off from the state of exception as a whole, one can see that it is an extreme case of the French model in which the tension between radical democracy and constitutionalism has been replaced by ethno-religiosity and constitutionalism (Zreik 2008, 143–45). In this constellation, democratic values experience deterioration even if they are nothing more than a façade of violence and anti-democratic rules and practices because legality is rooted in violence and the constant need for exceptional measures.

Within this framework, trials of repudiated violence embodying the triangle of exception, exceptionality, and legality allow us to examine how violence is legalized and legitimized (Madar 2021). These questions are enhanced by two elements in the trial examined here: Israel's military control over Palestinians living in the occupied territories and the decision by Azaria's defence team to claim selective enforcement. Whereas martial law always resorts to legality when violence erupts in ways that question its legitimacy (Hussain 2006), the defence's claim for selective enforcement required transgressing the specific limits of the case to discuss other cases involving the killing of Palestinians by the Israeli police and army, and thus question the claimed exceptionality of Al-Sharif's extra-judicial killing.

When the triangle of exception, exceptionality, and legality is 'put on trial' in a claim for selective enforcement, each side of the triangle is revealed. Deliberating the extent to which the killing of Al-Sharif is indeed exceptionally different from similar incidents or is part of an arithmetic sequence of Palestinian deaths requires establishing or refuting the constitution of difference and repetition; these are the two elements that can make or break each side of the triangle.

Generally, every trial of repudiated violence, especially in colonial settings, is a rich site for questioning the tensions and reciprocity between exception, exceptionality, and legality. The decision to prosecute a member of the state security forces means reversing the roles of victim and perpetrator, forcing the society in question to deal with the cost of securitization. As much as the decision not to prosecute unveils how embedded the logic of sovereignty is within the prosecutor's role (Sarat and Clarke 2008), trials of repudiated violence reveal that the logic of sovereignty is present both in the exclusion of one from legal responsibility and in the decision to make one liable for acts that usually go unnoticed from a legal perspective. That is especially the case here. While the decision to press charges against Azaria, a member of the IDF,

is itself exceptional, the violence on trial is that of the state, making this trial a site from which one can observe the performance of the rule of law. Further, when the legal structure of selective enforcement is combined with the specific characteristics of martial law in a trial of repudiated violence, a window opens up for us to examine the question of Palestinian death in Israel and how military courts address it. Entangled within the triangle of exception, exceptionality, and legality, Palestinian death becomes this triangle's condition of possibility.

In what follows, I unpack the military court's rejection of the claim for selective enforcement. It was rejected on two bases: lack of evidence and similarity. As revealing as the first instance court's is regarding the epistemology of evidence, this discussion is beyond the scope of the article. Instead, I focus on the rejection of the claim revolving around the question of similarity and difference. The following sections show how the military court's discussion over selective enforcement led it to a search for radical sameness; objectives matching the 2016 shooting incident as exceptional and contradictory to the Israeli military's daily conduct.

On the search for radical sameness

Even as the military court cut off the oxygen of evidence from the argument of selective enforcement, reducing the number of cases to two, a second stage began forming around the killing of Ziad Jilani by Second Sergeant Border Policeman Maxim Vinogradov and of Bashar Masalha by a police volunteer (who was never named). The court and the military prosecution crafted a legal argument to establish that the killing of Al-Sharif by Azaria was wholly incommensurable with the other two cases under discussion. The court's convoluted reasoning on what constitutes difference and repetition comes most forcefully to light in how it established the incommensurability of these cases: through a detailed process of comparison that is purposefully limited and designed by Israel's open-fire regulations.

The stipulations of the military open-fire regulations anchored this otherwise meandering, speculative discussion: they limit a soldier's licence to kill, and do not altogether revoke it. The state's security forces have the right to use lethal power against those they identify as a threat to themselves, to the public, and, cryptically, 'to the State'. The use of live ammunition is permissible in two cases: when a soldier's life is in imminent danger and during the apprehension of a person suspected of committing a serious crime (Straschnov 1994, 140–41).² During the 2000 Al-Aqsa intifada, these regulations were changed: the term 'life-threatening' was expanded, and the regulations were made applicable to police officers when dispersing demonstrations, carrying out routine arrests, and operating checkpoints (B'Tselem 2002, 5; Schaeffer Omer-Man 2017, 139–40).³

These regulations are, therefore, an important litmus test to gauge prevailing attitudes towards the legitimate use of violence. An important effect is realigning the skewed empathy index to familiar terms: the shooter's sense of threat and the extent to which the shooting can be justified. In what follows, Israelis' fears blot out the simple but harrowing reality that Palestinians often pay with their lives whenever they encounter Israeli forces.

The first case juxtaposed with the killing of Al-Sharif was that of the killing of Jilani by Vinogradov. This event, which occurred on 11 June 2010, began when Jilani was suspected of trying to drive into a group of Border Police standing in the middle of the road. This suspicion translated into the police shooting at him as he turned into a nearby alley. Two Border Police ran after his car and shot him after he left it and was on foot. He was hit, and as he lay wounded on the ground, Vinogradov shot him in the head at close range. The Police Investigation Unit (PIU) closed the case after an internal investigation. Jilani's family appealed to Israel's General Advocate, who did not reverse the decision. The family then appealed to the High Court of Justice (HCJ), which rejected the appeal (Moirá Jilani et al vs The Attorney General et al., 2014).

The second event the court deliberated on occurred on a seaside walk in Jaffa on 8 March 2016. Following the stabbing of passers-by, Masalha fell after being shot by a policeman. As he lay wounded on the ground, the officer declared Masalha was neutralized. Nevertheless, a police volunteer on the scene shot him again. According to eyewitnesses, this shot was fatal. No internal investigation was opened and no autopsy of Masalha's body was conducted. The general attorney approved the decision to close the case (see Brown in Haaretz, 2 August 2017).

The military court first juxtaposed each event with Azaria's, pointing out differences in the circumstances. Through this search for what I call 'radical sameness', the court reduced each event to a series of microsequences looking for near-identity, which was considered the only criterion that could render selective enforcement possible. The microsequencing, built on the military's open-fire regulations, allowed each event to be reviewed solely from the perpetrator's perspective: the security force member.

The court claimed a 'qualitative difference' between the execution of Al-Sharif and Jilani. The presiding court reasoned:

In the Jilani affair, the event was continually evolving. The shooter was involved from start to finish and followed the appropriate arrest procedures against the suspect, who failed to cooperate. It was determined, moreover, that it was factually impossible to disprove that, objectively, as the Palestinian lay on the road, he continued to constitute a threat and that, subjectively, the shooter genuinely believed that. (Sergeant Elor Azaria v MAG 2017, 24)

The differences the presiding court established relied on the differences between the sequences of microevents in each case and the perpetrator's

perspective within it. This was made clear when the judges claimed: 'Regarding the two other events [i.e. the killings of Jilani and Al-Sharif] indicated by the defence, we concur that the two events are substantively dissimilar, differentiable in both their characteristics and their causes from the event before us today' (Sergeant Elor Azaria v MAG 2017, 90).

Open-fire regulations remain in force, and deviation is supposedly the gravest error a soldier can commit. This affected the court's determination on whether the events brought before it for selective enforcement represented infractions similar to Azaria's. This structured a discussion based on a single perspective, that of the shooter, in a successive several-second-long sequence of events. It is evident by now that the moral imperative 'thou shalt not kill' ceases to be an absolute (or even primary issue). The killing in and of itself is not enough for conviction. Instead, guilt or innocence is determined by an event's immediate circumstances, the sequence of microevents that led to the shooting, the shooter's evolving cognition, and their judgement. Court discussions thus rapidly devolve into conflicting speculations of what the security member on trial could have known or felt at every stage as the event unfolded.

Within this strategy of differentiation through microsequencing, temporality plays a key role. The presiding court emphasized that Vinogradov's shooting of Jilani as he lay wounded was a 'continually evolving event'. This evolving narrative of continuity within the event- one development follows another both temporally and logically and affects the actor's mental state and decision-making – stands in stark opposition to the lack of perspective from the Palestinian's point of view. Jilani is not allowed questionable decision-making, to be afraid, or to believe things that might seem illogical in hindsight. The comparative framework adopted between the shooters in each case, their accounts and decision-making are lumped together, contrasted with the lack of individualization for each Palestinian victim. The chopping up and exceptionalism of each event from others that preceded it never account for the individual Palestinian's mindset.⁴

The presiding court first cast Vinogradov as the witness to a traumatic event, it then relied on his emotional state to explain his spontaneous decision to execute Jilani with shots to the head. This cause-and-effect structure, padded with a healthy dose of sympathy for the shooter, implied that Vinogradov's act was understandable and justified. It invited one to speculate on Vinogradov's mental turmoil and his state of mind behind the shifting versions he gave investigators. The short time between Jilani's alleged terror attack and his execution works in Vinogradov's favour: he operated spontaneously in the heat of the moment and in response to a credible sense of threat. Vinogradov's defence team even argued that Jilani was possibly wearing an explosive belt. The court accepted this statement at face value, even though Jilani was wearing a T-shirt under which

Vinogradov could easily have seen a belt. Instead, the judges praised Vinogradov's conduct and that of his commander, Shadi Kheir al-Din, pointing out that the two followed procedure for suspect apprehension, which included verbal instructions to Jilani to stop the car, shooting in the air first and only then at the vehicle.

Jilani, posthumously absolved of the charge of terrorism, had no similar consideration. The court's conclusion that he should have calmly obeyed the Border Police officer's instructions immediately after experiencing a car accident remains unstated. Instead, the court recognizes that Jilani, grievously wounded, remained 'acting suspiciously' as he moaned and moved his hand. The HCJ rejected the appeal of Jilani's family over the decision to close the case. It saw no reason to intervene after the attorney general decided that 'the shooting was carried out in accordance with open-fire regulations' (Moira Jilani et al vs The Attorney General et al 2014, clause 11).

If these events are not approached exclusively from the perpetrator's perspective, it becomes extremely difficult to identify the precise essential differences between Jilani's and Al-Sharif's murders. Both victims were lying wounded on the ground before being executed. The lethal shots were fired on both occasions after the wounded victims 'suspiciously' moved a body part. Nevertheless, the presiding court did see one significant difference. Azaria did not shoot Al-Sharif immediately after he moved his hand, apparently a highly suspect gesture from a wounded Palestinian, but six minutes later (*Sergeant Elor Azaria v MAG* 2017, 17). Another difference the court ascribes significance to is a phrase Azaria reportedly spoke to another soldier on the scene: 'My friend was stabbed, they tried to kill him, and so this one deserves to die, too' (91).

The same arguments reappear in the court's discussion of the guilt or innocence of the police volunteer who killed Masalha. Here too, the victim was fatally shot after being incapacitated and lay wounded on the ground. Moreover, here, too, the judges stressed the continuity of the event, the shooter's sense of threat, and the credible threat represented by Masalha moving his head and still clenching the knife in his hand. A video shows witnesses egging on the police volunteer to shoot the writhing Masalha, yelling commands like 'Shoot him! Kill him!' 'You are the boss!' 'Finish him off!' and 'That is a murderer right there'. As before, the court dismissed the notion that Masalha was incapacitated at the time of his execution and adopted the motion of the state's attorney to declare the video inadmissible evidence (*Sergeant Elor Azaria v MAG* 2017, 92).

Rather than stepping back to find the broad contexts in which these events unfolded, the court zoomed in on the closest possible perspectives: the minutiae of each case to prove an irreducible difference allowing it to claim incommensurability. Through this process, each event was broken into a sequence of microevents that were compared with the microsequences of

the other events. By adopting the perpetrator's perspective, the presiding court first sought to determine the extent to which the shooting violated the army's open-fire regulations. This exercise reaffirmed the original decision not to press charges against Vinogradov and the police volunteer.

To better capture the limits of legal discourse on how law blurs violence against natives in colonial settings, it is crucial to analyse what is written off as irrelevant (Razack 2011). In the search for radical sameness, the court's review of minute details obscured any discernible pattern in these killings, leading to an indifferent attitude towards the deaths themselves. No repetition was seen in the use of fatal violence, how these deaths came about, or the specific posture of the victims before they were shot. And certainly not the recurrent sense of 'overkillability', which implies that even as wounded bodies, Palestinians continue to be a threat (Ihmoud 2015; Shalhoub-Kevorkian 2015). None of this provoked the court to see a possible pattern between the events.

These chopped-up, microsequenced events allowed the military justices in Azaria's trial to use numerous starting and end points that were small enough to slide through the sieve of legality. It is hardly surprising that these were designed to accommodate a highly specific notion of difference, leading the court to conclude that none of these cases could be seen as repetitive. Moreover, since they were not repetitive, these were insular events, freak accidents, or regrettable episodes that did not add up to any existing pattern.

The court approached each event as a closed, temporal entity, a radical *courte durée*, with a clear beginning, middle, and end. Through this process, the presiding court decided that what happened to Al-Sharif was a contextless event, one in which Azaria, a soldier, shot Al-Sharif, a terrorist (in the court's language), after he allegedly attempted to stab another soldier.⁵ The dismemberment here is twofold: the first removes the event from its *longue durée*, and the second removes identities and positionalities from the actors. This temporality allows for factual repetition alone, which can only manufacture a situation with detached occurrences involving unrelated individuals. Under these conditions, even the question of the accused's equality group – a central factor for selective enforcement – functions as a legal smoke screen. By using cases, individually involving a police volunteer, and a Border Police officer, the court gave the appearance of looking at only one equal group, that of Israeli state security agents:

[W]e shall clarify, first, that, concerning the equality group, distinguishing between Border Police officers and IDF soldiers is irrelevant. Both routinely encounter difficulties and complexities as part of their counterterrorism activities and mission to preserve security. (*Sergeant Elor Azaria v MAG 2017*, 75)

The notion that Azaria may have faced increased negative attention or biased treatment because of his ethnic and social belonging was never raised in the

presiding court. The notion of selective enforcement against Azaria, if entertained at all, could only be proven by using cases against other socially unsituated soldiers.

Despite that, the advancement of a colourblind discourse was not the same for Azaria and Al-Sharif. The latter's enmity, danger, and criminality were very much present in the court's reference to him as either 'the terrorist' or 'the terrorist Al-Sharif'. Concurrently, his victimization was nowhere to be found. He was stripped of that right, and the violence inflicted by the court through its specific temporality – its crude *événementielle* in Braudelian terms (1958, 1966) – set the stage for the wholesale ignorance of the question of his death in a trial adjudicating on his killing.⁶ This epistemology made it impossible to consider Al-Sharif's death in relation to the deaths of Masalha and Jilani. To the presiding court, these men were 'nobodies', denied the singularity of their deaths (Da Silva 2009).

Chopping up the event: constituting difference

The presiding court effectively blocked its gaze by creating unbridgeable differences and incommensurability when reviewing the two cases in relation to Azaria's trial. Its hyper-specific approach rendered the killing of Al-Sharif inconsequential. However, combining the specific nature of this trial – as one of repudiated violence – with the question of selective enforcement means this legal manoeuvre cannot simply be applied to the different legal categories aligning the fatal act on a scale of severity. Instead, the specific context of Azaria's extra-judicial killing of Al-Sharif, even with the court ignoring its singular nature, shows how difference and repetition define and constitute the realm of Palestinian death in Israel and why we should pay attention to the specific kind of repetition the court employed, as well as consider what kind of a repetition could have accounted for these deaths.

To understand what transpires here, we need to think if another repetition – one that does not rely on radical sameness – is possible, and if so, what would that repetition entail for the possibility of setting Palestinian death aside while stripping it of its political meaning and singularity? We need, in other words, an extra-legal repetition that relates not only to similarities but also to differences.

According to Deleuze (1968 [2015]), although repetition is intuitively considered through similarity and identity, it is more closely related to difference. To unpack this, one must distinguish between two types of repetitions identified by Deleuze: 'interior' and 'exterior'. The assumption is that repetition is bound to include some form of replication, and thus two objects that vary too much from each other cannot, by definition, form a repetition. To Deleuze, this thinking stems from the tendency to view repetition through generalization and representations – two notions that

are of the essence in the legal sphere. The law's preoccupation with the interplay of generalizations and occurrences (the conditions for applying the law) happens only under the law's metaphysical terms. Because law resides in a sphere allowing it to both write the laws and abide by them, it predetermines what can be identified as repetition and regulates repetition under its terms. Within the law's sphere, repetition is 'exterior': it originates from the presumed possibility of identifying the concept of repetition with its representation. To Deleuze, this is a superficial repetition because it is nothing more than a guise. It is a nude repetition, valid only to the subject under the law. Unlike 'interior' repetition – a repetition for itself—'exterior' repetition is never universal. It is general, and consequently, it disguises the concept at the heart of the repetition.

This tendency is exacerbated when the subject under the law is de-facto exterior to it, as Al-Sharif was. Natives are inherently exterior to settler law (Rifkin 2012). This exteriority, both formal and epistemic, is crucial in informing us of the presiding court's understanding of repetition and difference. Yet, it is insufficient to understand what kind of repetition is missed here and why. According to Deleuze, an exterior repetition depends on another form of repetition that is masked but nonetheless structures the exterior repetition. This masked repetition stipulates a difference rooted in the idea of incommensurability or nonfungibility. Within this article's framework, repetition, as the maximality of differences, is present in death as one's own innermost possibility (Heidegger 1927, 251), in death as both a singular and a universal event. Throughout the court's search for radical sameness, this repetition is nowhere to be found. The court's focus on nude resemblances within the limits of open-fire regulations stripped death of its singularity and replaced it with generalization. Concomitantly that also suffocated the political meaning of Al-Sharif's death.

Nevertheless, beyond legal discourse and epistemology, death is this singularity that appears time and again. For the presiding court, the legal tradition within which it works, and the state's legal machinery in which it operates, repetition can only be measured by comparing the microsequences that led to the lethal shot and (another) Palestinian death. As noted by Hussain:

The category of 'necessity' is itself a temporal condition. That is, it must be represented as an interruption in the otherwise smooth functioning of lawful politics. Only its minute by minute narrative, its always so closely anticipated ending, can make legitimate the exercise of violence. (2006, 109)

Thus, in the court's fixation on the legal tool of the open-fire regulations, death – the anticipated ending – is so well camouflaged by legality that it becomes what the court cannot attend to. The uncomfortable truth is that the state of apathy shrouding the settler society lies in the inherent place of

forgetfulness for repetition. Throughout their search for radical sameness, the judges disregarded the maximality of differences and the radical reversal of this kind of repetition – a reversal that situates action – not trauma – as the origin of repetition. Repetition is thus not what masks the origin. This originality is repeated time and again and can lead to the repression not of the act itself but of its meaning. Paraphrasing Deleuze, the possibility of *setting Palestinian death aside*, the failure to judge and account for Palestinian death, and the rejection of the selective enforcement's claim all reveal that the State of Israel does not repeat (killing Palestinians) because it represses (the death of the Palestinian). It represses because it repeats.

As an ongoing process that strives from erasure, settler colonialism, cannot but reject the meaning that dwells within the repetition of these deaths. In other words, the repetitive nature of the extra-judicial killing of Palestinians is critical to the development of mechanisms that allow an Israeli court to set aside (Palestinians) death to delve into long, detailed discussions of the minutiae and the microsequences of the cases brought before it. To avoid this, the court should have set aside the search for radical sameness, and instead look for an extra-legal repetition. That is not to say that judges, soldiers, and Israeli-Jewish society cannot or should not be held accountable for their actions and complicity. Rather, this permits a better understanding of the singularity and universality at work, even when it is camouflaged by a legal system that repeats and represses its own doing with legal reasoning.

Conclusion: setting death aside

As I have shown, during the court's search for radical sameness between the cases, the inquiry devolved into extended discussions on the microsequences of the events and how they fit open-fire regulations. This fixation produced the situation in which the death of Al-Sharif, like those of the Palestinian victims whose killings were examined to substantiate the claim for selective enforcement, became irrelevant in relation to the perpetrator's perspective of the event. Whenever the victims did appear, it was through a thick screen of dehumanization that turned them effectively mute effigies of Israeli fears. Not only were they not present in the trials as victims, but to the presiding court representing settler society, the truth about their death was removed to the only place allocated to them by Israel: as the dangerous Other.

The presiding court was concerned with the letter of the law that decides a priori what field of vision can be used to conceptualize the legal significance of a given act. Its indifference to the deaths of Palestinians, who are subject to Israeli law but never truly seen as its subjects, explains why the attempts to deliberate the meaning of their deaths invariably ended with cellularisation. The legal proceeding ascribed little weight to their killings. Instead, their

deaths were relegated to a situation orchestrated in advance by Israel's open-fire regulations.

In thinking of repetition and difference with Deleuze, one realizes that the presiding judges were on the search for only one kind of repetition: an exterior and nude repetition that is locked on resemblance, representations, and generalizations. This repetition stripped Al-Sharif's death from its singularity and meaning. To preserve both singularity and universality through repetition, we should think about the death of Palestinians in the hands of Israeli forces as an interior repetition. Only in these terms can we identify the prior act as what commemorates every following event (Deleuze 1968 [2015], 16–17) because 'iterability requires the origin to repeat itself originally' (Derrida 1992, 43).

The paradox of iterability stands in the way of the court's wishful thinking that one act of violence, resulting in the death of (another) Palestinian, could be clearly distinguished from another. The deaths of Palestinians do not represent a 'repetition', even though Israelis time and again encounter the shooting of Palestinians who are lying wounded on the ground, and in events that share similar elements. Rather, it is a repetition because these deaths are a necessity, and 'necessity cannot avoid the explicit recognition of the sociological, and [...] racial' (Hussain 2006, 113) reality. This reality is nothing less than Israel's conditions of possibility. The extra-judicial killing of Al-Sharif and the other killings of Palestinians by Israeli forces required the presiding court to adjudicate an act of violence that both constitutes and preserves the law. These acts mark an ongoing exceptional violent repetition that constitutes and preserves the legal system put in place to decide the limits of the legal and the illegal while maintaining Palestinians 'at the limits of justice' (Perera, Shereen, and Razack 2014, 14). Accepting the claim for selective enforcement entails nothing less than the dismantling of this legal system.

Notes

1. Put simply, claiming selective enforcement means making a case that the law has been discriminatingly enforced. This does not amount to arguing that it has not been fully enforced. Instead, it implicates faulty judgement or ulterior motives in the enforcement of the law. In Israel, discrimination is established by examining the result of an act or decision. However, where selective enforcement is concerned, judges disagree over the legal necessity of demonstrating ulterior motives (Tamir 2010). In the case of Azaria, for instance, the appeal judges cited two conditions for selective enforcement: (1) a resemblance between the cases regarding the decision to prosecute and (2), an ulterior or inappropriate motive by the military prosecution (Sergeant Elor Azaria v MAG 2017, 89). The first instance court argued that the following questions must be addressed in order

to establish selective enforcement: (1) the equality group of the defendant; (2) the difference between selective enforcement and partial enforcement; and (3), the required burden of proof (*MAG v Sergeant Elor Azaria* 2017, 73).

2. 'Serious crimes', according to Straschnov (1994), include murder, attempted murder, illegal possession of a firearm, membership in a hostile organization and taking part in its activity, throwing stones at a person or a vehicle, and causing risk and malice to property on security grounds.
3. In the West Bank, open-fire regulations are employed differently on Israelis and Palestinians. A soldier is allowed to open fire on any Palestinian at the moment they are identified as a threat. In the case of Israelis, a soldier is expected to first order the person committing a life-threatening action to stop or to try to stop it by physical force. If that is not possible, then a soldier is allowed to use a weapon, but only as a threat by shooting in the air or at the person's legs. A soldier is not allowed to shoot towards an Israeli who is not risking life. If a Palestinian is fleeing the scene, the soldier may shoot in their direction, but under no circumstances should a soldier shoot at an Israeli fleeing the scene (Sharon 2007).
4. The presiding court insisted on continuity throughout this comparison, and the appeals court claimed there was limited time to delve into past events based on procedural concerns on the admission of new evidence through the appeals process (*Sergeant Elor Azaria v MAG* 2017, 44). Making the claim for selective enforcement requires two starkly different temporalities: one locked within the event (allowing for a clear continuity within these limits) and one without continuity and context. This dialectic temporality is based on the continuity of microsequences limited to a given event. On the one hand, it detracts from the *longue durée* of Israeli regime and the tension between settler and native temporalities. On the other hand, it emphasizes the crucial role of temporality in the construction of legitimate violence, which is always intertwined with rights over land. For temporal implications of law on natives and settlers, see Mawani (2014). For the natives' temporal options, which range from being locked in the past to being locked in the settler's temporality, see Rifkin (2017). Povinelli (2011b) analyses the question of the former by looking at what is at stake in each temporality and how it is embedded within settler-colonialism. These different temporalities are allocated differently to Palestinians and Israelis, as seen in Azaria's trial, and are reiterated in the tendency of Israeli courts, generally, and the HCJ, particularly, to address Palestinian appeals and convictions favourably when the claims are not made on a national basis but rather individually. Further, even when an appeal is based on the specific national status of being Palestinian, the court often, even when deciding in favour of the Palestinian, reduces this demand to an individual one (Jabareen 2002). This again reiterates the tension between collective demands and individual rights of Palestinians in Israel (Jamal 2005).
5. According to international law, because Al-Sharif is alleged of attacking a soldier, not a civilian, he cannot be defined as a terrorist. Despite that, the court referred to him as a terrorist 312 times (Ben-Naftali 2018, 472).
6. Wallerstein translates *événementielle* as 'a whole episodic explanation' (Wallerstein 2009, 161).

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ORCID

Revital Madar  <http://orcid.org/0000-0002-1927-7451>

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