Mission permanente d'Israël
auprès de l'Office des Nations Unies
et des Organisations Internationales à Genève

משלחת ישראל
ליד משרד האומות המאוחדות
והארגונים הבינלאומיים בג'נבה

Mr. Nils Melzer
Special Rapporteur on Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment
Office of the High Commissioner for Human
Rights
8-14 avenue de la Paix
1211 Geneva 10
sr-torture@ohchr.org

Geneva, 4 May 2018

Dear Mr. Melzer,

Re: The Ruling of the High Court of Justice in the Case of Mr. Asa'ad Abu Gosh

We received your enquiry dated January 31, 2018 regarding the above matter and we would like to address your concerns.

We would like to reiterate that according to the *Israel Security Agency Law* 5762-2002, the Israel Security Agency (ISA) internal rules and procedures, as well as its methods of interrogation, are confidential, for security reasons. The ISA and its employees are required to act within the limits of the law and are subject to both internal and external supervision and review, including the Inspector for Complaints against ISA Interrogators, the State Attorney, the Attorney General and every instance of the courts, including the High Court of Justice, as demonstrated in the mentioned High Court of Justice ruling.

As for the measures taken to incorporate a specific offence of torture in legislation, there is an inter-governmental staff work on a bill anchoring a specific offence of torture in the Israeli *Penal Law*, pursuant to the recommendations of the Turkel Committee and the Ciechanover Team. In this regard, the Ciechanover Report states that "The crime of torture that shall be defined is expected to set a ban, along the lines of the crime of torture in the Convention against Torture".

As you may be aware, the State of Israel has been confronted with increasing and ongoing terrorist attacks conducted by Palestinian perpetrators. To address these challenges, Israel is required to take

effective security measures and is committed to the safety and wellbeing of its nationals. Nevertheless, even in light of these imminent threats, Israel attaches great importance to ensuring the rule of law and to complying with its national and international legal obligations, as part of its constant attempt to find the intricate balance between the protection of human rights and national security.

As for the High Court of Justice ruling, which you refer to in your enquiry, (H.C.J. 5722/12 *As'ad Abu Gosh v. the Attorney General* (12.12.2017)), we would like to highlight a few aspects:

First, due regard should be given to the facts of the case; the petitioner, Mr. Asa'ad Abu Gosh, was arrested on September 3, 2007 on suspicion that he was the explosives expert of an active Hamas terrorist cell in Nablus, possessing information pertaining to its explosives lab, explosive devices and plans for terrorist attacks. These suspicions were based on highly credible information. Therefore, there were concrete grounds to assume that the petitioner was in possession of information that was crucial to the aversion of a real and substantial threat to human life. Due to the immediate need to attain this urgent information in order to save lives, the interrogators employed certain exceptional measures in his interrogation.

During the course of his interrogation, the petitioner revealed the location of the explosives lab in which he produced explosive materials and explosive devices and the details of a person to whom he had given an explosive belt that he had manufactured. The petitioner also gave his interrogators information about another explosives lab and a warehouse for chemical substances used in the preparation of explosive materials. The information provided by the petitioner led to the apprehension on September 22, 2007 of a ready-to-use explosive belt that was left in the heart of Tel Aviv-Jaffa, for a terrorist to collect and use to carry out a mass terrorist attack. That information also led to the discovery of two additional explosives labs in which many explosive materials were found.

Second, the High Court of Justice ruled that the petitioner's complaints filed regarding the interrogation were examined on a number of separate occasions by the most senior Israeli legal professionals, including the State Attorney and the Attorney General. The Office of the Inspector for Complaints against ISA Interrogators conducted three inquiries of the matter in question: in 2007 when the initial complaint was filed by the ICRC on behalf of the petitioner, in 2014 and in 2015, after the Inspector became part of the Ministry of Justice. On these occasions, the Inspector recommended not to open a criminal investigation on the basis of its findings. The recommendation of the Inspector for Complaints against ISA Interrogators were brought before the State Attorney and the Attorney General for review on several occasions, when those positions were held by different persons, and time and again it was decided that a criminal investigation was not warranted. The

inquiry process was extensive and included interviews with the petitioner and the ISA interrogators, in addition to thorough reviews of various evidence, medical records and classified material.

Third, the High Court of Justice found that certain exceptional methods of interrogation were used, but they do no constitute torture as they did not cause severe pain and suffering according to Article 1 of the Convention against Torture. The Court based this decision on the severity of events described by the petitioner in his initial complaints and in accordance with the material presented by the Attorney General and the ISA, and rejected a more severe description of the events that was raised by the petitioner at a later time (upon his release from prison in 2012). The Court found that a forensic evaluation of the petitioner conducted according to the Manual on the Effective Investigation and Documentation of Torture (Istanbul Protocol), did not have substantial evidentiary weight as it was based on his later complaints, did not have sufficient medical documentation from the time of the interrogation and could not point to a direct and substantial link between the medical assessments and the interrogation.

Finally, the Court held that the interrogation methods used do not constitute torture and that the interrogators are entitled to the claim that they acted under the necessity defense regarding certain exceptional methods that were used. The Court stated that according to the Attorney General's guidelines the necessity defense can not be applied when interrogation methods of the ISA amount to torture. Since it was established in this case that the ISA interrogation methods did not constitute torture, and there was a real and substantial threat to human life, the Court ruled that the interrogators are entitled to the necessity defense and therefore should not be subjected to a criminal investigation or prosecution (H.C.J. 5722/12 *As'ad Abu Gosh v. the Attorney General* (12.12.2017)).

For further information on the implementation of the relevant international norms we would like to refer to the 5th Periodic Report submitted by the State of Israel to the Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/ISR/5, 2014), and to the Israeli Follow-up to the CAT Concluding Observations from 2016 (CAT/C/ISR/CO/5/Add.1, 2017).

Yours sincerely,

Aviva Raz Shechter
Ambassador
Permanent Representative

CC: Beatriz Balbin, Chief, Special Procedures Branch, OHCHR