

Mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL ISR 7/2018

31 January 2018

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolution 34/19.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the reported lack of investigation or prosecution into the physical and psychological torture and ill-treatment suffered by Mr. **As'ad Abu Gosh**, during his detention and interrogation at the hands of Israeli Security Agency (ISA) in 2007.

According to the information received:

Allegations of torture and other ill-treatment

On 3 September 2007, Mr. Abu Gosh, a resident of the Balata refugee camp in Nablus, oPt, was arrested at his home by Israeli security forces and taken to the Petah Tikva ISA facility for interrogation on suspicion that he had information about Hamas' explosive devices labs and plans for possible future terrorist attacks. Mr. Abu Gosh was denied access to his lawyer from the moment of his arrest until 4 October 2007 and was not allowed visits by his family during this period. The only person from outside the Israeli military-security system who was able to see Mr. Abu Gosh was a representative of the International Committee of the Red Cross (ICRC), on 18 September 2007.

Throughout his incommunicado detention, Mr. Abu Gosh was kept in a small cell exposed to constant yellow light. During his interrogation, agents of the ISA subjected him to physical and psychological violence, that inflicted severe pain and suffering. The alleged methods of torture included beatings, walling (being thrown against a wall), the prolonged use of stress positions, forced arching and tying the body in the "banana" position, bending back fingers, sleep deprivation as well as threats, verbal abuse, and humiliation.

As a result of his treatment, Mr. Abu Gosh confessed that he manufactured weapons for Hamas in Nablus, and disclosed the location of an explosives lab on the roof of his house in Balata refugee camp. Mr. Abu Gosh was subsequently charged in a military court for terrorism-related offences, convicted and sentenced to five years' imprisonment, which he has by now completed.

Immediately after meeting with Mr. Abu Gosh in September 2007, the ICRC filed a complaint with the Inspectorate for Complaints (ICI) against ISA interrogators. Mr. Abu Gosh also filed a complaint through his legal representatives. An initial probe into the case was initiated by the ICI. However, the Attorney General decided to close the case and declined to open a criminal investigation. In July 2012, Mr. Abu Gosh filed a petition with the Supreme Court of Israel requesting the opening of criminal investigations into the acts of torture and ill-treatment he suffered.

The lack of investigation or prosecution

On 12 December 2017, the Supreme Court denied Mr. Abu Gosh's petition and upheld the decision of the Attorney General not to open an investigation.

In its ruling, the Supreme Court acknowledged the facts and the methods of interrogation used against Mr. Abu Gosh. However, it determined that Mr. Abu Gosh's interrogators used special interrogation techniques that were not constitutive of torture, since they did not cause him severe pain and suffering. In doing so, the Supreme Court dismissed the evidentiary weight of a forensic evaluation conducted in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), which concluded that Mr. Abu Gosh continued to suffer from various neurologic injuries resulting from the torture he had been subjected to.

Furthermore, the Supreme Court invoked the necessity defense to exempt the alleged perpetrators from prosecution, noting that the use of so-called "pressure techniques" was warranted by the existence of grave suspicions suggesting that Mr. Abu Gosh was involved in terror activities, which could have harmed or endangered human life.

I wish to express my utmost concern at the decision of the Supreme Court of Israel not to open a criminal investigation into the use of torture and cruel, inhuman or degrading treatment against Mr. Abu Gosh during his interrogation and detention by Israeli security officers in 2007. Without any doubt, the methods used against Mr. Abu Gosh, as acknowledged by the Supreme Court, constitute acts of torture according to the definition of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). In particular, any technique used by state agents to intentionally inflict pain and suffering of sufficient intensity to achieve its coercive purpose must be regarded as meeting the severity test under that definition. Also, in reference to the "necessity defense", I strongly reiterate that, under both customary and applicable treaty law, no circumstances, however exceptional and well argued, may be invoked to justify torture and other ill-treatment.

Under both the UNCAT and the grave breaches provisions of the Geneva Conventions of 1949, any allegation of torture must be investigated and, if confirmed,

prosecuted and punished without exception. Given that the prohibition of torture is universally recognized as having achieved a peremptory nature, it necessarily overrides any contradicting domestic law, administrative act or judicial decision, including on the part of the highest judicial authorities. It is therefore my considered view that the Supreme Court's decision of 12 December 2017 sets a dangerous precedent gravely undermining the absolute, non-derogable and peremptory nature of the prohibition of torture in serious violation of Israel's obligations under the International Covenant on Civil and Political Rights, the UNCAT, the Geneva Conventions as well as customary international law.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. I would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or any comment(s) you may have on the above-mentioned allegations.
2. Please provide information regarding the measures taken by your Government to incorporate a specific offence of torture into domestic law and to ensure that the definition of that offence is in full conformity with the definition contained in Article 1 of CAT, which Israel ratified on 3 October 1991.
3. Please indicate what other measures, if any, have been taken by your Excellency's Government to prevent the re-occurrence of the alleged violations and to ensure the accountability of any responsible perpetrator, direct or indirect.
4. Please provide full details of any penal, disciplinary, administrative or other measures taken by your Excellency's Government in compliance with its duty to investigate, prosecute and punish all acts of torture committed by or with the involvement of its officials. If no legal proceedings have taken place please explain why, and how this is consistent with the relevant international legal obligations of Israel.
5. Please indicate what measures, if any, have been taken by your Excellency's Government in compliance with its duty to provide redress, compensation and rehabilitation to Mr. Abu Gosh, and other victims of torture and other forms of ill-treatment.

I would appreciate receiving a response within 60 days.

As per usual practice, this communication and Your Excellency's Government's response will feature in the periodic report to the Human Rights Council for its consideration.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

I would welcome a response at your earliest convenience. I intend to publicly express my concerns in the near future about the present case as, in my view, the information I received is sufficiently reliable to indicate a matter warranting the most serious attention. I also believe that the public should be alerted to the substance of my concerns. Any expression of concern on my part will indicate that I have been in contact with your Excellency's Government's to clarify the issues in question.

Please accept, Excellency, the assurances of my highest consideration.

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment

Annex
Reference to international human rights law

While I do not wish to prejudge the accuracy of the information received, I would like to draw the attention of your Excellency's Government to the relevant international norm and standards that are applicable to the issues brought forth by the situation described above.

The absolute prohibition of torture constitutes one of the few universally recognized peremptory norms of international law. It is one of the most fundamental norms of international law, and its violation is listed among the most serious international crimes, including crimes against humanity and war crimes.

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment has been codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as well as in article 7 of the International Covenant on Civil and Political Rights (ICCPR), which Israel ratified on 3 October 1991. The human right to be free from torture and other ill-treatment is non-derogable and, therefore, continues to apply in situations of war or a threat of war, internal political instability or any other public emergency. No justification may ever be invoked to justify the perpetration of torture and other ill-treatment.

I further would like to remind your Excellency's Government that article 12 of the CAT requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that acts of torture have been committed. Articles 5 and 7 require States party to the Convention to establish jurisdiction and to prosecute suspected perpetrators of torture. It is therefore a concern of the utmost gravity that no investigation or prosecution has been initiated against the perpetrators and no redress, compensation and rehabilitation has been afforded to the victim.

Moreover, article 15 provides that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made", and article 14(3)(g) of the International Covenant on Civil and Political Rights states that the accused "should not be compelled to testify against himself or to confess guilt."