

האגודה לזכויות האזרח בישראל
جمعية حقوق المواطن في اسرائيل
The Association for Civil Rights in Israel



19 March 2009

S/18854

Mr. Meni Mazuz
Attorney General

Urgent:

Via Fax (02) 646-7001

**Re: Mechanism to Investigate Harm to Gaza Civilians:
Suspicion of Grave Violations of the Laws of War**

Refs:

Our letter to you dated 20 January 2009

Atty. Raz Nizri's response dated 24 February 2009

Dear Mr. Mazuz:

1. We are in receipt of your response to our appeal regarding the need to establish a mechanism to conduct an independent and effective investigation of the events that transpired in the Gaza Strip.
2. You assert in your response that the State of Israel does not intend to establish an independent body to investigate these events, but that operational debriefings will be conducted and submitted to the Judge Advocate General (JAG), which, together with the position of the JAG, will be submitted for your perusal. You also stated that despite the involvement of the JAG and those in the JAG Corps in providing legal counsel to military personnel during the course of the fighting, they would be the ones responsible for investigating claims and complaints concerning breaches of the law during the fighting.
3. We feel it necessary to appeal to you again with a request that you reconsider your position. This appeal comes in the name of the Association for Civil Rights in Israel, Bimkom, B'Tselem, Gisha, Hamoked Center for the Defense of the Individual, the Public Committee against Torture in Israel, Yesh Din, Physicians

for Human Rights – Israel, Rabbis for Human Rights, Adalah, and Itach. The subject concerns establishment of an independent mechanism by which Israel will fulfill its responsibility to conduct an impartial and effective investigation of cases in which there is suspicion that its armed forces violated provisions of international law.

4. As will be described below, your rejection of our request to establish an independent investigatory body while continuing the policy of only conducting operational debriefings is not consistent with Israel's obligation to investigate or its declarations of adherence to international law.
5. This is not a matter of infringement of a minor or trivial obligation. The obligation to investigate and bring to trial is one of the cornerstones of compliance with the provisions of international law. In the absence of an appropriate investigation, the legal provisions designed to minimize the harm to and suffering of civilians are worthless, and the declarations about adherence, meaningless.

On the obligation to investigate

6. As enshrined in the first article of each of the four Geneva Conventions, every State is obligated to respect and ensure respect for the provisions of the Conventions under all circumstances. This includes the obligation to take measures in advance to ensure that its armed forces adhere to the provisions of the Conventions (through teaching and assimilating these provisions, ensuring that commands are consistent with them, and thereby ensuring that orders that ultimately reach the troops are also consistent with the Convention provisions). From this also derives the obligation to investigate suspected violations of the Convention provisions.
7. The obligation is to initiate and conduct **independent and effective** investigations for cases in which the State of Israel is suspected of violating humanitarian law, or its officers or soldiers are suspected of responsibility for criminal activity.
8. A post factum investigation is a complementary aspect of the obligation to ensure in advance adherence to international law, **hence not conducting an investigation when required renders meaningless the obligation to respect the provisions of international law.**
9. The obligation to investigate is anchored in three normative sources: international humanitarian law, international human rights law, and Israeli law.

10. International humanitarian law imposes on the State the independent obligation to investigate. This obligation obtains when the armed forces of the State are suspected of involvement in grave violations of international law (from whence arises the suspicion of responsibility for engaging in war crimes).
11. Article 146 of the Fourth Geneva Convention notes explicitly that every State party to the Convention must search for and put on trial persons suspected of grave breaches of the Convention, i.e., violations for which there is personal responsibility. This obligation constitutes part of customary international law:

Rule 158: States must investigate war crimes allegedly committed by their own nationals or armed forces...and, if appropriate, prosecute them.¹
12. The significance of this obligation is that the State is responsible in these cases for **initiating** the investigation. Hence, not conducting an investigation in suspected cases itself constitutes a violation of international law.
13. Article 156 imposes an additional obligation on the States – the need to take all necessary measures to prevent activity that contravenes any provisions of the Conventions (not just grave violations). This also implies the obligation to investigate suspicion of any violations, not just grave violations.
14. International human rights law also imposes the obligation of investigation on States whose forces were responsible for the killing of civilians, as part of the obligation to respect and safeguard the right to life, as enshrined in Article 6 of the International Covenant on Civil and Political Rights. Derived from this right, and as part of safeguarding it, every State has the obligation to initiate an investigation into the circumstances of cases in which its security forces are responsible for the killing of civilians.² Failure to carry out the obligation to investigate could itself constitute a violation of the Covenant's provisions:

Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies...A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.

(Emphasis added – L.Y.)

¹ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, 2005) Vol. 1: Rules, Rules 156-158, pp. 607-611.

² *Rajapakse v. Sri Lanka* (Communication 1250/2004); Concluding Observations of the Human Rights Committee, United States of America, parag. 14 (CCPR/C/USA/CO/3/Rev. 1, 18 Dec 2006).

General Comment No. 31 of the UN Human Rights Committee (2004): [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument)

15. In his 2006 report on extrajudicial, summary, or arbitrary executions, Prof. Philip Alston sums up the obligations placed on States:

34. ...The Geneva Conventions of 12 August 1949 first established the legal obligation of States to investigate alleged unlawful killings and to prosecute their perpetrators. Elaborating the general obligation to “respect and ensure respect” for humanitarian law, the Geneva Conventions mandated the penal repression of violations. In particular, when a State receives allegations that someone has committed or ordered a grave breach – such as the “willful killing” of a protected civilian – the State is then legally obligated to search for him and either try him before its own courts or extradite him to another State that has made out a prima facie case...

Today, human rights law and humanitarian law together require accountability in all circumstances.

35. Human rights law imposes a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies”. This duty is entailed by the general obligations to ensure the right to life to each individual.

(Emphasis added – L.Y.)

Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions (Mr. Philip Alston), 8 March 2006, p. 14-17; http://www.extrajudicialexecutions.org/reports/E_CN_4_2006_53.pdf

16. A ruling by the European Court of Human Rights clarified that this requirement is not limited to violations of the right to life during times of peace. This Court adjudicated petitions against Russia that dealt with actions during Russia’s military operation against the Chechen rebels. The Court found that Russia is responsible for violations of the right to life, inter alia, because it did not carry out credible investigations in cases of the killing of civilians by its forces.³
17. Israeli law also imposes on the law-enforcement authorities the obligation to investigate cases in which government authorities and forces acting at their behest are suspected of grave violations of the law. This obligation is derived from the principle of the rule of law, according to which all parties in the State must abide by the law and, in cases where the law was contravened, sanctions must be applied. From this derives the obligation of the Attorney General, who

³ *Isayeva v. Russia* (Appl. 57950/00); *Khatsiyeva and others v. Russia* (Appl. 5108/02).

heads the system of enforcement in Israel, to open an investigation when prima facie evidence suggests violations by a party in the executive authority.⁴

18. The State's obligation to investigate even during times of war was underscored in HCJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* (2006) (hereinafter, "the targeted assassinations case"):

The principled starting point is that a continuous state of armed conflict has existed since the first intifada between Israel and the various terrorist organizations operating in Judea, Samaria and the Gaza Strip (hereinafter "the area") ...

Third, after executing an attack upon a civilian suspected of taking an active part at that time in the hostilities, a thorough investigation should be conducted (retroactively) regarding the precision of identifying the target and the circumstances of the attack upon him. This investigation must be independent.

Parags. 16 and 40 of the decision, respectively

19. The obligation incumbent upon the State of Israel is that it itself initiate an investigation into the suspicions that arise from the actions of its forces in the Gaza Strip.

Principles of a Proper Investigation

"promptly, thoroughly and effectively through independent and impartial bodies"⁵

20. The investigation must meet all of the following four conditions:
- a. Promptness: The investigation must be carried out with due speed and completed within a reasonable period from the time of the event and the date the investigation began.
 - b. Independence of the investigating body: The investigating body and those conducting the investigation must be impartial and independent – formally and effectively – of those to be potentially investigated.
 - c. Transparency: The investigation must be open to scrutiny by the public and the victim's family.
 - d. Effectiveness: The investigation must be effective such that it will reasonably lead to objective findings concerning the responsibility of those acting by order of the State, the broad circumstances that led to the death or injury, as

⁴ HCJ 428/86 *Barzilai v. State of Israel* PD 40(3) 505, pp. 621-622.

⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Mr. Philip Alston), 8 March 2006, pp. 14-17.

well as the responsibility for it, and the identification and trial of those responsible.

See:

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989;

<http://www.unhchr.ch/html/menu3/b/54.htm>

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Mr. Philip Alston), 8 March 2006, pp 14-17;

http://www.extrajudicialexecutions.org/reports/E_CN_4_2006_53.pdf

The extensive rulings of the European Court of Human Rights, e.g.:

22729/93 *Kaya v. Turkey*, 1998, Article 87;

19807/92 *Erdogan v. Turkey*, 2006, Articles 66, 88-95;

41335/98 *Kamer Demir v. Turkey*, 2006;

63758/00 *Anik v. Turkey*, 2007;

57935/00 *Tangiyeva v. Russia*, 2007;

5108/02 *Khatsiyeva and others v. Russia*, 2008.

The extensive rulings of the Inter-American Court of Human Rights:

I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988, Article 180.

21. Even Israeli law asserts that the investigation must be independent and objective. In the targeted assassinations case, the Supreme Court ruled:

Last, the laws related to preventive military activity that brought about the deaths of terrorists and innocent bystanders require ex post facto investigation of the army's conduct (see parag. 40 above). **This investigation must – as set in customary international law – be objective...** Also, **judicial review is not a substitute for retroactive objective review** following an event in which harm was allegedly caused to innocent civilians not directly involved in the hostilities.

(emphasis added – L.Y.)

Parag. 54 of the ruling

Independence of the Investigatory Body

“A fundamental principle in our judicial system is that a public servant must not be in a situation in which there is a real possibility of a conflict of interest.”

H CJ 531/79 *Petah Tikva Municipality Likud Faction v. Petah Tikva Municipal Council*, P.D. 34 (2) 566, 569

22. The requirement that the investigatory body be independent is a basic condition that seems self-evident. A fundamental cornerstone of our judicial system and of every judicial system worthy of its name is the prohibition of conflicts of interest. This is rooted in the principle that prohibits bias and the adjudication of one's own case. The rule that prohibits conflict of interest developed and expanded this concept. According to this rule, a public servant or person serving in public office must by law not be in a situation of conflict of interest, hence the prohibition on a situation in which there is reasonable concern or actual possibility of conflict of interest.⁶
23. The Likud faction case raised the issue of appointing a member of the City Council to serve simultaneously as chair of the Audit Committee in the city administration. Serving simultaneously in two city bodies was ruled a conflict of interest by majority opinion:

The trust and confidence in Mr. Mukhtar's functioning as a member of the Audit Committee are based on him taking into account only considerations related to auditing. He is unable to do this when the audit relates to his own actions, and this dual loyalty creates the real possibility of a conflict of interest. The auditee cannot be the auditor...Not only is the Audit Committee's work harmed by this, but public trust in the system of auditing is undermined. The public will not have confidence in the Audit Committee's recommendations if they are made by those who are themselves being audited...The function fulfilled by the Audit Committee – to study and make recommendations regarding the audit – does not reduce or nullify the application of the rules of conflict of interest. On the contrary: For the very act of auditing, as for judging, the independence and impartiality of the auditor must be maintained.

Likud faction case, 578-579

24. As noted, this requirement is also one of the basic criteria for an investigation in accordance with international law. This requirement is even more significant and should be particularly addressed in cases in which claims are raised against the impartiality or expertise of the existing bodies:

11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the

⁶ Rhanan Har-Zahav, *Israeli Administrative Law*, (1966), pp. 299-300.

apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. **In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry.** The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

(emphasis added – L.Y.)

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989. <http://www.unhchr.ch/html/menu3/b/54.htm>

25. Concerning the attacks in the Gaza Strip, the scope of the harm and damage to civilians and civilian structures as well as additional circumstances (see parags. 12-15 in our letter dated 20 January 2009) reveal at least prima facie doubts about the legality of the orders and commands issued to the combat forces. Therefore, the investigation must also include an examination of the orders and commands given before and during the operation, and cannot suffice with investigating the specific implementation of orders in the field.
26. Unfortunately, the approach of the JAG appears to be completely different. This is evident in the letter from Brigadier General Avichai Mandelblit dated 25 March 2008 in response to an appeal to launch an investigation into the events of the Second Lebanon War:

It should be noted in this context that, in my understanding, a criminal investigation of acts or failures as a result of operational-combat operations is an exception, not a matter of routine. It is the policy of the office of the Judge Advocate General that criminal investigation of an operational event, and certainly an event that transpires during a large-scale war, will be initiated only when there is a concrete basis of suspicion that a criminal act was committed by an IDF soldier in a specific situation...

...

Needless to say, any instance brought to the attention of the JAG about which there is prima facie evidence of a criminal offense by an IDF soldier during the Second Lebanon War will be investigated in its own right and dealt with accordingly...

From parags. 16-21 of the letter.

27. The conclusion that emerges from this text is that, according to the JAG, an investigation will be opened only when deviant acts of a soldier are at issue. By implication, no investigation will be conducted concerning actions about which

there is suspicion of systematic violation of the laws of war. This is evidently not a possibility, according to the JAG.

28. However, for an independent and impartial investigation to take place, it must not be conducted by parties that had been involved in the decision-making process. In the Cast Lead operation, the most senior echelons of the legal system, both military and civilian, were involved in the decision-making process and in the formulation and approval of commands for IDF troop activity. The letter dated 18 January 2009⁷ from Brigadier General Avichai Mandelblit suggests that even you were personally involved in these matters. In light of the involvement of both the military legal system and the Ministry of Justice in the decision-making process, it is clear that an investigation conducted by military persons, including JAG personnel, or persons from the Ministry of Justice or the State Prosecutor's office, or those subordinate to them, would not meet this requirement.
29. As noted, the requirement of independence of the investigatory body is a necessary and fundamental condition. The fact that the JAG or the Attorney General "wears several hats" does not add or detract from this. The meaning is clear – in light of the involvement of the JAG and personnel from the JAG Corps in counseling the military during combat, they cannot serve in the body responsible for investigating these events.
30. The need for an independent body with expertise becomes more urgent in light of the failures of past investigations. One can cite, inter alia, the investigations of the killing by IDF forces of James Miller⁸ and [injuring of] Brian Avery⁹, and the

⁷ Letter dated 18 January 2009 from JAG Brig. General Avichai Mandelblit to Attorney Fatmeh El-'Ajou of Adalah.

⁸ Following the debriefing conducted by the IDF and the investigation carried out over a year and a half by the Military Police, no evidence was found for a criminal indictment. The officer was even completely absolved of all responsibility at a disciplinary hearing. Legal measures were taken in Britain about this case, which led to the determination by an inquest jury that James Miller had been murdered. As revealed later, the delay in launching an investigation by the Military Police allowed for covering up of evidence and obstruction of the investigation. At the conclusion of the process, Israel paid damages to Miller's family.

⁹ In this case, the JAG decided, based on the operations debriefing, not to open an investigation by the Military Police about the circumstances of the [injury]. In a petition to the High Court of Justice against the decision not to launch an investigation, it was reported that the shooting took place in the direction of a road near the wall of a building, the figures fled, and the military forces did not discern that someone was hit and did not report anyone hurt by the shooting. However, statements submitted to the court in the civil proceeding initiated by the family revealed entirely different circumstances. According to the affidavits of the soldiers, one figure fell after the shooting. While an affidavit submitted to the High Court of Justice stated that a comprehensive debriefing was conducted by the brigade commander of the sector that was also based on interrogation of the troops, the soldiers' stated in their affidavits that they did not take part in any debriefing, but were asked about the event for the first time

investigations into the use of cluster bombs and the killing of dozens of civilians in the attack on Qana during the Second Lebanon War.¹⁰

31. Furthermore, it is our assumption that some of the relevant investigative material will remain classified and therefore closed to public scrutiny. In circumstances in which there will be limitations on transparency – one of the key factors ensuring the credibility and seriousness of an investigation – the other elements should be strengthened to ensure its integrity.
32. To be perfectly clear, it is our contention that an operational debriefing carried out by combat forces in the field or by individuals in their chain of command clearly does not meet the criteria of a worthy investigation. A debriefing of this kind does not fulfill the basic conditions of independence, effectiveness, and transparency.¹¹ So too a committee whose sole members are former military personnel or government authorities (such as the committee appointed to investigate the assassination of Salah Shehadeh in which fourteen civilians were killed) would not fulfill the basic conditions of expertise and independence, and not ensure the credibility of the investigation.
33. An expert opinion was brought to our attention that was submitted to you by six law professors who are specialists in international and public law.¹² In this statement, the experts determined what would be required of such an investigation according to international law. They concluded that, in the given circumstances, a foreign expert in international humanitarian law should be included in the investigatory body. In their view, the presence of this expert could contribute greatly to the credibility of the investigation.
34. We are in agreement with the assessment that appointment of a foreign expert of stature would provide an important element to ensure the independence and

only a year and a half later. See Attorney Shlomo Lecker's letter dated 3 January 2008 to Attorney Yuval Roitman from the Office of the State Attorney. Only in the wake of the petition did the JAG decide that the Military Police should investigate.

¹⁰ *Flooding South Lebanon: Israel's Use of Cluster Munitions in Lebanon in July and August 2006*, an investigative report by Human Rights Watch:

<http://www.hrw.org/en/reports/2008/02/16/flooding-south-lebanon-0>. In a letter dated 1 April 2008 responding to the demand by ACRI and B'Tselem to the Attorney General to launch an investigation into the attacks carried out in Lebanon, Shai Nitzan wrote that there is no need to open an investigation based on the findings of the office of the JAG. An appended letter from the JAG stated that findings of the investigating officer concerning the use of cluster bombs did not indicate a the need to take legal measures.

¹¹ For more on this, see the arguments of the petitioners in HCJ 9594/03 *B'Tselem and the Association for Civil Rights v. Judge Advocate General*, Response dated 20 December 2004.

¹² Letter dated 5 February 2009 from Prof. Eyal Benvenisti, Prof. Yaffa Silberschatz, Prof. Barak Medina, Prof. Claude Klein, Prof. David Kretzmer, and Prof. Yuval Shany concerning IDF actions in Gaza: "The Obligation to Investigate".

credibility of the investigation. The inclusion of foreign experts in an investigatory body has been used in the past: In the royal commission established by the British government to investigate the so-called “bloody Sunday massacre” in northern Ireland, judges from other countries participated.

35. We are aware of the concerns of security personnel about Israeli soldiers and officers who participated in the Gaza operation having to stand trial in international tribunals or courts in other countries. As you are certainly aware, the issue of the jurisdiction of other courts can arise only when the state directly involved does not fulfill its obligation to conduct a proper trial of those suspected of violating international law:

...where a state with a nexus to the crime effectively exercises its jurisdiction over the perpetrators, there is no justification for the application of universal jurisdiction by other states. The failure of a state to subject crimes to adjudication – a failure that contravenes the concept of the rule of law and undermines the values common to the community – is what justifies the exercise of universal jurisdiction.¹³

36. This principle is also anchored in Article 17 of the Rome Statute of the International Criminal Court in the Hague, which defines the rules of admissibility for exercising jurisdiction:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; ...
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: ...

¹³ Orna Ben-Naftali and Keren Michaeli, “Universal Jurisdiction and State Legal Discourse”, *Hamishpat* 18 (2004) 44-53 (Hebrew). See also Orna Ben-Naftali and Yuval Shany, *International Law Between War and Peace*, p. 307 (Hebrew); and Principles 8 and 9 of the Princeton Principles on Universal Jurisdiction.

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

37. It appears, therefore, that conducting impartial investigations and, when required, bringing suspects to trial not only does not increase the risk of Israeli soldiers and officers having to face other courts, but is actually the main avenue to avoid it.
38. In summary, conducting an impartial investigation in cases in which there is suspicion of violation of international law and, when required, bringing to trial the suspects are obligatory based on Israel's legal obligations as well as its aspiration to establish the truth and prevent unnecessary suffering and harm to civilians. This investigation must be independent and effective. If these conditions are not met, the investigation will have no credibility whatsoever.
39. To meet the requirements of an independent investigation and to ensure the necessary credibility, individuals should be appointed to the investigatory body who are experts in the field of international law, experienced in investigations, have no connection to the bodies or systems under investigation, and are not involved in any way with the decision-making process. In light of the fact that you, too, were involved to one extent or another in the decision making and issuing of directives, we are of the opinion that special attention should be given to the appointment of suitable individuals to ensure that they are neutral, have the requisite expertise, and are independent beyond all doubt.
40. Not conducting a worthy independent investigation will make intolerable the gap between declarations about respect for international law and what is actually practiced, and will render hollow Israel's declarations of credibility.
41. We would appreciate your expeditious reply.

Yours very truly,

Atty. Limor Yehuda

CC: Mr. Ehud Olmert, Prime Minister

Mr. Ehud Barak, Minister of Defense

Ms. Tzipi Livni, Foreign Minister

Brigadier General Avichai Mandelblit, Judge Advocate General