



Unnecessary U.S. Investigation into Israeli Operations

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The recently reported U.S. investigation into whether Israel used U.S.-provided weapons illegally in operations in Gaza and Lebanon is an ill-timed and counterproductive policy decision. The existence of this investigation, particularly without clear answers as to how and why it is being conducted, will only serve to unjustifiably prejudice public opinion against Israel—even before the probe reveals its conclusions—and increase political pressure for U.S. conditions on aid to Israel or Israel terminating the war before defeating Hamas and recovering the remaining hostages.

In accordance with how the United States has proceeded in similar, though not precisely analogous, cases involving alleged U.S. and Ukrainian illegal military conduct, Israel's functioning and transparent military judicial system should be allowed to conduct its own investigations first. Subsequently, a U.S. policy process—using already existing, better, less disruptive, and less prejudicial mechanisms—for ensuring U.S. weapons are used in accordance with U.S. policy and international law could demonstrate Israel's many efforts to uphold its legal obligations.

The United States should wait to review any Israeli military operations until after Israel conducts its internal legal review and U.S. officials have received an assessment from the Israel Defense Forces (IDF), U.S. leaders should avoid signaling a willingness to condition aid to Israel, and Congress should rapidly pass supplemental military funding to Israel.

What Happened?

- On February 14, *The Wall Street Journal* [reported](#), citing U.S. officials, that the United States is investigating several Israeli airstrikes in Gaza that allegedly killed dozens of civilians as well as Israel's possible use of white phosphorus in Lebanon. These investigations are part of a State Department probe “to determine whether Israel has misused [U.S.-provided] weapons to kill civilians,” according to the report.
 - » The investigations are reportedly part of a new State Department process set up in August 2023, prior to the war's outbreak, to give the United States more options to restrict military aid to countries if they misuse U.S.-provided weapons.
 - » One incident reportedly under investigation is an Israeli airstrike on October 31, 2023 on the Jabaliya refugee camp that allegedly killed over 125 people. The report stated that weapons investigators suspect that Israel used a 2,000 bomb in the airstrike, potentially provided by the United States, which Israel said targeted a Hamas commander in a tunnel.
 - » Investigators are also probing Israel's alleged use of white phosphorus in October 2023 during operations in Lebanon.

Why Is It Important?

- The U.S. investigation into whether Israel used U.S.-provided weapons illegally in Gaza and Lebanon is an ill-timed and counterproductive policy decision that raises numerous questions about how it will be conducted. While a credible, well-timed probe to ensure U.S. weapons are used in accordance with U.S. policy and the law could show how Israel repeatedly upholds its legal obligations, at this time, the negative consequences of such an indiscriminate probe prejudicing the public against Israel—even before it can reach conclusions—outweigh the benefits. The United States has more productive, less disruptive, and less prejudicial methods to ensure its partners follow international law.
- Oversight of U.S. weapons sent to foreign partners is important but, in recognition that nations with functioning legal processes should first be able to conduct their own internal reviews, the United States has consistently rejected the right of other countries to investigate it for alleged violations of the laws of armed conflict (LOAC) and similarly has only monitored, and not launched investigations of, Ukraine after reporting of alleged crimes during the ongoing war there.
 - » After a U.S. Special Operations AC-130 gunship killed thirty people at a hospital in Kunduz, Afghanistan on October 3, U.S. State Department spokesperson Mark Toner argued during a [press briefing](#) on October 5, 2015, “we’ve got three investigations underway. Certainly, we’ve got our own DOD-led investigation. We obviously strongly believe that can be a very transparent and accountable investigation. Let’s let these three investigations run their course and see what the results are.”
 - In November 2015, the top U.S. commander in Afghanistan, General F. John Campbell, called the [incident](#) a “tragic mistake,” and several U.S. service members were suspended from duty following the internal U.S. investigation.
 - » While the nature of Ukrainian combat is more conventional than in Gaza where Israel must target Hamas terrorists located among the civilian population, the United States did make the notably different choice to monitor allegations of Ukrainian war crimes instead of launching an investigation.
 - Following a video released in November 2022 suggesting that Ukrainian soldiers fired upon surrendering Russian troops at close range, Ambassador-at-Large for Global Criminal Justice Beth Van Schaack, the U.S. State Department’s top war crimes adviser, noted that the U.S. government was “tracking that.” Ukrainian officials [pledged](#) to investigate, and no U.S. investigation was announced.
- Israel has a functional military justice system that has proven capable of investigating and, if necessary, punishing crimes by its soldiers.
 - » There are multiple layers of legal review built into Israeli operations before it conducts a strike, as [JINSA’s report on the 2021 Gaza War](#) indicated.
 - Lawyers within IDF Southern Command determine the legality of targets during pre-planning procedures. Israeli Air Force (IAF) lawyers may do a second vetting process to approve the method of attacking the target.
 - High-value targets may be personally approved by IDF Chief of Staff Lt. Gen. Herzi Halevi, the highest military official in Israel.
 - » The IDF has already demonstrated an ability to review the conduct of its troops during the ongoing war and administer consequences when it finds them at fault.

- The IDF [disciplined](#) soldiers who were filming themselves singing Jewish prayers at a Mosque in Jenin after a raid in the area.
- The IDF pledged to take [disciplinary action](#) against several soldiers who the IDF deemed had behaved inappropriately in Gaza by riding motorcycles through rubble, removing prayer rugs from mosques, and burning food and water supplies.
- In light of the established U.S. preference to allow national judicial processes to unfold first, any investigation into a U.S. partner that preempts the partner’s own review should meet a high standard for credibility, clarity, and urgency. The reported investigation into Israel meets none of these criteria.
- The reported reasons for which the United States is investigating certain Israeli military operations do not rise to the level of credible allegations that would justify circumventing precedent and prior practice, instead relying on insinuated, misleading, or unknown conclusions.
 - » Israel’s use of [2,000-pound bombs](#) against targets in Gaza has led to [media scrutiny](#) because of the munitions’ considerable destructive potential. However, the use of 2,000-pound bombs is not inherently illegal; they have a legitimate purpose in war.
 - Large and powerful bunker-buster munitions may be a legally proportional means to destroy Hamas’s underground infrastructure and tunnel network, which is precisely why the United States provided Israel with these weapons.
 - Hamas deliberately locates its fighters, infrastructure, and weapons in or nearby civilian locations to use innocent Palestinians as human shields and make it impossible for the IDF to strike lawful targets without serious risks of civilian casualties or damage to civilian property. Hamas has also [killed](#) Palestinian civilians fleeing areas of hostility for the express purpose of using them as human shields.
 - As JINSA Distinguished Fellow LTC Geoffrey Corn, USA (ret.) argued in a [JINSA NatSec Brief](#) about the legal considerations for the war, the LOAC principle of proportionality “permits launching an attack on a military objective when the attack is anticipated to result in incidental (as opposed to deliberate) foreseeable harm to civilians or civilian property, so long as the harm to civilians and civilian property is not assessed as excessive in relation to the anticipated concrete and direct military advantage.”
 - Corn also noted that the principle of military necessity “justifies all measures not otherwise prohibited by international law to bring about the prompt submission of the enemy in the most efficient manner.”
 - » While *The Wall Street Journal* report noted that white phosphorous is highly flammable and its “use is restricted and can constitute a war crime if it is fired at civilians,” it “can be used legally in war.”
 - *The Wall Street Journal’s* overinclusive framing here misleadingly insinuates that the use of white phosphorous poses a legal problem.
 - The use of any weapon to deliberately target civilians would violate LOAC, but white phosphorous itself is not illegal and its use in conflict is permitted under certain circumstances.
 - While the United States has supplied Israel with white phosphorous munitions, it is not clear that Israel used the U.S.-supplied weapons in recent attacks. Israel’s use of white phosphorous not supplied by the United States would undermine the policy argument for investigating Israel’s use of U.S. weaponry in that case.

- Nor is there any evident urgency for this investigation to be conducted now, given that officials [acknowledge](#) it is “not a rapid reaction mechanism.”
 - » A probe into Israeli military operations would be an extensive, time-consuming process. Especially during wartime when access to necessary information will necessarily be difficult is not a productive means toward answering questions U.S. officials may have about Israeli military operations.
 - » Yet, State Department spokesperson Matthew Miller [said](#) that the process “is not intended to function as a rapid response mechanism” but instead “is designed to systematically assess civilian harm incidents and develop appropriate policy responses to reduce the risk of such incidents occurring in the future.”
- Despite the lack of clarity for why this investigation is needed at this time, its mere existence will create a presumption of Israeli wrongdoing that opponents of Israel will seek to use to sway ongoing policy debates.
 - » The investigation will prejudice public opinion against Israel—even before the probe could release its conclusions—and increase political pressure for the United States to add conditions on aid to Israel or for Israel to end the war before it can defeat Hamas or recover the remaining hostages.
 - Calls for [conditioning U.S. aid](#) for Israel have been building as Israel has expanded its ground operations in Gaza. Nineteen Senate Democrats supported an [amendment](#) to the \$100 billion security aid package for Israel, Ukraine, and Taiwan that would have blocked weapons sales to countries that prevent or limit humanitarian efforts. The proposal did not specify Israel, but the amendment sponsors indicated it was intended to ensure humanitarian aid to Palestinians. On February 13, the Senate [approved](#) the bill without any amendments by a vote of 70-29. However, Speaker of the House Mike Johnson has [signaled](#) he will not bring the bill to the House floor.
- Instead, the United States has more suitable, less distracting, and less detrimental mechanisms for answering questions about its partners' use of U.S. weapons and assuring that its partners abide by international law.
 - » As a separate process from the State Department investigation process, President Biden [issued](#) a *National Security Memorandum on Safeguards and Accountability With Respect to Transferred Defense Articles and Defense Services* on February 9, which will require nations that receive U.S. military aid to provide “credible and reliable written assurances” that they are abiding by international law. Following this process would enable Israel to fully conduct its legal review and inform U.S. officials of its findings before the United States initiates its own investigation.
 - The memo also requires the Secretaries of State and Defense to report to the president within 45 days if they assess that those assurances “have been called into question and should be revisited” and “requires the Secretaries of State and Defense to provide periodic congressional reports to enable meaningful oversight.”
 - The Secretary of State and Secretary of Defense must submit written reports within 90 days of the memo’s release and once every fiscal year about “any new assurances obtained since the prior report” and the reports must include “an assessment of any credible reports or allegations that such defense articles and, as appropriate, defense services, have been used in a manner not consistent with international law, including international humanitarian law.”

- However, the memo “does not apply to (1) air defense systems; (2) other defense articles or defense services that are intended to be used for strictly defensive purposes or are exclusively for non-lethal purposes other than in armed conflict; (3) defense articles or defense services that are non-lethal in nature; or (4) transfers strictly for the operational needs of the Department of Defense.”
- At a press conference on February 9, White House press secretary Karine Jean-Pierre [clarified](#) that “there are no new standards in this memo ... Instead, we are spelling out publicly the existing standards by the international law, including the law of armed conflict.” Jean-Pierre added that the administration briefed Israel on the memo and that They reiterated their willingness to provide these types of assurances.”

What Should the United States Do Next?

- The United States should avoid prematurely investigating Israel’s military actions before it can conduct its own internal review and report findings to U.S. officials.
- If the Biden administration still decides to pursue an investigation, it should provide a more fulsome explanation of the investigators and the scope of the investigation.
 - » U.S. officials should guard against and strongly reject premature accusations, as well as ensure the investigatory process and participants render a credible outcome and not a predetermined outcome.
- President Biden and members of Congress should avoid signaling a willingness to place conditions on U.S. aid to Israel.
- Congress should quickly pass supplemental military aid funding to Israel.