

United States Senate

WASHINGTON, DC 20510

March 8, 2024

Antony Blinken
United States Secretary of State
Department of State
2201 C Street Northwest
Washington, DC 20520

The Honorable Lloyd J. Austin III
Secretary of Defense
Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301

Avril Haines
Director of National Intelligence
Office of the Director of National Intelligence
1500 Tysons McLean Dr.
McLean, VA 22102

Dear Secretary Blinken, Secretary Austin, and Director Haines:

We write regarding the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services, or NSM-20, and to request a briefing on the questions outlined below and how the Administration will collect and analyze credible reports or allegations to make the assessments and determinations required by President Biden's new directive.

This National Security Memorandum is a historic, substantive step aimed at ensuring that all U.S. security assistance provided by U.S. taxpayers to any country is used in accordance with our values, U.S. domestic law, and international law, including international humanitarian law. NSM-20, which is now in effect, is based on an amendment that we filed to the recently passed national security supplemental legislation and we applaud the President's decision to issue this directive. We now look forward to working with your respective agencies to ensure the implementation of the NSM is planned and resourced effectively.

National Security Memorandum 20 requires, for the first time, that the Secretaries of State and Defense obtain credible and reliable written assurances, prior to the transfer of specified U.S.-funded security assistance. Recipient countries must agree to use these weapons in accordance with international law, including international humanitarian law, and promise to facilitate, and not arbitrarily deny or restrict, U.S.-supported efforts to provide humanitarian assistance in areas of conflict where U.S. weapons are being used. Moreover, NSM-20 requires robust reporting to Congress on the provisions referenced above, as well as assessments and determinations, based on credible reports or allegations, of whether U.S. weapons have been used in a manner inconsistent with international law and established best practices for preventing civilian harm. It also requires reporting on the extent to which recipient countries are cooperating with U.S.-supported efforts to deliver humanitarian aid into certain conflict areas, and a determination of their compliance with the Humanitarian Aid Corridor Act (Sec. 620I(c) of the Foreign Assistance Act of 1961).

The first report is due to Congress on May 8th, 90 days after the NSM was issued, and will include, among other matters, assessments, analyses, and determinations regarding the use by recipient countries of U.S. weapons in areas of armed conflict since January 2023. As such, the congressional report will include the use of such weapons by Ukraine and Israel during that time period, and other such recipient countries as determined by the Administration.

NSM-20 requires the Secretaries of State and Defense to submit this, and future congressional reports, “to enable meaningful oversight.” In order to achieve that purpose, it will be necessary for the Administration to develop systems and mechanisms to seek out and obtain the “credible reports or allegations” that are required to meaningfully respond to the congressional reporting requirements. While we understand that processes such as the Civilian Harm Incident Response Guidance (CHIRG) now exist at the State Department, this process is still in its infancy and lacks sufficient resourcing. We want to ensure that each of your agencies is actively working to collect all the information needed to meet the reporting requirements of NSM-20.

In addition, the assurances required by NSM-20 for countries in active armed conflict using U.S.-funded security assistance are due on March 24th. However, questions remain on what form these assurances will take and how often they will be renewed. NSM-20 also creates a novel enforcement mechanism for these assurances if a country violates any of these assurances, including by potentially suspending any further transfers of defense articles or defense services. Despite the creation of this mechanism, the NSM does not outline how the administration will determine if a country has violated an assurance and if there is a process in place to track its adherence to them.

We request a briefing from all of your respective agencies, by no later than two weeks from today, on the implementation of NSM-20 and we have included questions below to help inform that briefing:

1. How does the administration define “credible reports or allegations” for the purposes of collecting and compiling the necessary information needed to make the assessments, analyses, and determinations required by the NSM?
2. Which offices and other entities in your respective agencies are involved in the implementation of NSM-20, especially the job of actively seeking out and collecting “credible reports or allegations” needed to make the assessments, analyses, and determinations required in the congressional report? Which offices or other entities in your respective agencies are responsible for conducting the assessments, doing the analyses, and making the determinations? Has the Administration already collected or otherwise received information that is relevant to the congressional report? Which official or agency is responsible for coordinating the production and transmission of reporting to Congress, and which agency or official will transmit and be responsible for the veracity, quality, and completeness of such reporting?
3. Is the Intelligence Community actively collecting information relevant to the requirements of this congressional report? How will the Intelligence Community, as well

as the Departments of State and Defense, ensure that intelligence is incorporated into the assessments, analyses, and determinations required by NSM-20? Will the President consider making collection relevant to the assessments and reporting required by NSM-20 a Presidential Intelligence Requirement (PIR) for the Intelligence Community?

4. What processes already exist and what new mechanisms are being created to ensure that NGOs, international agencies, and humanitarian organizations can share relevant credible information about potential violations of international law, including international humanitarian law, information that recipient countries are not adhering to best practices for preventing civilian harm and/or information that recipient countries have restricted the delivery of U.S.-supported humanitarian assistance? How will the administration authenticate and assess the veracity of the information provided? Do these processes include reaching out to such entities or developing an online portal, or other reporting system, to allow easy submission of such information? Is the Department of State and/or the Department of Defense actively reaching out to such organizations, agencies, and persons to seek information relevant to the congressional report? Is the Department of State and/or the Department of Defense establishing and providing secure and reliable reporting mechanisms or points of contact for credible third parties to submit such information for review and consideration by the Administration?
5. NSM-20, Section 1. Policy (a) states that its requirements apply to the provision to foreign governments by the Departments of State or Defense of any defense articles funded with congressional appropriations under their respective authorities. What transfers of U.S. defense articles, if any, does the Administration maintain are not covered by the requirements of NSM-20, and why? NSM-20 clearly states that, “in addition to the requirements of this memorandum, the Secretaries of State and Defense are responsible for ensuring that all transfers of defense articles and defense services by the Departments of State and Defense under any security cooperation or security assistance authorities are conducted in a manner consistent with all applicable international and domestic law and policy...” What measures is the Administration taking to ensure that the transfers of any defense articles or services that are not covered by specific requirements of NSM-20 are nevertheless conducted in a manner consistent with all applicable international and domestic law and policy?
6. What tools, standards, and methodologies will you use in order to conduct the assessments, perform the analyses, and make the determinations for each of the reporting requirements NSM-20? Will the assessments and analyses required by the NSM consider trends and the frequency and severity of potential violations when making determinations? Will the Congressional Report identify all those instances where there are credible reports or allegations that U.S. defense articles have been used in a manner inconsistent with international law and/or with established best practices for mitigating civilian harm? Will the Congressional Report identify all those instances where there is a prima facie case that U.S. defense articles have been used in a manner that is inconsistent with international law and/or with established best practices for mitigating civilian harm? Where there are credible reports or prima facie evidence of uses of U.S. defense articles inconsistent with international law or without application of best practices to mitigate

civilian harm, will you conduct independent investigations and inquiries, including into any affirmative defenses that a recipient country may assert? Where there are instances where a prima facie case of a violation of international law or U.S. best practice exists and it appears likely but is not immediately certain that U.S. origin weapons were involved, what steps will the Departments of State and Defense take to ascertain whether or not U.S. weapons were involved?

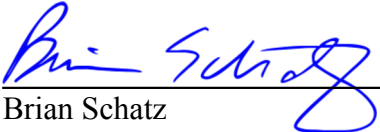
7. As you know, Leahy Law vetting does not require a determination that a foreign unit is using U.S. defense articles. It requires that no security assistance be given to any unit if the Secretary of State or Defense has credible information that such unit has committed a gross violation of human rights. When, in the course of reviewing a “credible report or allegation” for the purposes of the congressional report required by NSM-20 you identify credible reports or allegations that a foreign unit has engaged in gross violations of human rights, will you use such information to inform the administration’s implementation of the Leahy Law and make publicly available, to the maximum extent practicable, the identity of those units?
8. As part of current end-use monitoring programs, to what extent does the United States Government track where and how U.S. defense articles are being used in current conflict areas, including in Ukraine, Israel, Gaza, the West Bank, and Lebanon? How will your agencies assess and determine whether U.S. defense articles were used in an incident where there are credible reports or allegations of violations of international law and/or best practices for mitigating civilian harm? Where a foreign unit is equipped with defense articles covered by NSM-20, how will you assess the likelihood that such equipment was used in any particular incident that may have been inconsistent with international law and/or with established best practices for mitigating civilian harm?
9. What form will the assurances required by Section 1 of NSM-20 take and what processes have been created to ensure that the written assurances we receive from recipient countries are adhered to? How frequently will assessments be made on a country’s adherence to these assurances?

We respectfully request that we hear from your agencies as soon as possible on scheduling this briefing within the next two weeks and thank you for your quick consideration of these critical matters.

Sincerely,



Chris Van Hollen
United States Senator



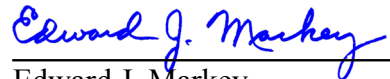
Brian Schatz
United States Senator



Martin Heinrich
United States Senator



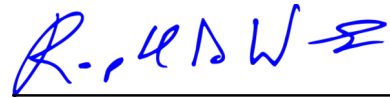
Tina Smith
United States Senator




Edward J. Markey
United States Senator



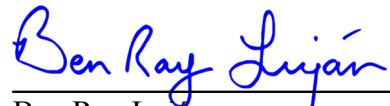
Jeffrey A. Merkley
United States Senator



Raphael Warnock
United States Senator



Peter Welch
United States Senator



Ben Ray Lujan
United States Senator



Elizabeth Warren
United States Senator



Christopher S. Murphy
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