

FEBRUARY 08, 2024

National Security Memorandum on Safeguards and Accountability With Respect to Transferred Defense Articles and Defense Services

NATIONAL SECURITY MEMORANDUM/NSM-20

MEMORANDUM FOR THE SECRETARY OF STATE

THE SECRETARY OF DEFENSE

THE ATTORNEY GENERAL

THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND
BUDGET

THE DIRECTOR OF NATIONAL INTELLIGENCE

SUBJECT: Safeguards and Accountability With Respect to
Transferred Defense Articles and Defense
Services

As outlined in National Security Memorandum 18 of February 23, 2023 (United States Conventional Arms Transfer Policy) (NSM-18), supporting foreign partners of the United States through appropriate transfers of defense articles by the Department of State and the Department of Defense is a critical tool for advancing United States foreign policy and national security objectives, including to:

(a) strengthen the collective security of the United States and its allies and partners by enhancing interoperability and supporting United States-led diplomacy in building and maintaining international coalitions;

(b) promote international peace and stability, and help allies and partners deter and defend themselves against aggression and foreign malign influence;

(c) strengthen United States national security by reinforcing respect for human rights, international humanitarian law, democratic governance, and the rule of law;

(d) prevent arms transfers that risk facilitating or otherwise contributing to violations of human rights or international humanitarian law; and

(e) strengthen ally and partner capacity to respect their obligations under international law and reduce the risk of civilian harm, including through appropriate tools, training, advising, and institutional capacity-building efforts that accompany arms transfers.

Equally critical is ensuring that adequate safeguards and accountability exist with respect to transferred defense articles and defense services. Under the Arms Export Control Act (22 U.S.C. 2751, *et seq.*), both the Department of State and the Department of Defense implement end-use monitoring programs.

In addition, as a matter of policy, the United States always seeks to promote adherence to international law and encourages other states and partners to do the same. United States policy, including as reflected in Executive Order 13732 of July 1, 2016 (United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force), is for executive departments and agencies to engage with foreign partners to share and learn best practices for reducing the likelihood of and responding to civilian casualties, including through appropriate training and assistance. In order to effectively implement certain obligations under United States law, the United States must maintain an appropriate understanding of foreign partners' adherence to international law, including, as applicable, international human rights law and international humanitarian law. As a matter of international law, the United States looks to the law of state responsibility and United States partners' compliance with international humanitarian law in assessing the lawfulness of United States military assistance to, and joint operations with, military partners.

For these reasons, I am issuing this memorandum, which requires the Secretary of State to obtain certain credible and reliable written assurances from foreign governments receiving defense articles and, as appropriate,

defense services, from the Departments of State and Defense, and requires the Secretaries of State and Defense to provide periodic congressional reports to enable meaningful oversight. 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, including international humanitarian law and international human rights law, the applicable “Leahy Law” (22 U.S.C. 2378d, 10 U.S.C. 362), and NSM-18.

Section 1. Policy. (a) Except as provided below, the policy outlined in this memorandum applies prospectively to the provision to foreign governments by the Departments of State or Defense of any defense articles funded with congressional appropriations under their respective security assistance and security cooperation authorities, including with Foreign Military Financing and Ukraine Security Assistance Initiative funds, pursuant to 10 U.S.C. 333, and pursuant to Presidential drawdown authority under section 506 of the Foreign Assistance Act of 1961 (22 U.S.C. 2318). Prior to the Departments of State or Defense providing such defense articles to the recipient country and, as applicable, consistent with the timelines set out in subsection (c) of this section, the Secretary of State shall:

(i) obtain credible and reliable written assurances from a representative of the recipient country as the Secretary of State deems appropriate that the recipient country will use any such defense articles in accordance with international humanitarian law and, as applicable, other international law; and

(ii) in furtherance of supporting section 620I of the Foreign Assistance Act of 1961 (22 U.S.C. 2378-1) and applicable international law, obtain credible and reliable written assurances from a representative of the recipient country as the Secretary of State deems appropriate that, in any area of armed conflict where the recipient country uses such defense articles, consistent with applicable international law, the recipient country will facilitate and not arbitrarily deny, restrict, or otherwise impede, directly or indirectly, the transport or delivery of United States humanitarian assistance and United States Government-supported international efforts to provide

humanitarian assistance.

The assurances described in this subsection shall be enforceable consistent with subsection (b) of this section.

(b) Upon an assessment by the Secretary of State or the Secretary of Defense that the credibility or reliability of assurances provided by the recipient country as required by subsection (a) of this section has been called into question and should be revisited, the Secretary of State or the Secretary of Defense, as appropriate, shall report to the President, through the Assistant to the President for National Security Affairs, within 45 days of such assessment and shall indicate appropriate next steps to be taken to assess and remediate the situation. Such remediation could include actions from refreshing the assurances to suspending any further transfers of defense articles or, as appropriate, defense services.

(c) Recognizing that a reasonable period of time is necessary to obtain the assurances required by subsection (a) of this section from foreign governments already receiving such defense articles from the Departments of State or Defense as of the date of this memorandum, the Secretary of State shall obtain the required assurances from those countries within the following time periods:

(i) For any country to which subsection (a) of this section applies and that is deemed by the Secretary of State to be engaged, as of the date of this memorandum, in an active armed conflict in which defense articles covered by this section are used, the Secretary of State shall obtain the assurances outlined in subsection (a) of this section not later than 45 days after the date of this memorandum and shall provide an update to the President, through the Assistant to the President for National Security Affairs, regarding the recipient countries that have provided such assurances. If the Secretary of State does not obtain such assurances within 45 days of the date of this memorandum, the transfer of defense articles and, as applicable, defense services, shall be paused until the required assurances are obtained.

(ii) For any country to which subsection (a) of this section applies and that is not deemed by the Secretary of State to be engaged, as of the date of this memorandum, in an active armed conflict in which defense articles

covered by this section are used, the Secretary of State shall obtain the assurances outlined in subsection (a) of this section not later than 180 days after the date of this memorandum and shall provide an update to the President, through the Assistant to the President for National Security Affairs, regarding the recipient countries that have provided such assurances. If the Secretary of State does not obtain such assurances within 180 days of the date of this memorandum, the transfer of defense articles and, as applicable, defense services, shall be paused until the required assurances are obtained.

(d) This memorandum 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.

(e) This memorandum shall apply to the provision to foreign governments by the Departments of State or Defense of any defense services the Secretary of State or the Secretary of Defense determines to be appropriate under their respective authorities in furthering the aims of the policy outlined in this memorandum.

(f) In rare and extraordinary circumstances justified by an imperative associated with the national security of the United States, and with concurrent notification to the President, including an articulation of the relevant justification, the Secretary of State or the Secretary of Defense may waive the requirements of this section. Such waiver should be as limited in time, scope, and nature as deemed necessary to advance the interests of United States national security.

Sec. 2. Congressional Reporting. (a) Not later than 90 days after the date of this memorandum, and once every fiscal year thereafter, the Secretaries of State and Defense shall report in written form and, to the extent additionally appropriate, through verbal briefings by appropriate senior officials of their respective departments, to the Committee on Foreign Relations, the Committee on Armed Services, and the Committee on Appropriations of the Senate; the Committee on Foreign Affairs, the Committee on Armed Services,

and the Committee on Appropriations of the House of Representatives; and, upon request, other congressional national security committees as appropriate. The written report shall address defense articles and, as appropriate, defense services, provided by the Departments of State or Defense described in subsections 1(a) and 1(e) of this memorandum, and shall include:

(i) any new assurances obtained since the prior report;

(ii) 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; such assessment shall include any determinations, if they can reasonably be made, as to whether use has occurred in a manner not consistent with international law, and if so, whether the recipient country has pursued appropriate accountability;

(iii) a description of the procedures used to make the assessment described in subsection (a)(ii) of this section;

(iv) an assessment and analysis of (1) any credible reports indicating that the use of such defense articles and, as appropriate, defense services, has been found to be inconsistent with established best practices for mitigating civilian harm, including practices that have been adopted by the United States military, and including measures implemented in response to the Department of Defense's Civilian Harm Mitigation and Response Action Plan or incidents reviewed pursuant to the Department of State's Civilian Harm Incident Response Guidance; and (2) the extent to which efforts to induce effective implementation of such civilian harm mitigation best practices have been incorporated into the relevant United States security assistance program;

(v) a description of the procedures used to make the assessment and analysis described in subsection (iv) of this section;

(vi) a description of any known occurrences of such defense articles and, as appropriate, defense services, not being received by the recipient foreign government that is the intended recipient, or being misused for

purposes inconsistent with the intended purposes, and a description of any remedies undertaken;

(vii) an assessment and analysis of whether each foreign government recipient has abided by the assurances received pursuant to section 1(a)(ii) of this memorandum, whether such recipient is in compliance with section 620I of the Foreign Assistance Act of 1961 (22 U.S.C. 2378-1), and whether such recipient has fully cooperated with United States Government efforts and United States Government-supported international efforts to provide humanitarian assistance in an area of armed conflict where the recipient country is using such defense articles and, as appropriate, defense services; and

(viii) a description of any challenges to conducting the assessment and analysis described in subsections (a)(i)-(vii) of this section, including whether or not there is available information responsive to the subsections above.

(b) The written report and, where applicable, accompanying verbal briefing provided under subsection (a) of this section shall be unclassified but may be supplemented, to the extent necessary, with classified reporting as appropriate for the protection of classified national security information.

(c) The first report provided under this section shall include available information on the use, since January 2023, of defense articles and, as appropriate, defense services, provided by the Departments of State or Defense described in subsections 1(a) and 1(e) of this memorandum by recipient countries that engaged in armed conflict during calendar year 2023.

(d) The Secretaries of State and Defense shall notify the congressional committees specified in subsection (a) of this section within 7 days following any report provided to the President pursuant to section 1(b) of this memorandum and within 7 days following any notification provided to the President of the exercise of a waiver pursuant to section 1(f) of this memorandum, and shall notify the same committees of assurances newly received pursuant to section 1(a) of this memorandum within 30 days of receiving such assurances if not otherwise reported to the Congress within that time period.

Sec. 3. Definitions. For purposes of this memorandum, the terms “defense article” and “defense service” have the meanings given in section 47 of the Arms Export Control Act, 22 U.S.C. 2794.

Sec. 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The requirements in this memorandum are not intended to reflect an understanding that they are required by treaty or customary international law, and this memorandum should not be understood or cited to that effect.

JOSEPH R. BIDEN JR.