## aff answers

### 2ac – secrecy bad

#### Secrecy in US-NATO security cooperation enables violations of international law’s principles of proportionality AND distinction

Austin Nolen 21, J.D., Temple University Beasley School of Law, 2021; B.A., History, Temple University, 2017, "Article: Evading Accountability: How the Secrecy of International Organizations Harms Americans? Right to Know." Temple International & Comparative Law Journal, 35, 229 Summer 2021, pp. 230-232, Lexis, nihara

I. INTRODUCTION

The United States expends significant resources on what it calls efforts to preserve international peace and security. These costs are incurred both through U.S. agencies directly and through international organizations in which the United States plays a part. Both U.S. agencies and international organizations also have the capability to infringe on legally and normatively guaranteed rights of Americans and non-U.S. citizens. However, despite the sums expended by Americans and the potential infringements and abuses by international organizations, U.S. citizens have very few mechanisms to obtain information about these organizations. This is in contrast to the established regime of transparency required and practiced by U.S. agencies. Specifically, the existing transparency tools for citizen oversight of two international security organizations, the North Atlantic Treaty Organization (NATO) 1and the International Criminal Police Organisation (INTERPOL), 2are inadequate because they default to secrecy rather than balancing organizational needs against the requirement for public legitimacy.

A. Public Interest in NATO Operations

U.S. support to NATO takes two primary forms: indirect contributions in the form of American troops deployed on NATO missions and direct contributions in the form of American money provided for NATO's budget. 3In June 2008, the United States contributed 23,550 troops to NATO's International Security Assistance Force (ISAF) in Afghanistan, in addition to 19,000 forces operating independently of NATO in Afghanistan under Operation Enduring Freedom (OEF). 4In June 2019, the U.S. contribution to Resolute Support (RS), NATO's successor mission to ISAF, was 8,475 troops. 5In addition, the United States contributed about $ 570 million to NATO's headquarters in 2018 alone. 6

The U.S. Department of Defense accepts that its troops must, inter alia, plan and execute operations in Afghanistan 7in compliance with the law of war principles of proportionality and distinction. 8When U.S. troops commanded 9by NATO under the former ISAF and current RS mission engage in combat, they must follow certain rules of international law. 10One such rule, proportionality, requires military commanders to weigh the expected combat benefits of action against the incidental harms to the civilian population, and avoid combat where the incidental harms are excessive compared to the benefits of the legitimate military mission. 11Distinction, another law of war principle, mandates that commanders take care to differentiate between enemy forces, which can be targeted, and civilians, who cannot be intentionally targeted. 12

However, during non-international armed conflicts such as the one in Afghanistan, military authorities may experience greater difficulties distinguishing between enemy combatants and civilians. 13As a result, NATO and independent U.S. forces in Afghanistan have killed hundreds of civilians in airstrikes. 14Human rights groups have alleged these military forces failed to properly follow international law in the course of such attacks. 15Yet, as demonstrated below, the records of U.S. forces are presumptively open to civilian inspection, allowing Americans to assess the legality of the force used in our name and with our tax dollars, while the records of NATO forces are not. 16

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II. CASE STUDIES

Existing international organization transparency efforts fail to account for the public's interest in their actions and for the need for public legitimacy. 66This lack of transparency is borne out by two case studies of international organizations that perform public duties like those undertaken by comparable U.S. agencies, with similar risks to human rights, but without the same level of public transparency: (1) NATO troops made up of soldiers from the United States and other nations compared with U.S.-commanded troops in Afghanistan, and (2) INTERPOL Red Notices compared with domestic arrest warrants.

A. NATO Airstrikes in Afghanistan

Both NATO forces and U.S. forces in Afghanistan are funded by U.S. taxpayers, both help to implement U.S. security interests, and both have the potential to violate international laws and norms. However, for the reasons explained below, the actions of U.S. forces are far more transparent to the U.S. taxpayer than the actions of NATO forces.

1. Structure and Mission of NATO and U.S. Forces in Afghanistan

In order to understand the different levels of transparency applied to NATO and U.S. forces undertaking similar public duties in Afghanistan, it is first necessary to understand the basic organizational details and legal authorities of both institutions. Transparency itself depends on the entity from which the armed forces derive their authority and on the organizational arrangements used by those armed forces.

a. NATO Structure

The North Atlantic Treaty establishes only one NATO body, the North Atlantic Council. 67The Council contains representatives from each state party and has authority to "set up such subsidiary bodies as may be necessary." 68The North Atlantic Council has created a military hierarchy for its armed operations. 69The chief military authority is the Military Committee, which consists of the most senior military officer of each member country or his or her representative. 70The Committee is assisted by its International Military Staff. 71

Subordinate to the Military Committee is the military command structure, which is composed of two commands: Allied Command Operations and Allied Command Transformation. 72Allied Command Transformation is led by Supreme Allied Command Transformation and focuses on strategic planning and readiness. 73Allied Command Operations directs and executes all military operations and is led by the Supreme Allied Commander Europe (SACEUR) from the Supreme Headquarters Allied Powers Europe (SHAPE) in Belgium. 74Traditionally, SACEUR is also the U.S. military officer in charge of U.S. European Command. 75

The International Security Assistance Force (ISAF) was authorized by the U.N. Security Council to provide security in and near the Afghan capital, Kabul, in December 2001. 76NATO took control of the ISAF mission in August 2003. 77ISAF's authority was expanded to encompass the entire country in October 2003. 78ISAF was terminated in 2014 and replaced with the RS mission. 79The NATO commander in Afghanistan is subordinate to SACEUR/SHAPE. 80

b. U.S. Forces Structure

Separate and apart from U.S. troops operating in Afghanistan under the NATO banner, the U.S. military also commands troops in Afghanistan directly. 81The structure of those forces is the result of the evolution of American military organization in the twentieth century more broadly. 82Past the beginning of World War II, the Department of War and the Department of the Navy, the two extant departments of the American military, 83operated autonomously from one another. 84In response to the shortcomings of this approach, Congress and the executive branch took steps during and after World War II to increasingly remove the leadership of the military departments from any direct control over military operations. 85

In 1986, responding to concerns that the military departments still exercised too much informal control over operations, 86Congress officially removed the departments from any command over the operational elements. 87That reform, which still provides the basic framework for the American military structure, 88tasks the military departments 89with preparing their forces for combat. 90The military departments then assign their forces to the combatant commands, which have operational authority. 91The President is responsible for creating combatant commands and assigning their areas of operation or responsibilities. 92There are presently eleven active combatant commands, including U.S. Central Command (CENTCOM), 93the combatant command responsible for U.S. forces in Afghanistan and the Middle East more broadly. 94

Most U.S. troops in Afghanistan who are not assigned to the NATO mission are under the control of U.S. Forces-Afghanistan (USFOR-A), which in turn, is a component of CENTCOM. 95USFOR-A was created by the Department of Defense in 2008 to merge several different Afghanistan chains of command into one, and it commanded most soldiers assigned to OEF, which has subsequently been replaced by OFS. 96Since USFOR-A was created in 2008, its commander has always simultaneously commanded NATO troops in Afghanistan under the ISAF and then RS missions. 97

2. Alleged Abuses

Airstrikes carried out by both NATO and U.S. forces are a consistent source of civilian casualties in Afghanistan. Human Rights Watch has alleged that airstrikes by these two military organizations were responsible for 116 civilian deaths in 2006 and 321 in 2007. 98In 2018, the United Nations Assistance Mission to Afghanistan counted 393 civilian deaths and 239 civilian injuries caused by aerial operations by U.S. and NATO forces for a total of 632 civilian casualties. 99These figures are disputed by military officials. 100However, the issue with these casualties for the purpose of this comment is not so much their exact number, but the fact that they raise serious concerns about whether the United States and NATO are complying with relevant law of war standards. 101Human Rights Watch and the U.N. noted similar casualty trends across time in both reports. For instance, both organizations noted their concern about civilian casualties caused by relatively spontaneous airstrikes carried out in support of ground forces, as opposed to airstrikes planned well in advance. 102

3. Comparative Inability to Access NATO Records

Both the United States and NATO have transparency laws or policies. 103However, NATO's transparency policy is far weaker. As a result, there is no public right to access most NATO documents, even though their equivalents are public under U.S. law. Because the commander of NATO forces in Afghanistan is an American, 104and most NATO troops are contributed by the U.S., 105it is arguable that many NATO records should be accessible as records of one or more U.S. military agencies. However, the Department of Defense has concluded that NATO records in the possession of American personnel assigned to NATO are not records of U.S. agencies. 106

a. High-Level Policy Documents

In the United States, laws and quasi-legislative documents of the federal government must be made public, a requirement that falls under the legislative and judicial type of transparency. First, the U.S. Constitution itself requires public access to Congressional enactments. 107Second, provisions of the Freedom of Information Act require executive agencies to publish all general rules and policies. 108As a result, the public has access to a wealth of information about the law and policy governing the American armed forces. These include not only the law, 109but also voluminous quasi-law policy documents from the Department of Defense and the services branches, such as Department of Defense Directives, 110service regulations, 111and doctrinal publications. 112If an executive branch agency refuses to disclose such policy documents, any individual can seek a court order compelling their release. 113

In contrast, NATO's transparency policy is far more limited. First, unlike the Freedom of Information Act, NATO's policy is limited to historical documents--those thirty years or older, which NATO has determined for itself to have permanent historical significance. 114Even though the present war in Afghanistan is now nearly twenty years old, 115this transparency mandate does not extend to any policies enacted since NATO became involved in that conflict. 116Second, the policy provides no mechanism for outside enforcement. 117

b. Investigations into Alleged Abuses

The Freedom of Information Act is not limited to official policy documents. It also creates a presumption of access to unpublished internal government records, an example of executive type transparency. 118This presumption is qualified with several exceptions, including classified information and information that would compromise investigations. 119Even so, U.S. military agencies must at times release the results of their investigations into alleged human rights abuses. For instance, after a high-profile incident in which soldiers assigned to USFOR-A carried out an airstrike against a hospital operated by the charity Médecins Sans Frontières in Kunduz Province, CENTCOM released a redacted copy of the investigation report under the Freedom of Information Act. 120Agency failures to disclose records of these investigations are subject to judicial review. 121

When U.S. troops under either command allegedly carry out human rights abuses, both NATO and U.S. authorities may carry out investigations into such allegations. 122However, NATO appears to carry out more frequent investigations, while the United States undertakes relatively few civilian casualty investigations under its internal procedures. 123Under the NATO Public Disclosure Policy, none of the investigative results from NATO investigation processes are publicly available for at least thirty years. 124As a result, valuable information about compliance with the law of war is not available to the public.

#### Strong LOAC norms against civilian casualties prevent satellite attacks

Beard, 18—associate professor of law at the University of Nebraska-Lincoln (Jack, interviewed by Brandon McDermott, “Crafting The Manual For Warfare In Space,” <http://netnebraska.org/article/news/1163396/crafting-manual-warfare-space>, dml)

There's another factor here too, the growing commercialization of space. With more and more launches, with more and more satellites – the individual operators the individual companies – those are the responsibility of the states under the rules that are now in place in the Outer Space Treaty. You can see, as space becomes more congested and more competitive that there are going to be problems that are likely to occur between – for instance – space mining entities. Which is no longer a far-fetched idea. As competition for resources in space grows the likelihood of a conflict grows and so you'd like to try to interpret some of the terms that haven't been applied yet in space. Phrases like “interference,” or “due regard,” which are found in the treaties haven't ever been interpreted to this point in any real detail.

It would be nice to know what the appropriate response is to certain actions in space and things that are perceived as hostile in order to prevent as much damage as possible to civilian objects and to civilians. The law of armed conflict has as one of its central goals preventing unnecessary or excessive damage to the civilian population. There are satellites up there that are solely dedicated to all sorts of humanitarian purposes – weather satellites, satellites related to rescue and emergency – those sorts of things aren't appropriate targets in an armed conflict and should be treated with some special regard.

#### Satellite attacks cause nuclear war

Grego, 17—Senior Scientist, Global Security Program, with the Union of Concerned Scientists (Laura, “50 years after the Outer Space Treaty: How secure is space?,” <https://www.ucsusa.org/sites/default/files/attach/2017/12/50-Years-OST-article.pdf>, dml)

For the foreseeable future, military tensions among the United States, China, and Russia are likely to remain high, as are those between China and India. It is imperative to track investments and strategies that could escalate a crisis or lead actors to consider approaching or crossing the nuclear threshold. Attacks on satellites can create or escalate terrestrial crises in ways that are difficult to predict and which are particularly dangerous among nuclear powers.

While the OST prohibits nuclear weapons in space, it is less specific about other military activity, and states have different interpretations of “peaceful purposes.” Thus, the drift is toward a space regime that includes increasingly sophisticated anti-satellite technology, with very little mutual understanding about how actions in space are perceived and what constraints, if any, global governance provides.

States—and, increasingly, sub-state actors—have been developing technologies that can be used to interfere with satellites. Not all such technologies are equally dangerous, and it may be possible to prioritize appropriate limits. Signals jamming, for example, is relatively low-tech, but is also limited temporally and spatially in its effects; identification of the perpetrator is relatively straightforward, even if remedies for the interference are less so. More concerning are technologies with a strategic-sized capability, or which are stealthy and hard to attribute, or which make intent difficult to discern; these technologies can provide new and unpredictable paths to crisis escalation. The inventories of such weapons are growing and relevant technology is proliferating.