

Migration of Civilian and National Security Access to Information Norms

Ádám Földes*

INTRODUCTION

Since the end of the Cold War, freedom of information has been blossoming. The number of countries endorsing the right to seek, receive, and impart information has grown from fourteen countries to over a hundred countries. Moreover, freedom of information has been acknowledged as a human right.¹ At the same time, the new era has not only brought more transparency in the decision-making and spending of public bodies, but also resulted in restructuring the fields of national security and defense. The dissolution of the Soviet Union and the Warsaw Pact, along with the aftermath of 9/11 have significantly altered national security and defense policies worldwide.

The expansion of freedom of information consolidated the principles of transparency and enhanced the accountability of public authorities. Indeed, this development can be observed on a limited scale even in such countries where neither transparency nor democratic accountability has much history. Any right to information law adopted by any country implies that, with few exceptions, the functioning of any public entity or any decision of a civil servant can be analyzed in detail and discussed in public. These new laws bring significant changes to the functioning of public administrations and bureaucratic cultures. Even in well-established democracies it can be a long and tenuous process to make transparency a part of the everyday practice of public administrations. Ultimately, a right that, for most of the world, has only existed in international treaties for only some decades has now turned into an enforceable right for everyone.

* Ádám Földes is a legal advisor at the International Secretariat of Transparency International and specializes in freedom of information and protection of classified information.

1. Right to information and freedom of information are used synonymously in this article.

Parallel to the spread of freedom of information laws, another wave of law-making engulfed Western democracies first and, after the fall of the Berlin Wall, former Soviet-bloc countries. Since the mid-1970s, in most Western democracies, non-executive accountability and oversight of national security bodies have slowly evolved. After the Cold War, countries that went through democratic transition had to reform their armed forces and intelligence services. In the Soviet-bloc, these agencies were not transparent at all, they ignored human rights, and were only held accountable to decision-makers without any democratic legitimacy. Post-Cold War national security policy reforms and rearrangement of alliances were translated into hard and soft law norms, applicable to the functioning of security bodies on a national level, as well as to standards of international cooperation in the field of security (for the purposes of this article the term “national security” also covers the field of defense).

Both processes received significant attention from legal scholars and political scientists during the last two decades. However, few studies focused on the differences of the information policies and norms underlying the two processes, or on their interaction.

Freedom of information, which is both a human right and a precondition for a democratic society, provides for transparency and accountability of any public entity, including national security bodies. These bodies are also subject to specific regulations of the national security field. While these national security regulations satisfy the requirement that they be passed by decision-makers that enjoy democratic legitimation, they follow a logic that is fundamentally different from a rights-based approach.

The interaction between the two sets of norms is visible through the following: policies and legal standards of civilian administration have been gaining ground in national security administrations by increasing expectations of transparency and accountability, and by influencing the pertinent rules and practices (examples include involvement of democratic oversight over intelligence bodies, or the increase in transparency of military budgets). At the same time, national security policies and rules infiltrate civilian law-making, judiciary and governance (e.g. the adoption of new protection of classified information laws by countries that joined the NATO during the last three enlargement rounds). These actions and reactions have implications on national and international levels both in civilian and national security administrations.

MIGRATION OF HUMAN RIGHTS NORMS AND METHODOLOGY TO EXAMINE THEM

The phenomenon that legal concepts and ideas, that are present in one legal field or legal system, reappear in another is fairly common. There is a

rich literature of comparative constitutional law on which norms are moving, why they are moving, and how they are moving. Is it a transplant of legal norms? Borrowing? Migration? Choudhry carefully recapitulates the strengths and weaknesses and differences of these metaphors in his compilation of studies which examine the constitutional migration from numerous aspects (the terms of moving, migrating and transplanting are used as synonyms in this article).²

Migration of norms is observable in both law-making and in legal interpretation methods and approaches. The literature also covers migration between areas of constitutional law in the jurisdiction of a given country, between national jurisdictions, domestic law and international law, emergency law and civilian law, as well as the migration of unconstitutional ideas.³

The present article examines the migration of access to information norms between the civilian and national security fields on national and international levels. These norms are migrating by national legislation, international treaties, and through the decisions of national and regional courts.

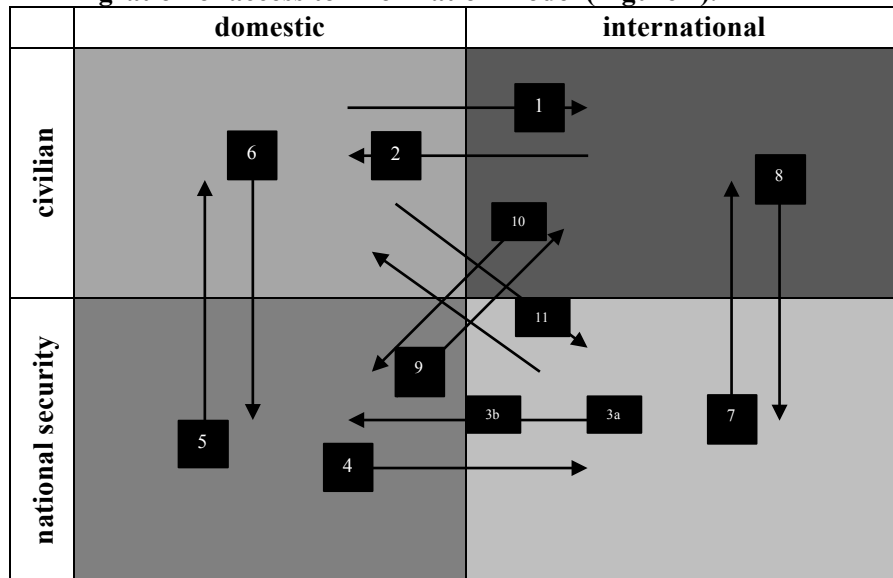
The migration of the civilian and national security access to information norms can be described by the following statements:

1. There are norms on national and international levels.
2. Civilian and national security fields can be distinguished.
3. There are norms both in civilian and national security fields, and on national and international levels, which means there are four areas to which norms can be assigned.
4. The four areas are not isolated from each other.
5. Access to information norms are moving between the four areas.

A model of the four areas and the direction of movements will help to prove these statements (Figure 1). In the present article the term “migration of norms” is used to describe the phenomenon when a norm that was present in a particular legal field or in a particular jurisdiction appears in another legal field or in another jurisdiction where it was not present before.

2. SUJIT CHOUDHRY, Migration as a New Metaphor in Comparative Constitutional Law, *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1, 13-25 (Sujit Choudhry ed., 2006); See also ROBERT C. BLITT, The Bottom Up Journey of ‘Defamation of Religion’ from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional ideas, 56 *STUDIES IN LAW, POLITICS AND SOCIETY* 121 (2011).

3. OREN GROSS, ‘Control Systems’ and the Migration of Anomalies, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 403-05 (Sujit Choudhry ed., 2006); KIM LANE SCHEPPELE, The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 347 (Sujit Choudhry ed., 2006).

Migration of access to information model (Figure 1).

Possible directions of migration of access to information norms:

1. Domestic civilian norms influence or become international norms
International civilian norms having effect on national legislation and practice
- 3a., 3b. International level norms of defense/national security influence domestic civilian and national security norms
4. Domestic military rules of a country define the rules of a military alliance
5. Emergency (martial) laws or military rule norms applied in civilian jurisdiction
6. Application of civilian access to information norms to national security administration
7. International level norms of defense/national security influence international civilian norms
8. International civilian norms influence international defense/national security norms of access to information
9. Domestic defense/national security norms influence international civilian norms of access to information
10. International civilian norms influence national level norms of defense/national security
11. Domestic civilian norms of access to information influence international defense/national security norms of access to information

There are a number of authors who have provided detailed methodological guidance for comparative studies on migration of constitutional norms that can be directly applied to migration of access to information norms.⁴ For the purposes of this article, the evaluative tools designed by Tebbe and Tsai are the most useful. The four tools are: (a) fit, (b) transparency, (c) completeness, and (d) yield.

These four criteria implement basic assumptions about the rule of law. First, the notion of fit complies with the sense that the law's substance (including borrowed material) should be compatible with existing arrangements. Second, a preference for transparency endorses the expectation that arguments appeal to reason and further a public purpose. Third, completeness is related to substantive fidelity and deliberative values, necessary features of a purposively designed legal system. Fourth, the idea of yield acknowledges that above all, the rule of law must solve problems of practical governance (and therefore, an act of borrowing must not frustrate self-rule but aid it). Once borrowing is understood as a presumptively legitimate practice most concerns that arise have to do with how well particular legal ideas fit together – how open and notorious the borrowing is, what is lifted and what is left behind, and what yields that creative act.⁵

To benefit from the application of these tools, the migrating norms, the circumstances of migration, their origins, and the new contexts must be analyzed. There was sufficient information available from several cases for this exercise. However, there are other cases that are included only to illustrate a direction of migration, but a proper evaluation was not available due to lack of information.

MIGRATION OF ACCESS TO INFORMATION NORMS

The following sections will provide examples of the migration of access to information norms. As shown in Figure 1, there are twelve possible directions of migration of access to information norms, but real life examples for three of the possible directions are still missing.

4. RAN HIRSCHL, *On the Blurred Methodological Matrix of Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 39 (Sujit Choudhry ed., 2006); NELSON TEBBE & ROBERT L TSAI, *Constitutional Borrowing*, 108 MICH. LAW REV. 459-522 (2009); A MOMIROV & AN FOURIE, *Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law*, 2 ERASMUS L. REV. (2009).

5. Tebbe & Tsai, *supra* note 4, at 459-522.

Domestic Civilian Norms Influence or Become International Norms

It is among the most obvious forms of migration when international law draws on domestic norms. Both the Universal Declaration of Human Rights (hereinafter, "UDHR") and the International Covenant on Civil and Political Rights (hereinafter, "ICCPR"), enshrine "the freedom to seek, receive and impart information." However, the origin of the freedom of information in these instruments cannot be traced back to domestic legislations. When the UDHR was adopted, Sweden was the only country that already had a freedom of information law.⁶ The ICCPR was adopted in 1966 and by that time Finland had become the second country that had a freedom of information law in force. There is nothing in the travaux préparatoires of the UDHR that would indicate any influence of the laws of either countries on this right.⁷

The Council of Europe Convention on Access to Official Documents (hereinafter, "Tromsø Convention")⁸ is the only comprehensive multilateral access to information treaty, although it has not entered into force yet. There are other instruments of international law that regulate access to information, though limited to certain areas, such as the United Nations Convention on Access to Information; Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, "Aarhus Convention").⁹ Or, the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. Furthermore, there is a great number of international hard and soft law that contain access to information norms.

Because of its unique position, it is particularly interesting to analyze how domestic norms migrated into the Tromsø Convention. Notwithstanding this approach, the United Nations Convention against Corruption (hereinafter, "UNCAC") resisted the migration of national access to information norms.¹⁰

6. ANDERS CHYDENIUS, *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press* (1766), translated and reprinted in *THE WORLD'S FIRST FREEDOM OF INFORMATION ACT - ANDERS CHYDENIUS' LEGACY TODAY*, (Juha Mustonen ed., 2006).

7. WILLIAM A. SCHABAS, *The Universal Declaration of Human Rights - The Travaux Préparatoires*, (ed., 2013).

8. COUNCIL OF EUROPE CONVENTION on *Access to Official Documents*, June 18, 2009, C.E.T.S. No. 205.

9. UNITED NATIONS CONVENTION on *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, June 25, 1998, 2161 U.N.T.S. 447, 450-72.

10. UNITED NATIONS Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

(A) Council of Europe Convention on Access to Official Documents

The Tromsø Convention builds on a number of sources. In its preamble it refers to international law that is relevant for Council of Europe members, such as the European Convention on Human Rights and the Council of Europe data protection convention.¹¹ It also refers to the United Nations sources, the UDHR and the Aarhus Convention. It recalls the relevant soft law of the Council of Europe – however, it does not mention two more fundamental sources in the text of the convention.

The jurisprudence of the European Court of Human Rights and the national access to information laws of the Council of Europe members are the ones that may have influenced the Convention the most and these are mentioned only in the Explanatory Report of the Tromsø Convention:

[T]he Steering Committee for Human Rights (CDDH), instructed by the Committee of Ministers of the Council of Europe to draft the present Convention, was guided by the concern to identify, amongst the various national legal systems, a core of basic obligatory provisions reflecting what was already accepted in the legislation of a number of countries and that, at the same time, could be accepted by States that did not have such legislation.

The Explanatory Report also points out that “[a]lthough the European Court of Human Rights has not recognized a general right of access to official documents or information, the recent case law of the Court suggests that under certain circumstances Article 10 of the Convention may imply a right of access to documents held by public bodies.”¹² Just prior to the signature of the Tromsø Convention, the European Court of Human Rights rendered two judgments in access to information cases which proved that Article 10 of the Convention not only may, but in fact, implies a right of access to documents when public watchdogs or historians request access.¹³

It may be among the most complex exercise of legal transplant to draft a multilateral treaty in a legal field, where the potential parties to the treaty already have existing domestic legislation and practice (especially since the parties select and agree on these norms with the intention that the norms of

11. Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 005; Council of Europe CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA of 28 January 1981, ETS No. 108.

12. Citing *Sdružení Jihočeské Matky v. Czech Republic*, App. No. 19101/03, decision on admissibility of 10 July 2006.

13. *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, (ECtHR 2009) (The author was executive board member of the non-governmental organisation *Társaság a Szabadságjogokért* and prepared the applicant’s observations in *Társaság a Szabadságjogokért v. Hungary*); *Kenedi v. Hungary*, App. No. 31475/05, (ECtHR 2009).

the treaty will migrate into the legal systems of the signatories when the parties implement the treaty). Each party may carefully examine from which legal systems they are willing to transplant and carefully select which norms to be transplanted into the treaty, as any norm that they are required to include in their domestic laws may strengthen or weaken this right and such changes could be contrary to the actual policy considerations of the negotiating government.

(i) Fit and Completeness

In the case of multilateral treaties, the questions of fit and completeness cannot be separated. Out of forty-seven members of the Council of Europe, thirty-nine already had an access to information law in force by the time the convention was adopted in 2009. As the Explanatory Report of the Tromsø Convention describes, the drafters of the convention had to balance which norms are present in the laws of a “number of countries” what can be made obligatory to the parties of the convention, and at the same time what could be realistically accepted by those states that did not have such legislation.¹⁴ As there were only eight Council of Europe countries without any access to information legislation, the main challenge in this process was building consensus concerning a convention that would give standards for the thirty-nine countries already having legislation in this area and for the eight countries that would be joining the treaty. The content of national access to information legislations concerning each norm addressed in the treaty varies a lot, such as scope, exemptions and reviews. Access to information laws are defined, among others, by the breadth of the right of access to information, the legal traditions, the constitutional structure of the country and means of democratic representation, the quality of the codification and the actual policies of the government proposing the law and of the Parliament adopting it.

“[T]he notion of fit complies with the sense that the law’s substance (including borrowed material) should be compatible with existing arrangements.”¹⁵ The aim of the drafters of the convention was identifying a “core of basic obligatory provisions.” This core could have been significantly above the standards that a signatory had in 2009, or it could have been far below the domestic access to information norms already in force. In the former case, the bar could be set too high compared to already available norms, and if the lawmakers do not want to meet these standards, they may

14. THE GROUP OF SPECIALISTS ON ACCESS TO OFFICIAL DOCUMENTS (DH-S-AC), representing 15-17 member states at their meetings, http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC_en.asp (last visited November 15, 2017).

15. Tebbe & Tsai, *supra* note 4, at 495.

never join the convention. If the bar is too low, then those countries that already have higher standards may become disinterested, as the international standards do not require to bring any improvement to their legislation. At the same time, other members of the multilateral organization with weaker norms are not inspired to improve their legislations either. Moreover, there is always a risk that if weak standards become the standards sanctioned by international consensus and subsequently law, because these standards may serve as an excuse for future governments that are not supportive of the right of access to information to weaken their domestic norms.

(ii) Transparency

The drafting of an international treaty that draws on national laws is fully transparent for the future parties of the treaty, as they can be involved in the drafting process. The documentation of the drafting, such as the reports of the expert/drafting groups, the explanatory note of the treaty, and the Travaux Préparatoires of the treaty negotiations also provide for a significant level of transparency for the public and countries that join the treaty later (which can be instrumental for acceptance of the final text, including any borrowed ideas).

(iii) Yield

It may be fruitful to ask whether an instance of borrowing is intended to promote or resist the law's development along its present path, and to what extent it is successful in terms of the borrower's aims. Such purposes and consequences collectively constitute the yield of an act of borrowing.¹⁶

A detailed comparison of the adopted text of the convention and the national laws of the parties that were represented in the Group of Specialists on access to official documents would exceed the limits of the present article, but it is worth mentioning an example where the yield of borrowing was called into question.

The Information Commissioner of Slovenia addressed her letter to the members of the Group of Specialists on Access to Official Documents.¹⁷ She voiced her concerns that drafting the first legally-binding document regulating the field of freedom of information is a historical moment and the convention should not set weaker standards than the relevant

16. Tebbe & Tsai, *supra* note 4, at 507.

17. Letter from the Nataša Pirc Musar, *Info. Comm'r, Slov., To The Members of the Group of Specialists on Access to Official Docs.* (Sept. 20, 2007), THE COUNCIL OF EUROPE STEERING COMMITTEE FOR HUMAN RIGHTS at 32.

Recommendation of the Council of Europe.¹⁸ She explained that, “Slovenia adopted effective legal model also resulting from standards defined by the Recommendation (2002) No. 2 of the Council of Europe which has, in combination with the Explanatory Memorandum, importantly contributed to the development of higher standards in access to public information,” and went into further details on where the draft’s standards diluted the norms included in the Recommendation and in the Slovenian law.¹⁹

(B) Article 13 of the United Nations Convention against Corruption and Article 19 of UDHR

It is clear from the text of the UNCAC and its travaux préparatoires that the convention prescribes obligations for States Parties concerning access to information, but it does not provide any right to individuals.²⁰ Scheppele points out “the idea of ‘borrowing’ always signals that something positive is being transferred without alteration, which takes attention away from the cases in which one country draws negative implications from another country’s experience.”²¹ In the case of the UDHR, the agreement on the text of its Article 19, which includes the freedom “to seek, receive and impart information and ideas by any means and regardless of frontiers” due to the “deep incompatibilities between the communist and liberal approaches to the functions of the press” was “a considerable achievement.”²² More than half a century passed between the drafting of the UDHR and the UNCAC, and 38 further countries adopted laws on freedom of information, still the preservation of the status quo between the liberal and the restrictive approaches defined the text of Article 13 of UNCAC.

In regards to UDHR, it cannot be stated with certainty that the core of the freedom of information “to seek, receive and impart” was not inspired by any piece of existing national legislation, but according to the travaux préparatoires, neither the drafting committee, nor the Sub-Commission on Freedom of Information and of the Press included the representative of Sweden.²³ Furthermore, the language of Article 19, despite the similar content, does not align with the Swedish Freedom of the Press Act. Freedom of information norms as enshrined by the UDHR, and by the ICCPR (of

18. Council of Europe Recommendation Rec 2 of the Committee of Ministers to Member States on Access to Official Documents, Adopted by the COMMITTEE OF MINISTERS (2002).

19. *Id.*

20. UNITED NATIONS OFFICE ON DRUGS AND CRIME, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Corruption (2010).

21. Scheppele, *supra* note 3, at 348.

22. WILLIAM A. SCHABAS, *Introductory Essay*, in *The Universal Declaration of Human Rights - The Travaux Préparatoires*, lxxi, cii-ciii (ed., 2013) (quoting John P. Humphrey, *Human Rights & the United Nations: A Great Adventure*, 36 (Transnational Publishers 1984).

23. Schabas, *supra* note 7, at 1373-74.

which drafting started in conjunction with the drafting of UDHR), seem to be an original piece of international law-making.

In 1948, the drafts and the final text of UDHR were adopted through a vote. It resolved the issue that the Soviet-bloc countries were concerned about the negative implications on their system caused by this freedom's unrestricted phrasing and content, and the (Western) liberal states were concerned by the restrictive language proposed by the Soviet-bloc countries. In 2002, the drafting process of the UNCAC did not use a voting method, which meant consensus was needed on every single word of the convention, and the consensus was not furthering the right to information.

The migration of access to information norms within a single area of the model (Figure 1) is not examined in this article; still it is worth looking at the interplay between UDHR and UNCAC. It provides an example when the status quo is upheld as it also demonstrates a case of resisting migration of norms from national laws.

(i) Fit and Completeness

Transparency is a key criterion of corruption prevention and it is present in practically each article of Chapter II of UNCAC that deals with preventive measures. The main prerequisite of transparency is freedom of information. The linkage between the UNCAC and the UDHR and ICCPR is clear and it is appropriate that the UNCAC explicitly refers to the freedom of information. According to Article 13 of UNCAC, "participation should be strengthened by such measures as: ...Ensuring that the public has effective access to information; ...Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption."²⁴ Following these provisions, the UNCAC repeats most of paragraph 3 of Article 19 of the ICCPR, which stipulates the possible restrictions of freedom of information.

(ii) Transparency

The total correspondence of the restrictions of freedom of information in the UNCAC and in the ICCPR leaves no doubt about the origin of the text. Furthermore, the travaux préparatoires of the UNCAC explains in a footnote that:

It was agreed that the travaux préparatoires would indicate that the intention behind paragraph 1 (e) of article 13 is to stress those obligations which States parties have already undertaken in various international instruments

24. UNCAC, *supra* note 10, at 152-53.

concerning human rights to which they are parties and should not in any way be taken as modifying their obligations.²⁵

(iii) *Yield*

“It may be fruitful to ask whether an instance of borrowing is intended to promote or resist the law’s development along its present path, and to what extent it is successful in terms of the borrower’s aims.”²⁶ Considering the rapid development of the freedom of information field, including the dozens of new laws adopted after the end of the Cold War, “the present path” seemed to be the further extension of this freedom when the UNCAC was drafted in 2002. The UNCAC could have taken up the role of promoting freedom of information with a view of enhancing corruption prevention through transparency, but the negotiating parties stuck to the status quo and did not endeavor to extend or establish individual rights at all.

International Civilian Norms Having Effect on National Legislation and Practice

When a country becomes party to a regional human rights convention and accepts the jurisdiction of the court established by the convention, its intention seems to be clear: signing up to the human rights standards embodied in the convention and securing the exercise of these rights and freedoms. How these international norms become part of a national legal system varies significantly. Without going into the details of monist and dualist legal systems, and the question of direct effect, it is fair to say the norms of these conventions migrate into national legal systems.

Countries often join a human rights convention to improve their national legislation and its implementation, to demonstrate that their domestic norms are or will be in line with international standards, and to expect the same from other countries with which they have manifold relationships. Amendments of domestic laws and changes in applying the law are often needed over time, even in cases where the country’s law is completely compatible with the convention standards at the time of joining the convention. The content of the norms of the human rights conventions are not stable, the jurisprudence of the human rights courts constantly shape them and countries have to follow.²⁷ Bringing in line the domestic norms with international law is a form of migration of legal norms.

25. UNODC, *supra* note 19, at 144 n.20.

26. Tebbe & Tsai, *supra* note 4, at 507.

27. See ALEC STONE SWEET & HELEN KELLER, *Assessing the Impact of the ECHR on National Legal Systems*, in FACULTY SCHOLARSHIP SERIES, 677 (2008).

International human rights norms can migrate a number of ways into the domestic legislation and into the application of laws by the judiciary and the executive. In the field of right of access to information, the most influential case so far is the *Claude Reyes and Others v. Chile*, adjudicated by the Inter-American Court of Human Rights (hereinafter, "IACHR").²⁸ This decision influenced countries beyond Chile and inspired right to information legislation in Nicaragua (2007), Chile (2008), Guatemala (2008), Uruguay (2008), El Salvador (2011), Brazil (2011) and Argentina (2016).²⁹ The Bill of the access to information law of Argentina even has a direct reference to the *Claude Reyes* judgment.³⁰

(A) *Claude Reyes and Others v. Chile*

The IACHR held in its judgment, concerning the refusal of an information request on the Río Condor logging project, that Chile violated the complainants' right of access to information in Article 13 of the American Convention on Human Rights (hereinafter, "ACHR"). It also held that Chile has to adopt measures to guarantee the right of access to information, remove laws and practices that violate and enact laws and practices "leading to the effective respect for these guarantees. In particular, this means that laws and regulations governing restrictions to access to State-held information must comply with the Convention's parameters and restrictions may only be applied for the reasons allowed by the Convention."³¹ Before this judgment, in 1999, 2003 and 2005 the Chilean Executive and Legislative had only enacted symbolic reforms in this field when "[t]he Court ordered Chile to 'adopt, within a reasonable time, the necessary measures to ensure the right of access to state-held information.' The embarrassing ruling [*Claude Reyes and Others v. Chile*] highlighted a glaring policy lacuna in the region's least corrupt country."³²

28. *Reyes v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am.Ct.H.R. (ser. C) No. 151, (2006).

29. EVIDENCE AND LESSONS FROM LATIN AMERICA, THE LATIN AMERICAN APPROACH TO TRANSPARENCY AND ACCESS TO INFORMATION, 5 (2012); CENTRO DE ARCHIVOS Y ACCESO A LA INFORMACIÓN PÚBLICA, VENCENDO LA CULTURA DEL SECRETO, 26 (2011).

30. *Proyecto de Ley de Acceso a la Información Pública* [Bill of the Law on Access to Public Information] (2016).

31. *Id.* at §101.

32. ROBERT GREGORY MICHENER, THE SURRENDER OF SECRECY: EXPLAINING THE EMERGENCE OF STRONG ACCESS TO INFORMATION LAWS IN LATIN AMERICA, 349-59 (2010).

(i) Fit

Although Chile had ratified the ACHR in 1990, the various Chilean administrations showed little interest in adopting a right to information law until the 2006 IACHR judgment. Chilean administrations “could afford to shirk real reform; the news media never took a strong interest in the issue, and both Presidents enjoyed legislative majorities and high approval ratings. Hence successive administrations had few incentives to please a limited constituency of right-to-public information advocates.”³³ Two months after the judgment President Bachelet announced the Pro Transparency Agenda of her government, which included the right to information law.

[T]he press faced the choice of either ignoring the issue or doing its civic part and providing coverage. In contrast to Ecuador, Guatemala, Mexico, Nicaragua, and Peru, the Chilean news media followed the lead of government, rather than vice versa. This represents an important point of differentiation. Even though the Chilean media ultimately followed the government’s lead and provided significant coverage of the right-to-public information law, a strong argument can be made that concentrated news media ownership played a significant role in more than half a decade of relative media indifference.³⁴

Surveys conducted by the Chilean Transparency Council (Consejo para la Transparencia), representative of Chile's population, show that between 2011 and 2015 an increasing percentage of the population became aware of the transparency law. The surveys also show that between 2012 and 2015 an annually increasing number of Chileans requested information from public bodies.³⁵ These statistics indicate that the migration of freedom of information norms into the Chilean legal system resulted in domestic norms that are accepted and used by average citizens.³⁶

(ii) Transparency and Completeness

The process of migration of the freedom of information norms was very transparent. The IACHR requested the State publish the most important parts of the judgment “in the official gazette and in another newspaper with extensive national circulation” and made clear the State's “obligation to adopt the legislative and other measures necessary to make these rights and freedoms effective.”³⁷ Jaime Gazmuri Mujica, one of the two senators

33. *Id.* at 350-52.

34. *Id.* at 358.

35. *Consejo para la Transparencia*, ESTUDIO NACIONAL DE TRANSPARENCIA SÉPTIMA MEDICIÓN ANÁLISIS DE RESULTADOS, 37-38, 48 (2015).

36. *Id.* at 54.

37. *Reyes v. Chile*, at paras.160-61.

introducing the Bill of the Law on Access to Public Information, recalled in his presentation of the Bill that the IACHR judgment gave a new impulse of the adoption of the law.³⁸

The IACHR judgment detailed features of the law that needed to be adopted. The court outlined that “these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials.”³⁹ Such level of detail goes far beyond “the freedom to seek, receive, and impart information” of Article 13 ACHR, but is in line with Article 2 ACHR. Article 2 requires “legislative or other measures as may be necessary to give effect to those rights or freedoms.” The Law on Access to Public Information provides for the right required by Article 13 ACHR and includes the components requested in the IACHR judgment.⁴⁰

(iii) *Yield*

The right of access to information has taken root in Chile since *Reyes v. Chile* and the adoption of the Law on Access to Public Information. The right to information laws introduced are known and used by a significant part of the country’s population. The Chilean Transparency Council is building up a solid right to information jurisprudence. The state of Chile that refused access to environmental information and resisted the disclosure throughout the eight years of litigation is now, in 2016, a promoter of the right to information. In the negotiation of a regional agreement on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in Latin America and the Caribbean, Chile is an active participant, supporting a broad right of access to information.⁴¹ The country also hosted the fourth meeting of the negotiating committee.⁴²

38. Biblioteca del Congreso Nacional de Chile, Historia de la Ley N° 20, 285 SOBRE ACCESO A LA INFORMACIÓN PÚBLICA 166 (2008).

39. *Reyes v. Chile*, at para. 163.

40. *Law No. 20285, Chile*, Sobre Acceso a la Información Pública 166 (2008).

41. *Text Compiled by the Presiding Officers Incorporating the Language Proposals from the Countries* (third version), http://repositorio.cepal.org/bitstream/handle/11362/39051/S1600429_en.pdf?sequence=7 (last accessed November 20, 2017).

42. UN ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *Santiago de Chile Será Sede de Nueva Ronda de Negociación Para Acuerdo Regional Sobre Derechos de Acceso en Asuntos Ambientales*, August 9, 2016, <http://www.cepal.org/es/comunicados/santiago-chile-sera-sede-nueva-ronda-negociacion-acuerdo-regional-derechos-acceso>.

International Level Norms of Defense/National Security Influence Domestic Civilian and National Security Norms

There are numerous bilateral and multilateral security alliances, which vary greatly in form and content.⁴³ NATO provides an example, from among this group, of how access to information norms of a security alliance can influence civil and national security norms of its members and partners. For NATO, this impact was felt in the Cold War and post-Cold War eras. Although information available on NATO access to information norms is limited, it is still worth examining this example of norm-migration, as the relevant rules of other military alliances are even less accessible.

Any country that is invited to join NATO is required to “implement measures to ensure the protection of NATO classified information.”⁴⁴ For example the Sub-Committee on Central and Eastern Europe of the NATO Parliamentary Assembly in 2004 reported that Estonia “amended legislation on the protection of classified information, to bring it into line with NATO standards.”⁴⁵ A country’s access to information laws are published and available for everyone, including NATO member states’ laws concerning national level protection of classified information. However, it is still not clear what the NATO standards are and what “bringing [national laws] into line” with the standards means.

Since 2006, when the Hungarian government started to draft a new Act on Protection of Classified Information (introduced to the Parliament in August 2008), the relevant NATO standards have become clearer.⁴⁶ The reasoning of the Bill explained that, the “experiences of applying the Act LXV of 1995 on State and Service Secrets and the duties originating from the NATO membership, as well as the new obligations originating from the integration into the European Union” brought about a general review of the State and Service Secrets Act.⁴⁷ The reasoning of the Bill also highlighted that C-M(2002)49, Security within the North Atlantic Treaty Organization NATO (hereinafter, “NATO Security Policy”) was among the international law norms providing the basis of the new Act.⁴⁸

43. STEFAN BERGSMANN, *The Concept of Military Alliance*, in SMALL STATES AND ALLIANCES 20–31 (2001).

44. *NATO Enlargement*, April 9, 2009, http://www.nato.int/summit2009/topics_en/05-enlargement.html.

45. SUB-COMMITTEE ON CENTRAL AND EASTERN EUROPE OF THE NATO PARLIAMENTARY ASSEMBLY, *Alliance Partnerships: Projecting Stability Beyond NATO’s Central and Eastern Borders*, para. 67, 153 PCCEE 04 E rev 1 (May 13, 2004).

46. T/6147 Számú Törvényjavaslat a Minősített Adat Vedelméről (Bill No. T/6147 on the Protection of Classified Information).

47. Act LXV of 1995 on State and Service Secrets was the predecessor of the Act CLV of 2009 on Protection of Classified Information.

48. *Id.*

Alasdair Roberts described five basic features of NATO's secrecy policy, based on the C-M(55)15(Final) version of the policy issued in July 1964. For the purposes of this article, it is worth summarizing four of them. The principle of *breadth* implies that "the policies a member state adopts regarding security of information should govern all kinds of sensitive information, in all parts of government. It eschews narrower approaches that would be limited, for example, to information received through NATO, or information held within military or intelligence institutions."⁴⁹ The principle of *depth* underpins "[t]he policy [that] errs on the side of caution when determining what information should be covered by secrecy rules."⁵⁰ According to the *need to know* principle, "individuals should have access to classified information only when they need the information for their work, not 'merely because a person occupies a particular position, however senior'."⁵¹ The *principle of originator control* sets out that "information may not have its classification reduced, or be declassified, without the consent of the government from which the information originated."⁵²

These principles are present in both the 1964 and the 2002 versions of the NATO Security Policy and only the principle of breadth underwent alteration. The earlier version of the NATO Security Policy requested from each country "a common standard of protection . . . to the secrets in which all have a common interest."⁵³ In contrast, the new version holds that "NATO nations and NATO civil and military bodies shall ensure that the agreed minimum standards set forth in this C-M are applied to ensure a common degree of protection for classified information exchanged among the parties."⁵⁴ The newer version no longer implies that NATO's security of information policy should govern all types of sensitive information in all parts of government. However, "classified information exchanged among the parties" covers a lot more than national security matters. NATO parties cooperate in countless areas such as criminal justice, public finance, or foreign policy through a variety of frameworks including the European Union or the International Monetary Fund. This cooperation inevitably involves the exchange of classified information unrelated to their NATO membership and duties. Any country that implements the principle of

49. Alasdair Roberts, *NATO, Secrecy, and the Right to Information*, 12 E. EUR. CONST. REV. 86, 88 (2003).

50. *Id.* at 88.

51. *Id.* at 89.

52. *Id.* at 89.

53. *Id.* at 88.

54. *Security Within the North Atlantic Treaty Organization* (NATO) C-M(2002) 49, at Point 9(a) of Enclosure B, <http://nbf.hu/anyagok/jogszabaly/C-M%282002%2949.pdf> (last visited November 20, 2017).

breadth as required by the NATO Security Policy transplants the NATO's "agreed minimum standards" into both civilian and national security legislation, and into the application of laws. The migration of the four principles included in the 2002 version of the NATO Security Policy can be examined in terms of fit, transparency, completeness and yield.

(i) *Fit*

Both international law and national legislation recognize the protection of national security as a ground for the restriction of the right of access to information. Countries joined NATO "for collective defence and for the preservation of peace and security."⁵⁵ These goals clearly pertain to the field of national security. When NATO's access to information rules are applied on information within the purview of collective defense and the preservation of peace and security, it can have two outcomes. Some restrictions stemming from NATO's Security Policy will harmonize with the national level legislation on (right of) access to information, while others will result in a conflict of norms.

For example, the principle of *depth* can become part of national access to information legislation without conflict when it is limited to a narrow information set and includes additional systemic safeguards against over-classification. In contrast, the principle of *need to know* cannot be reconciled within the same regulatory system with the right to know (right of access to information) and neither the principle of *originator control* with the right to impart information, which is a partial right of access to information enshrined by Article 19 of the UDHR and the ICCPR. The principle of *breadth* that would require the application of NATO minimum standards for the protection of – and as the other principles show rules of access to – all classified information exchanged among NATO states. Such a requirement will almost always conflict with domestic right to information provisions, as well as with provisions of other instruments of international law on exchange of information. As two or more contradicting set of standards cannot be applied at the same set of information at the same time, a conflict will almost always arise.

(ii) *Transparency*

It is mandatory for all NATO member states to apply the NATO Security Policy. Although the NATO Security Policy shapes the domestic legislation of any country that joins the organization, it was not accessible for the public until 2006, with only archival versions being made available for research

55. North Atlantic Treaty Pmb., Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

purposes. This means by 2006, 26 of the 28 NATO countries became NATO members without letting the public know what NATO membership would mean for national legislation and its application.⁵⁶

When NATO norms become part of any national legal system they have to appear in some form of domestic law. It is an axiom of any modern democratic system that laws should be public and accessible for anyone to take any effect on individuals. The requirement that laws be accessible and clear is present in the jurisprudence of the European Court of Human Rights, the United States Supreme Court and the Supreme Court of Canada. The jurisdiction of these courts covers all NATO member states.⁵⁷ Despite this, the transplant of the NATO Security Policy into national legislations lacked transparency for the vast majority of NATO countries.

(iii) Completeness

As NATO's access to information norms have never been made entirely accessible, it is not possible to assess the completeness of the migration of these norms into domestic legislations.

(iv) Yield

The differences between the 1964 and the 2002 versions of the NATO Security Policy are negligible from a right of access to information point of view. In the 1950s, when the first version of the NATO Security Policy was adopted, the British, Canadian, Danish, and Norwegian governments raised significant concerns regarding the policy.⁵⁸ With the exception of Luxembourg, all of the NATO member countries adopted right to information laws. Some were NATO members before adopting right to information laws, others were not yet members. In both scenarios, the access to information standards of NATO did not contribute to higher standards of right to information and eventually compliance with the NATO norms even resulted in the deterioration of the right in some countries. The lack of transparency around the NATO requirements means it is not possible to fully evaluate how these standards influenced domestic legislation. Beyond the

56. In 2006 the author of the present study requested and obtained through an information request from the Hungarian National Security Authority the Security Within The North Atlantic Treaty Organization (NATO) C-M (2002) 49 document and some further pieces of the rules that define the protection of classified information within the NATO, but a significant part of the relevant regulations remained inaccessible for the public.

57. *Comm. for the Commonwealth of Canada v. Canada*, (1991) 1 S.C.R. 139; *Grayned v. City of Rockford*, 408 U.S. 104 (1972), 108-09; *The Sunday Times v. United Kingdom*, *ECHR* §A. No. 30 (1979), para. 49.

58. *Roberts*, *supra* note 49, at 90-91.

concerns of NATO founding states discussed above, the NATO accession rounds of 1999 and 2004 produced various examples where governments either followed actual NATO requirements or used them as a pretext, with the result that right to information laws in their countries weakened.⁵⁹

Domestic Military Rules of a Country Define the Rules of a Military Alliance

It is not surprising that the United States, as the leading NATO power, initiated and was successful in setting the NATO protection of classified rules to reflect their domestic standards. "The NATO standards adopted in the late 1950s were not released by NATO until 2003."⁶⁰ "The criteria were closely modelled on those contained in an executive order on security clearances approved by President Eisenhower in November 1953."⁶¹

It is unclear how the Soviet Union influenced the Warsaw Pact's rules on the protection of secrets and whether the Warsaw Pact set such rules. What can be seen, are the traces of the secrecy regime of the Soviet Union in laws of many former Soviet Bloc countries, even after these countries went through a democratic transition. The Soviet classification system was constructed so that "[a]ll articles, documents and information are divided into three categories according to the degree of secrecy: 'of particular importance', 'top secret' or 'secret.' Information 'of particular importance' and 'top secret' constitutes a state secret, and 'secret denotes as official secret'."⁶²

There is a significant difference between the available examples of migration of domestic access to information norms to international level. In the civilian field, when the Tromsø Convention of the Council of Europe was drafted, the text of the treaty drew on the laws of a number of countries in a transparent process and the final text was adopted on a consensus basis. Contrary to this approach, in the national security fields when NATO set its Security Policy the member states either agreed to accept the United States rules or risked their NATO membership. The scarcity of accessible NATO norms does not allow a detailed analysis of this transplant. However, the fact that relevant NATO rules were not at all accessible for decades and that the reluctance of the UK to accept rules of the United States as NATO Security Policy could only be reconstructed through archival documents half a century

59. *Id.* at 86-87.

60. *Id.*

61. ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE*, 272 n.12 (2006).

62. VASILY MITROKHIN, *KGB Lexicon: The Soviet Intelligence Officer's Handbook*, 366 (2002).

later, shows the migration was not transparent.⁶³ Completeness of the migration of norms cannot be assessed as NATO never made its access to information norms entirely accessible. As regards the fit and the yield, considering that NATO already had 12 members when it was founded, it is hard to see why taking the rules of one-member state was the best choice when these rules had to match the diversity of all the member states.

Emergency (Martial) Laws or Military Rule Norms Applied in Civilian Jurisdiction

Emergency laws are as old as any form of separation of powers, and are addressed by both domestic constitutional law and international human rights instruments.⁶⁴ Emergency laws (or martial laws) provide extraordinary powers to the executive to address an emergency threatening the life of the nation. These powers are exercised in particular by civilian and/or military entities, typically, to uphold security and public order. “Originally the term ‘martial law’ was often identified with what is known today as military law, i.e., a system of military justice that is designed to guarantee discipline and order in the army and the governance of military.”⁶⁵ When a country proclaims a state of emergency there is a clear switch from *normal* laws (and the institutions that apply these laws) to emergency laws applied by executive bodies. By this proclamation national security norms become the norms to be applied in civilian matters too.

The ICCPR, the ACHR and the ECHR allow for a temporary derogation of the right to information in time of emergency. However, the African Charter on Human and Peoples’ Rights does not contain any provision that would allow for the derogation of any right. National level emergency laws are rather diverse and the derogation of the right to information is a possible feature of these rules. Whether an emergency law that restricts the right to information is applied in practice is a further question. Thailand provides an example for this.

The 1997 and 2007 Constitutions of Thailand recognized “the right to receive and to get access to public information in possession of a government

63. Roberts, *supra* note 49 at 128-29.

64. See International Covenant on Civil and Political Rights, Art. 4, Dec. 16, 1966; S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; AMERICAN CONVENTION ON HUMAN RIGHTS, Pact of San Jose, Costa Rica(B-32), Art. 47, July 18, 1978, 1144 U.N.T.S. 144; *European Convention on Human Rights*, EUR. CT. HUM. RTS., Art. 15 http://www.echr.coe.int/Documents/Convention_ENG.pdf.

65. Oren Gross, ‘Control Systems’ and the Migration of Anomalies, in THE MIGRATION OF CONSTITUTIONAL IDEAS 403, 404-05 (Sujit Choudhry ed., 2006).

agency.”⁶⁶ The Official Information Act was adopted and entered into force in 1997.⁶⁷ The civilian laws of Thailand provide for the right to seek, receive and impart information.⁶⁸ In 2014 General Prayut Chan-o-cha announced that “to maintain peace and order and bring back peace into all groups and all sides as soon as possible, I used law section 2 and 4 on Martial law 2457, to announce martial law all over Thailand.”⁶⁹ The Martial Law 2457 adopted in 1914 was amended several times over the last century and unsurprisingly contains provisions empowering the military authority, among others, to “prohibit the issuance, disposal or distribution or dissemination of any book, printed material newspaper, advertisement, verse or poem.”⁷⁰ Less than a year after the proclamation of martial law it was lifted and replaced by an order issued by General Prayuth Chan-ocha in his capacity as Head of the National Council for Peace and Order. The new provision does not materially differ from the one contained in the Martial Law.⁷¹ Although this provision is not formally martial law, (it has been lifted and the order was issued in line with the emergency provisions of the 2014 Interim Constitution) it remains that “the concept of martial law has always been rather vague as were its operative and implementations guidelines.”⁷²

Application of Civilian Access to Information Norms to National Security Administration

Since the end of the Cold War there has been a growing consensus on the need for democratic oversight of security and intelligence services. Regional and global international organizations have adopted and proposed a wide range of norms in this field.⁷³ A parallel development is that democratic oversight and anti-corruption measures not only alter security and intelligence administrations, but also alter military administrations. These

66. Constitution of the Kingdom of Thailand, B.E. 2540 (1997), §58; *see also* Constitution of the Kingdom of Thailand, B.E. 2550 (2007) § 56.

67. Official Information Act, B.E. 2540 (1997).

68. Constitution of the Kingdom of Thailand B.E. 2550 (2007) §45, contains a provision, “A person shall enjoy the liberty to express his opinion, make speech, write, print, publicize, and make expression by other means.”

69. ARIRANG NEWS, *Thailand's army declares martial law*, YOUTUBE (MAY 20, 2014) <https://www.youtube.com/watch?v=Vw6dFOhBooc>.

70. Martial Law B.E. 2457 (1914), §11 para. 2.

71. Order number 3/2558 (3/2015) issued by General Prayuth Chan-ocha in His Capacity as Head of the National Council for Peace and Order (NCPO), unofficial translation, <http://www.prachatai.com/english/node/4933> (last visited November 20, 2017).

72. Gross, *supra* note 65, at 404.

73. HANS BORN AND IAN LEIGH, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, 14 (2005), <http://www.dcaf.ch/sites/default/files/publications/documents/making-intelligence.pdf>.

measures are mainly exercised by the legislative and judicial branches of power and by the independent institutions such as court of auditors or ombudspersons. However, thanks the surge of the right to information, ordinary citizens are gaining access to national security information of unprecedented quality and quantity.⁷⁴ Although varying from country to country, there is a sizeable group of countries that brought transparency into this field and among others publish their intelligence and security services' annual reports, conduct open public procurement tenders for a wide range of goods and services, publish supreme audit institutions' reports on national security entities and civilian courts adjudicate civil, administrative or military cases of the sector.

The right of access to information enables oversight by individuals, journalists, NGOs and other legal persons in two main areas: the exercise of public authority and the use of public funds. In over 100 countries that adopted the right to information laws everyone has the right to find out the how civilian administration spends public funds and manages public assets. Contrary to the civilian administration in most countries, details of defense budgets were traditionally considered to be sensitive national security information as budgets may reveal the capabilities of armed forces. Numerous countries such as Egypt, China, the Kyrgyz Republic, and Saudi Arabia follow this logic.⁷⁵ At the same time there are countries that strike a different balance between national security and democratic accountability. South Korea, for example, follows a gradual approach in disclosing defense budget information.⁷⁶ "NATO members and partner countries, for example, are required to submit defense spending information on an annual basis. The merit of such practices is now pushing other regions to create similar

74. See *Transparency International UK, Defence and Security Programme: Government Defence Anti-Corruption Index*, <http://government.defenceindex.org> (last visited November 15, 2017).

75. Hans Born, European Parliament – OPPD: Parliamentary Oversight of the Security Sector, 55 (2013), quotes William J. Dobson, *The Dictator's Learning Curve: Inside the Global Battle for Democracy*, 209 (2012), <http://www.dcaf.ch/Publications/Parliamentary-Oversight-of-the-Security-Sector7>; Transparency International UK, *Defence and Security Programme: The Transparency of National Defence Budgets*, 7 (2011), http://ti-defence.org/wp-content/uploads/2016/03/2011-10_Defence_Budgets_Transparency.pdf.

76. "One important change introduced by the new civilian government in 1993 was to divide the defense budget delivered to the National Assembly into three categories: category A budget items are aggregated and are presented to the entire National Assembly; category B items are disaggregated and are revealed without restrictions to the members of the National Assembly Committee of National Defense; and category C items are further disaggregated and revealed to the Committee of National Defense with certain restrictions. The entire defense budget was previously deliberated as a lump sum." JCHUL CHOI, *Chapter 6: South Korea, in ARMS PROCUREMENT DECISION MAKING VOLUME I: CHINA, INDIA, ISRAEL, JAPAN, SOUTH KOREA and THAILAND*, 196 (Pal Singh R ed. 1998).

initiatives”, such as the members of the South American Defense Council which result in increased regional security and stability.⁷⁷

*International Level Norms of Defense/National Security Influence
International Civilian Norms*

A clear example of an international level migration of defense/national security norms into the civilian domain is the replacement of the European Union’s protection of classified information rules with NATO norms. Tony Bunyan, the director of the civil liberties NGO Statewatch, described the “Summertime Coup” in which under the leadership of Javier Solana,⁷⁸

the top-level committee of Brussels-based permanent representatives of the 15 EU member states, COREPER, agreed in secret to replace the 1993 Code of access to EU documents with a new code of access to meet the demands of NATO for secrecy. Only three countries voted against - the Netherlands, Finland and Sweden. This decision was formally approved by another secret process – “written procedure”, whereby a telexed text is agreed unless a EU government objects - on 14 August 2000.⁷⁹

These amendments affected public access to the Council's documents. At that time, the Council consisted of the ministers of all European Union member states and was an essential decision-maker of the EU. It had legislative functions and also held the executive power of the EU. The amendments resulted in several major changes. The following assessment builds largely on the analysis prepared by Statewatch.⁸⁰

First, the public cannot have access to Council documents classified as TRÈS SECRET/TOP SECRET, SECRET or CONFIDENTIE. The new Article 1 also made it clear “[w]here a request for access refers to a classified document within the meaning of the first subparagraph, the applicant shall be informed that the document does not fall within the scope of this Decision.”⁸¹ This Decision functioned as the right to information law

77. TRANSPARENCY INTERNATIONAL UK, *Defence and Security Programme: The Transparency of National Defence Budgets*, 9 (2011), http://ti-defence.org/wp-content/uploads/2016/03/2011-10_Defence_Budgets_Transparency.pdf (last visited October 30, 2017).

78. Javier Solana was Secretary General of the NATO from 1995 to 1999 and subsequently the High Representative for the Common Foreign and Security Policy, Secretary General of the Council of the European Union between 1999 and 2009.

79. Tony Bunyan, *26 July 2000 - The Day of the Infamous "Solana Decision" - How Did Mr Solana Reply to a Letter He Had Not Received?*, <http://www.statewatch.org/news/2002/mar/16solana.htm> (last visited October 30, 2017).

80. See Council Decision of 20 December 1993, *Public Access to Council Documents*, OJ L 340, 31.12.1993, 43-44, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993D0731>.

81. *Id.*

of the Council, which means practically, if a document is not under the scope of the law the right cannot be exercised.

Second, the amendments meant that any Council document that in any manner refers to any classified information regarding matters of security and defense, military or non-military crisis management, can be made available to the public only with “the prior written consent of the author of the information in question.”⁸² Such author may be NATO or other third parties. Statewatch pointed out that the “general inclusion of ‘non-military management of crises’ is particularly deceptive. This includes the use of EU police forces in the role of an EU para-military force, as agreed at the Summit concluding the Portuguese Presidency, some 5,000-strong (with 1,000 on stand-by), in third world and EU locations.”⁸³

Third, decisions on access to documents are to be prepared by the same public officials (in the relevant law enforcement and security fields) who are authorized to access these documents in any case. Quite likely are the same persons whose findings, opinions, proposals may be challenged in public if the information is disclosed.

Fourth, according to the rules preceding the above changes, as the main rule the public register of the Council included references “to the document number and the subject matter of classified documents.”⁸⁴ There was also an exception if disclosure of the document number and the subject matter could undermine various public and private interests, such as public security, international relations, protection of privacy (listed in the same document), then it prescribed that no reference shall be made to the subject matter.”⁸⁵ Following the amendment “the public register of Council documents contains no reference to documents classified TRÈS SECRET/TOP SECRET or SECRET or CONFIDENTIEL.”⁸⁶ These changes allow for an assessment of the migration of NATO norms into the EU legal system.

(i) *Fit*

The three countries that voted against the proposed changes held that “the confidentiality of Council documents on the common European security and defense policy (ESDP) can be guaranteed without the a prior exclusion

82. *Id.*

83. *Analysis of the Working Document to Change the 1993 Code of Access to EU Documents*, <http://www.statewatch.org/news/jul00/05solana3.htm> (last visited October 30, 2017).

84. COUNCIL DECISION (EC) No. 23/2000 of 6 Dec. 1999, *Improvement of Information on the Council's Legislative Activities and the Public Register of Council Documents* (1999).

85. *Id.*

86. Council Decision of 14 August 2000 *amending* Decision 93/731/EC Public Access to Council Documents and Council Decision and 2000/23/EC, *Improvement of Information on the Council's Legislative Activities and the Public Register of Council Documents*.

of documents from the scope of the Council Decisions on public access to Council documents and on the public register of Council documents.⁸⁷ The circumstances of the introduction (i.e. the lack of transparency) of the rules on access to Council documents and the objection of three member states out of fifteen, indicate that this transplant of norms was not a good fit.

(ii) Transparency

The lack of access to the text of the NATO Security Policy meant that a substantive part of the norms to be transplanted, namely the NATO requirements with which the EU rules were supposed to be brought in line, was not accessible for the public. Moreover, not only was the substance of the access to information rules inaccessible, but also the process excluded the public.

In the public arena the Commission, Council and European Parliament were engaged on a process of adopting a new Regulation on the citizens' right of access to documents to meet a commitment in the Amsterdam Treaty. In the secret confines of the Council here was the top official, working to meet NATO requirements, to permanently exclude whole categories of documents from public access.⁸⁸

(iii) Completeness

Since NATO has never made its access to information norms entirely accessible, it is not possible to assess the completeness of the migration of these norms into EU law.

(iv) Yield

It is beyond the scope of this article to assess how this instance of transplant of NATO rules helped the development of the cooperation of the EU and NATO. What is clear is that these changes of EU law resulted in a significant erosion of the right of access to information held by the Council of the European Union.

87. *Statement by the Danish, Netherlands, Finnish and Swedish Delegations*, COUNCIL OF THE EUROPEAN UNION, 10782/00 LIMITE, INF 96 JUR 271, July 31, 2000, <http://www.statewatch.org/newcode5.htm>.

88. Tony Bunyan, *Chapter 6: The "Solana Decision"*, in *SECURITY AND OPENNESS IN THE EUROPEAN UNION - THE ONGOING STRUGGLE FOR FREEDOM OF INFORMATION*, <http://www.statewatch.org/secret/freeinfo/ch6.htm>.

International Civilian Norms Influence International Defense/National Security Norms of Access to Information

There is no example available for this direction of migration, when of international level civilian access to information norms influence defense/national security norms. Such a case would be, for example if the United Nations right to information norms would influence NATO's access to information norms.

Domestic Defense/National Security Norms Influence International Civilian Norms of Access to Information

There is no real life example available for this direction of migration, when one or more countries' domestic defense/national security norms on access to information would migrate into international level civilian law.

International Civilian Norms Influence National Level Norms of Defense/National Security

Decisions of Council of Europe bodies show two cases of international civilian access to information norms influencing domestic national security norms. Both cases concerned human rights violations committed by intelligence agencies.

(A) Illegal Transfers and Secret Detentions in Europe

The Council of Europe's investigation into illegal transfers and secret detentions in Europe, examined the US Central Intelligence Agency's Detention and Interrogation Program in Council of Europe member states.⁸⁹ This is an example of international civilian access to information norms interacting with domestic national security norms.

In 2009, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (hereinafter, "PACE") started an inquiry into the illegal transfers of detainees and secret CIA detentions. The rapporteur faced two main challenges. First, the lack of cooperation by governments and authorities that participated in these human

89. *The Council of Europe's Investigation into Illegal Transfers and Secret Detentions in Europe: a Chronology*, <http://www.assembly.coe.int/nw/xml/News/FeaturesManager-View-EN.asp?ID=362> (last visited October 30,2017); S. SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO.113-288 (2014).

rights abuses, and second the excessive state secrets regulations.⁹⁰ The PACE pointed out in the resolution originated from this report "[i]t is unacceptable that activities affecting several countries should escape scrutiny because the services concerned in each country invoke the need to protect future cooperation with their foreign partners to justify the refusal to inform their respective oversight bodies."⁹¹ The PACE also called on the Council of Europe member and observer states to set up parliamentary oversight for secret services, "while ensuring that it has sufficient access to all the information needed to discharge its functions while respecting a procedure which protects legitimate secrets."⁹² It also requested "an adversarial procedure before a body allowed unrestricted access to all information, to decide, in the context of a judicial or parliamentary review procedure, on whether or not to publish information which the government wishes to remain confidential."⁹³

The resolution was accompanied by a set of recommendations to the Council of Europe Committee of Ministers which included that the Committee of Ministers should draw up recommendations, among others, on state secrecy. In particular, the resolution stressed the importance that human rights abuses can be properly investigated, perpetrators held accountable, victims can get reparations and the public can learn about these violations.⁹⁴ In its reply, the Committee of Ministers invited "member States to review, where necessary" their rules on the procedures of "facilitating the establishment of special procedures," which would allow for the examination of such human rights abuses.⁹⁵ This reply could not have been weaker and unsurprisingly the Committee of Ministers have not drawn up any recommendations to address these issues since 2012. The question whether any of the forty-seven Council of Europe member states amended any legislation as a result of the resolution exceeds the limits of this article and would require a comprehensive survey. In this case, however, the legal transplant of access to information norms seems to be incomplete.

90. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations, Explanatory Memorandum*, <https://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12952&lang=EN> (last visited November 5, 2017).

91. *Id.*

92. *Id.*

93. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations, Resolution 1838* (2011), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18033&lang=en> (last visited November 5, 2017).

94. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations, Recommendation 1983* (2011).

95. COUNCIL OF EUROPE, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations*, Doc. 12969, June 26, 2012.

(B) *R.V. and Others v. the Netherlands*

In 1984 an anti-militarist activist group raided the offices of a team of Dutch counter-intelligence detachment (450-CID) and disclosed the documents they found in the office, revealing among others, names of civilians and organizations that were noted on the "planning board of the so-called Infiltration-Influencing Outline (Infiltratie Beïnvloedings Schema; IBS) as dangerous to the State. Fifteen of these civilians were denoted by a red tag as hazardous to a military mobilisation."⁹⁶ Dutch nationals whose names were on the planning board wanted to find out what information were held on them by intelligence or security services. In "subsequent debates in Parliament in March 1985, it became apparent that the 450-CID may have over-stepped its authority by investigating persons and organisations active in the so-called 'Peace Movement'."⁹⁷ In 1988, after unsuccessfully requesting information under the Publicity of Public Administration Act (Wet Openbaarheid van Bestuur; Wob) from the Minister of Defense and the Minister for Home Affairs and exhausting domestic remedies, ten individuals filed applications before the European Commission of Human Rights seeking remedy for the violation of their rights under Article 8 of the European Convention of Human Rights.⁹⁸ Parallel with the court domestic procedures, the Royal Decree that regulated intelligence and security services was replaced by an act of the Parliament that entered into force on 1 February 1988. The application was filed with the European Commission of Human Rights (hereinafter, "ECoHR") in July and August 1988. The report prepared by the ECoHR moved on to further instances of the Council of Europe, while in 1994 the Council of the State of the Netherlands found in two judgments that the provisions of the new Act were still not in conformity with Article 8 and 13 of the European Convention on Human Rights and the government of the Netherlands initiated a further legislative reform.⁹⁹ In these judgments the Council of State relied on the ECoHR's report and referred to the case-law of the ECtHR. "After this decision, requests for access to security service

96. *Id.* at §II (A).

97. *Id.*

98. *R.V. and Others v. The Netherlands*, Applications Nos. 14084/88, 14085/88, 14086/88, 14087/88, 14088/88, 14109/88, 14173/88, 14195/88, 14196/88, and 14197/88 (admissibility) (Eur. Comm'n on H.R.), <http://hudoc.echr.coe.int/eng?i=001-836> (last visited November 5, 2017).

99. *Interim Resolution DH (2000) 25*, Human Rights Application No. 14084/88, *R.V. and Others v. the Netherlands* (Adopted by the Committee of Ministers on February 14, 2000 at the 695th meeting of the Ministers' Deputies), <http://hudoc.echr.coe.int/eng?i=001-51733> (last visited November 20, 2017).

files were to be examined under the Government Information (Public Access) Act (Wet openbaarheid van bestuur; Wob).¹⁰⁰

As a result of the sixteen year long legal battle at the domestic and international level the new Intelligence and Security Services Act that entered into force in 2002, included

the procedure for the treatment of requests for access to security service is outlined in the Act, as well as the instance competent to receive appeal. The Act lays an obligation on the security services to publish an annual report which is submitted to Parliament, in which areas of specific attention of the services for the past and coming year are outlined.¹⁰¹

Domestic Civilian Norms of Access to Information Influence International Defense/National Security Norms of Access to Information

There is no real life example available for the direction of migration when a country's civilian access to information laws influence international level defense/national security norms of access to information. A theoretical example could be where NATO revokes its access to information regime and replaces it with a member state's right to information law.

CONCLUSION

This article showed through a number of concrete examples that access to information norms of the civilian and national security administrations are distinct and that these norms are moving between the two fields on the national and international level in nine of the twelve possible directions. Further research may identify examples for the remaining three directions of migration of norms. The migration of access to information model can be easily reused for the examination of comparable movements between civilian and national security fields. These movements include the migration of norms of right to privacy, procedural rights (civilian court and court martial), and labor rights.

The four evaluative tools of Tebbe and Tsai functioned well in the field of analyzing migration of access to information norms. These tools highlighted crucial aspects of the migration of norms which provide a basis for further analysis concerning questions of legitimacy of adopting and using transplanted norms. Some norms do not fit very well into their new environment and sometimes this can be foreseen before transplanting act

100. *Final Resolution CM/ResDH (2007) 86*, Human Rights Application No. 14084/88, R.V. and Others v. the Netherlands (Adopted by the Committee of Ministers on June 20, 2007, at the 997th Meeting of the Ministers' Deputies), <http://hudoc.echr.coe.int/eng?i=001-81529> (last visited November 20, 2017).

101. *Id.*

takes place. In other cases, the migration is not very transparent and raises questions about the democratic authorization of the decision-makers to transplant norms in an obscure manner. Completeness and yield brings up the question “was it worth it?” The answer is not always positive. In the field of access to information, which is one of the fundamentals of democratic rule of law systems, major shortcomings identified by any of these tools ought to raise serious concerns.

The reasons behind each example of migration of norms featured in this article deserve further research in the field of information policies. Policy, lawmakers, and everyone else taking part in public debate concerning the right of access to information and national security would benefit from a clearer picture of why these norms are moving and which entities have a role in transplanting access to information norms.