Access to Information in International Organizations
- the EU and UN

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Abstract

It has been argued that transparency has become a global public good and thus international organizations have become subject of demands for more transparency. This paper analyses the access to documents rules of the EU and the UN and maps how the two organizations balance between the novel calls for transparency against the centuries old tradition of secrecy in the international fora. The focus is on three points of analysis: how the concept of transparency materializes in the laws of international organizations, including the decision-making power; what is the role of the human element of the bureaucracies and how do the policies work in practice. The main conclusion is that the interests of national governments often override the under-represented global (regional) social interests, despite the seemingly exhaustive legal frameworks. A mandate alone is not enough to institutionalize transparency against the background of secrecy.
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<tr>
<td>CoJ</td>
<td>European Court of Justice</td>
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<td>CRP</td>
<td>(UN) Conference Room Paper</td>
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<td>DPI</td>
<td>(UN) Department of Public Information</td>
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<td>ECCC</td>
<td>Extraordinary Chambers in the Court of Cambodia</td>
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<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<td>EU</td>
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<td>Millennium Development Goals</td>
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<td>MEP</td>
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<td>NGO</td>
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<td>(UN) Official Document System</td>
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<td>TFEU</td>
<td>Treaty of the Functioning of the European Union</td>
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<td>TTIP</td>
<td>Transatlantic Trade and Investment Partnership</td>
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<td>UN</td>
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<td>United Nations Bibliographic Information System</td>
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<td>UMOVIC</td>
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Introduction

The inviolability of diplomatic documents and the need for confidentiality in international political negotiations date back to the times when the heads of state had absolute sovereignty in the foreign affairs of the state. The need for secrecy is so old a concept that it is assumed readily and without question in most of the scholarship.¹ On the other hand, transparency and accountability are fairly new concepts, even if their roots can be traced to the beginnings of democratic governance - for example in freedom of expression articles in late-18th century constitutions and laws.²

In the late-20th - early 21st century period, the ownership of information and the information production³ climates have changed drastically, but this is not enough to override centuries of secrecy in international politics. Freedom of information laws were first introduced in Europe and North America⁴, and have subsequently spread to over 100 countries. One of the catalysts for the widening of access to information legislation is certainly the Internet, since more than 80% of the relevant laws were passed after 1999.⁵ In the past 15 years, most prominent near-universal international and supranational organizations have developed their own transparency regimes that reflect the balance between secrecy and openness. Nevertheless, these regimes and the resulting dynamics between the organizations and its Member States have remained underexplored.

There is no international treaty that applies to international organizations that codifies transparency or secrecy⁶, and no comprehensive theory on transparency in the international legal scholarship. The legality of both resorts to the internal law of the organizations.⁷ It is important to note that international organizations that are not parties to the treaties are not bound by the rules inscribed in them, and the obligations of Member States are not automatically transferred to the organizations they create. The internal law of the organizations is the only applicable law, and each organization only applies its own

² Acknowledging that transparency is an ambiguous concept, in this paper transparency is mainly used to refer to access to documents.
⁴ Most sources refer to the Swedish Freedom of the Press Act of 1766 as the first freedom of information act.
⁶ Diplomatic secrecy between states is codified in the Vienna Convention on Diplomatic Relations of 1961, and in the work of the International Law Commission in preparation for the Convention (1947-1961). Access to information is written in Art. 19 of the Universal Declaration of Human Rights (1948), and Art. 19 (2) of the International Covenant on Civil and Political Rights (1966). Various documents have established that the “right to access information held by public authorities is a fundamental human right”, but the obligation is only placed on national authorities. See the the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004.
rules. There has been some convergence between organizations, which is consistent with the theoretical framework of global administrative law. However, the decision-making power on what is transparent and what is confidential still rests largely with nation-states and politically-elected civil servants. In addition to the rules, another relevant dimension is the role of the civil service, who have direct written obligations to preserve the confidentiality of documents and the negotiation process.

In the academic sphere, it has been claimed that transparency has become a global public good especially as a result of decision-making becoming more globalized. Thus furnishing transparency only at the national level has become inadequate to serve its purpose. We could argue that in theory, the bureaucracy of international organizations has an obligation to the global society to facilitate transparency. But, the existing organizational culture of international organizations has not (yet) evolved to the point where it supports the global public interest of transparency. In the national context, there is democratic and direct accountability to constituents, but at the global level the interests of the global society are unclear and lack a designated mouthpiece. The global institutions have tried to find the “sweet spot” between releasing too little information, which would draw criticism from civil society, and releasing too much, which will draw criticism from national governments.

Over the past decades transparency as a broad concept has started to gain wide recognition as an important element of institutional legitimacy for global institutions. The European Union in particular has been described as making a “tremendous stride” from the 1980s to date. The EU Regulation 1049/2001 on public access to documents was formulated in a way that mirrors closely national freedom of information rules. At the other end of the spectrum, the United Nations has a much larger and more economically diverse membership; a much broader variety of attitudes towards information; a significant physical distance between much of the global society and the institution; and a bureaucracy that has been reluctant to apply the transparency regulations in spirit. The current UN access to information regime is based on a Secretary-General’s Bulletin from 2007, as well as the individual regulations of the different agencies and programmes. Some of these mandates, in particular the new UNDP and UNEP rules from 2015-2016, have adopted an approach that is similar to the EU Regulation. There is, however, evidence that the agencies interpret the function of the legislation in terms of protecting the secrecy of the negotiating process and controlling the projected image of the organization.

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This paper will explore the current access to documents rules and practices of the UN and the EU to see how the notion of transparency is actually reflected in the history, the rules and the practices of the international organizations. We begin with a brief description and comparison of the legal framework and history of transparency in the UN and the EU. Then we will use evidence from the two different organizations to demonstrate the following points. First, we will analyze how the balancing act between transparency and secrecy is reflected in the EU and UN regimes. Second, we will outline a specific feature of transparency in international organizations, namely the dynamics between the Member States and the institutions and the role of the bureaucracy. We will also offer evidence of some more practical questions of realizing the right of access to documents that also reflect the state of recognition of transparency as a global public interest in the UN and the EU.

The existing research on transparency has generally focused on analyzing transparency rules and policies of individual international organizations or specific policy fields. The emphasis is often on justifying transparency or analyzing secrecy historically. This paper takes the innovative step into analyzing two different international organizations in parallel to uncover the dynamics of transparency in international organizations more generally. The evidence presented in this paper suggests that the dynamics described are not limited to only one institution even though the legal frameworks on transparency of the institutions are very different.

I. Regulating transparency in international organizations

Freedom of information laws have spread to a large number of national legal systems, each with their own specificity. International organizations have grappled with questions of transparency and have arrived at an interesting point in the legal development. The EU serves here as an example of an international organization with a fairly developed access to documents Regulation that is comparable to the freedom of information laws passed in its Member States. The UN’s transparency regime is more obscure and it is difficult to make theoretical conclusions without referencing the concrete evidence that the EU provides.

We need to be cognizant of the differences between the EU and the UN while making the parallel. The EU as an entity does not fit the dichotomy of a state or an international organization, since it has strong supranational features and a very different legal framework and structure compared to the UN. The UN, as an international organization is considered to be a subject of public international law, but does not

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have the same powers\textsuperscript{14}, responsibility\textsuperscript{15} and autonomy as nation states, and is generally not considered a supra-national institution.\textsuperscript{16} It stems from early case law of the European Court of Justice that the EU is an autonomous legal order, which entails that it is an integral part of the legal systems of the Member States and is binding on Member States’ national courts.\textsuperscript{17} Another related issue is competence; the founding Treaties of the EU have been amended over the years and each successive Treaty amendment has increased the areas of competence the EU holds over its Member States.\textsuperscript{18} The division of competence and the substance areas where the EU and the UN are active naturally reflect the kind of documents that are created in the organizations but also who creates the documents; is it the Member States or the institutions. Finally and most obviously the UN is a near-universal organization while the EU is a regional one. This section will describe the legal framework on transparency of the UN and the EU and will demonstrate how they have evolved through history.

A. Transparency in the UN

1. The Institutional framework in the UN

If we were to analyze the transparency mandates of the UN and the UN agencies in isolation from other organizations, or from the application of the rules, we might conclude that there have been significant developments that have led to very evolved transparency regimes in the largest near-universal international organization. However, the access to information mandates do not exist in isolation from either the general principles of international organizations law, or from the organizational history.

The institutional machinery of the UN, and its applicable moving parts, are certainly vital in the background of the legal structure of the transparency/secrecy legality within the UN context. The UN has 5 active principal organs - the General Assembly, the Security Council, the Economic and Social Council, the International Court of Justice, and the Secretariat. Those can be divided in two groups according to their composition - the Assembly, the Security Council and ECOSOC are composed of Member States’ representatives who vote on resolutions and other decisions; the ICJ and the Secretariat are independent\textsuperscript{19}, neutral international bodies. Meetings of the UN bodies, including hearings at the ICJ,

\textsuperscript{14} See Hawkins, Darren \textit{et al.} (eds), \textit{Delegation and Agency in International Organizations} (Cambridge University Press, 2013) for discussion of the attributed powers; the doctrine of implied powers has been at the root of several key ICJ cases, most notably in the Reparations for Injuries Advisory Opinion from 1949. From a more idealistic perspective, international organizations have been deemed to have ‘inherent powers’, see Seyersted, Finn, \textit{Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon the Conventions Establishing Them?} (Copenhagen, 1963).

\textsuperscript{15} The issue of responsibility of international organizations came into focus after the collapse of the International Tin Council in 1985, and in 2011 the ILC adopted the Articles on the Responsibility of International Organizations.

\textsuperscript{16} Except for the EU. In the Reparations for Injuries Advisory Opinion, the ICJ explicitly states that an international organization is “certainly not a Super-state”.

\textsuperscript{17} C-6/64 Costa v E.N.E.L. ECLI:EU:C:1964:66.

\textsuperscript{18} Craig, Paul and de Bürca, Grünne, \textit{EU Law - Text, Cases and Materials} (Oxford: Oxford University Press, 2015, 6th edn), 27.

\textsuperscript{19} The independence of the UN Secretariat is enshrined in the UN Charter Art. 100 and 101.
are now often opened to accredited visitors - media or NGO representatives - and recently many official sessions are being streamed live on the UN website.

The staff of the ICJ and the UN bureaucracy are supposed to be loyal only to the purpose of the organization, and support the negotiations and law-making activities of the diplomats\(^{20}\). In practice, the budget of the UN consists entirely of Member States’ contributions, and there is a lot of pressure on the Secretariat not to frustrate the interests of the largest contributors. The mandates for transparency and confidentiality are voted by state representatives in the plenary bodies, and the administrative implementation is the jurisdiction of the Secretary-General and the other politically-elected heads of organizations\(^{21}\). As we will demonstrate, it is the bureaucratic loopholes and the diplomats-bureaucrats see-saw that protect the secrecy status quo.

2. Legal principles and the mandates

The starting point of international organizations legal scholarship is usually functionalism - the notion that global institutions were created by states to fulfill a certain purpose and infused with the legal personality, powers, privileges and immunities necessary to achieve that goal. The core of the ICJ jurisprudence supports this theory, although there is some disagreement on whether the legal qualities exist only inasmuch as they are bestowed by the nation states, and how much autonomy does the institution command.\(^{22}\) From another perspective, the purpose of international organizations is to preserve the sovereignty of states and to support the representatives of national governments in their pursuit of national interests. The interests of states are not always aligned with the purpose of the organizations, and this enmeshment and internal conflict, as well as the qualities of the negotiation process have affected the legal personality, powers and immunities. Therefore, the activities of the global institutions fluctuate between the overt (function) and covert (state interest) purposes, and this dichotomy reflects very clearly in the transparency-confidentiality polarity.

In terms of transparency and legitimacy, international organizations are not directly accountable to national electorates, or subjects of the jurisdiction of national courts. Global institutions are accorded a number of privileges and immunities (including immunity from prosecution), and that has necessitated

\(^{20}\) See UN Charter Art. 100.

\(^{21}\) According to a report by the Joint Inspection Unit, “The selection of executive heads in the United Nations system organizations, including the United Nations Secretary-General, falls within the prerogative of Member States. Member States also determine the conditions of service of the executive heads. … The selection of the Secretary-General is unique in comparison with that of the other executive heads, given the right of the permanent members of the Security Council to cast a negative vote against any candidate (Veto),” JIU/REP/2009/8, Selection and Conditions of Service of Executive Heads in the United Nations System Organizations, 2009.

giving them the ability to create their own internal law, including access to information rules23. According to Burci, the UN considers confidentiality to be “a necessary legal tool to achieve [their] purpose”, considering that “their mandate was essentially to co-operate with their Member States and other stakeholders”. It is clear that the inviolability principle is based on a “functional necessity” test that is rooted in the interests of states as negotiating parties, as third parties to UN activities, and as source of many documents in question.

Against the background of national interests and (for the first 50 years24) limited mandate for participation of global civil society, the United Nations has maintained a lopsided balance between openness and secrecy. We could trace the beginning of the UN confidentiality mandate back to the League of Nations. The archives of the League were declared inviolable in Article III of the 1921/1926 modus vivendi with Switzerland, and this principle was introduced without much discussion by the Preparatory Commission of the United Nations in the Convention of the Privileges and Immunities of the UN, adopted by the General Assembly on 13 February 1946.25 Naturally, the provisions assume a very broad understanding of archives that has been further developed in the access to information policies in the Secretary-Generals' Bulletins that we will analyze below.26 The inviolability of the archives is said to derive from the “fundamental immunities for the purpose of protecting the independent exercise of [the international organization’s] functions” and “the protection of the privacy and safety of third parties”.27

Again on 13 February 1946, General Assembly resolution 13 (I) "Organization of the Secretariat" created the Department for Public Information (DPI). Part 11 of this resolution, entitled "Information", says that,

“The United Nations cannot achieve its purposes unless the peoples of the world are fully informed of its aims and activities. “

This mandate appears to include an express obligation on the side of the organization to release information to the “people of the world” or the global society. This information dissemination responsibility is tied to the function of the organization, which, as pointed out above, is the source of the legality of international organizations law. On the other hand, the specific DPI mandate was and is limited to dealing with the press and civil society, including creating and managing places where official

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24 Art. 71 of the UN Charter states: “The Economic and Social Council [ECOSOC] may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within competence”. It was only 22 years later, in 1968, that ECOSOC Resolution 1296 established the consultative status of international NGOs, and in 1996 Resolution 1996/31 gave eligibility for accreditation to sub-regional, regional and national NGOs.
25 Art III, Section 6 Convention on the Privileges and Immunities of the Specialized Agencies has identical content.
27 Ibid.
UN documents could be accessed before the Internet - the UN information centres (63 around the world).

The first (one paragraph long) UN procedure for declassification of documents was released in 1956. The document only established that the jurisdiction for declassification rested with the Executive Office of the Secretary-General, in consultation with the Offices of Legal Affairs and Conference Services, as well as the issuing office. The 1973 revision of the policy elaborated the first presumption for openness, where a document is declared confidential only as an exception, since “the work of the United Nations should be “open” unless circumstances require confidentiality.” [emphasis added] The 1973 policy also reiterates the prevailing protection of the interests of third parties in general and states in particular, and the necessity to obtain their permission before releasing information received in confidence. From a historical point of view this was an unusual time to establish institutional transparency - the middle of the Cold War and many conflicts erupting over the world - but it was also the time when decolonization increased the UN membership, introducing new actors and changing the balance of informational power. The mid-late 1970s were also the years of many UN global conferences on international issues, so there could have been an attempt to create a good image of the UN. In 1994, Secretary-General Boutros-Ghali issued a strongly-worded Bulletin reminding of staff members of their obligations of discretion when handling documents. The political background of this document is more than clear - the UN failure to act in the Rwandan genocide.

The history of transparency at the UN and international organizations in general did not truly begin until after the global social movements of the late 1990s gave rise to massive protests at major millennial summits. At that time, many institutions issued institutional mandates for transparency, updated their declassification mandates, and created digital databases for documents and websites. We can argue that international organizations responded to calls for increased transparency with a flooding of badly organized information through non-retroactive mandates. One very important legal question is how enforceable are the access to information mandates in their current and past forms. Arguably,

28 Another access point is the Dag Hammarskjold Library (created 1946), which manages the depository libraries (currently 362).
29 ST/AI/117, Administrative Instruction from the Secretary-General to members of UN staff, “Procedure for Declassification of Documents”, 1 August, 1956.
30 ST/AI/189/Add.16, Administrative Instruction, Regulations for the Control and Limitations of Documents, Addendum “Classification and Declassification of Documents”, 7 June 1973. One historical point from that period is that the UN ran into a documentation problem - the diplomats criticized the Secretariat for not producing documents with the required speed. For instance, General Assembly Resolution 593 VI of 4 February 1952 and several others later on urged the Secretariat to be more efficient with producing documents, and distributing them more efficiently. It was apparently difficult to estimate the budgetary and printing needs of the whole organization. From 1949 the UN had an annual Publications Programme. Also, distribution lists were created, and Restricted documents were available by request only, to a limited internal audience. The 1973 Policy was part of the efforts to reduce documentation.
32 See Stoyanova, Diliana, “Digital Media, Secrecy, and International Law-Making”, in Edwards, Sam and Santos, Diogo (eds), Revolutionizing the Interaction between State and Citizen through Digital Communications (Hershey: IGI Global, 2015).
administrative instructions, Secretary-General’s Bulletin, are part of the internal law of the organization and therefore applicable, but there is no known precedent in the administrative tribunals or in the ICJ.

The current version of the access to information policy is contained in a Secretary-General’s Bulletin33, from 2007. Section 1 includes the presumption for openness and then gives a list of information “deemed sensitive” - information received from third party under an expectation of confidentiality, likely to damage the security or privacy of someone, likely to damage the security of a Member State or of a United Nations operation, covered by legal privilege, etc. The list also includes a very wide cover of internal UN documents disclosure of which “would undermine the Organization’s free and independent decision-making process”, and “[other] kinds of information, which because of their content or the circumstances of their creation or communication must be deemed confidential.” This definition gives a practically limitless prerogative to the Secretariat and the Secretary-General to classify information as sensitive, and to keep it sensitive as long as the current administrative head’s political agenda requires.

The general rule of the current policy, that has persisted from previous versions, is that the originating office decides on the classification level - Public, Confidential or Strictly Confidential34 - according to how potentially harmful the release of the information would be. This approach is also applied at the depository libraries and for documents held in the Archives. The highest authority on declassification rests with the Secretary-General. Confidential documents are automatically declassified after 20 years, unless restrictions are imposed; strictly confidential documents are declassified on a case-by-case basis by the Secretary-General either after 20 years, or during a review that takes place every 5 years thereafter.35 At the UN, confidential and strictly confidential materials are not transferred to the library and are treated and referenced as “unpublished materials”.

The United Nations’ funds, agencies, programmes and “others” are in many ways autonomous institutions, with a separate membership, budget and mandates, including their access to information rules. We will focus on two fairly new documents - the UNDP Information Disclosure Policy from October 201536 and the UNEP Access to Information Policy from January 2016.37 It is worth noting that the two organizations have quite a different history in terms of their access to information regimes - the

34 Previously classifications “Secret” and “Top Secret” were used. Some sources mention classifications “UN Restricted”, “UN Confidential”, “For eyes of … only”, but these are not established in the policies.
35 There are some special cases of UN bodies (not to be confused with the agencies) in terms of declassification - for example the documents of the International Criminal tribunals or the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) can only be released after much longer periods - 30, 50 or 60 years - and have a separate system for privileged early access to classified information.
UNDP has had such a mandate since 1997, while UNEP released its first policy in 2014. The two institutions engaged in extensive reviews and revamps that incorporated comments from non-state actors, and considered the policies of other agencies.

Both policies begin with a statement for presumption for openness, and include a summary of the type of information that each organization possesses and deals with. The balance between transparency and confidentiality is very clearly outlined in the UNEP policy, which,

“endeavors to strike an appropriate balance between the need to grant the public maximum access to information in the UNEP's possession, including environmental information, and UNEP's obligation to respect the confidentiality of information regarding its Member States, partners, employees and other parties.”

One key feature of the information disclosure policies of the UNDP, UNEP and the other agencies mentioned above, is the exceptions list to the openness assumption (also included in the Bulletin) - a general outline of the categories of information that is deemed sensitive and therefore classified as confidential. The exceptions include information that is part of confidential communication with third parties; information whose disclosure is likely to harm an individual, or endanger the security of Member States or the safe conduct of UNDP activities; information covered by legal privilege; information on UNDP internal deliberations or communications with Member States or other entities; commercial information; and information whose disclosure would undermine the policy dialogue with Member States or others.

From a legal analysis perspective, this list constitutes the main shift in thinking about confidentiality - a realisation of the need for legal justification for secrecy and an outline of how the interests of third parties, and specifically Member States, are to be protected. It is obvious that the list is quite exhaustive, and there is no real explanation for why the categories are necessary. What distinguishes the UNDP and UNEP policies is that they take the legal justification two steps further, by introducing the “public interest”/”extraordinary circumstances” override. They diverge on how they incorporate the consent of the third party that is the source of the information - UNEP would require written consent, and UNDP would inform the third party and seek to mitigate the negative consequences.

Finally, both policies establish bodies - UNEP's Access to Information Panel and UNDP’s Information Disclosure Oversight Panel - that deal with information requests and provide for appeal procedures. Interestingly, both panels are to include a member from outside of the organization, such as a

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38 As mentioned above, the new mandates are part of a legal convergence of transparency mandates. Organizations with similar policies include the UNFPA, UNOPS, UNICEF, and the World Bank.


40 We discuss this in depth in the Analysis section.
representative of an NGO; UNDP’s panel will also include a member of another UN agency. Currently the UNEP panel has not yet been convened. The request and appeal procedures established through these bodies are quasi-judicial at best, although they do institutionalize the access to information channels available to the global society.

B. Transparency in the EU

1. The institutional framework in the EU

From the perspective of transparency, the current institutional framework of the EU includes four core institutions: The European Council, The Commission, The European Parliament and the Council of the European Union (the Council). The tasks of the institutions are defined in Title III of the TEU. The European Council meets in the composition of the Heads of State or Government together with its President and the President of the Commission. The European Council can be described as the most inter-governmental body of the EU. The Council and the European Parliament are the co-legislators. The Council consists of representatives of each member state at ministerial level, but for the day to day preparation of legislative and non-legislative work of the Council it has a number of working groups and committees that meet either at civil servant or ambassador level. From the point of view of transparency, it is important to note that when the Council meets in its legislative capacity, it must meet in public.

The European Parliament is the other co-legislator, which has gradually gained equal standing with the Council as a legislator. The Parliament is composed of representatives of the Union’s citizens, the MEPs elected for a term of five years by direct universal suffrage. The Commission promotes the general interest of the Union and ensures the application of EU law. Most importantly, the Commission has the right of initiative in legislative matters. Currently the Commission consists of Commissioners from each Member State.

All of the four institutions are bound by the same access to documents Regulation, which reflects the integrated nature of transparency in the workings of the whole of the EU. Moreover, the EU also hosts a growing number of bodies offices and agencies set up for different kind of tasks. The agencies, bodies and offices as well as the European External Action Service are not legally bound by the access to documents Regulation directly, but they either apply the Regulation by virtue of a reference in their internal rules, or alternatively similar or identical internal rules.

41 The first UNEP policy (2014), did not include an outside member in the Panel. This was criticized by NGOs like the World Resources Institute, see http://www.wri.org/blog/2014/06/unep’s-new-access-information-policy-fails-short-true-transparency (online on 14 March 2017).

42 In accordance with Article 13 TEU the institutional framework of the EU includes seven institutions. The Court of Justice of the EU, the European Central Bank and the Court of Auditors will not be considered here since they apply specific transparency rules as opposed to the general access to documents Regulation 1049/2001 which applies to the rest of the institutions.

43 Art. 16(8) TEU.
2. The legal framework on transparency

Transparency rules in the European Union started to develop as a response to the political turmoil of the EU in the beginning of the 1990s when Denmark voted against the ratification of the Maastricht Treaty. It is also closely related to the continuing democratic deficit discussion of the EU.\(^{44}\) The starting point of the transparency debate can be traced to inter-governmental negotiations on the Maastricht Treaty in the beginning of the 1990s.\(^{45}\) Denmark and the Netherlands had pushed for explicit freedom of information rules in the EU while a large majority of Member States resisted the idea. The negotiations resulted in a Declaration attached to the Final Act of the Treaty of the European Union including a recommendation that the Commission would submit to the Council a report on measures designed to improve public access to information.\(^{46}\)

The Maastricht Treaty received a negative public reaction and faced some difficulties in national referendums and ratification processes.\(^{47}\) As a reaction to the controversy the European Council decided in its Birmingham and Edinburgh meetings in 1992 to take some immediate measures to increase transparency in the EU institutions. In 1993 the Council and the Commission adopted a Code of Conduct on the handling of requests for access to documents.\(^{48}\) Both institutions then approved and implemented this Code in their respective decisions with slight variance in the content.

Access to documents of the core EU institutions became a Treaty recognized right in the Treaty of Amsterdam in 1997. The detailed rules were established in Regulation 1049/2001, which is the first access to documents legislation in the EU that applies directly to all core institutions. The Regulation governs access to documents of the institutions and has only limited and indirect impact on national access to documents regimes in the Member States. The Lisbon Treaty in 2007 brought about some changes at Treaty level by broadening the scope of public access to all EU ‘bodies, offices and agencies’ and by explicitly emphasizing that the Council shall meet in public when considering and voting on a draft

\(^{44}\) For a summary of the discussion on the deficit, see Hix, Simon and Follesdal, Andreas, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik”, (2006) 44 JCMS 533.

\(^{45}\) Alternatively, it can be traced back to 1970s or 1980s, where pressures for greater transparency emerged in particular with regard to environmental and consumer protection. The first piece of legislation in the area was the Council Directive 90/313 on freedom of access to information on the environment [1990] OJ L 158/ 56–58. However, the Directive only applied to Member States, not to the institutions. See Grigorescu, Alexandru, Democratic Intergovernmental Organizations: Normative Pressures and Decision-Making Rules (Cambridge: Cambridge University Press, 2015), 161 ff.


legislative act. These provisions are complemented by the right of access to documents in Article 42 of the EU Charter of Fundamental Rights. The broadening of the institutional scope of the access to documents rules has not yet materialized in secondary legislation. The Commission gave a proposal to extend the scope of the Regulation to cover bodies, offices and agencies, but the Council and European Parliament have not adopted legislation based on the proposal. Bodies, offices and agencies continue to have internal rules that are either identical or similar to the Regulation. In general, even though the applicable rules vary in the agencies, the broad content of access to documents rules has become fairly harmonized among the EU institutions and agencies with some exceptions.

Regulation 1049/2001 is built on the principle of openness. According to Recital 11, all documents held by the EU institutions should be accessible to the public, but certain public and private interests are protected by exceptions. The exceptions are to be interpreted restrictively. The definition of a document is broad. If a document is requested, access to it is examined on the basis of a specific and individual assessment and in principle there are no categories of documents (e.g. e-mails) that would be excluded from the scope of application of the Regulation.

The protected public interests under the exceptions include public security, defence and military matters, international relations, financial, monetary or economic policy of the Union or a Member State. In addition the exceptions protect a private interest i.e. the privacy and integrity of an individual. These exceptions are mandatory in the sense that they are not subject to a public interest test that requires the institution to balance the harm caused to the protected interest against an overriding public interest in disclosure. For these exceptions only a harm test is mandated.

The exceptions relating to the protection of commercial interests, court proceedings, legal advice, the purpose of inspections, investigations and audits and the internal decision-making process of the institutions are subject to a public interest test. After establishing that the disclosure would undermine the protection of an interest, the institution still has to balance the harm against an overriding public interest in disclosure. In addition to the exceptions, the Regulation provides for a clear two-stage procedure on access to documents with fairly strict deadlines for the institutions in Articles 6-8. Article 8(1) provides for the remedies in case the institution partially or fully denies access to a document. The

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49 Art. 15 TFEU.
51 For a discussion on the need of extending the institutional scope in secondary legislation and details on varying rules see Leppävirta, Liisa and Darbishire, Helen, “The right to ask…the right to know - The successes and failures in access to documents rules and practices from an NGO perspective” in Leino, Paivi, Harlow, Carol and della Cananea, Giacinto (eds) Research Handbook on Transparency (Cheltenham and Massachusetts: Edward Elgar Publishing, forthcoming in 2016).
52 On the difference between the harm test and the overriding public interest test see Adamski, Dariusz, “How Wide is “the Widest Possible”? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited”, (2009) 46 CMLRev, 521-549.
applicant can either institute court proceedings at the General Court or make a complaint to the European Ombudsman. The effectiveness of the system of remedies for the applicants can be debated\textsuperscript{53}, but at least the remedies provide the means for tracing how the institutions apply the rules on access to documents and thus offers crucial information on the practice of transparency in the EU institutions.

In addition to Regulation 1049/2001, the EU also has secrecy rules regarding classified documents.\textsuperscript{54} In principle, Regulation 1049/2001 applies to classified documents but according to Article 2(5) of the Regulation sensitive documents that are defined in Article 9(1) of the Regulation shall be subject to special treatment.\textsuperscript{55} These documents bear a classification stamp of either Top Secret; Secret or Confidential. Unlike the access to documents Regulation that was enacted in the legislative procedure of the EU, the classification of documents is based on security rules of the institutions that the institutions adopt as internal rules.

\section*{II. Analysis}

\subsection*{A. Access to information rules - balancing interests}

The previous section described the rules on access to documents in the EU and the UN and their functioning. There are some important differences between the two organizations’ regimes that we underline below, but there are also many common features. Most significantly, both regimes recognize that the global society should have access to information on the function and work of the organizations at large. A more thorough analysis of the rules is needed to see how the balancing between transparency and secrecy is being done in international organizations.

With regard to transparency rules, one fundamental difference between the organizations lies in the logic how access to documents is regulated. In the UN, the Bulletin functions as an internal rule on the classification of documents, which determines if the document is public or not, how it is handled, and how the classification can be changed potentially. The Bulletin is not enforceable in a national or international court, and at the UN level it is tenuous to claim that the organization can be charged in a court for a breach of the classification rules, even if they were considered an international obligation. Most importantly, in the UN public access is not \textit{erga omnes}, whereas in the EU a successful application


\textsuperscript{54} For an up-to-date analysis of the EU secrecy rules see Abazi, Vigjilenca, “Secrecy and Oversight in the European Union - The Law and Practice of Classified Information” (PhD thesis approved by the University of Amsterdam, 2015).

for access to documents will result in the document becoming public for all, not just for the applicant. The EU Regulation is a genuine access to documents law, which is comparable to national Freedom of information laws.

In addition, the balancing act between transparency and secrecy is done slightly differently in the two organizations in the way documents are classified, which reflects the different functions of the external communication of the two institutions. In the EU Regulation there are areas of substantive interests that can provide an exception to the presumption of openness, and in the UN there are lists of documents deemed sensitive and exceptions that protect the confidentiality of the negotiation and policy-making internal processes. The EU has both internal and external functional communications - i.e. both communication between the Member States within the EU and communication between the EU as a unit and external actors - while the UN is focused on the dialogue between Member States within the institution. To put it in another way, both the UN and the EU have instituted a decision-making exception to the presumption for openness, but the UN does not have express external interest areas that are affected by transparency. Even though the logic and the categories are different, the practical implications for access to documents are the same - both the UN Bulletin and the EU Regulation determine whether a document is public or not and how access can be granted.

The UN mandates contain a written presumption for openness dating back to 1977, and there was a clear indication in Resolution 13 (I) from 1946 that established the Department of Public Information, that the global public needs to be informed of the work of the UN. The EU Regulation also holds a clear presumption of openness. Moreover, both the EU Regulation and the new UNEP and UNDP policies contain a so-called public interest test that specifically provides that transparency can serve a public interest purpose. On the basis of how the exceptions to disclosure are formulated in the EU Regulation, it can be argued that the co-legislators have recognized that transparency serves a public interest that can sometimes even override another interest that would be in favor of secrecy. In the case of the two UN agencies, the information dissemination policies formulate an exception to the exceptions - a clause that states that in certain circumstances, the organizations would release information, even if it has been classified strictly confidential, “if the overall benefits of such disclosure outweigh the potential harm to the interests protected by the exceptions”. It is ultimately up to the UNDP and UNEP as institutions, and the Secretariat as its arm, to make a judgement call. The claim is not that it is always good for the public to know everything, but that there are cases in which it should not be entirely up to the national governments to decide what information should be made public. For instance, the UNDP Policy public interest override is geared to,

“situations in which the disclosure of certain confidential information would, in UNDP’s view, be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment. Such disclosure by UNDP would be on the most restricted basis necessary to achieve the purpose of the disclosure.”

The UNEP policy has a very similar definition, and in both cases it appears that the two organizations have discovered a common ground that could override the interests of national governments in certain contexts - health, safety, the environment. If the global public interest is contextual - i.e. depending on the situation, it could be in the interest of the public to be kept in the dark, or to be informed - then (a) that means there is common global context of issues that are not defined by the Member States and (b) international organizations, in particular contexts, are responsible for the information going directly to individuals.

We can further theorize that there are more concrete global public interests that are not specifically mentioned in the clause. While it is true that the two policies do not reference the Millennium Development Goals directly, they do refer to the large international conferences of the new millennium, including the Millennium Development Goals Summit. The MDGs and SDGs could represent an elaboration of the global public interests that could trump the interests of secrecy and confidentiality in international negotiations.

In the EU, the overriding public interest test is less clear, since there is no indication in the Regulation of what could constitute such a public interest that overrides the interest of secrecy. There are two different types of exceptions in the Regulation - those that contain a public interest test and those that do not. This has concrete repercussions on how access to documents requests are being handled and thus also on transparency. The mandatory exceptions in Article 4(1)(a) of the Regulation are exceptions where the institution enjoys a wide margin of discretion to decide whether the public interest that is protected by the exception is undermined or not.57

One of the commonly used mandatory exceptions is the exception on international relations.58 Thus the institutions enjoy a wide margin of discretion to establish that the public interest as regards the protection of international relations would be undermined by disclosure of a document and do not have to balance the protection of international relations against the public interest of transparency. The use of the exception is related to EU’s external relations and it does not include relations between EU institutions and Member States and lately has been often invoked in the context of sanctions and the EU’s big international treaty negotiations such as the Agreement on the Transatlantic Trade and

57 Case C-266/05 P Sison v Council ECLI:EU:C:2007:75, para 34.
58 On the use of the international relations exception see Heremans, Tinne, “Public access to documents: jurisprudence between principle and practice (Between jurisprudence and recast)”, Egmont Paper 50, September 2011, 20.
Investment Partnership (TTIP). Due to its mandatory nature and the limited review of the Court, the public has little chance to argue against the application of the exception.59

Besides the mandatory exceptions, the Regulation also recognizes exceptions where the institution is under an obligation to balance the harm caused to an interest protected by the Regulation against an overriding public interest in disclosure. These exceptions are more flexible and do not include as wide a margin of discretion for the institution. Nevertheless, regardless of the formulation of the overriding public interest in disclosure and the many attempts of applicants to claim the existence of such a right, the Court has not explicitly granted in any single case that an overriding public interest in disclosure would exist.60 Often the cases where the overriding public interest is claimed to exist are resolved by the Court on other merits and the question is not even addressed by the Court.61 From the EU experience and case law it is difficult to positively define the situations where transparency as an overriding public interest would have been established. The Court emphasizes balancing between the interest of secrecy and disclosure and so far it has been extremely difficult for the applicants to tip the balance towards transparency.62 Even with a strong commitment in the legislation for transparency in the EU, the fact remains that transparency as a public interest has to be balanced against other interests that speak for secrecy.

Ironically, while the EU rules and bureaucratic procedures are better developed, the substance in the definition of the notion of public interest is weaker than those of the UN agencies’ policies. It is possible that, since the UN agencies are near-universal and their mandate is to find common ground for all of their members, a more concrete legal definition of what the global society needs and rights are has materialized. Nevertheless, it is impossible to verify how the balancing is being done in the UN, since the requests and replies are not public. The only known case is a request by Professor Alasdair Roberts.63 On June 21, 2004 he submitted a request for all documents relating to development of the communications strategy for the 2004 Arab Development Report. The final decision was reached on October 9, 2006, after several letters by non-governmental organizations were submitted to the UNDP. The UNDP panel

59 Seminal cases on the application of the international relations exception include T-331/11 Besselink v Council ECJ/EU:T:2013:419, which specifically addressed documents relating to negotiations of an international agreement (EU’s accession to the ECHR) and two cases initiated by Sophie in’t Veld, a Dutch MEP, that deal with the negotiations on the ACTA agreement: Case T-301/10 In’t Veld v Commission ECJ/EU:T:2013:135 and Council legal advice in the context of the negotiations on the SWIFT-agreement Case C-350/12 P Council v In’t Veld ECJ/EU:C:2014:2039. The Courts have applied a fairly strict interpretation of the international relations exception when it comes to protecting the negotiating position of the EU.


61 On the ambiguous possible content of the overriding public interest see Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council ECJ/EU:C:2008:374, paras 44-47 and 74; Joined cases C-514/07 P, C-528/07 P and C-532/07 P P Sweden and Others v API and Commission ECJ/EU:C:2010:541, paras 152 and 156.

62 Nevertheless, The CJEU has emphasized that transparency as such could serve as the overriding public interest. See Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council ECJ/EU:C:2008:374, paras 44-47 and 74.

63 As with other access to information requests to the UN and its agencies, these documents are not considered public. Copies of the documents were obtained from Professor Roberts himself, and appear genuine.
decided not to release the documents, by drawing a distinction between disclosure of documents and disclosure of information, and gave a summary of the background of the preparation of the Report. It is obvious that the panel conducted a complex balancing act between the confidentiality of the internal policy-making process and the transparency policy, which was strengthened by public pressure from the NGOs.

Based on the analysis of the two organizations it is clear that transparency has emerged in the international legal framework as a principle that applies not only to internal state matters, but also to global society. Still, the voice of the global public is not that strong and can easily be overridden by the interests of national governments. The following section will go deeper into the special dynamics of implementing transparency in international organizations which is still relevant in the EU and the UN, namely the relationship between the member states and the bureaucracy of the organizations. Overall, the evidence suggests that simply having a mandate and an appeals board does not create a regime of transparency without the organizational culture.

B. The role of the bureaucracy

Before taking the parallel further, we need to put our research questions in the proper socio-legal context and clear some common misunderstandings. First, we need to ask ourselves where the information comes from, how / by whom is it classified, and how it is disseminated. In both the EU and the UN, the source of information has been either the Member States voluntarily sharing information, other international organizations, office inside the organization, or non-state actors. The classification of the information is done in-house in both institutions. The dissemination is nowadays done digitally, but in the past there were issues of physical accessibility of the organization and its documents, as well as costs of printing and distributing hard copies. Second, we need to keep in mind that in international organizations, there is a dichotomy of power, function, responsibilities and privileges between the Member States and the administrative branch, and within the bureaucracy - between politically-appointed and career civil servants.

The role of knowledge as power materializes in an interesting way in the international plane. Within a national political system, the government usually holds the monopoly on information regarding the use of public power in international negotiations, and decides on its dissemination to the public. In the

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64 Professor Roberts was kind enough to provide a copies of his correspondence with the UNDP. According to him, the policy had been a mute one that was not popular internally, and his was the first request to the Board. Here is the key passage from the decision: “After careful review of the policy the Panel drew a distinction between disclosure of documents and disclosure of information. The Panel decided not to grant disclosure of documents related to the development of the strategy, apart from what is already available to the public, such as the press kit for the report. The panel did ask, however, that UNDP try to meet the spirit of your request, by providing you with information about the overall process it uses to craft a communications strategy for a product such as the 2004 Arab Human Development Report.”

65 The UNDP 1997 Transparency Policy is not available online and we have submitted an official request for it to the UNDP Legal Office.
international or intergovernmental plane the relationship of information sharing has traditionally been more horizontal than vertical. Especially in the UN the emphasis has been on information sharing between states and not so much between the organization and the global public at large. The central question has therefore been trust and how much nation states trust each other to share information. There is also the problem of the states not trusting the international organizations and the international civil servants. This power/information balance has started to tip as official information has become easier to access through the internet and electronic archives, and as unofficial leaks have become more common and have a wider audience. The public can contact and access the work of the international organizations directly, not just through their governments or through dedicated information points. A vertical relationship between the international organizations and the public has started to evolve, and in the EU context is already fairly well-developed. A genuine public sphere has started to evolve around the EU as evidenced eg. by various protests against the TTIP negotiations conducted by the EU that focused on the lack of transparency around the negotiations and grew so strong that the institutions had to respond by increasing transparency.

At the UN proper, Member States have expressed lack of trust in the organization, and of each other of course, so they have been reluctant to give confidential information to the UN. Also, transparency as such is a western democratic political concept, so not all UN members subscribe to it, and in many cultures the truth is less important than saving face, for instance. The national governments insisted that the UN had no intelligence gathering capacity, nor need for one, since all of the information would be coming from the Member States. This was proved wrong in the UN missions, but there was still no targeted budget for information gathering. The focus was on transparency of Member States to the organization and to each other - for example in armaments and military expenditure, outer space activities, recommendation for corporate governance and financial reporting, treaty-based investor state arbitration etc. External transparency was considered to be the prerogative of national governments, with the UN acting in concord with Member States’ information dissemination.

An additional complication arises from the secrecy enshrined in the UN rules applicable to staff. The main legal sources of the obligations of the UN Secretariat are UN Charter Article 100, which outlines the independence of the international civil service and its international character; and Article 101 (3), which establishes the principles of “efficiency, competence and integrity” as the basis of the bureaucratic

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activities. Many provisions affect that ability of the bureaucrats to communicate knowledge externally, which also reflects on their role in the transparency regime. According to a report by the Secretary-General (referred in the Repertory 1945-54), even though international civil servants do not forfeit their political and religious beliefs,

“any public pronouncements [an international civil servant] makes, his general conduct - all must be consonant with his international status, and must conform to the interests of the United Nations to which his service is dedicated. His conduct must be such that he merits the trust and the confidence of the Member nations and their peoples, and that he does not, through loss of that trust and that confidence, jeopardize the reputation and effectiveness of the Organization.”

This general obligation to consider the interests of the Member States and the image of the organization is even more pronounced in the Staff Regulation 1.5 from 1952, which has been reproduced in the newest version, Regulation 1.2 (i) from 2014. The two texts appear very similar, but the new version includes the obligation to regulate communication not only to persons, but also to other entities; it also expands the duty to protect information that the staff member “ought to have known” was not public. Thus the obligation extends to all internal information and communications, which is not classified as public documents. This responsibility clearly establishes that secrecy has a higher priority than transparency for the international civil service, and that communication has evolved from person-to-person to institution-other entities.

As was mentioned above, the decisions on declassification are made by only one branch of the civil service - the Secretary General - which is directly selected by the Security Council in a very secretive and undemocratic way. One feature of the UN access to documents requests is that they are not published as UN documents, and it is therefore very difficult to find legitimate cases of public requests for documents. One such rare case was a very recent request by the Extraordinary Chambers in the Courts of Cambodia (the ECCC), also know as the Khmer Rouge Tribunal. In March 2015, Mr. Meas Muth was charged in absentia by the ECCC with various crimes, including genocide. In November 2015, the Defence requested documents from the negotiations between the UN and the Royal Government of Cambodia on the establishment of the ECCC and on the drafting of its “Establishment Law”. In February 2016, Judge Michael Bolander, the International Co-investigative Judge, submitted a request for declassification of relevant documents to the UN Legal Counsel. The request was denied in a letter from April 2016 (which

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70 Here is the text of the Regulation 1.5 from 1952: “‘Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position which has not been made public, except in the course of their duties, nor shall they at any time use such information to private advantage. These obligations do not cease upon separation from the Secretariat.’

71 Here is the text of the Regulation 1.2 (i) from 2014: “Staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service.”

is published on the ECCC website, but is not in the UN database or bibliographic system), which cited the Privileges and Immunities Convention and the Secretary-General’s Bulletin. The justification used was that the documents were “[internal] inter-office or intra-office documents, including draft documents, … disclosure [of which] would undermine the Organization’s free and independent decision-making process.” The letter reiterated the Secretary-General’s “sole discretionary authority to authorize the release of United Nations documents”. This short case illustrates not only the information access prerogative of the UN, but also the wide reach of the exceptions contained in the Secretary-General’s Bulletin. It would have been really interesting if the ECCC had appealed the decision of the UN by challenging the definition of “internal documents”, since the documents in question relate to the ECCC itself. It is possible that the ECCC Judge was procedurally obligated to effect the request, but there was no real impetus in the court to argue for the information to be released. In essence, despite the gradual inclusion of transparency aspiration in the UN access to documents mandates, they are strongly biased towards the interests of states (as they are the source of most information more often than not) and there is no transparency in the document request and appeal process. The system of requesting documents and their declassification is ad hoc and entirely up to the Secretary-General and his agents.

In the EU a novelty of the Regulation in 2001 was that it in principle abolished the authorship rule, i.e. the principle that the originator of the document decides whether or not the document is public.\(^{73}\) According to Article 2(3), the Regulation applies to all documents held by an institution, i.e. documents drawn up, or received by it and in its possession in all areas of activity of the European Union. The Regulation provides for a consultation mechanism for third party documents, which also include Member State documents. Nevertheless, documents transmitted by Member States as part of their work in the Council are considered as Council documents and do not come under the scope of the Article.\(^{74}\) According to Article 4(4) of the Regulation the institution shall consult the third party with a view to assessing whether the exceptions provided in the Regulation are applicable unless it is clear that the document shall or shall not be disclosed. Moreover, Article 4(5) of the Regulation provides that a Member State may request the institution not to disclose a document without its prior agreement.\(^{75}\)

The wording in the Regulation is cryptic, so not surprisingly, a body of case law was built on the issue of whether the Member States have a veto over disclosure of documents that originate from Member States

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\(^{73}\) Heremans, Tinne, “Public access to documents: jurisprudence between principle and practice (Between jurisprudence and recast), Egmont Paper 50, September 2011, 73. The authorship rule is still reflected in the Regulation with regard to classified documents under Art. 9 of the Regulation, but it is an exception to the main rule.


\(^{75}\) In addition, the Council internal security rules still stipulate the originator consent principle with regard to classified documents to some extent, but the legal framework is, again, ambiguous and their application to Member State documents can be questioned since they are adopted as internal rules and without a clear Treaty legal basis, which eventually resulted in the Member States making a separate international agreement on the issue. On the complexity of the lack of legal basis and the position of Member States in the secrecy rules see Curtin, Deirdre, “Official secrets and the negotiation of international agreements: is the EU executive unbound?” (2013) 50 CMLRev, 423, 433-442.
and whether or not the veto is unconditional. The issue was discussed by the Court in a saga of cases entitled \textit{IFAW}, where the CoJ, in ambiguous language, granted that the Member States had a veto, but that it was conditional on the fact that the Member State had to give a clear statement of reasons on its objection based on the exceptions listed in the Regulation.\textsuperscript{76}

The case law of the General Court of the EU clarified the extent of the veto in a case brought by Germany against the Commission.\textsuperscript{77} The Commission had received an application for access to various documents relating to an infringement procedure which the Commission had initiated in respect of Germany. The German authorities informed the Commission that it objected to disclosure of the documents. In the initial stage the Commission conveyed the reasons why Germany objected to the disclosure of the documents but also advised the applicant of the chance to seek review of the decision. The applicant confirmed its application challenging the validity of the reasons provided by German authorities. Even though the German authorities restated their objection to the release of the document, the Commission decided to grant access to the documents. The Commission claimed that:

\begin{quote}
the arguments put forward by Germany as justification for its objection to disclosure of the documents were, prima facie, unfounded and that, in consequence, it was necessary to conclude that the German authorities had not provided sufficient evidence to justify application of either of the exceptions relied upon.''
\end{quote}

The General Court dismissed the action. The General Court emphasized the fact that the institution is the one defending the decision in the Court and therefore has to have a possibility to influence on the defensibility of the decision. The importance of having a genuine dialogue between the originator and the institution was also emphasized. The Court confirmed that the institution could exercise a certain level of independent scrutiny and take a decision contravening the position of the Member State.

The case law described above and the fact that the Council treats a fairly big proportion of Member State documents as Council documents, and thus has waived consultation of the Member States, underlines that within the EU an integrated approach to transparency has been taken. The right to decide has already partly shifted from the Member States to the institutions. Nevertheless, the issue of trust and the right to decide on the disclosure of information is still very contentious in the EU as illustrated by the argumentation of Germany in the above mentioned cases. Regardless of the integration and the “forced” trust, there is evidence that the Member States still tend to hold on the power of deciding on information dissemination when it comes to their own interests.\textsuperscript{79}

\textsuperscript{76} Case C-64/05 \textit{P Sweden v Commission} ECLI:EU:C:2007:802. For a thorough analysis of the saga see Heremans, Tinne, “Public access to documents: jurisprudence between principle and practice (Between jurisprudence and recast)”, Egmont Paper 50, September 2011, 73-77 and Leino, Päivi, Case note in (2008) 45 CMLRev, 1469.


\textsuperscript{78} Ibid.

\textsuperscript{79} The relationship naturally works the other way round as well in the EU. Art. 5 of the Regulation states that when a Member State receives a request for a document in its possession that originates from an institution, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardize the attainment of the objectives of this Regulation.
C. The practical matters

The conceptual analysis in the above sub-sections gives the impression that transparency as a global public interest has started to emerge in practice instead of being just a vague idea. Delving into the grassroot level of how information can be accessed and analysing possible hindrances for accessing information and documents is extremely pertinent at the international plane. International organizations are physically situated far from citizens and their functioning, competences and mandates are difficult to comprehend for all citizens so information needs to be reachable mainly online and in comprehensible language. In this last subsection we enumerate several interesting and relevant pieces of evidence of how information can actually be accessed.

From a historical perspective, we need to keep in mind that before digital databases (not so long ago), documents could only be accessed in hard copy, and through limited channels. In the case of the UN this was done through the Information Centres and depository libraries, and there were not so many, compared to the entirety of international society and taking into consideration the price of airfare.80 The online database for UN documents, the Official Documents System, is in operation since 1991, and was opened for general free access on 31 December 2004. Before 2001 it was only available for diplomats and national governments, and between 2001-2004 there was a paid access scheme for non-state actors, which was abolished following a campaign by NGOs. In other words, it took the national governments 13 years to decide to allow (by voting on a budget) for information on a near-universal organization to be directly available to their constituents. These actions strongly emphasize how the ownership of information on what occurred in international organizations was strictly in the hands of Member States until a decade ago.

In addition to actually accessing official documents, an important aspect of realizing access to information is knowing what kind of information exists and could be requested. In the UN there are many ways in which the metadata of documents has been restricted. According to the United Nations Bibliographic System (UNBIS) website81, strictly confidential documents

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“... such as confidential documents issued for the Human Rights Council (formerly the Commission on Human Rights) and its Advisory Committee (formerly the Subcommission on Promotion and Protection of Human Rights) ... are not available to users and they are not included in the Official Document System (ODS). For purposes of bibliographic control they are indexed in UNBIS, but at a minimal level of subject analysis.” [emphasis added]

Not only are strictly confidential documents not published in the ODS, but special measures are taken to preserve the secrecy of certain documents through the referencing system itself. For instance -

“Confidential human rights communications concerning Member States should be indexed only with the 650 subject term WRITTEN COMMUNICATIONS, not with terms for the subject of the communication or the geographic subject for the Government. ... Transcribing the titles and contents notes allow the documents to be identified and differentiated, but the records will not be retrieved in subject searches for a country and will only appear in printed subject indexes under the general subject heading WRITTEN COMMUNICATIONS.”

The examples given make it clear that in many cases, a document cannot be identified through UNBIS, even with complete knowledge of its title and document symbol. One thing to bear in mind is that inter-office memoranda (which also apply to reports of the Office of Internal Oversight Services), are not indexed in UNBIS. Another little loophole is the case of “conference room papers” (marked with CRP), which are also not indexed in the bibliographic system, even if they are published on the website of a UN agency. According to the Dag Hammarskjold Library, CRPs are not published as official UN documents and are not considered public information.

The EU Regulation, in Article 11, specifically provides for an obligation to provide public access to a register of documents. Moreover, access should be provided in electronic form and references to documents should be recorded in the register without delay. The Regulation also contains a fairly detailed list of metadata that needs to be included in the register. The institutions all have their own registers, but their content varies.

The European Parliament has an easily accessible legislative observatory that contains all legislative files, and the most important documents related to the file. Nevertheless, the documents of a more political nature handled by the MEP’s are not covered by Regulation 1049/2001 according to the rules of procedure of the Parliament, so the register is incomplete.82 The Council has a good online register of documents, although sometimes it might be difficult to find what you are looking for, if you don’t know for example under which working group the matter has been prepared. The Council register contains also metadata of documents that are not directly accessible on the website, so it is comprehensive and enables citizens to check if certain documents exist even though they are not made public proactively.

The Commission has a register of documents on its website but it is far less comprehensive than the Council register. The Commission lists only certain categories of documents on the website, but there is no way of knowing what other categories or uncategorized documents could exist. It already requires

quite a lot of knowledge on the internal proceedings of the Commission to perceive what kind of documents could exist outside the register that could then be requested. The European Ombudsman has criticized the quality of the Commission register following a complaint by an NGO Statewatch in 2006 and it seems that it has not improved much since then.83

Again, even though the rules on the registers in the EU are developed, the practice still shows that there are obstacles to enforcing the right of access for the citizens. In the context of the UN the rules are less developed even though the importance of having electronic registers is even more pertinent in a wider global context, which is even more detached from the public.

**Conclusions**

Transparency is difficult to conceptualize in strictly legal terms because information is so often the crux of political/power considerations. In the framework of international organizations, it is even more complicated because the sources of legality and the application of the rules is very fluid. Before and during the 1990s, transparency in international politics was virtually non-existent, so the academic and civil society argument was straightforward - more transparency is better. Two decades later we have arrived at a point where we need to analyze the nuances of the practice and how they reflect on the theory.

In this paper we have established that both the UN and EU legal mandates are fairly exhaustive and include the notion of global public interest in transparency, and that in practice the institutions play a balancing act between the interests of nation states in confidentiality and the expectations of openness from constituents. In the EU context we see that even when the rules on access to documents are developed and legally enforceable, they are still vague, ambiguous and require a fair amount of balancing against other interests. The balancing act often becomes politicized and the result is that political arguments on balancing values such as public security against transparency are just done in the language of law. Nevertheless, legally enforceable rules have advantages as they make the practice of the institution visible and also more predictable. The UN is nearly 7 times larger than the EU in terms of membership numbers, not to mention the cultural variety. The UN access to information mandates are a reflection of the mistrust between the governments, their reluctance to give power to a global institution, and the lack of tangible constituency. The UN agencies have often served as arenas for “forum-shopping” on the side of national governments, and their mandates are a reflection of their effort to stay relevant in a world where the “hot” issues change all the time.

83 The issue of insufficient registers has been the object of several ombudsman investigations. On the early developments see Harden, Ian, “Citizenship and Information”, (2001) 7 EPL 165, 177. For the investigation on the Commission register see European Ombudsman, Investigation 3208/2006/GG.
The other side to consider is the organizational practices - they institutionalize procedures that turn into bureaucratic routine, and they strive to preserve the status quo and to protect their own image. There are various bureaucratic and technical loopholes that perpetuate the secrecy regimes. For there to exist a genuine global transparency, the decision-making should be made at the global level, but the Member States object loudly to such a development, as evidenced by the EU experience.

This paper argues that even a well-developed legal regime for transparency does not automatically override hundreds of years of diplomatic secrecy. The experience of the EU demonstrates that it is possible to have a streamlined process for accessing documents at the level of international organizations, even if the global social interests are not perfectly protected. At the UN it is even more important to have a user-friendly declassification system because of the physical distance between the organization and its constituents, and because the work of the organization is often misrepresented in local politicized media releases. If the global (civil) society were to become more active in seeking information about international law- and policy-making directly from the organization, the process would become more streamlined. The transparency mandates obviously represent a reaction to the changing informational climate, but in order for the transparency rules to become law in spirit, there needs to be a push both from outside of the organizations - from the global society - and from within - from the civil service.