EVADING ACCOUNTABILITY: HOW THE SECRECY OF INTERNATIONAL ORGANIZATIONS HARMS AMERICANS' RIGHT TO KNOW

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Do Americans have the right to know how our taxpayer dollars are spent on international peace and security? Right now, the answer is "it depends"—on whether the United States acts directly or through one or more increasingly powerful international organizations. While citizens have a legally enforceable right of access to the records of federal agencies, the same is not true for the records of international organizations. This distinction is not defensible in a world where international organizations exercise increased power. In practice, it leads to arbitrary outcomes; even the activities of different American military forces in a single foreign country can be subject to greater or lesser public oversight depending on their chain of command. While there are significant barriers to imposing a domestic transparency regime on international organizations, these entities can and must develop their own comprehensive policies to increase public access.

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I. INTRODUCTION

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

A. Public Interest in NATO Operations

U.S. support to NATO takes two primary forms: indirect contributions in the form of American troops deployed on NATO missions and direct contributions in the form of American money provided for NATO's budget.[3] In June 2008, the

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1. *See* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (creating North Atlantic Treaty Organization). See *infra* Section II.A.1.a and accompanying text for a discussion of NATO's structure.

2. *See* Constitution of the International Criminal Police Organisation-INTERPOL, June 13, 1956 (last amended 2017) [hereinafter INTERPOL Constitution], https://www.interpol.int/content/download/590/file/Constitution%20of%20the%20ICPO-INTERPOL-EN.pdf [https://perma.cc/Z3VW-C7Q7] (creating INTERPOL). See *infra* Section II.B.1.a and accompanying text for a discussion on INTERPOL's structure.

3. PAUL BELKIN, CONG. RSCH. SERV., R45652, ASSESSING NATO'S VALUE 7 (updated ed.

United States contributed 23,550 troops to NATO's International Security Assistance Force (ISAF) in Afghanistan, in addition to 19,000 forces operating independently of NATO in Afghanistan under Operation Enduring Freedom (OEF).[4] In June 2019, the U.S. contribution to Resolute Support (RS), NATO's successor mission to ISAF, was 8,475 troops.[5] In addition, the United States contributed about $570 million to NATO's headquarters in 2018 alone.[6]

The U.S. Department of Defense accepts that its troops must, *inter alia*, plan and execute operations in Afghanistan[7] in compliance with the law of war principles of proportionality and distinction.[8] When U.S. troops commanded[9] by NATO under the former ISAF and current RS mission engage in combat, they must follow certain rules of international law.[10] One such rule, proportionality, requires military commanders to weigh the expected combat benefits of action against the incidental harms to the civilian population, and avoid combat where the incidental harms are excessive compared to the benefits of the legitimate military

2019).

4. HUMAN RIGHTS WATCH, "TROOPS IN CONTACT": AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN 10–11 (2008), https://www.hrw.org/sites/default/files/reports/afghanistan0908webwcover_0.pdf [https://perma.cc/7CGD-ZMT5].

5. NATO, *Resolute Support Mission: Key Facts and Figures* (June 2019), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2019_06/20190625_2019-06-RSM-Placemat.pdf [https://perma.cc/SUQ7-AGCD].

6. BELKIN, *supra* note 3.

7. Because the current opponents of the U.S. and NATO missions in Afghanistan are not state actors, the Afghan war is classified as a legal matter as a "non-international armed conflict" (NIAC). *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 629–32 (2006) (holding that Afghan war is NIAC for purposes of Common Article 3 of Geneva Conventions); *see also* OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 3.3.1 (updated ed. 2016) [hereinafter LAW OF WAR MANUAL], https://dod.defense.gov/Portals/1/Documents/DoD_Law_of_War_Manual-June_2015_Updated_May_2016.pdf [https://perma.cc/8UJB-KKGB] (distinguishing between international and non-international armed conflicts).

8. In general, non-international armed conflicts are regulated by customary international law, not treaty obligations. LAW OF WAR MANUAL, *supra* note 7, § 17.1.3.2. Customary international law is generated in part by the practice of states themselves; as a result, determining the content of customary international law may be difficult. *Id.* § 1.8. However, fundamental principles of the law of war clearly are included in customary international law and therefore apply to NIACs. *Id.* § 17.2.2.1. These fundamental principles include proportionality and distinction. *See id.* § 2.1 (including proportionality and distinction within the list of law of war principles). This is the official position of the Department of Defense. *See id.* § 1.1.1 ("This manual represents the legal views of the Department of Defense.").

9. The phrase "command" has a specific meaning in military doctrine. *See* DEP'T OF THE ARMY, FIELD MANUAL 3-16: THE ARMY IN MULTINATIONAL OPERATIONS 2-5 (2014). Moreover, this meaning differs between military organizations (for instance, the U.S. military and NATO have different definitions of the term). *Id.* This Comment is concerned with the military organization at a high level of generality, as such the term is only used in the general civilian sense for brevity.

10. *See* U.N. ASSISTANCE MISSION IN AFG., AFGHANISTAN PROTECTION OF CIVILIANS IN ARMED CONFLICT ANNUAL REPORT 2018, 71–72 (2019), https://unama.unmissions.org/sites/default/files/unama_annual_protection_of_civilians_report_2018_-_23_feb_2019_-_english.pdf (reprinting letter from U.S. Army general assigned to NATO command structure stating that all NATO Resolute Support missions are conducted in accordance with international law).

mission.[11] Distinction, another law of war principle, mandates that commanders take care to differentiate between enemy forces, which can be targeted, and civilians, who cannot be intentionally targeted.[12]

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

B. Public Interest in INTERPOL Operations

Though not as financially significant as its commitment to NATO, the U.S. government's pledge to support INTERPOL's operations totals tens of millions of dollars annually.[17] This support primarily takes the form of appropriations by the U.S. Congress to the Department of Justice for use by the U.S. National Central Bureau, also known as INTERPOL Washington.[18] INTERPOL Washington serves as the official U.S. representative to INTERPOL and as the access point for American law enforcement to INTERPOL information and services.[19] INTERPOL Washington requested $34 million in appropriations for fiscal year 2019, including $16.9 million to cover membership payments, set by INTERPOL, for U.S. participation in the organization.[20] In addition to its regular membership payments through the Department of Justice, the United States also provides funding through the Department of State; these contributions make the United States INTERPOL's

11. *See* LAW OF WAR MANUAL, *supra* note 7, § 2.4.1 (describing the limits and justifications of proportionality in a military setting).

12. *See id.* § 2.5.2 (discussing discrimination in attacks against an enemy).

13. *See id.* § 17.5.1 (discussing discrimination in attacks against an enemy in non-international armed conflict).

14. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 4, at 12–15 (tracking civilian deaths from NATO and U.S. airstrikes from November 2005 until July 2008).

15. *See, e.g.*, *id.* at 30 ("This [data] suggests that the US is not taking all feasible precautions during prolonged battles, including . . . positively identifying the locations of combatants and civilians.").

16. See *infra* Section II.A and accompanying text for a case study of NATO airstrikes in Afghanistan.

17. *See* LIANA W. ROSEN, CONG. RSCH. SERV., IF10766, TRANSNATIONAL CRIME ISSUES: ICPO-INTERPOL 2 (updated ed. 2019) (discussing U.S. membership dues to INTERPOL).

18. *See id.* (noting that U.S. National Central Bureau requested over $34 million in appropriations for fiscal year 2019, including $16.9 million in payments to INTERPOL); *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 411 (appropriating money to INTERPOL Washington under Department of Justice budget).

19. *See* ROSEN, *supra* note 17, at 1–2 (discussing INTERPOL's structure, governance, and authority).

20. *Id.* at 2.

largest financial supporter.[21]

One of the most important services provided by INTERPOL is the Red Notice—bulletins issued and distributed on behalf of member countries, requesting that other member countries locate, arrest, and extradite an alleged fugitive.[22] In 2017, INTERPOL issued 13,048 new Red Notices; combined with non-expired Red Notices from prior years, a total of 52,103 notices were pending law enforcement action.[23] Though the U.S. Department of Justice takes the position that a Red Notice alone is not sufficient to make an arrest,[24] there may be other collateral consequences domestically as the result of a Red Notice issuance.[25] Moreover, other countries may be willing to make arrests based on a Red Notice alone.[26]

The U.S. and most other nations are obligated by treaty not to discriminate on the basis of political opinion[27] and not to subject individuals to "arbitrary arrest or detention."[28] INTERPOL itself recognizes a duty to comply with similar obligations.[29] However, human rights organizations have alleged that authoritarian

21. *See id.* at 1–2 (explaining U.S. financial contributions to INTERPOL).

22. *See id.* at 1 (explaining INTERPOL's system of notices).

23. *Id.*

24. *See* U.S. Dep't. of Justice, *INTERPOL Washington: Frequently Asked Questions*, https://www.justice.gov/interpol-washington/frequently-asked-questions [https://perma.cc/7ETX-4EPZ] (last updated Oct. 29, 2019) ("The United States does not consider a Red Notice alone to be a sufficient basis for the arrest of a subject because it does not meet the requirements for arrest under the 4th Amendment to the Constitution. Instead, the United States treats a foreign-issued Red Notice only as a formalized request by the issuing law enforcement authority to 'be on the look-out' for the fugitive in question, and to advise if they are located."). Arrests are commonly made only when extradition is formally requested; *see, e.g.*, Extradition Treaty, Fin.-U.S., arts. 14–15, June 11, 1976, 31 U.S.T. 944 (contemplating arrest upon formal extradition request by other state).

25. For example, foreign nationals in the United States may be selected for removal by immigration authorities as a result of Red Notices. *See* Natasha Bertrand, *How Russia Persecutes Its Dissidents Using U.S. Courts*, ATLANTIC: POLITICS (July 30, 2018), https://www.theatlantic.com/politics/archive/2018/07/how-russia-persecutes-its-dissidents-using-us-courts/566309/ (chronicling cases wherein immigration authorities allegedly acted based on Red Notices).

26. *See* FAIR TRIALS INT'L, STRENGTHENING RESPECT FOR HUMAN RIGHTS, STRENGTHENING INTERPOL 13 (2013) [hereinafter FAIR TRIALS INT'L, STRENGTHENING INTERPOL], https://www.fairtrials.org/wp-content/uploads/Strengthening-respect-for-human-rights-strengthening-INTERPOL4.pdf [https://perma.cc/YYQ2-8ERC] ("[O]ur casework experience suggests that Georgia, Spain, Italy, Poland and Lebanon will readily arrest those subject to Red Notices."); *see also* FAIR TRIALS INT'L, STRENGTHENING INTERPOL: AN UPDATE (2018), https://www.fairtrials.org/sites/default/files/publication_pdf/Strenghtening%20INTERPOL%20an%20Update.pdf [https://perma.cc/C4SU-Q5HC] (arguing that, while INTERPOL has undertaken reforms since 2013, more progress is necessary to deter Red Notice abuse).

27. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, T.I.A.S. No. 92-908 [hereinafter ICCPR].

28. *Id.* art. 9.

29. *See* INTERPOL Constitution, *supra* note 2, arts. 2–3 (discussing general provisions of the document). Article Two specifically refers to the Universal Declaration of Human Rights, not the ICCPR. *Id.* art. 2. However, the ICCPR explicitly recognizes and builds upon the Universal

regimes, such as the current Russian Government, have abused the Red Notice system to persecute dissidents and INTERPOL has failed to check its member states' abuses of the system.[30] In the United States, warrants to arrest an individual on the basis of criminal charges must ordinarily be disclosed to the public once executed.[31] The public is also able to obtain internal documents from domestic agencies to assess their compliance with legal requirements.[32] However, despite the possibility for political abuse of INTERPOL Red Notices, the same standard of openness and transparency is not applied to INTERPOL and its documents, hindering efforts to reform its practices.[33]

C. The Problem of Transparency in International Law

Scholars, practitioners, states, and international organizations increasingly recognize the importance of transparency in international law.[34] However, the exact meaning of transparency in international law is unclear.[35] Transparency for the purpose of this Comment is broadly defined as different forms of access to the records of international organizations. Other possible definitions of transparency include openness of deliberative proceedings themselves—as opposed to access to the records of those proceedings—and the ability of third parties to participate directly in those same proceedings.[36] This section provides an overview of different types of a record-based definition of transparency in international law.

Part II reviews in depth the organizational forms and missions of NATO in Afghanistan and of INTERPOL, and similar information for both organizations'

Declaration. *See* ICCPR, *supra* note 27, pmbl. ("Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights.").

30. *See, e.g.*, FAIR TRIALS INT'L, STRENGTHENING INTERPOL, *supra* note 26, at 25 ("We conclude that, in practice, INTERPOL's Red Notices are being used as political tools . . . and are being issued and maintained on the basis of criminal cases which have been recognised as being politically-motivated by extradition courts and asylum authorities.").

31. *See* WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(h) (6th ed.) (describing the policy and common law right to public access to arrest warrants).

32. *See* Freedom of Information Act, 5 U.S.C. § 552(a)(3) (2018) (allowing for public access of U.S. federal executive branch documents upon request).

33. See *infra* Section II.B and accompanying text for case study analyses of abuses of INTERPOL Red Notices.

34. Anne Peters, *Towards Transparency as a Global Norm*, *in* TRANSPARENCY IN INTERNATIONAL LAW 534, 534 (Andrea Bianchi & Anne Peters eds., 2013) ("In all major fields of international law . . . demands for more transparent institutions and procedures have recently been voiced by civil-society actors, by States, and within the international institutions themselves.").

35. *See* Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, *in* TRANSPARENCY IN INTERNATIONAL LAW 1, 6–10 (Andrea Bianchi & Anne Peters eds., 2013) (discussing transparency as a concept in international law).

36. *See* Alan Boyle & Kasey McCall-Smith, *Transparency in International Law-Making*, *in* TRANSPARENCY IN INTERNATIONAL LAW 419, 421–22 (Andrea Bianchi & Anne Peters eds., 2013) (including open deliberations, ability to participate, and access to information under rubric of transparency).

domestic counterparts, and explains the comparative inability to access the records of both international bodies. Part III applies the types of transparency introduced in this section to INTERPOL and NATO to determine the best possible fit. Though this Comment is confined to security institutions, it contributes generally to the project of further defining the concept of transparency in international law.

1. Transparency for Lawmaking Procedures

One of the most common definitions of transparency is the ability for the public to access legislative and judicial proceedings and records of those proceedings, which this Comment describes as the legislative and judicial type of transparency.[37] This form of transparency is a basic requirement for any rule of law system, insofar as those governed by law have the right to understand and critique the law.[38] In the United States, early efforts to increase transparency of the executive branch focused specifically on the branch's quasi-legislative and quasi-judicial administrative functions as the result of concerns that these new capacities were effectively creating secret law.[39] Many, though not all, international organizations have taken measures to publicize, at least, their final legislative and judicial actions.[40] Key questions to consider when evaluating a system of transparency for legislative and judicial proceedings and documents include whether the public has access to deliberations or only to finished products[41] and whether all documents in the category or only documents specifically selected by the agency or a party are published.[42]

2. Transparency for Internal Agency Files

The next common concept of transparency is the openness of executive government agencies' files, which this Comment describes as the executive type of transparency.[43] Executive transparency rests on a different concept than legislative

37. *See* Peters, *supra* note 34, at 537 (discussing the modern understanding of transparency in democratic states).

38. *See id.* at 538, 548 (considering transparency alongside the core objectives in international lawmaking bodies).

39. ELIZABETH GOITEIN, BRENNAN CTR. FOR JUST., THE NEW ERA OF SECRET LAW 13–14 (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_The_New_Era_of_Secret_Law_0.pdf [https://perma.cc/66WA-E4J7].

40. *Judgments, Advisory Opinions and Orders*, INT'L CT. JUST., https://www.icj-cij.org/en/decisions (last visited Oct. 8, 2019) (collecting final decisions of the International Court of Justice); *see, e.g.*, *Official Document System*, UNITED NATIONS, https://documents.un.org/prod/ods.nsf/home.xsp (last visited Oct. 8, 2019) (collecting official U.N. records, including General Assembly and Security Council resolutions).

41. *See* Thore Neumann & Bruno Simma, *Transparency in International Adjudication*, *in* TRANSPARENCY IN INTERNATIONAL LAW 436, 437–62 (Andrea Bianchi & Anne Peters eds., 2013) (discussing public access to written and oral submissions of parties and drafting records of judges); *see also* Boyle & McCall-Smith, *supra* note 36, at 431 (noting that U.N. Security Council releases little information to the public other than its final agreed resolutions).

42. *See* Neumann & Simma, *supra* note 41, at 437–47 (noting that written submissions to some international tribunals may be published only by submitting parties themselves).

43. *See* Megan Donaldson & Benedict Kingsbury, *Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance Institutions*, *in* TRANSPARENCY

and judicial transparency; while the latter is a basic necessity for a rule of law system, the former rests on the right of the public to judge the performance of the executive agencies they have empowered through their representatives.[44] This type of transparency tends to be subject to more restrictions than transparency for lawmaking because particular implementations of the law must be kept secret for a time to preserve their effectiveness.[45] As a result, policies or laws governing access to unpublished executive agency files tend to establish a broad presumption of access to records subject to specific exemptions.[46] This type of transparency policy typically varies along several axes, including the scope of records subject to the presumption of access, the breadth of agency discretion in invoking exemptions to that presumption, and the possibility of obtaining administrative or judicial review of a decision to deny access.[47]

3. Transparency as a Compliance Measure

The two prior definitions of transparency focus on policies—whether in the form of statutes, executive policies, or anything in between—in which an entity or agency mandates its own transparency.[48] In contrast, a third definition focuses on transparency obligations imposed by government agencies upon third parties, which this Comment describes as the compliance type of transparency.[49] In both domestic and international law, these transparency duties may be imposed either upon states or private actors. For instance, domestic compliance transparency requirements include disclosures for the sale and trading of securities[50] and for the financing of political campaigns. [51] International compliance transparency

IN INTERNATIONAL LAW 502, 511–12 (Andrea Bianchi & Anne Peters eds., 2013) (discussing policies maintained by international organizations for access to unpublished documents); *see also* 5 U.S.C. § 552(a)(3) (granting public access to unpublished documents of the U.S. federal executive branch upon request).

44. *See* GOITEIN, *supra* note 39, at 22–24 (distinguishing between "secret law" and the difficulty of holding government accountable for violations of the law when those violations are "secret facts").

45. *See, e.g.*, 5 U.S.C. § 552(b)(7) (permitting executive branch to withhold, despite request, records or information which would interfere with government investigations in various ways).

46. *See, e.g.*, *id.* (providing one of several exemptions to general openness required by § 552(a)(3)).

47. *See* Donaldson & Kingsbury, *supra* note 43, at 511–15 (comparing transparency policies of international organizations along these axes).

48. See *supra* Section I.C.1 and I.C.2 and accompanying text for a discussion of transparency in lawmaking and in agency filings.

49. *See, e.g.*, Mirko Sossai, *Transparency as a Cornerstone of Disarmament and Non-proliferation Regimes*, *in* TRANSPARENCY IN INTERNATIONAL LAW 392, 394–95 (Andrea Bianchi & Anne Peters eds., 2013) (defining transparency in the disarmament context, in part, as the self-reporting by states of relevant data under international agreements or the collection of the same by observers not affiliated with the state in question).

50. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2018) (requiring public disclosure by private parties as part of regulation of public sale of company securities).

51. *See, e.g.*, Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101–30146 (2018) (requiring public disclosure of donations to campaign committees of those running for election to Federal office).

requirements include disarmament verification by states and international organizations.[52] These compliance disclosure requirements commonly vary along several dimensions, including whether the information disclosed is transparent only to the regulator or also to the public[53] and the degree to which these disclosures are voluntary or compulsory.[54]

4. Illegal Action as Transparency

In addition to transparency guaranteed by law or official policy, leaking is also an important type of transparency,[55] especially for information about national security and foreign affairs.[56] While a discussion of transparency would be remiss not to include a section about leaking, ultimately, this Comment will not apply this concept in the case studies below for two reasons. First, leaking is discretionary and relies on contingent circumstances and motivations; rather than permitting the constituents of an organization to be their own agents in obtaining information, this type of transparency makes constituents reliant on the whims and wills of government agents. Second, especially in the security context, leaks of information that are not favored by government officials may result in serious criminal jeopardy, making leaking insufficient as a standalone transparency mechanism.

The unlawful disclosure of confidential information is and has been a common tactic of American presidential administrations.[57] This practice permits administration officials to release favorable information about their national security policies without risking the formal oversight that would come with an official release.[58] While this information may help constituents understand

52. *See* Sossai, *supra* note 49, at 395–409 (cataloging different means of verifying compliance with disarmament and non-proliferation treaties).

53. *See, e.g.*, *id.* at 412–14 (discussing limits on disclosure of information obtained by disarmament verification and the resulting limit on the audience for whom the subject states are transparent).

54. *See id.* at 408–09 (noting difference between relatively voluntary disclosures among states about disarmament and compulsory disclosures required by the U.N. Security Council).

55. Professor David Pozen offers the following working definition of a leak: "Most commonly, a leak is taken to be (i) a targeted disclosure (ii) by a government insider (employee, former employee, contractor) (iii) to a member of the media (iv) of confidential information the divulgence of which is generally proscribed by law, policy, or convention (v) outside of any formal process (vi) with an expectation of anonymity." David Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 521 (2013).

56. *See, e.g.*, Gregg Leslie & Emily Grannis, *History of Leaks in the United States from the Pentagon Papers Through WikiLeaks to Rosen*, *in* WHISTLEBLOWERS, LEAKS, AND THE MEDIA: THE FIRST AMENDMENT AND NATIONAL SECURITY 13, 13–27 (Paul Rosenzweig et al. eds., 2015) (chronicling high-profile news media stories which were based on the unauthorized disclosure of government information).

57. Pozen, *supra* note 55, at 559.

58. *Id.* at 559–60. Pozen also makes a more controversial claim: federal officials are relatively relaxed in pursuing leaks by unauthorized officials in part to preserve the ability to make quasi-authorized, but technically unlawful, leaks. *Id.* at 562 ("For a strategy of planting to work, it is critical that relevant audiences not immediately assume that every unattributed disclosure they encounter reflects a concerted White House effort to manipulate the information

government activities, it only reveals information about those programs that the government itself deems favorable, and thus may be unhelpful in allowing the public to fully evaluate government performance.[59]

Even in the case of dissident leakers, who wish to provide information critical of the present administration, there are transparency issues. Dissident leakers make individual decisions based on their own grievances, legitimate or otherwise.[60] The scope of these grievances and range of knowledge of those leakers will shape what they leak and, accordingly, the material they make available may not coincide or fully overlap with the subject of the public's interest. Moreover, true dissident leakers, in contrast to authorized and quasi-authorized pro-administration leakers, are more likely to be subject to serious penalties under American criminal law.[61]

One offense that prosecutors are likely to utilize in dissident leak cases is a provision of the Espionage Act that prohibits those authorized to access national defense information from releasing it to unauthorized individuals if they have reason to believe the information could be harmful to the United States—intent to actually cause such harm is not an element of the statute.[62] While the exact scope of the term national defense information is not clear in the text of the statute, courts have referenced the executive branch's classification rules to help define its breadth.[63] The current executive branch classification rules expressly protect information shared with the United States by an international organization, and information created in partnership with an international organization, if the parties intend the information to be confidential.[64] As a result, a U.S. government employee who releases NATO or INTERPOL information without authorization could face charges under the Espionage Act.[65]

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environment.").

59. See *supra* Section I.C.2 and accompanying text for a discussion on transparency for agency internal files. Indeed, Pozen notes, courts have held that Freedom of Information Act protections are not waived by unofficial acknowledgements. Pozen, *supra* note 55, at 560. Therefore, these unofficial acknowledgements do not provide a method for constituents to lawfully obtain other relevant information. *Id.*

60. *See* Pozen, *supra* note 55, at 532 (categorizing whistleblower leaks as those that seek to remedy perceived abuses).

61. *See, e.g.*, *id.* at 572 ("The rare undeniable leak like Chelsea Manning's can be investigated and punished with only modest externalities for the executive's broader functioning.").

62. Stephen Vladeck, *Prosecuting Leaks Under U.S. Law*, *in* WHISTLEBLOWERS, LEAKS, AND THE MEDIA: THE FIRST AMENDMENT AND NATIONAL SECURITY 29, 32 (Paul Rosenzweig et al. eds., 2015).

63. Pozen, *supra* note 55, at 523; *see* United States v. Morison, 844 F.2d 1057, 1074 (4th Cir. 1988) ("Further, the materials involved here are alleged in the indictment and were proved at trial to be marked plainly 'Secret' and that classification is said in the Classification Order to be properly 'applied to information, the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security.'").

64. Exec. Order No. 13526, 75 Fed. Reg. 707, §§ 1.1(d), 1.4(b), and 6.1(s) (2010) (permitting classification of foreign government information, which includes information produced by or in conjunction with international organizations, and also creating presumption that unauthorized release of such information damages national security).

65. Given the insistence by U.S. agencies that information available to U.S. employees

II. CASE STUDIES

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

A. NATO Airstrikes in Afghanistan

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

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

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

a. NATO Structure

The North Atlantic Treaty establishes only one NATO body, the North

detailed to NATO and INTERPOL is not under the control of the United States for Freedom of Information Act purposes, it is not entirely clear that these employees would violate the classification rules if they leaked NATO or INTERPOL information. *See infra* Sections II.A.3 and II.B.3; Exec. Order No. 13526, *supra* note 64, § 1.1(a)(2) (restricting scope of classification rules to information owned by, produced for or by, or under the control of the United States). However, there are at least two possible paths to Espionage Act prosecutions notwithstanding this barrier. First, the same terms in the Executive Order and in judicial interpretation of the Freedom of Information Act do not necessarily bear the same meaning in two different contexts. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2126 (2019) (plurality opinion of Kagan, J.) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation and internal quotation marks omitted). Second, because executive classification rules are not expressly incorporated in the Espionage Act but are used by courts to determine whether the boundaries of the Act are sufficiently clear, it is possible that an American could be prosecuted for violating a different set of security rules. *See* Morison, 844 F.2d at 1073 (finding Espionage Act was not vague as applied to the defendant in part because he had personal knowledge of government secrecy and intelligence operations).

66. See *supra* Section I.A and I.B and accompanying text for a discussion on public interest in these organizations.

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

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

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

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67. North Atlantic Treaty, *supra* note 1, art. 9.

68. *Id.*

69. *Military Organisation and Structures*, NATO, https://www.nato.int/cps/en/natohq/topics_49608.htm [https://perma.cc/4LLD-U5V8] (last updated May 25, 2018). As detailed below, *see infra* Section II.A.3, my description of NATO organization is heavily based on secondary source because the NATO transparency scheme does not apply to contemporary records. As a result, there are comparatively few primary sources for current NATO organization.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Allied Command Transformation*, NATO, https://www.nato.int/cps/en/natohq/topics_52092.htm [https://perma.cc/8F42-EG97] (last updated Oct. 3, 2018).

74. *Allied Command Operations*, NATO, https://www.nato.int/cps/en/natohq/topics_52091.htm [https://perma.cc/K44V-X5PD] (last updated Oct. 3, 2018).

75. *Id.* See *infra* Section II.A.1.b for a description of the U.S. regional combatant commands.

76. S.C. Res. 1386, ¶ 1 (Dec. 20, 2001).

77. HUMAN RIGHTS WATCH, *supra* note 4, at 10.

78. S.C. Res. 1510, ¶ 1 (Oct. 13, 2003).

79. *See* S.C. Res. 2189 (Dec. 12, 2014) (recognizing agreement between NATO and government of Afghanistan to establish Resolute Support Mission).

80. *See* U.S. DEP'T OF DEF., REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN: REPORT TO CONGRESS IN ACCORDANCE WITH SECTION 1230 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008, at 13 (2010), https://archive.defense.gov/pubs/November_1230_Report_FINAL.pdf [https://perma.cc/Q4TQ-MLE5] (reprinting 2010 ISAF and USFOR-A organization chart).

b. U.S. Forces Structure

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

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

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81. See *supra* Section I.A and accompanying text for a discussion on military operations in Afghanistan.

82. STAFF OF S. COMM. ON ARMED SERVICES, 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE 275–76 (Comm. Print 1985).

83. *Id.*

84. *Id.* at 276.

85. *Id.* at 276–81. For instance, the National Security Act of 1947 placed the previously independent military departments under the control of the newly created Secretary of Defense and transferred operational control from the departments to the Secretary. *Id.* at 276–77.

86. *See, e.g.*, *id.* at 302–07 (arguing that military departments held too much power over operations in part because the Joint Chiefs of Staff, on which each department is represented, was placed in chain of command over operations).

87. *See* 10 U.S.C. § 162(b) (2018) (specifying that command of operational elements runs directly from Secretary of Defense to combatant commands).

88. *See* Shawn Brimley & Paul Scharre, *Ctrl+Alt+Delete: Resetting America's Military*, FOREIGN POL'Y, May–June 2014, at 58, 58 (listing 1980s reform, popularly known as the Goldwater-Nichols Act, as last major structural change to U.S. military structure).

89. The military departments are the Army, the Air Force, and the Navy (including the Marine Corps, and, when in military service, the Coast Guard). 10 U.S.C. § 101(a)(9).

90. *See, e.g.*, 10 U.S.C. § 7013(b) (tasking Secretary of the Army with duties including recruiting, organizing, and training Army soldiers).

91. *Id.* at § 162(a).

92. *Id.* at § 161(a).

93. *Combatant Commands*, U.S. DEP'T OF DEF., https://www.defense.gov/Our-Story/Combatant-Commands/ [https://perma.cc/E3CM-YQPG] (last visited Nov. 18, 2019).

94. *Area of Responsibility*, U.S. CENT. COMMAND, https://www.centcom.mil/AREA-OF-

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

2. Alleged Abuses

Airstrikes carried out by both NATO and U.S. forces are a consistent source of civilian casualties in Afghanistan. Human Rights Watch has alleged that airstrikes by these two military organizations were responsible for 116 civilian deaths in 2006 and 321 in 2007.[98] In 2018, the United Nations Assistance Mission to Afghanistan counted 393 civilian deaths and 239 civilian injuries caused by aerial operations by U.S. and NATO forces for a total of 632 civilian casualties.[99] These figures are disputed by military officials.[100] However, the issue with these casualties for the purpose of this comment is not so much their exact number, but

RESPONSIBILITY/ [https://perma.cc/27G3-WUMV] (last visited Jan. 6, 2020).

95. U.S. DEP'T OF DEF., PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN: REPORT TO CONGRESS IN ACCORDANCE WITH THE 2008 NATIONAL DEFENSE AUTHORIZATION ACT 27 (2009), https://dod.defense.gov/Portals/1/Documents/pubs/OCTOBER_1230_FINAL.pdf [https://perma.cc/N2VA-9NEW] [hereinafter 2009 PROGRESS TOWARD SECURITY].

96. Press Release, U.S. Dep't of Def., Def. Dep't Activates U.S. Forces-Afghanistan (Oct. 6, 2008); 2009 PROGRESS TOWARD SECURITY, *supra* note 96, at 27 (noting that the duties of the Commander, USFOR–A, in 2009 included the direction of all OEF soldiers in Afghanistan with an exception for certain missions assigned directly to CENTCOM). Though specific details of the allocation of control between CENTCOM and USFOR–A may have changed over time, only the basic structure is relevant to this comment and this remains the same. *See Hearing to Consider the Nomination of Lt. General Austin S. Miller, USA to be General and Commander, Resolute Support Mission, North Atlantic Treaty Organization/Commander, United States Forces Afghanistan Before the S. Armed Serv. Comm.*, 115th Cong. (2018), https://www.armed-services.senate.gov/imo/media/doc/18-55_06-19-18.pdf [https://perma.cc/V9K3-8VMB] (reprinting 2018 Senate hearing on nomination of General Miller to the position of Commander, USFOR–A, as well as Commander, RS). See U.N. ASSISTANCE MISSION IN AFG., *supra* note 10, at 58, for OEF's replacement by OFS.

97. *See* U.N. ASSISTANCE MISSION IN AFG., *supra* note 10, at 58 (noting that NATO and U.S. forces share the same commander); *ISAF History*, NATO, https://rs.nato.int/about-us/history/isaf-history.aspx [https://perma.cc/6U3K-UZR5] (last visited Dec. 27, 2019) (listing prior ISAF commanders); *Resolute Support: History*, NATO, https://rs.nato.int/about-us/history.aspx [https://perma.cc/7DZ3-HK6N] (last visited Dec. 27, 2019) (listing current and former RS commanders).

98. HUMAN RIGHTS WATCH, *supra* note 4, at 14. Human Rights Watch defines airstrikes to include any use of aerial munitions, a category which seems to include military helicopter attacks. *Id.* at 12.

99. U.N. ASSISTANCE MISSION IN AFG., *supra* note 10, at 35. This includes military helicopter attacks. *See id.* at 61 (defining "Aerial operations/attack or airstrike" to include close combat attacks using rotary-wing aircraft, such as helicopters).

100. *See, e.g.*, *id.* at 71–72 (reprinting comment letter from NATO on 2018 civilian casualty findings).

the fact that they raise serious concerns about whether the United States and NATO are complying with relevant law of war standards.[101] Human Rights Watch and the U.N. noted similar casualty trends across time in both reports. For instance, both organizations noted their concern about civilian casualties caused by relatively spontaneous airstrikes carried out in support of ground forces, as opposed to airstrikes planned well in advance.[102]

3. Comparative Inability to Access NATO Records

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

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101. *See* HUMAN RIGHTS WATCH, *supra* note 4, at 4, 6 (noting that civilian casualties are not themselves violations of the law of war but that they do raise concerns that the law of war is not being followed). These same concerns might soon be the subject of an investigation by the Office of the Prosecutor of the International Criminal Court. In 2017, the Office of the Prosecutor submitted a request to the Pre-Trial Chamber to approve an investigation into the situation in Afghanistan. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15," ¶ 1 (Nov. 20, 2017). The Office of the Prosecutor included in its request a discussion of civilian casualties caused by international forces, including casualties caused by airstrikes; although the Prosecutor stated that existing evidence did not support a belief that these casualties were the result of international crimes, the Office could develop further information during an investigation. *Id.* ¶¶ 255–60. In March 2020, the Appeals Chamber reversed a decision of the Pre-Trial Chamber and allowed the Prosecutor to open an investigation into the entire situation in Afghanistan. Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶¶ 46, 79 (Mar. 5, 2020). See *supra* Section I.A for a discussion on NATO operations.

102. *See* HUMAN RIGHTS WATCH, *supra* note 4, at 3–4 (noting that more civilian casualties occur when air forces provide support to ground forces engaged in combat); U.N. ASSISTANCE MISSION IN AFG., *supra* note 10, at 39 ("UNAMA is increasingly concerned about civilian casualties resulting from airstrikes conducted in support of international or Afghan partner forces on the ground that may come under attack, when targeting decisions are made with urgency and insufficient information may be readily available concerning the presence of civilians.").

103. 5 U.S.C. § 552; North Atlantic Trade Organization [NATO], *Policy on the Public Disclosure of NATO Information*, NATO Doc. C-M(2008)0116-REV1, annex, (Feb. 13, 2017) [hereinafter NATO Public Disclosure Policy], https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_archives/20180913_C-M-2008-0116-REV1_E.pdf [https://perma.cc/CCL4-HRYP].

104. *See Resolute Support: History*, *supra* note 97 (listing current and former RS commanders).

105. See *supra* Section I.A for a discussion of the public interest in NATO operations.

106. *See* Letter from Michael L. Rhodes, Dir., Office of the Deputy Chief Mgmt. Officer, Dep't of Def., to author (Sept. 10, 2015) (on file with author) (regarding FOIA Appeal 14-AC-0034-A1, Rhodes argues that although U.S. military employees had access to requested NATO

a. High-Level Policy Documents

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

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records, those records were not records of U.S. military agencies). In addition to enabling the discrepancy between access to U.S. and NATO records, this position by the federal government could also allow it to engage in records arbitrage: representing that U.S. records belong to NATO to attempt to avoid FOIA disclosure. In an extreme domestic example of this phenomenon, the federal government took custody of electronic surveillance records held by a city police detective to avoid disclosure to the ACLU of Florida. *See* ACLU of Florida v. City of Sarasota, 859 F.3d 1337 (11th Cir. 2017) (holding in action removed from state court that ACLU was entitled to jurisdictional discovery on whether detective was acting as a special deputy U.S. Marshal when he prepared records in question).

107. *See* U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require Secrecy.") (capitalization altered); *id.* art. I, § 9, cl. 7. ("No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.") (capitalization altered). These provisions establish a clear general norm that all legislative business is to be undertaken in public, though this norm is occasionally breached. GOITEIN, *supra* note 39, at 12–13. What is less clear is whether these Constitutional provisions can be enforced by a member of the general public. *See* Lawrence Rosenthal, *The Statement and Account Clause as a National Security Freedom of Information Act*, 47 LOY. U. CHI. L.J. 1, 59–89 (2015) (noting that Supreme Court rejected taxpayer standing suit under Statement and Account Clause in 1974 but arguing that subsequent doctrinal developments limit this holding).

108. 5 U.S.C. § 552(a)(1)(D) ("Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."); § 552(a)(2)(B) (requiring publication outside of the Federal Register of all other statements of policy).

109. *See, e.g.*, Brimley & Scharre, *supra* note 88, 90–93 (providing detailed statutory rules for the organization of U.S. armed forces).

110. *DoD Directives*, U.S. DEP'T OF DEF., https://www.esd.whs.mil/Directives/issuances/dodd/ [https://perma.cc/XJ86-ENWN] (last visited Jan. 1, 2020).

111. *See, e.g.*, *Army Regulations*, ARMY PUB. DIRECTORATE, https://armypubs.army.mil/ProductMaps/PubForm/AR.aspx [https://perma.cc/SRM8-WHZS] (last visited Jan. 1, 2020) (listing general regulations of the Department of the Army).

112. *See, e.g.*, *Joint Doctrine Library*, U.S. JOINT CHIEFS OF STAFF, https://www.jcs.mil/Doctrine/ [https://perma.cc/Q25D-R397] (last visited Jan. 1, 2020) (listing military-wide doctrinal publications promulgated by Joint Chiefs of Staff).

113. 5 U.S.C. § 552(a)(4)(B).

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

b. Investigations into Alleged Abuses

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

114. NATO Public Disclosure Policy, *supra* note 103, ¶ 7.a. NATO's directive implementing the Public Disclosure Policy makes explicit that this thirty-year embargo period applies even to information NATO never marked as security sensitive. *See* North Atlantic Trade Organization [NATO], *Directive on the Public Disclosure of NATO Information* ¶¶ 9, 10, NATO Doc. AC/324-D(2014)0010-REV2 (Jan. 16, 2018) [hereinafter NATO Public Disclosure Directive] https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_archives/20180913_AC_324-D-2014-0010-REV2_ENG_NHQD89016.pdf [https://perma.cc/349W-5BY2] (last visited Jan. 2, 2020) (tasking NATO Archivist with task of sorting NATO information at least thirty years old into several categories for disclosure review, including a category consisting of documents which were never classified or which were declassified prior to review for release).

115. *See* S.C. Res. 1386, *supra* note 76 (authorizing ISAF operations in 2001); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing U.S. military to use force against, *inter alia*, those who harbored al Qaeda prior to the Sept. 11, 2001 attack).

116. In correspondence, a NATO archivist confirmed that even recent records of the North Atlantic Council, NATO's highest decision-making body, are released only rarely on an ad hoc basis. Email from Nicholas Roche, NATO Archives, to author (Sept. 16, 2019) (on file with author).

117. There is no reference in either the Public Disclosure Policy or Directive to any right of any person outside of NATO employees or national government employees to request disclosure of NATO information. NATO Public Disclosure Policy, *supra* note 103; NATO Public Disclosure Directive, *supra* note 115. However, NATO employees and employees of national governments can themselves initiate "ad hoc" requests to release information prior to thirty years. *See, e.g.*, NATO Public Disclosure Policy, *supra* note 103, ¶ 12. This disparity between privileged access by NATO and national government employees and the publics they serve creates the same risks of self-serving information releases that exists in the case of plants of classified information. See *supra* Section I.C.4 for a discussion on leaking as a type of transparency.

118. 5 U.S.C. § 552(a)(3) (providing for access to unpublished agency records upon request); § 552(b) (creating exceptions to disclosure requirement).

119. 5 U.S.C. § 552(b)(1), (7).

investigation report under the Freedom of Information Act.[120] Agency failures to disclose records of these investigations are subject to judicial review.[121]

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

B. Abuse of INTERPOL Red Notices

Like NATO, INTERPOL is funded by U.S. taxpayers, aids U.S. security interests, and can infringe on legally guaranteed human rights.[125] And like NATO, it is opaque to the U.S. taxpayer in comparison to domestic law enforcement, as explained below.

1. Structure of INTERPOL Compared to U.S. Law Enforcement

For the same reasons as in the comparison of NATO and the U.S. military, to understand the differences in transparency requirements between INTERPOL and domestic law enforcement, it is first necessary to compare their respective organizations and missions.

a. INTERPOL Structure

INTERPOL in its present form was created in 1956 when delegates from member countries of the International Criminal Police Commission adopted a new constitution, and renamed the organization.[126] That constitution created several

120. U.S. FORCES-AFG., INVESTIGATION REPORT OF THE AIRSTRIKE ON THE MÉDECINS SANS FRONTIÈRES / DOCTORS WITHOUT BORDERS TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON 3 OCTOBER 2015, PT. 1, (Nov. 21, 2015) [hereinafter Investigation Report], https://www3.centcom.mil/FOIA_RR_Files/5%20USC%20552(a)(2)(D)Records/2.%20AR%2015-6%20Investigations/2015/Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015/01.%20AR%2015-6%20Inv%20Rpt-Doctors%20Without%20Borders,%203%20Oct%2015_CLEAR.pdf [https://perma.cc/TV5W-YHW2].

121. *See supra* note 114.

122. *See* U.N. ASSISTANCE MISSION IN AFG., *supra* note 10, at 50 (listing investigative mechanisms used by both NATO and U.S. military). This is certainly the case when those U.S. forces are assigned to NATO command. NATO may also carry out oversight of U.S.-commanded forces. *See, e.g.*, INVESTIGATION REPORT, *supra* note 120, at Bates Stamp 072–73 (indicating that USFOR–A abides by certain NATO tactical guidance).

123. *See id.* (comparing number of incidents reviewed under NATO investigative process versus U.S. investigative process).

124. *See* NATO Public Disclosure Policy, *supra* note 103 (describing NATO's transparency policies).

125. See *supra* Section I.B. for a discussion on the public's interest in INTERPOL operations.

126. *See generally* INTERPOL Constitution, *supra* note 2.

entities within the INTERPOL structure, including the General Assembly, the Executive Committee, the General Secretariat, the National Central Bureaus, and the Commission for the Control of Files.[127] The General Assembly is the highest authority in INTERPOL and is responsible for setting policy and directing the other branches.[128] The Executive Committee assists the General Assembly in implementing its decisions, including through its supervision of the performance of the Secretary General and his staff.[129] The General Secretariat executes the decisions of the General Assembly.[130] The National Central Bureaus are the interfaces between member countries and INTERPOL.[131] Finally, the Commission for the Control of Files audits the General Secretariat's data sharing practices.[132]

Over the years, INTERPOL has promulgated a number of regulations to govern its data sharing services, including Red Notices.[133] The current governing regulations are the Rules on the Processing of Data.[134] These rules assign the duties of different branches of INTERPOL in processing communications for police cooperation, including Red Notices.[135] Under the rules, each National Central Bureau is responsible for proposing the publication of notices and ensuring compliance of its proposed notices with the INTERPOL Constitution.[136] This includes compliance with Articles 2 and 3, which require member countries that participate in INTERPOL to follow the sentiment of the Universal Declaration of Human Rights, and forbid INTERPOL from participating in any activities that have a political, military, religious or racial character, respectively.[137] The staff of the General Secretariat then performs their own check of the proposed notice.[138] Once the General Secretariat clears the proposed notice, it is published to all other National Central Bureaus.[139]

b. Process for Obtaining Domestic Arrest Warrants

The domestic arrest warrant is the closest American analogue to the Red Notice.[140] In contrast to the centralized quasi-warrant-issuing process of

127. *Id.* art. 5.

128. *Id.* arts. 6, 8.

129. *Id.* art. 22.

130. *Id.* arts. 25–27.

131. *Id.* arts. 31–32.

132. *Id.* art. 36.

133. Int'l Criminal Police Org. [INTERPOL], RULES ON THE PROCESSING OF DATA, ch. 2, §2, III/IRPD/GA/2011 (amended 2019) [hereinafter RULES ON THE PROCESSING OF DATA] https://www.interpol.int/en/content/download/5694/file/24%20E%20RPD%20UPDATE%207%2011%2019_ok.pdf [https://perma.cc/B7E3-KR85].

134. *Id.*

135. *See id.* arts. 3–4, 82 (providing scope of rules in general and their application to Red Notices, respectively).

136. *Id.* art. 76.

137. INTERPOL Constitution, *supra* note 2, arts. 2–3.

138. RULES ON THE PROCESSING OF DATA, *supra* note 133, art. 77.

139. *Id.* art. 79.

140. See *supra* Section I.B for an analysis of American public interest in INTERPOL operations.

INTERPOL, domestic law enforcement's process of seeking arrest warrants is highly decentralized. There are approximately 18,000 state and local law enforcement agencies in the United States, not to mention federal agencies with law enforcement power.[141] When such agencies seek an arrest warrant,[142] they usually seek it from a local judge or court official.[143] In seeking such warrants, police are governed by the requirements of the Fourth Amendment to the U.S. Constitution as well as any applicable state constitution, court rules, and statutes in their respective jurisdictions.[144]

2. Alleged Abuses

Human rights groups have alleged that some states, such as Russia, have abused the Red Notice system, using the system for the purpose of harassing political dissidents.[145] Such alleged abuses are in violation of the international law standards applicable to INTERPOL and its member nations.[146] Fair Trials International has found that the risk of arrest for a person subject to a Red Notice is high,[147] and that there can be other practical consequences for individuals subject to a Red Notice, such as immigration difficulties.[148] Authorities can also choose to publicize a Red Notice when seeking it; when a Red Notice is publicized based on

141. For state and local law enforcement, see BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf [https://perma.cc/PJQ9-SBAX] (providing comprehensive data on state and local law enforcement agencies). In 2016, there were 83 federal law enforcement agencies. CONNOR BROOKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., FEDERAL LAW ENFORCEMENT OFFICERS, 2016 – STATISTICAL TABLES 1 (2019), https://www.bjs.gov/content/pub/pdf/fleo16st.pdf [https://perma.cc/FX55-7P3G].

142. Arrest warrants are not generally required before an arrest is made, but when police make a warrantless arrest, a judge must determine after the fact whether probable cause existed for that arrest. Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975).

143. *See* LAFAVE, *supra* note 31, § 5.1(h) (describing ability of non-lawyer municipal court clerk to issue arrest warrants for lesser offenses). In the federal courts, arrest warrants are commonly sought from magistrates of the district court for the area. *See* FED R. CRIM P. 1 advisory committee's note to 1972 amendments (authorizing federal magistrate judges to issue arrest warrants for federal offenses).

144. U.S. CONST. amend. IV. The requirements of the Fourth Amendment for arrest warrants include the existence of reason to believe that an offense was committed and that the person to be arrested was the one who committed it. These must be proved by sworn written or oral submissions to the magistrate. LAFAVE, *supra* note 31, § 5.1(h). One example of a requirement that varies among jurisdictions is the "four corners rule." Some jurisdictions require arrest warrants to be justified on the "four corners" of a written submission, while others permit oral testimony. *Id.*

145. *See, e.g.*, FAIR TRIALS INT'L, STRENGTHENING INTERPOL, *supra* note 26, at 23–25 (concluding that Red Notices are being abused as political tools).

146. See *supra* Section I.B for an analysis American public interest in INTERPOL operations and potential abuses among INTERPOL member nations.

147. FAIR TRIALS INT'L, STRENGTHENING INTERPOL *supra* note 26, at 13–14 (noting that evidence suggests many, though not all, INTERPOL members will make arrests based on Red Notices, and that 7,958 such arrests were made in 2011).

148. *See id.* at 17–18 (chronicling common immigration and travel impacts of Red Notices).

spurious charges, the subject individual's reputation may be damaged.[149] Fair Trials International has alleged that the portions of Red Notices sought for harassment are commonly based on spurious charges[150] and that systemic flaws in INTERPOL's governance enable this abuse.[151]

3. Comparative Inability to Access Interpol Records

Unlike both NATO and the United States, INTERPOL appears to lack any comprehensive formal transparency policy.[152] The U.S. Department of Justice, like the Defense Department, asserts that despite the high degree of U.S. involvement in INTERPOL operations, INTERPOL records that federal employees can access are nevertheless outside the reach of the Freedom of Information Act.[153] Informally, INTERPOL is superior to NATO in disclosing its current high-level policies.[154] However, this informal success is not sufficient to match the equivalent requirements of U.S. law for two reasons: first, this informal policy cannot be invoked or enforced in the event of breach; second, as detailed below, this practice does not extend to other INTERPOL records crucial for assessing the organization's compliance with its international obligations.

a. Policy Documents

In addition to the foundational legal documents promulgated by INTERPOL, the organization also appears to maintain more detailed policy guidance, such as guidance on the review of proposed Red Notices.[155] However, INTERPOL declined to provide more information about the aforementioned guidance when requested by Fair Trials International.[156] In contrast, the Freedom of Information

149. *See id.* at 18 (discussing reputational damage).

150. *See id.* at 23–25 (listing cases in which Red Notices were maintained despite findings by national authorities that the individual sought was a refugee or was otherwise subject to political persecution).

151. *See id.* at 30–36 (arguing that INTERPOL's legal criteria for denying Red Notices are unclear and that the internal policies by which it applies criteria should be publicized).

152. Even an article of INTERPOL's data processing rules which refers to transparency references only transparency between INTERPOL's constituent bodies and between INTERPOL and member states. RULES ON THE PROCESSING OF DATA, *supra* note 133, art. 13. Moreover, with respect to data sharing processes such as Red Notices, the data processing rules specifically require any future disclosure policy comply with, *inter alia*, the following conditions: 1) the initial source of the data (e.g. the contributing nation) must authorize the disclosure, 2) the disclosure must not damage the image or interests of INTERPOL or of its members. *Id.* art. 61.

153. *See* Letter from Daniel R. Castellano, Acting Assoc. Chief, Off. of Info. Pol'y, Dep't of Just., to author (Dec. 14, 2019) (on file with author) (addressing FOIA Appeal DOJ-AP-2020-000709). Like the position of the Department of Defense, this position also carries a risk of records arbitrage. See *supra* note 107 for an explanation of how federal agencies can utilize records arbitrage to avoid FOIA disclosure.

154. Unlike NATO, which discloses few current policies, INTERPOL discloses a number of its high-level policy documents. For an example of the policies disclosed by INTERPOL, see RULES ON THE PROCESSING OF DATA, *supra* note 134.

155. FAIR TRIALS INT'L, STRENGTHENING INTERPOL, *supra* note 26, at 34.

156. *See id.* (noting that INTERPOL denied request for more information based on operational concerns, not on the basis that the guidance did not exist).

Act's proactive disclosure requirements[157] generally require the disclosure of more detailed policy guidance maintained by U.S. agencies.[158] As a result, the American public can more easily determine the working practices of comparable domestic agencies than those of INTERPOL.

b. Red Notices

The U.S. Supreme Court has recognized a qualified right possessed by the public under the First Amendment[159] to access criminal trials.[160] The Supreme Court has held that this right also attaches to certain pre-trial criminal proceedings.[161] Lower courts have specifically extended the right to include access to charging documents[162] as well as to pre-trial detention proceedings[163] and their associated documents.[164] As a result, arrest warrants and other charging instruments are generally filed publicly once the subject is arrested, even in cases where sensitive security issues are involved.[165] These documents commonly include an affidavit or another document setting forth the factual basis for

157. See *supra* notes 109–14 and accompanying text for a discussion of the Freedom of Information Act's disclosure requirements.

158. For example, the U.S. Department of Justice has posted online a detailed manual on the law and practice its prosecutors should follow in seeking court orders to conduct electronic surveillance. U.S. DEP'T OF JUST., CRIM. DIV., ELECTRONIC SURVEILLANCE MANUAL: PROCEDURES AND CASE LAW (rev. June 2005), https://www.justice.gov/sites/default/files/criminal/legacy/2014/10/29/elec-sur-manual.pdf [https://perma.cc/QJE8-XRP3].

159. U.S. CONST. amend. I.

160. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980).

161. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 15 (1986) (holding that First Amendment right of access extends to preliminary hearings).

162. *See, e.g.*, United States v. Smith, 776 F.2d 1104, 1111–12 (3d Cir. 1985) (finding that indictments are presumptively public under the First Amendment and that criminal bills of particulars are analogous to indictments and therefore also presumptively public); *see also* United States v. Anderson, 799 F.2d 1438, 1442 (11th Cir. 1986) (holding that indictments were presumptively public but bills of particulars are not sufficiently similar to indictments to be presumptively public).

163. *See, e.g.*, United States v. Chagra, 701 F.2d 354, 365 (5th Cir. 1983) (extending right of access to bail hearing).

164. *See, e.g.*, Seattle Times Co. v. U.S. District Court, 845 F.2d 1513, 1518–19 (9th Cir. 1988) (holding that public has a right to access pretrial documents relating to bail). The public can also seek access to judicial proceedings and documents under a distinct legal theory: the common law right of access to court documents. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); Smith, 776 F.2d at 1112 (holding that indictments are presumptively public under both common law and First Amendment). The First Amendment and common law rights are separate from the right of criminal defendants to an open trial. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); Gannett Co. v. DePasquale, 443 U.S. 368, 369 (1979) (holding that Sixth Amendment right is not enforceable by the press or public at large).

165. *See, e.g.*, Criminal Complaint, United States v. Thomas, No. 15-cr-00171 (E.D. Pa. Apr. 3, 2015), ECF No. 1 (filing unredacted complaint and executed arrest warrant return in criminal case alleging provision of material support to the Islamic State).

believing that a crime has been committed.[166]

In contrast, Red Notices are not publicly available unless specifically designated by the INTERPOL member that sought the Notice, even after those Red Notices have caused real world effects in the form of arrests or immigration difficulties.[167] This limitation makes it more difficult for constituencies that INTERPOL serves to assess whether the agency is properly observing the non-political boundaries of its charter and whether it is issuing Red Notices only in non-frivolous cases.[168]

III. APPLYING TRANSPARENCY

Any effort to apply transparency to international organizations must contend with two interrelated issues: (1) determining the most effective model for implementing each policy;[169] and (2) adapting that model to the particular aims, circumstances, and transparency problems of each organization.[170] This part considers the merits of several models of transparency: specifically, the individual rights model and the voluntary model. Given the current lack of feasibility of implementing an individually enforceable right, this Comment then proposes an adaption of the voluntary model by NATO and INTERPOL.

A. Enforcing Access to Information

Once an international organization or its state parties determine to adopt a formal transparency law or policy, one of the most pressing questions is how to permit the public to use that policy. Given the prominent role that individual enforcement rights play in domestic freedom of information schemes,[171] this section is bifurcated between possible mechanisms for individual enforcement and other possible access models.

1. Individually Enforceable Rights to Information

Many domestic transparency regimes are anchored in significant part on an individual right to demand access to information held by the government and to

166. When probable cause rests on oral testimony as opposed to affidavit, best practice is to record that oral testimony for later review. *See, e.g.*, Spencer v. Stanton, 489 F.3d 658, 661–63 (5th Cir. 2007) (denying qualified immunity where content of detective's oral testimony in support of arrest warrant was unclear).

167. FAIR TRIALS INT'L, STRENGTHENING INTERPOL, *supra* note 26, at 13.

168. According to a sample Red Notice published by Fair Trials International, Red Notices contain brief factual summaries as well as prior judicial actions in the country seeking the Notice and citations to the relevant criminal statutes. *Id.* annex 2A.

169. See *infra* Section III.A., which details the problems facing attempts to enforce transparency in international law.

170. *See, e.g.*, Steven R. Ratner, *Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross*, *in* TRANSPARENCY IN INTERNATIONAL LAW 297 (Andrea Bianchi & Anne Peters eds., 2013) (arguing that transparency efforts need to consider the unique needs of each international organization).

171. *See, e.g.*, Donaldson & Kingsbury, *supra* note 43, at 515–16 (noting ability to obtain judicial review as a feature of many domestic freedom of information laws).

obtain judicial review whenever that right is denied, which this Comment describes as the individual rights model.[172] However, this common condition of domestic transparency legislation would be extremely difficult, if not impossible, to replicate on the international level.[173] At its root, this problem results from the fact that although individuals are increasingly seen as capable of possessing rights under international law, as well as the capacity to enforce those rights, states still serve as the only actors capable of creating such individual personality on the international stage in the first place.[174] As a result, all of the preconditions for an individually enforceable right require the consent of and participation by states; an unlikely scenario.

First, the appropriate states would have to agree to establish a forum, whether in the form of a permanent court or a tribunal, with subject matter jurisdiction to hear claims for access to records.[175] At present, there is no international adjudicatory body with jurisdiction to resolve disputes between NATO or INTERPOL and individuals who are not employed by those bodies.[176] Second, even if such a body existed, there would be other legal and practical issues. When states do create international courts or arbitration tribunals, it is not guaranteed that individuals or non-governmental entities can access these tribunals; standing on the part of entities other than states to enforce rights under international law must be provided for in the constitutive instrument.[177] The relevant states would likely have to agree on the actual content of the rights to be enforced and include it within an international agreement; the existence and content of an individually enforceable

172. *Id.* at 505–06.

173. Some scholars have postulated a growing body of international administrative law with the potential to create unmediated relationships between citizens of states and international organizations. Under such a system, transparency rights could exist and theoretically be enforced without regard to the states which purportedly empower the international institutions. *See, e.g.*, *id.* at 530–32 (arguing that direct access by citizens to international institutions threatens to disrupt the legal nature of these institutions as state agents). This comment retains the standard account of international organizations acting only on behalf of states, and it takes the view that transparency is increasingly necessary as states delegate their authority to international organizations. *See, e.g.*, Peters, *Towards Transparency as a Global Norm*, *supra* note 35, at 539–42 (advocating view that increased outsourcing of state functions to international organizations requires increased transparency for those same organizations). See *supra* Section I for discussion of NATO, INTERPOL, and the problem of transparency in international law. Accordingly, this section focuses only on the possibility of enforcing an individual right to transparency against particular international organizations, not international organizations as a class.

174. KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW 360 (2011).

175. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("In international law . . . there is no integrated judicial system and . . . every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction . . . .").

176. *See, e.g.*, Christian Tomuschat, *International Courts and Tribunals*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 11–17, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e35?rskey=MMAPa2&result=1&prd=OPIL (last updated Apr. 2019) (listing current international courts and their responsibilities).

177. *See* PARLETT, *supra* note 174 at 359–62; *see also* Tomuschat, *supra* note 176, ¶¶ 54–58 (describing uneven developments in standing of individuals before international tribunals).

right to information in non-treaty sources of international law is controversial and far from well-developed.[178] Even if the relevant states agree to adopt such an instrument, international means for enforcing judgments are weak compared to those available to domestic courts, and little would stop one or more state parties from backing out later if transparency resulted in unintended consequences.[179]

The vagaries of international processes and judgments make it natural to consider the established remedies of domestic courts. One possible domestic individual remedy involves a redefinition of the Freedom of Information Act's scope. FOIA applies only to "agency records," but the Act does not define that term.[180] The Supreme Court has interpreted that term to apply to records that are created or obtained by an agency, over which the agency has control at the time of the request.[181] Lower courts have further defined these criteria. The U.S. Court of Appeals for the D.C. Circuit, the appeals court called upon most often to interpret the FOIA,[182] has identified four factors for assessing an agency's control of a record or set of records.[183] It is possible, though unlikely, that courts interpreting FOIA could modify these factors to facilitate public access to records generated or relied on by federal employees assigned to international organizations.[184]

178. Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, *supra* note 35, at 5–6 (discussing difficulty in finding legal basis for transparency in traditional sources of international law).

179. The United States famously withdrew from participation before the International Court of Justice in the challenge brought by Nicaragua to U.S. support for "contra" forces. Keith Highet, *Between a Rock and a Hard Place–The United States, the International Court, and the* Nicaragua *Case*, 21 INT'L LAW. 1083, 1085 (1987). The United States then withdrew its consent to the compulsory jurisdiction of the ICJ overall. *Id.* at 1085 n.16. When the ICJ's merits judgment favored Nicaragua, the United States vetoed efforts to enforce the decision in the Security Council. *Id.* at 1093. Correct or not, this course of conduct by the United States illustrates the difficulty in enforcing politically sensitive international judgments.

180. 5 U.S.C. § 552(a)(4)(B).

181. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144–45 (1989).

182. The U.S. District Court for the District of Columbia is an appropriate venue for all FOIA suits, regardless of the location of the plaintiff or the records. 5 U.S.C. § 552(a)(4)(B). As a result, the District Court and its corresponding court of appeals are the primary venues for FOIA litigation. *See, e.g.*, OFF. INFO. POL'Y, U.S. DEP'T JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: LITIGATION CONSIDERATIONS 11–12 (Sept. 25, 2019), https://perma.cc/CP7H-Y86U (noting that D.C. federal courts have created most of the influential precedent interpreting FOIA).

183. Those factors are "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." Burka v. U.S. Dep't of Health & Hum. Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (internal quotation marks omitted) (quoting Tax Analysts v. Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988)). In denying the author's request for a record in the possession of the American-commanded NATO mission in Afghanistan, the Department of Defense relied on *Burka*. Rhodes, *supra* note 106.

184. While the D.C. Circuit has been willing to question the applicability of the *Burka* factors, it has tended to apply more restrictive control tests for cases involving records shared by a government entity not subject to FOIA—such as Congress or the White House. *See, e.g.*, Cause of Action v. Nat'l Archives & Records Admin., 753 F.3d 210 (D.C. Cir. 2014) (discussing limits on *Burka* test). Arguably, the same approach could extend to international organizations. This

However, even though NATO and INTERPOL are ultimately constituted by the will of their state parties, there would be serious difficulties with enforcing such a domestic remedy. Both organizations have broad immunity from U.S. law, including compelled access to their official records. The Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff provides that the records of NATO are inviolable.[185] While scholars debate the question of whether INTERPOL is properly considered an international organization,[186] the United States has nevertheless extended it similar protections[187] under the International Organizations Immunities Act.[188] As a result, even where NATO and INTERPOL records are otherwise within the reach of U.S. officials, it is questionable that the release of these records could be compelled.[189] NATO's military forces and INTERPOL's national bureaus are made up of individuals also employed by domestic governments,[190] raising difficult questions about when sharing records waives any applicable privilege or immunity.

2. Other Models of Transparency

Given the difficulties in creating an individual right to access the records of international organizations in the sense contemplated by domestic freedom of information laws, it makes sense to consider adopting alternative mechanisms. One promising model is the approach under which an international organization voluntarily adopts its own transparency policy—the voluntary policy model.[191] These policies make documents available to the public to varying degrees, with some expressly permitting individuals to file administrative appeals inside the

development, in addition to the immunity issue which will be discussed in the following paragraph, makes the domestic enforcement approach questionable.

185. Agreement on the Status of the North Atlantic Treaty Organisation arts. 6–7, Sept. 20, 1951, 5 U.S.T. 1087.

186. *See, e.g.*, Sabine Gless, *INTERPOL*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 34–35 (Anne Peters ed., Oxford Univ. Press) (last updated July 2019) https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1832 ("Compelling arguments have been made to treat Interpol as an NGO as membership is not attained through a treaty and police forces, not governments, have been the true Interpol participants.").

187. President Reagan initially extended limited protections to INTERPOL in 1983. In 2009, President Obama broadened that grant of immunity, in part by providing immunities for INTERPOL records after the organization formally opened a U.S. field office. Exec. Order No. 13524, 74 Fed. Reg. 67803 (2010); Charlie Savage, *Order on Interpol Work Inside U.S. Irks Conservatives*, N.Y. TIMES, Dec. 31, 2009, at A8.

188. 22 U.S.C. §§ 288-288f (2018).

189. In Keeney v. United States, 218 F.2d 843 (D.C. Cir. 1954), one member of the appellate panel voted to reverse appellant's conviction for contempt of Congress in part on the grounds that the appellant, an American who worked for the U.N., was privileged not to respond to Congressional inquiries about internal U.N. matters. The other two judges concurred on other grounds, with one concluding that the appellant may have been privileged but that further clarification was needed. *Id.* at 849–50 (Prettyman, J., concurring).

190. See *supra* Section I.A for a discussion about NATO's military forces and Section I.B for a discussion about INTERPOL's national bureaus.

191. *See* Donaldson & Kingsbury, *supra* note 43, at 510 (listing certain international organizations which have adopted transparency policies).

organization when their requests are denied.[192] A number of international organizations have in fact adopted such policies.[193] One of the most progressive of these policies is that adopted by the World Bank.[194] Like the Freedom of Information Act, the World Bank's policy requires the release of all information subject to specific exemptions and for the proactive disclosure of certain categories of information.[195] The policy also provides that certain exemptions will cease to apply after a certain number of years.[196] A dissatisfied requester may appeal to one, and possibly two, appeals bodies.[197]

State parties themselves could also push for the adoption of such voluntary policies, which would resemble the "compliance" transparency type discussed above.[198] Although there would be legal difficulties in requiring states to adopt such a model in their domestic law, and practical difficulties associated with states inserting legally-binding language into the charters of the organizations in the first place,[199] nothing prevents a state from informally pushing an international organization to adopt its own policy. In fact, the United States has played just this role in pushing for the adoption of transparency policies at other international organizations.[200]

B. Adapting the Models

The exact contours of a substantive policy will shift somewhat depending on the chosen model of enforcement. For the time being, the voluntary model, in which international organizations adopt their own policies, and the compliance model, in which state parties informally pressure international organizations to

192. *Id.*

193. *See id.* at 512–16 (identifying international organizations that maintain transparency policies allowing individual requests and administrative review).

194. *See, e.g.*, Luis Miguel Hinojosa Martínez, *Transparency in International Financial Institutions*, *in* TRANSPARENCY IN INTERNATIONAL LAW 77, 93–94 (Andrea Bianchi & Anne Peters eds., 2013) ("The World Bank was already one of the international financial institutions with a better rate of disclosure and, in spite of its shortcomings, the 2010 reform has placed the World Bank as the most transparent international financial institution."); Donaldson & Kingsbury, *supra* note 43, at 513 (comparing features of transparency policies for selected international organizations).

195. THE WORLD BANK, BANK POLICY: ACCESS TO INFORMATION §§ III.B.1, III.B.4 (2015), https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3693 [hereinafter Access to Information Policy]. Note, however, that the scope of this comprehensive access only applies to the World Bank, not related entities which are part of the World Bank Group.

196. *Id.* § III.B.6(b).

197. *Id.* § III.B.8.

198. See *supra* Section I.C.3 for a discussion about the compliance type of transparency and the duties it imposes.

199. See *supra* Section III.A.1 for a discussion about the challenges of international enforcement and the responsibility of state parties to draft the charter's legally-binding terms.

200. *See* Martínez, *supra* note 194, at 93 (noting that pressure from U.S. Congress helped prompt the World Bank to adopt its first formal transparency policy in 1993).

implement internal policies, are the most likely models to succeed.[201] Accordingly, the following policy outlines attempt to take into account the unique needs of each international organization and the mechanism of enforcement through internal administrative appeals—which is common to both the voluntary and compliance models outlined above—while building on the basic substance of domestic transparency laws.[202] These outlines are not, and could not be, an effort to finally resolve the question of the optimal scope of the transparency policies for these organizations, but are only an effort to demonstrate that it is possible to generate policies that are more transparency-friendly and to begin a dialogue over their proper scope.[203]

1. NATO

First, NATO should adopt an administrative policy for affirmative disclosure of high-level policy documents. This policy, representing the legislative and judicial type of transparency, would include both records of the North Atlantic Council and high-level policy documents generated by NATO's military structure. However, given the perception by states that more discretion is necessary in the creation of multilateral international policy than domestic policy,[204] it may be defensible for this portion of the NATO policy to apply only to final products of deliberation, not verbatim records of the proceedings.[205]

Second, the policy should provide a mechanism for members of the public to make requests for NATO records not affirmatively disclosed. Like the FOIA and

201. See *supra* Section III.A for a discussion comparing the individual rights model and the voluntary model.

202. The decision to base the policy outlines on domestic laws does not imply that these laws represent an ideal. In fact, there are significant flaws in the form and execution of domestic transparency laws. David E. Pozen, for instance, argues that too few documents are subject to affirmative disclosure and the emphasis on individual requester rights privileges actors with special resources or knowledge rather than the public at large. David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099, 1100, 1107–08 (2017). Pozen also contends that funding for FOIA administration, as well as enforcement of FOIA rights, is haphazard. *Id.* at 1099. Nevertheless, American transparency law has provided a model for numerous other nations and, as a result, serves as a sensible starting point. *See id.* at 1098–99 ("[M]ore than one hundred countries . . . have enacted their own freedom of information laws, many of them based on the federal FOIA . . . .").

203. *See, e.g.*, Martínez, *supra* note 194, at 93–94 (noting that World Bank transparency policy has been repeatedly revised).

204. *See* Boyle & McCall-Smith, *supra* note 36, at 428–30 (noting that transparency principles are more clearly established in domestic lawmaking, and while multilateral negotiations are growing more transparent, not all international bodies hold open deliberations).

205. In the event verbatim records or similar information about the proceedings of the Council are exempted, the policy should include a provision expressly making them public after a defined time frame. This would follow the approach of both the World Bank and the Freedom of Information Act, which was recently amended to provide a sunset on agency claims of deliberative process privilege. *See supra* Section III.A.2; *see also* FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(2), 130 Stat. 538, 539–40 (2016) (codified at 5 U.S.C. § 552(b)(5)) (amending FOIA to prohibit use of deliberative process privilege claim for records older than twenty-five years). This provision would require the release of historical materials once they are no longer sensitive.

the World Bank policy, this provision for public access would not be unqualified. While claims of military necessity for secrecy may sometimes be exaggerated, it is unquestionably true that certain information must remain secret for a time to permit successful military operations.[206] This information includes plans for future operations (such as attacks on the enemy and troop movements),[207] intelligence sources and methods (as opposed to conclusions derived from intelligence per se),[208] and, in some circumstances, covert action.[209] Accordingly, the policy should include exemptions similar to those the U.S. military can claim under the FOIA. Similar to the way in which the current NATO policy incorporates feedback from member nations,[210] the new policy could include a mechanism for soliciting member feedback on the release of records.[211] The policy should also include a mechanism for administrative enforcement by the requester.[212] This mechanism should consist of at least one level of internal administrative appeal, a function which could be handled by the existing Archives Committee.[213]

2. INTERPOL

A similar three-part structure to that proposed for NATO should work for an INTERPOL policy, with a few modifications. First, even though INTERPOL already voluntarily posts many of its high-level policies online,[214] it should explicitly include this legislative and judicial type of transparency in its policy through affirmative disclosure. Second, the policy should allow individual requesters to ask for additional records under the executive type of transparency.

206. *See* Orna Ben-Naftali & Roy Peled, *How Much Secrecy Does Warfare Need?*, *in* TRANSPARENCY IN INTERNATIONAL LAW 321, 323 (Andrea Bianchi & Anne Peters eds., 2013) (arguing that authorities have expanded national security secrecy beyond its defensible boundaries).

207. *See id.* at 329 (listing operational plans and troop locations as core national security information).

208. *See id.* at 339–40 (arguing that substantive conclusions can often be disclosed without endangering underlying sources and methods).

209. Covert action, by definition, is action that its government sponsor believes would not be effective if properly attributed. *See, e.g.*, 50 U.S.C. § 3093(e) (2018) ("[T]he term 'covert action' means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . . ."). The restrictions governing covert action, however, attest to its potential to interfere with democratic accountability. *See, e.g.*, 50 U.S.C. § 3094(c) (prohibiting expenditures for covert actions without presidential approval and reporting to congressional committees).

210. *See* NATO Public Disclosure Policy, *supra* note 103, ¶ 7.c (requiring consultation with member nations on the release of records).

211. This may be a necessary concession given NATO's heavy dependence on member nations' troop contributions. See *supra* Section I.A. for a discussion about the direct and indirect contributions of NATO member nations.

212. *See* Access to Information Policy, *supra* note 196, § III.B.8 (providing for requester appeals within World Bank).

213. *See* NATO Public Disclosure Policy, *supra* note 103, ¶ 15 (referencing Archives Committee).

214. See *supra* Section II.B.3. for a discussion about INTERPOL's policy and practice of providing access to records.

However, INTERPOL's secrecy concerns are likely different than NATO's because of the two organizations' contrasting missions. INTERPOL can adopt exemptions for sensitive law enforcement investigations similar to those applicable to the Department of Justice.[215] For Red Notices, INTERPOL can rely on an interpretative framework like that applicable to domestic arrest warrants: a presumption of public access will attach only once the Red Notice is in some way executed.[216] This will help avoid undue embarrassment to individuals solely from having a Red Notice issued against them.[217] This presumption of public access should be separate from that required for INTERPOL records by the subjects of INTERPOL data under concepts of due process.[218] Finally, like NATO, INTERPOL's policy should incorporate at least one level of administrative appeal to challenge denials of access. This function could be performed by the existing Commission for the Control of Files.[219]

IV. CONCLUSION

The concept of transparency in international law remains vague and its implementation fragmented. At present, international organizations are largely responsible for adopting and enforcing their own conceptions of transparency in response to informal pressure. Despite movement in the direction of greater access to information by the public, many organizations, including those profiled here, still fail to adequately balance their legitimate interests in secrecy with the growing need of the public to understand their operations. Each international organization is created to serve, directly or indirectly, the needs or interests of the public in one or more states. Each organization should, therefore, consider how it can be transparent with those publics while adopting any measures necessary to provide the goods for which it was created.

215. See *supra* notes 44–48 and the accompanying text for a discussion about exemptions to the broad presumption of access to government records.

216. See *supra* Section II.B.3.b. for a discussion about the public documents in domestic criminal proceedings and the access restrictions for Red Notices.

217. *See* FAIR TRIALS INT'L, STRENGTHENING INTERPOL, *supra* note 26, at 18 (noting potential for reputational damage from public issuance of Red Notice).

218. See *supra* notes 160–67 and accompanying text for a discussion about access rights under the First Amendment and provided by common law. *See also* FAIR TRIALS INT'L, STRENGTHENING INTERPOL, *supra* note 26, at 4–5 (discussing need for more effective protection of due process by INTERPOL).

219. *See* FAIR TRIALS INT'L, STRENGTHENING INTERPOL, *supra* note 26, at 4–5 (discussing existing quasi-judicial role of Commission).