

Never again *Wir haben es nicht gewußt*

Intransparency on warfare: a human rights violation?

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INTRODUCTION

1. Human rights and democracy are inherently intertwined. Human rights not only formulate positive and negative obligations of the state, they also constitute a mechanism for democracies to mitigate a distribution of power that is out of balance. As a consequence, they interact and foster each other's development.

2. The increasing or decreasing importance of certain themes in democracy will thus also be reflected in the human rights law and jurisprudence. One clear case of this is the rising attention to the place of information in democracies and human rights. The voices increasingly demanding a more participatory sort of democracy, where adequate communication can foster more complete checks and balances and positive involvement of citizens to reach policy goals, have found their reflection in more extensive information rights. In November 2016, the European Court of Human Rights (hereafter: ECtHR) caught up with that evolution and formally recognised for the first time a right to information under the European Convention of Human Rights in the *Magyar* arrest, while spelling out the conditions, who all demonstrate a clear link to an evolved concept of democracy.

3. This makes the time ripe to take a closer look at the precise content of the right to information, on a national and European level. Since the right is not absolute and open to restrictions, one could ask whether the right differs in its extent in Belgium and Europe. More specifically, the question rises whether the Belgian conception of the right to information is still in conformity with the conception of the ECtHR, seen its recent milestone arrest.

4. In order to make my assessment sufficiently concrete and tangible, I will pursue this research question with the help of a case study. Over the past year, several heated debates have sprung up concerning the intransparency of the

Ministry of Defence. Lately, this has centered on the lack of democratic debate concerning the purchase of new fighter jets, the existence of a “killer list” of (ex-)ISIS combatants and the problems concerning the control on civilian casualties due to Belgium’s participation in the war against ISIS. I will use the latter case to seek where the limits of the right to information lie.

With this research I hope to contribute to the pursuit of stronger democratic foundations in Belgium and other European states through the means of human rights.

1. SUBJECT AND METHOD

1.1. SUBJECT MATTER

5. The aim of this thesis is clear: investigating whether the military is subject to a right to information concerning its actions. Of course, there is a direct link between the possible right to information and the concrete type of information one is after. Since the main justificatory reason for a Ministry of Defence not to disclose information are security reasons, the extent of this right (if it exists) will vary according to the sensitive nature of the information sought.

6. In order to be able to make the assessment of my thesis concrete and relevant, I will narrow down the information one wants to obtain to a specific type. I will do so according to two criteria. On the one hand, I will concentrate on a type of information that lies on the “not extremely sensitive” side of the spectrum of information that can be requested from the military. It does not make much sense to make a legal inquiry with regard to information that would make the proper functioning of the army impossible, such as asking on beforehand when they would strike. On the other hand, I want to direct my inquiries to a type of information that has an obvious public relevance.

7. Inspired by the demands for information from different NGO’s such as Peace Action (Vredesactie) and Airwars, I decided to confine my research question to the following information: the date, location and number of airstrikes in during Belgium’s participation in the war against ISIS.

1.2. RELEVANCE OF THE INFORMATION

8. The reason for the public relevance of the date, location and number of airstrikes, is that these data enable external monitors (i.e. monitors besides the official ones of the Global Coalition against Daesh (hereafter: the Coalition)) to assess whether humanitarian law has been violated.¹ I will explain briefly in which ways Belgium can violate international law.

¹ There are other reasons for wanting to obtain these data, for example, to provide evidence in a suit for damages against the army. However, since my thesis is concerned with the public interest and the democratic control on the army, I will not go into the aspects of private interest.

9. To this aim, a classification of the war is needed first. The war of the Coalition in Iraq and Syria is by the majority of States and academics seen as a non-international armed conflict.² The Iraqi government had invited foreign nations to assist it in suppressing the surge of ISIS in its territory.³ The Syrian government did not make a similar invitation. However, the general view is that the actions of the Coalition in Syria are a spill over from its actions in Iraq against ISIS, which endows them with the same classification.⁴

10. Due to this classification, only Common art. 3 of the Geneva Conventions and Additional Protocol II (hereafter: AP II) apply,⁵ which Belgium has ratified.⁶ Furthermore, customary law is also a relevant source.⁷

11. Even though the notion of “civilians” is not defined in AP II, State Parties interpret it making an analogy with AP I, the Protocol that concerns international armed conflicts. “Civilian” is generally defined negatively as someone who does not belong to the armed forces, whether that be of a State or of an organised armed group.⁸ Regardless the absence of a clear definition, AP II does confer protection to civilians. This protection of civilians is also generally known as ‘the principle of distinction’ and is one of the corner stones of international humanitarian law. Art. 13 (2) AP II prohibits States to make civilians the object of attack, which is also a rule of customary law. Consequently, if Belgium were to undertake indiscriminate air strikes on the civilian population, it would violate one of the core principles of humanitarian law.⁹ Hence, the inquiry into whether Belgian airstrikes have caused the death

² Classification by RULAC, project of the Geneva Academy of International Law and Human Rights, Syria, <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse3accord> and Iraq <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-iraq#collapse4accord>.

³ J. GARAMORE, “DoD Authorizes War on Terror Award for Inherent Resolve Ops”, *US Department of Defence* October 2014, <https://www.defense.gov/News/Article/Article/603569/>.

⁴ Since this is not the main subject of my thesis, I will not go into the legal discussions on the matter and follow the Geneva Academy.

⁵ G.D. SOLIS, *The Law of Armed Conflict*, New York, Cambridge University Press, 2010, 153; D. SUÁREZ LEOZ “Conflictos armados sin carácter internacional y Derecho Internacional Humanitario: Normativa aplicable” in J.S. RODRIGUEZ-VILLASANTE Y PRIETO (ed.), *Derecho Internacional Humanitario*, Valencia, Tirant Lo Blanch, 2007, 719-723.

⁶ Database of the International Committee of the Red Cross: State Parties to the Following International Humanitarian Law and Other Related Treaties, http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/ihl.nsf/9EE82DA65960019EC12581E7002F91D2/%24File/IHL_and_other_related_Treaties.pdf?Open.

⁷ S. VERHOEVEN, “International and Non-International Armed Conflicts” in J. WOUTERS, P. DE MAN and N. VERLINDEN (eds.), *Armed Conflict and the Law*, Cambridge, Intersentia, 2016, 161-171.

⁸ ICTR 21 May 1999, nr. ICTR-95-1-T, Prosecutor/Kayishema and Ruzindana, §179; ICTR 6 December 1999, nr. ICTR-96-3-T, Prosecutor/Rutaganda, §100; ICTY 5 December 2003, nr. IT-98-29-T, Prosecutor/Galić, §47.

⁹ This paragraph is based on: Transparency in Belgian foreign military missions – Hearing with representatives of the NGO Airwars and the Belgian Ministry of Defence (Transparantie bij de Belgische militaire missies in het buitenland - Hoorzitting met vertegenwoordigers van de ngo Airwars en de Belgische Defensie), *Parl. P. Chamber* 2016-17, nr. 54-2640/001; D. SUÁREZ LEOZ “Conflictos armados sin carácter internacional y Derecho Internacional Humanitario: Normativa aplicable” in J.S. RODRIGUEZ-VILLASANTE Y PRIETO, *Derecho Internacional Humanitario*, Valencia, Tirant Lo Blanch, 2007, 730-731; S. VERHOEVEN, “International and

of civilians concerns a grave breach of humanitarian law and is thus a matter of public concern.

1.3. OVERVIEW AND METHOD

12. I will pursue this legal exploration of where the right to information and the interest of national security touch in the case of military information in three steps.

13. Firstly, I will describe the factual situation, with a focus on Belgium's refusal to publicly impart information on airstrikes in the war against ISIS. In this part, I will briefly sketch the background of the conflict and the controversies that led to a call for transparency. Secondly, I will describe how transparent Belgium and the other members of the Coalition are eventually. Regarding Belgium's transparency, I will give a holistic overview of all the different means that the Ministry of Defence uses towards transparency and the reasons for them not to share the data on airstrikes publicly.

14. Secondly, I will explore the existing legal framework in Belgium that regulates the tension between the right to information and national security interests. I will concentrate on both the law and the jurisprudence, since these are not always very consistent. Lastly, I will assess whether there exists a right to the data on the airstrikes in Belgium and how likely it is that one can effectively enforce this.

15. Thirdly, I will investigate whether this right exists under the European Convention on Human Rights (hereafter: ECHR). To this aim, I will assess whether a right to military information exists under the ECHR and whether it could be subject to an exception for reasons of national security.

16. The large majority of my thesis will consist of a descriptive analysis with regard to the factual and legal situation based on a literature review, some interviews and mostly legal sources. However, in my conclusions, I will also compare and evaluate the current Belgian practice against the level of protection of the right to information that the Belgian Constitution and the ECHR envisages.

Non-International Armed Conflicts" in J. WOUTERS, P. DE MAN and N. VERLINDEN (eds.), *Armed Conflict and the Law*, Cambridge, Intersentia, 2016, 296-303.

2. BELGIUM'S BEHAVIOUR AND TRANSPARENCY IN THE WAR AGAINST ISIS

2.1. CONTROVERSIES SURROUNDING BELGIUM'S PARTICIPATION TO THE COALITION

2.1.1. *General overview*

17. In March 2011, in the context of the Arab Spring, pro-democracy protests erupted in Syria against the regime of Bashar al-Assad. Assad responded violently to these protests, killing and imprisoning demonstrators. The conflict escalated and in July 2011, defectors of the army announced the formation of the Syrian Free Army, which was aimed at overthrowing the government. These were both milestones in what would become a protracted, dreadful and increasingly complicated civil war.¹⁰

18. The character of the armed rebellion is diverse and extremists have been increasingly gaining power over moderate groups.¹¹ Despite the escalation of the conflict and Assad's use of chemical weapons, states refrained from military intervention.¹² However, one rebel group of jihadi nature changed this attitude. Islamic State (also ISIS, ISIL or Daesh) rapidly gained territory in 2014 and shocked the world by its cruelty.¹³ This led to the formation of the Coalition, led by the United States.

19. The Coalition counts 75 members and is aimed at the defeat of ISIS through military intervention.¹⁴ Since its establishment, it has reduced ISIS' areas of influence with 98% and entirely liberated Iraq.¹⁵ In addition, the Coalition has always been very transparent on the airstrikes it conducts and has been praised for this. However, this has lately been overshadowed by the

¹⁰ This paragraph is based on: L. RODGERS, D. GRITTEN, J. OFFER. and P. ASARE, "Syria: the Story of the Conflict", *BBC* March 2016, <http://www.bbc.com/news/world-middle-east-26116868>; X., "Syria's Civil War Explained from the Beginning", *Al Jazeera* May 2017, <http://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>; X., "Syria's Civil War: Five Years of Guardian Reporting", *The Guardian* March 2016, <https://www.theguardian.com/world/2016/mar/14/syria-civil-war-five-years-guardian-reporting>.

¹¹ L. RODGERS, D. GRITTEN, J. OFFER and P. ASARE, "Syria: the Story of the Conflict", *BBC* March 2016, <http://www.bbc.com/news/world-middle-east-26116868>.

¹² L. RODGERS, D. GRITTEN, J. OFFER and P. ASARE, "Syria: the Story of the Conflict", *BBC* March 2016, <http://www.bbc.com/news/world-middle-east-26116868>; X., "The Guardian View on Assad's Use of Chemical Weapons: Our Silence is Shaming", *The Guardian* August 2016, <https://www.theguardian.com/commentisfree/2016/aug/12/the-guardian-view-on-assads-use-of-chemical-weapons-our-silence-is-shaming>.

¹³ INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, *8th Report*, August 2014, nr. A/HR/27/60.

¹⁴ *Mission statement of the Global Coalition against Daesh*, <http://theglobalcoalition.org/en/mission-en/#military-progress>

¹⁵ X., "Coalition partners congratulate Iraq on the liberation of all Daesh held areas", *Global Coalition against Daesh* December 2017, <http://theglobalcoalition.org/en/coalition-partners-congratulate-iraq-liberation-daesh/>; *Mission statement of the Global Coalition against Daesh*, <http://theglobalcoalition.org/en/mission-en/#military-progress>.

multiple accusations of indiscriminate attacks, which have led to substantial civilian casualties.

2.1.2. *Controversies surrounding Acts of the Coalition*

20. Even though the Independent International Commission of Inquiry on the Syrian Arab Republic (hereafter: UN Inquiry Commission) already expressed its concern about the high amount of civilian casualties in certain airstrikes of the Coalition early on,¹⁶ international concern about the number of civilian casualties started to raise after a report of Amnesty International.¹⁷ This eventually led to a worldwide call for transparency.

21. Amnesty International released in October 2016 a report concerning 11 attacks carried out by the Coalition between September 2014 and October 2016.¹⁸ They contended that these attacks violated international humanitarian law and caused the death of some 300 civilians. Nevertheless, the Coalition only recognised one civilian death. Yet, Amnesty International deemed the total amount of civilian casualties in this period to be even much higher. It declared that reliable international and Syrian NGO's estimated 800-1200 casualties, whereas the Coalition only recognised 55 casualties. This report and the pressure of other human rights organisations led the Coalition to recalculate the number of deaths, which it admitted to be 119 in November 2016.¹⁹ It also announced that it would reconsider its assessment procedures of casualties, because it was under criticism for taking little account of external, on-the-ground reports.²⁰

22. This report brought the Coalition's adherence to the principle of distinction under scrutiny, which resulted in worldwide criticism on the Coalition's actions during the liberation of Mosul in Iraq and the liberation of Raqqa in Syria.

¹⁶ INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, *10th Report*, August 2015, A/HRC/30/48, par. 38.

¹⁷ E. GRAHAM-GARRISSON, "Coalition airstrikes in Syria have killed 300 civilians, Amnesty says", *The Guardian* October 2016, <https://www.theguardian.com/world/2016/oct/26/syria-coalition-airstrikes-civilian-death-toll-amnesty-international>.

¹⁸ AMNESTY INTERNATIONAL, *Cases of suspected civilian casualties in US-led Combined Joint Task Force attacks in Syria since 23 September 2014*, October 2016, MDE 24/5037/2016.

¹⁹ M. RYAN, "U.S. military announces that civilian casualties in Iraq and Syria are more than double previous estimate", *The Washington Post* November 2016, https://www.washingtonpost.com/news/checkpoint/wp/2016/11/09/u-s-military-announces-that-civilian-casualties-in-iraq-and-syria-are-more-than-double-previous-estimate/?utm_term=.75de4e182fb1.

²⁰ S. OAKFORD, "Admitted US strike near a Syrian mosque highlights continued risk to civilians", *Airwars* November 2016, <https://airwars.org/news/us-admits-record-tally-of-civilian-deaths-in-iraq-and-syria/>; M. RYAN, "U.S. military announces that civilian casualties in Iraq and Syria are more than double previous estimate", *The Washington Post* November 2016, https://www.washingtonpost.com/news/checkpoint/wp/2016/11/09/u-s-military-announces-that-civilian-casualties-in-iraq-and-syria-are-more-than-double-previous-estimate/?utm_term=.75de4e182fb1.

23. Mosul and Raqqa were densely populated cities, where ISIS used the inhabitants as human shields.²¹ While this severely complicated the operation, Coalition forces did not refrain from conducting airstrikes on civilian neighbourhoods, which led to an exponential increase of civilian casualties and international concern.²²

24. As to the number of these casualties, a great gap exists between estimates of NGO's and journalists and of the Coalition. According to the latest estimates of the Coalition, 855 civilians have been killed over the course of the war (while investigations are still open), whereas Airwars estimates the total toll from Coalition airstrikes to be 6,238 to 9,582 casualties.²³

25. The Coalition responds to the allegations holding that it strictly applies humanitarian law and tries to avoid as much as possible civilian casualties.²⁴ However, human rights organizations disagree, pointing at a link between the loosening of the rules of engagement of the Coalition and the rise of civilian casualties in 2017 and at the vagueness of the Coalition with regard to the vetting procedure for information from members requesting an air strike.²⁵

²¹ INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, *Report*, March 2018, A/HRC/32/72; UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, *Report on the Protection of Civilians in the context of the Nineva Operations and the retaking of Mosul City, 17 October 2016 – 10 July 2017*, 30 October 2017, http://www.uniraq.org/images/factsheets_reports/Mosul_report%2017Oct2016-10Jul201731%20October_2017.pdf.

²² INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, *Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016- 28 February 2017*, March 2017, A/HRC/34/CRP.3; INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, *Report*, March 2018, A/HRC/32/72; UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, *Report on the Protection of Civilians in the context of the Nineva Operations and the retaking of Mosul City, 17 October 2016 – 10 July 2017*, 30 October 2017, http://www.uniraq.org/images/factsheets_reports/Mosul_report%2017Oct2016-10Jul201731%20October_2017.pdf.

²³ This information dates from April 2018. Airwars is project of Remote Control, which is on its on its turn a project of the think tank Oxford Research Group, <http://remotecontrolproject.org/about/>; *Airwars Civilian Casualty Claims*, <https://airwars.org/civilian-casualty-claims/>; CENTCOM, *CJTF-OIR Monthly Civilian Casualty Report*, March 2108, <http://www.inherentresolve.mil/News/News-Releases/News-Article-View/Article/1477860/cjtf-oir-monthly-civilian-casualty-report/>.

²⁴ THE GLOBAL COALITION AGAINST ISIS, *Airstrikes, Civilian Casualties and Investigations*, November 2017, <http://theglobalcoalition.org/en/airstrikes-civilian-casualties-and-investigations/>.

²⁵ The Coalition changed its rules of engagement in December 2016 in the sense that Coalition members can now conduct airstrikes without asking for authorisation and review from the Coalition strike cell in Baghdad. The "strike cell" provides members with information about the targeted areas with regards to civilian and combatant presence.

B. WILLE, "1000 Days into the War on ISIS, Civilians Deaths Mount", *Human Rights Watch* May 2017, <https://www.hrw.org/news/2017/05/03/1000-days-war-isis-civilians-deaths-mount>.; X. "Iraq: Airstrike Vetting Changes Raise Concerns", *Human Rights Watch* March 2017, <https://www.hrw.org/news/2017/03/28/iraq-airstrike-vetting-changes-raise-concerns>.

2.1.3. *Belgian contributions*

26. Belgium began to participate in the war against ISIS in October 2014. It suspended its mission from July 2015 to July 2016 and from 26 December 2017 pursuant to an agreement with the Netherlands in which each would rotate to take care of the execution of air strikes and of protection on the ground.²⁶ Initially, the Belgian troops only acted in Iraq, but from 2016, they also targeted Syria.²⁷

27. Even though Belgium's participation remained largely under the radar, the controversies on the international level eventually also reached the internal political debate. On three occasions, Belgium was under serious criticism for deadly airstrikes it was alleged to have conducted. Belgium's involvement was later disproved for two of the strikes, but in all cases, Belgium's lack of transparency was criticised, because this made it much more difficult to deny the allegations.

28. Firstly, Russia publicly accused Belgium to have participated in an airstrike which caused civilian casualties on 18 October 2016.²⁸ Eventually, the evidence that Russia provided indicated just the contrary, namely that Belgium had not been involved.²⁹ Nevertheless, Russia remains convinced of the correctness of its allegations.³⁰

29. Secondly, Belgium had participated in the notorious Coalition airstrikes on 17 March 2017 in Mosul, which had caused the largest civilian massacre so far.³¹ These allegations caused another media storm.³² Eventually the Ministry of Defence declared that they had been involved, but that it was not the Belgian air force which had caused the civilian casualties, without pointing at who it could have been.³³

²⁶ L. BARDYN, "Belgische F-16's nemen het roer over", *Ministry of Defence* June 2016, <https://www.mil.be/nl/artikel/belgische-f-16s-nemen-het-roer-over>; J. STROOBANTS, "F-16's terug uit Jordanië", *Ministry of Defence* June 2016, <https://www.mil.be/nl/artikel/f-16s-terug-uit-jordanie>; S. VERBOVEN, "Zevenduizend vliegers boven Irak en Syrië", *Ministry of Defence* March 2017, <http://www.mil.be/nl/artikel/zevenduizend-vliegers-boven-irak-en-syrie>; X., "Medaille voor luchtbestrijders ISIS", *Defensie NL* October 2016, <https://www.defensie.nl/actueel/nieuws/2016/10/07/medaille-voor-luchtbestrijders-isis>.

²⁷ S. VERBOVEN, "Zevenduizend vliegers boven Irak en Syrië", *Ministry of Defence* March 2017, <http://www.mil.be/nl/artikel/zevenduizend-vliegers-boven-irak-en-syrie>.

²⁸ A. OSBORN, K. GOLUBKOVA and D. PINCHUK, "Russia summons Belgian envoy in row over Syria air strike", *Reuters* October 2016, <http://www.reuters.com/article/us-russia-belgium-diplomacy-idUSKCN12L0S1>.

²⁹ X., "Vandepuut: 'Russisch "bewijs" bevestigt dat Belgische F-16's niet verantwoordelijk waren", *de Standaard* October 2016, http://www.standaard.be/cnt/dmf20161020_02529796.

³⁰ G. VAN VLIERDEN, "Waarom viseren de Russen net ons?", *De Morgen* October 2016, <http://www.demorgen.be/buitenland/waarom-viseren-de-russen-net-ons-baa8a762/>.

³¹ X., "Belgium probes Mosul air strikes that killed civilians", *Al Jazeera* April 2017, <http://www.aljazeera.com/news/2017/03/belgium-probes-mosul-air-strikes-killed-civilians-170331180145418.html>.

³² K. HEYLEN, "Belgische F-16's in Mosul: wat weten we?", *Deredactie* April 2017, <http://deredactie.be/cm/vrtnieuws/buitenland/1.2941319>.

³³ X., "België was het niet in Mosul, wie dan wel?", *de Standaard* April 2016, http://www.standaard.be/cnt/dmf20170425_02851858.

30. Ultimately, Airwars accused Belgium last year of being involved in two deadly airstrikes, of which the Coalition had confirmed that two civilians had died in them. The matter is still contested up to date, but the Ministry denies its involvement and investigations have been closed.³⁴

31. Members of the Belgian army, however, stress that these debates don't adequately reflect Belgium's strict procedures which ensure their compliance with humanitarian law.³⁵ They take the humanitarian principles of distinction, proportionality and precautionary measures at heart, while planning and executing their missions. In case of doubt of whether it is a military or a civilian objective, they will never attack, because they operate with a "positive identification requirement".³⁶ Moreover, a red card holder in Qatar, who is assisted by a lawyer specialized in humanitarian law will veto the mission if there are any risks. Also, Lieutenant Colonel Dierick stated that Belgium, like most other continental states, refuses to strike when ISIS uses civilians as a human shield, which was common practice in Mosul.³⁷

2.2. TRANSPARENCY OF THE COALITION AND BELGIUM

32. The controversies above led to a demand for transparency and accountability both in Belgium as on the international level, which showed itself to be inherently related to the legitimacy of the Coalition's actions. Before investigating the legal possibilities to obtain greater transparency, it is necessary to first sketch the factual situation.

2.2.1. *General Transparency of the Coalition*

33. Of all parties of the war in Syria and Iraq, the Coalition in general scores best on informing the public about its actions.

34. US Central Command (hereafter: CENTCOM) carries out US military operations and also takes a central role in the operations of the Coalition.³⁸ Via CENTCOM and the related website of "Combined Joint Task Force-

³⁴ B. STRUYS, J. VAN HORENBEEK and B. EECKHOUT, "België betrokken bij burgerdoden in Irak", *De Morgen* August 2017, <https://www.demorgen.be/binnenland/-belgie-betrokken-bij-burgerdoden-in-irak-b93373e2/>; E. WESTRA, "Despite public denials, Belgium linked to two confirmed civilian casualty events", *Airwars* August 2017, <https://airwars.org/news/airwars-uncovers-civilian-casualties-tied-to-belgium-but-brussels-wont-admit-them/>.

³⁵ Transparency in Belgian foreign military missions – Hearing with representatives of the NGO Airwars and the Belgian Ministry of Defence (Transparantie bij de Belgische militaire missies in het buitenland - Hoorzitting met vertegenwoordigers van de ngo Airwars en de Belgische Defensie), *Parl. P. Chamber* 2016-17, nr. 54-2640/001; Interview with Lieutenant Colonel Dierick.

³⁶ However, testimonies do not always align, for instance with regard to the "non combattant casualty cutter value", which indicates the degree of which one is absolutely sure that there are no civilian casualties. While Colonel Gerard held in the parliamentary hearing that Belgium always uses the lowest degree "O", Lieutenant Colonel Dierick stated that Belgium uses a low degree, but that the highest and the lowest degree are almost never used by anyone.

³⁷ Interview with Lieutenant Colonel Dierick.

³⁸ Mission statement US Central Command, <http://www.centcom.mil/ABOUT-US/>.

Operation Inherent Resolve” (CJTF-OIR),³⁹ which is the official information channel of the Coalition, information about their actions can be obtained.

35. The Coalition distinguishes itself from other parties to the conflict by releasing information on the near location and the date of the airstrike it conducts and by writing monthly civilian casualty reports. These active measures are all positive responses to the aforementioned growing international demand for more transparency.⁴⁰

36. Nevertheless, human rights organisations have identified two problems that remain with regard to the Coalition’s transparency.

37. Firstly, the Coalition is very vague about which Coalition partner fulfilled which role. In November 2014, it stopped publishing which partners were involved in airstrikes⁴¹ and in March 2015, CENTCOM no longer distinguished between US forces and Coalition partners when they announced strikes.⁴² This makes it very difficult for NGO’s to identify to which member certain strikes and civilian casualties can be attributed and prevents members from being held nationally accountable. All Coalition members apart from the US also allege not to have caused any civilian death, which is hardly impossible, seen the immense civilian death toll of the operation.⁴³

38. Secondly, the assessment of civilian casualties is problematic, as the numbers estimated above indicate.

³⁹ News page of CJTF-OIR, <http://www.inherentresolve.mil/News/>.

⁴⁰ The Coalition discloses civilian casualty reports since January 2017. Executive Order 13732 of 1 July 2016 on the United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, *81 FR 44483* 7 July 2016, 44483-44487; CENTCOM, *CJTF-OIR Monthly Civilian Casualty Report*, January 2017 <http://www.inherentresolve.mil/News/News-Releases/News-Article-View/Article/1040262/cjtf-oir-monthly-casualty-report/>; Strike releases CJTF-OIR, <http://www.inherentresolve.mil/News/Strike-Releases/>.

⁴¹ Compare f.e. the CENTCOM news release of 8 October 2014 (<http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/884875/oct-8-us-military-partner-nations-conduct-airstrikes-against-isil-in-syria-and/>) and of 5 November 2014 (<http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/884886/nov-5-military-airstrikes-continue-against-isil-in-syria-and-iraq/>).

REMOTE CONTROL, Limited Accountability: A transparency audit of the Coalition air war against so-called Islamic State, December 2016, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf, 13-14.

⁴² Compare f.e. the CENTCOM news release of 20 March 2015 (<http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/885020/mar-20-military-airstrikes-continue-against-isil-in-syria-and-iraq/>) and of 25 March 2015 (<http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/885029/march-25-military-airstrikes-continue-against-isil-in-syria-and-iraq/>).

REMOTE CONTROL, Limited Accountability: A transparency audit of the Coalition air war against so-called Islamic State, December 2016, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf, 13-14.

⁴³ E. WESTRA, “Despite public denials, Belgium linked to two confirmed civilian casualty events”, *Airwars* August 2017, <https://airwars.org/news/airwars-uncovers-civilian-casualties-tied-to-belgium-but-brussels-wont-admit-them/>.

39. On the one hand, it is difficult to verify whether the Coalition makes fair investigations, because they classify almost all reports and only respond with one sentence, namely whether the allegation was credible or not.⁴⁴ Moreover, there are indications that the Coalition is reluctant to hold thorough investigations and find an allegation “credible”.⁴⁵ They rely mostly on footage from the air. Since they have no troops on the ground, they barely interview witnesses or make site visits. They also rely on reports of external monitors, such as human rights organisations, although in a passive and inconsistent way. Furthermore, by non-credible they mean that due to insufficient information it is more likely than not that no civilians died.⁴⁶ Even though it seems that they improved their assessment procedure over the past year,⁴⁷ a significant gap remains between the Coalition’s estimates and the ones from external monitors.

40. On the other hand, it is often difficult for external monitors to figure out who was responsible for a civilian casualty, because the Coalition is not willing to give sufficiently precise information concerning the location of its air strikes.⁴⁸

41. The deficiencies of the assessment procedures of both the Coalition and external monitors, prevent States from being held accountable for civilian casualties and maybe even the violation of humanitarian law. Hence, from the nature of the problems regarding the assessment of civilian casualties, it becomes clear that an increased transparency towards external monitors concerning data on airstrikes can be one way of realizing qualitative and neutral reports on civilian casualties.

⁴⁴ An example of one of the rare unclassified reports can be found here, <https://assets.documentcloud.org/documents/4243257/Al-Hatra-FOIA.pdf>.

A. KHAN and A. GOPAL, “The Uncounted”, *New York Times Magazine*, November 2017, <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>.

⁴⁵ A. KHAN and A. GOPAL, “The Uncounted”, *New York Times Magazine*, November 2017, <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>; REMOTE CONTROL, *Limited Accountability: A transparency audit of the Coalition air war against so-called Islamic State*, December 2016, 8-10, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf.

⁴⁶ CENTCOM, *CJTF-OIR Monthly Civilian Casualty Report*, November 2017, <http://www.inherentresolve.mil/News/News-Releases/News-Article-View/Article/1383586/cjtf-oir-monthly-civilian-casualty-report/>.

⁴⁷ Compare f.e. the casualty report from September 2017 (<http://www.inherentresolve.mil/News/News-Releases/News-Article-View/Article/1297778/cjtf-oir-monthly-civilian-casualty-report/>) to November 2017 (<http://www.inherentresolve.mil/News/News-Releases/News-Article-View/Article/1383586/cjtf-oir-monthly-civilian-casualty-report/>). See also the Coalition statement: THE GLOBAL COALITION AGAINST ISIS, *Airstrikes, Civilian Casualties and Investigations*, November 2017, <http://theglobalcoalition.org/en/airstrikes-civilian-casualties-and-investigations/>.

⁴⁸ A. KHAN and A. GOPAL, “The Uncounted”, *New York Times Magazine*, November 2017, <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>; REMOTE CONTROL, *Limited Accountability: A transparency audit of the Coalition air war against so-called Islamic State*, December 2016, 8-9, https://airwars.org/wp-content/uploads/2016/12/Airwars-report_Web-FINAL1.compressed.pdf.

2.2.2. *Belgian transparency*

42. Belgium does not complement the strike releases of the Coalition by indicating which strikes can be attributed to our national efforts. Hence, Belgium's own communication does not seem to mitigate the aforementioned problems.

43. According to a comparative study of Airwars, we are one of the most intransparent states of the Coalition. In contrast to fe. the UK or Australia, Belgium does not disclose any information on where, when or how many air strikes it executes. They announced attacks on 5 October 2014 and 3 November 2014, but these were the only individual attacks they ever made public.⁴⁹ Afterwards, only very general press statements have been released with the number of flights, in which country they operate and how many percent of Coalition airstrikes they carry out.⁵⁰

44. Furthermore, requests for more concrete information from the NGO Vredesactie (Peace Action) under the right to access to information only knew limited success. The Ministry of Defence provided them with information on air strikes carried out between 27 September and 19 November 2014, but all later requests were barred, because they had classified this information for security reasons.⁵¹

45. This lack of transparency has been criticised in the media on several occasions by politicians, academics and NGO's. The alleged responsibility in air strikes with civilian casualties and Airwars' negative report intensified this protest.⁵²

46. The Ministry of Defence, however, justifies this policy with two main arguments: the safety of our soldiers and alternative control mechanisms.

⁴⁹ P. DE CREM, "Gewapende interventie Belgische F-16's in Irak", *Press statement of the Minister of Defence* October 2014, http://www.pieterdecrem.be/index.php?id=184&tx_ttnews%5BbackPid%5D=188&tx_ttnews%5Btt_news%5D=4233&cHash=501383ec3a0b08a235c337b723340b70; VERBOVEN, S., "Belgische F-16's nemen de leiding in Irak", *Ministry of Defence* November 2014, <https://www.mil.be/nl/artikel/belgische-f-16s-nemen-de-leiding-irak>.

⁵⁰ J. LIEVENS, "Bilan Operatie Desert Falcon", *Ministry of Defence* July 2015, <http://www.mil.be/nl/artikel/bilan-operatie-desert-falcon>; J. THYS, "Defensie licht operaties toe", *Ministry of Defence* March 2017, <https://www.mil.be/nl/artikel/defensie-licht-operaties-toe>; S. VERBOVEN, "Zevenduizend vliegreuen boven Irak en Syrië", *Ministry of Defence* March 2017, <http://www.mil.be/nl/artikel/zevenduizend-vliegreuen-boven-irak-en-syrie>; X., "Belgische F-16's in Irak", *Ministry of Defence* April 2015, <https://www.mil.be/nl/artikel/belgische-f-16s-irak>.

⁵¹ X., "Maken Belgische F-16's geen burgerslachtoffers, of worden ze niet geteld?", *Vredesactie* April 2017, <https://www.vredesactie.be/nl/nieuws/maken-belgische-f-16s-geen-burgerslachtoffers-woorden-ze-niet-geteld>.

⁵² G. VAN VLIERDEN, "Waarom viseren de Russen net ons?", *De Morgen* October 2016, <http://www.demorgen.be/buitenland/waarom-viseren-de-russen-net-ons-baa8a762/>; X., "De Vriendt: Commissie bijeenroepen bij betrokkenheid Belgische leger burgerslachtoffers Mosoel", *de Standaard* April 2017, http://www.standaard.be/cnt/dmf20170401_02812554.

a. A substantial argument for non-disclosure: safety

47. Unfortunately, there is little adequate communication from the side of the military and the Ministry in the media as regarding their substantial reasons for classifying the information. They often stress, also in the parliamentary hearing on this topic, the cautious nature of their procedures, without giving concrete reasons for not imparting the information. However, through interviews with certain officials, I was able to identify the dangers that underlie this information.

48. Lieutenant Colonel Dierick was prepared to clarify what is meant with “the physical security of our soldiers” that demands non-disclosure.⁵³ One cannot go lightly over a decision to release military information, because it puts soldiers at risk in several ways. For instance, family members of soldiers have already been threatened when the enemy found out that they were active in battle. Concerning the impartation of data on airstrikes, this would create the risk of data-mining. He holds that if we would systematically disclose such information of a running operation, enemy combatants can discover flight patterns and habits, which would allow them to intercept the airplanes and endanger the life of the pilots and the success of the mission. He points out that the famous downing of an American stealth air plane by the Yugoslavian troops in 1999⁵⁴ and the recent downing of the Israeli F-16⁵⁵ was because the enemy had discovered flight patterns.

49. Even though the territory of ISIS has significantly reduced over time and it can be argued that information could be imparted on territory that is no longer part of the battle field, Lieutenant Colonel Dierick stresses that a war is dynamic and that there is always a chance that their operations will relocate to that territory again. Consequently, it constitutes a substantial danger for their troops to impart information on missions that are not considered “historic” yet. Moreover, he alleges that the military does declassify information on “historic” missions, Libya being the most recent one.

b. A Procedural Argument for non-disclosure: Transparency to a Parliamentary Commission

50. Voices supporting the Ministry of Defence, stress that by a one-sided focus on transparency to the public, other means of public control are being neglected.⁵⁶ Since Belgium is a parliamentary democracy, it organises this

⁵³ Interview with Colonel Lieutenant Dierick.

⁵⁴ D. CENCIOTTI, ““Vega 31”: the first and only F-117 Stealth Fighter Jet shot down in combat (15 years ago today)”, *The Aviationist* March 2014, <https://theaviationist.com/2014/03/27/vega-31-shot-down/>.

⁵⁵ M. LUBELL and L. BARRINGTON, “Israeli jet shot down after bombing Iranian site in Syria”, *Reuters* February 2018, <https://www.reuters.com/article/us-israel-iran/israeli-jet-shot-down-after-bombing-iranian-site-in-syria-idUSKBN1FU07L>.

⁵⁶ Transparency in Belgian foreign military missions – Hearing with representatives of the NGO Airwars and the Belgian Ministry of Defence (Transparantie bij de Belgische militaire missies in het buitenland - Hoorzitting met vertegenwoordigers van de ngo Airwars en de Belgische Defensie), *Parl. P. Chamber* 2016-17, nr. 54-2640/001, 11; K. GROSEMANS en P.

control mostly by informing members of parliament in specific commissions. These parliamentarians, who represent the people can keep an eye on the actions of the army, without risking that sensitive information that could endanger the functioning of the troops would be spread.

51. This form of transparency is indeed an important aspect to the verification of civilian casualties. Even though it does not enable NGO's (as an extra external check) to compare data on airstrikes with data assembled on casualties by local NGO's, it is a relevant factor in the assessment of Belgium's transparency. Definitely in case the question to the proportionality of the military's secrecy comes to the fore, one should be able to form an image of what this form of transparency contains. Consequently, I will shortly sketch the *de iure* and *de facto* possibilities for the Parliament to control the actions of the Ministry of Defence.

b.1. Legal Competences

52. I will concentrate here only on competences that have a concrete link with the Parliament's ability to assess the number of civilian casualties during foreign missions. The most relevant provision in the Constitution that determines the competences in this regard is art 167 §1.

53. "The King executes the command on the military, determines the state of war and the end of hostilities. He notifies the Chambers thereof, as soon as the interest and the security of the State allow it, while providing the adequate communication."

54. In other words, the Parliament only has a right to information and is not required to assent before the Belgian army can go to war. Since the Constitution does not impose requirements to the periodicity, the quantity, quality or the manner of the impartation of the information, the Parliament must make use of its general means to obtain information.⁵⁷

55. The Constitution offers (except for a few indirect means of obtaining information through parliamentary powers concerning the military)⁵⁸ the Parliament power to ask questions to the Minister and to demand his presence in the Chamber to answer them.⁵⁹

BUYSROGGE, "Belgische F16's in Syrie en Irak: Transparantie kan op verschillende manieren ingevuld worden", *Knack* 2017, <http://www.knack.be/nieuws/belgie/belgische-f16-s-in-syrie-en-irak-transparantie-kan-op-verschillende-manieren-ingevuld-worden/article-opinion-830373.html>.

⁵⁷ Y. REYKERS and D. FONCK, "Who is controlling whom? An analysis of the Belgian federal Parliament's executive oversight capacities toward the military interventions in Libya (2011) and Iraq (2014-2015)", *Studia Diplomatica* 2015, 68(2) 94.

⁵⁸ Art. 170, 182, 183, 185 and 186 Belgian Constitution (Grondwet) of 17 February 1994, *BS* 17 February 1994. (Hereafter: Constitution).

⁵⁹ Art. 88 and 100 Constitution.

56. Moreover, the Parliament is conferred via art. 56 of the Constitution a right to investigation, according to which it can create a commission to obtain information that is not available via the regular information channels.⁶⁰ The Parliament has also means of ‘soft control’, by which it can hold hearings and adopt resolutions, as an expression of a certain attitude they want the executive branch to adopt.⁶¹

57. The concrete control of foreign missions by the Parliament is exercised in committees. Three committees have powers to discuss topics related to the Ministry of Defence: the Defence Committee, the Foreign Affairs Committee, and the Special Committee for the Monitoring of Foreign Missions.⁶² The latter Committee is the most relevant in this regard. It was created after the Rwanda Commission recommended to let a parliamentary committee follow up foreign missions and handles the technical details of operations, such as the data, place and number of airstrikes.⁶³

58. According to its internal rules, the Committee gathers at least once a month behind closed doors.⁶⁴ Members of Parliament who are part of the Committee can be accompanied by one parliamentary assistant.⁶⁵ They are provided insight into the decisions of the council of ministers (ministerraad), the rules of engagement, the caveats and the reports of the military intelligence services.⁶⁶ The Committee can organise hearings and can ask assistance of experts in the relevant areas.⁶⁷

⁶⁰ T. RUYSS, “Kroniek van een nakende grondwetswijziging? Parlementaire controle op het inzetten van strijdkrachten in het buitenland”, *RW* 2009-10, 519.

⁶¹ Y. REYKERS and D. FONCK, “Who is controlling whom? An analysis of the Belgian federal Parliament’s executive oversight capacities toward the military interventions in Libya (2011) and Iraq (2014-2015)”, *Studia Diplomatica* 2015, 68(2) 94-95; E. VANDENBOSSCHE, “De federale Kamers en de buitenlandse missies van militairen”, *CDPK* 2011, 104.

⁶² *List of Commissions of the Chamber*, <https://www.dekamer.be/kvvcr/showpage.cfm?section=/none&language=nl&cfm=/site/www.cfm/comm/LstCom.cfm>.

⁶³ T. RUYSS, “Kroniek van een nakende grondwetswijziging? Parlementaire controle op het inzetten van strijdkrachten in het buitenland”, *RW* 2009-10, 519; E. VANDENBOSSCHE, “De federale Kamers en de buitenlandse missies van militairen”, *CDPK* 2011, 105.

⁶⁴ Art. 1 and 3 Internal Rules of 7 October 2017 of the Special Committee Charged with the Follow-Up of Foreign Missions (Huishoudelijk reglement van de bijzondere commissie belast met de opvolging van de buitenlandse missies), https://www.dekamer.be/kvvcr/pdf_sections/publications/reglement/Buitenlandse%20missies%20-%20Huishoudelijk%20reglement%20NTC.pdf.

⁶⁵ Art. 3 Internal Rules of 7 October 2017 of the Special Committee Charged with the Follow-Up of Foreign Missions (Huishoudelijk reglement van de bijzondere commissie belast met de opvolging van de buitenlandse missies), https://www.dekamer.be/kvvcr/pdf_sections/publications/reglement/Buitenlandse%20missies%20-%20Huishoudelijk%20reglement%20NTC.pdf.

⁶⁶ Art. 2 Internal Rules of 7 October 2017 of the Special Committee Charged with the Follow-Up of Foreign Missions (Huishoudelijk reglement van de bijzondere commissie belast met de opvolging van de buitenlandse missies), https://www.dekamer.be/kvvcr/pdf_sections/publications/reglement/Buitenlandse%20missies%20-%20Huishoudelijk%20reglement%20NTC.pdf.

⁶⁷ Art. 4 Internal Rules of 7 October 2017 of the Special Committee Charged with the Follow-Up of Foreign Missions (Huishoudelijk reglement van de bijzondere commissie belast met de opvolging van de buitenlandse missies),

b.2. Parliamentary Control in Practice

59. Since the Constitution and the Internal Rules of the Committee do not provide a strict framework with regard to the impartation of information, it is necessary to gain insight into the factual working of this mechanism of control in order to make a nuanced evaluation.

60. Firstly, it is important to mention that over the past twenty years, Members of Parliament have been complaining that they do not have enough influence in decisions on warfare. Whereas in several European states the Constitution has been adapted as to give Parliamentarians more control on military action, this trend has not been followed in Belgium.⁶⁸ Nevertheless, many Members of Parliament from different parties have already proposed to adapt the Constitution in this sense.⁶⁹ Interestingly, the most recent proposal, in which Belgium's intransparency was severely criticised was submitted by i.a. K. Grosemans of NVA, when she and her party were still in the opposition.⁷⁰ This of course calls into question the credibility of her defence of Minister Vandepuut's intransparency, arguing that it is to the Parliament to exercise control.

61. Secondly, analyses of the functioning of the Special Committee for the monitoring of Foreign Missions indicate that due to the manner in which the impartation of information takes place, the degree of control of the Parliament is rather dissatisfying. As the Members of Parliament receive only a one hour briefing per month in which the technical details of 7 different operations are

https://www.dekamer.be/kvcr/pdf_sections/publications/reglement/Buitenlandse%20missies%20-%20Huishoudelijk%20reglement%20NTC.pdf.

⁶⁸ T. RUYSS, "Kroniek van een nakende grondwetswijziging? Parlementaire controle op het inzetten van strijdkrachten in het buitenland", *RW* 2009-10, 523.

⁶⁹ Proposal of F. Lozie, of the Green Party: Proposal of Declaration to Review art. 167 of the Constitution (Voorstel tot declaratie om art. 167 van de Grondwet te herzien), *Parl. P. Senate*, 1993-1994, nr.1157/1; Proposal of D. Van Der Maelen of the Labour Party: Proposal of Review of art. 167, §1, second member of the Constitution concerning the powers on warfare (Voorstel om art. 167, §1, tweede lid van de Grondwet wat de bevoegdheid inzake oorlogsvoering betreft), *Parl.P. Chamber*, 2007-2008, nr. 1342 /1; Proposal of B. Anciaux and J. Vande Lanotte of the Labour Party: Proposal of Declaration to Review art. 167, §1, second member, of the Constitution, concerning the powers on warfare (Voorstel om art. 167, §1, tweede lid van de Grondwet wat de bevoegdheid inzake oorlogsvoering betreft), *Parl.P. Senate*, 2010-2011, nr. 5-836/1; Proposal of G. Lambert of Spirit, a leftist party: Proposal of Declaration of Review of art. 167, §1, second member of the Constitution to increase the democratic control on the determination of the state of war and the commissioning or placing on disposal of the military on order to uphold or improve the international legal order (Voorstel van verklaring tot herziening van artikel 167, §1, tweede lid, van de Grondwet, om de democratische controle te verhogen op het vaststellen van de staat van oorlog en op het inzetten of het ter beschikking stellen van de krijgsmacht ter handhaving of bevordering van de internationale rechtsorde), *Parl.P. Senate*, 2007- 2008, nr.4-915/1; Proposal of P. Dewael of the Liberal Party: Proposal of Declaration to Review art. 167, §1, second member of the Constitution (Voorstel van verklaring tot herziening van art. 167, §1, tweede lid van de Grondwet), *Parl.P. Chamber*, 2010-11, nr.1474/1; Proposal of A. De Croo and N. Lijnen of the Liberal Party: Proposal of Declaration to Review art. 167, §1, second member of the Constitution (Voorstel van verklaring tot herziening van art. 167, §1, tweede lid van de Grondwet), *Parl.P. Senate*, 2010-11, nr.5-1176/1.

⁷⁰ Proposal of Declaration to Review art. 167, §1 of the Constitution (Voorstel van verklaring tot herziening van art. 167, §1 van de Grondwet), *Parl. P. Chamber*, 2013-14, nr.3410/1.

communicated, there is no room for profound analysis of the military's activities.⁷¹ Moreover, no notes can be taken during the meetings and the Committee has no budget for a research section, which would allow them to adopt a critical position to the data that are presented to them.⁷² Members of Parliament have also stated that they are not always provided with the data on all conducted air strikes.⁷³ Consequently, some of them complain that they need to resort to alternative sources of information (their party, NGO's, academia) to be aware of the current situation and that the division of powers between the three Committees allows the Minister "not to touch the hot potato".⁷⁴

62. While the Court of Audit already emphasised the need for a transparent accountability framework towards the Parliament,⁷⁵ Members of Parliament have also recently submitted a proposal to create a framework that would enable an adequate information flow to the Chamber, similar to what exists in the Netherlands.⁷⁶

63. Consequently, from the concrete functioning of the Committee, it can be inferred that they are unable to exercise a genuine control on the number of civilian casualties of the Belgian military. This should be taken into account when the question of proportionality rises with regard to the Ministry of Defence's refusal to impart information to the public.

2.3. CONCLUSION

64. The allegations against the Coalition and the uncertainty on important issues of humanitarian law are clearly linked to a lack of transparency. While the Coalition makes significant attempts to increase the transparency of its operations, certain problems still overshadow the legitimacy of its operations. One of those is the complete lack of accountability from Coalition members. Since the Coalition does not reveal who conducted which air strike and NGO's do not possess sufficient data on the airstrikes, citizens of those States barely have a clue of the consequences of their army's participation in the war against ISIS.

⁷¹ VREDESACTIE: *Parlement Buitenspel? Democratische controle of militaire operaties*, January 2018, <https://www.vredesactie.be/sites/default/files/pdf/rapportpb.pdf>, 6.

⁷² Y. REYKERS and D. FONCK, "Who is controlling whom? An analysis of the Belgian federal Parliament's executive oversight capacities toward the military interventions in Libya (2011) and Iraq (2014-2015)", *Studia Diplomatica* 2015, 68(2) 96.

⁷³ Transparency in Belgian foreign military missions – Hearing with representatives of the NGO Airwars and the Belgian Ministry of Defence (Transparantie bij de Belgische militaire missies in het buitenland - Hoorzitting met vertegenwoordigers van de ngo Airwars en de Belgische Defensie), *Parl. P. Chamber* 2016-17, nr. 54-2640/001, 15.

⁷⁴ Y. REYKERS and D. FONCK, "Who is controlling whom? An analysis of the Belgian federal Parliament's executive oversight capacities toward the military interventions in Libya (2011) and Iraq (2014-2015)", *Studia Diplomatica* 2015, 68(2) 102-104.

⁷⁵ REKENHOF, *Leren van buitenlandse militaire operaties*, November 2010, [file:///C:/Users/Louise/Downloads/2010_43_BuitenlandseMilitaireOperaties%20\(2\).pdf](file:///C:/Users/Louise/Downloads/2010_43_BuitenlandseMilitaireOperaties%20(2).pdf), 21-22.

⁷⁶ Proposition of Law concerning the introduction of an assessment framework to evaluate Belgian foreign military missions (Wetsvoorstel houdende invoering van een toetsingskader ter evaluatie van Belgische buitenlandse militaire missies), *Parl. P. Chamber*, 2016-17, 2471/1.

65. Especially Belgium scores poorly. It almost never imparts information on its air strikes to the general public and also the parliamentary mechanisms that are supposed to control the army's actions do not function properly. Of course, important arguments against the disclosure of this information cannot be disregarded and it cannot be tolerated that the safety of soldiers is at risk.

66. Hence, one can note on the one hand a need for increased transparency in order to obtain clarity on the civilian casualty allegations and on the other hand a need to ensure the safety of our soldiers. When it comes to the legal question of whether one has a right to information regarding our conduct in the war, the question will most likely center on how these two interests should be balanced.

3. RIGHT TO TRANSPARENCY UNDER BELGIAN LAW

67. In this part, I will examine how the balance between interests of security and of information play out under Belgian legislation.

3.1. LEGISLATIVE FRAMEWORK

68. The framework that governs this issue today results from a worldwide civil movement in the 60's and 70's demanding greater transparency and participation.⁷⁷ Different from the legislative and judicial branch,⁷⁸ the administration was traditionally to act in secret.⁷⁹ However, gradually the opinion changed that transparency from the administration can significantly improve the relation between the government and citizens.⁸⁰

⁷⁷ F. SCHRAM, *Burger en bestuur. Een introductie tot een complexe verhouding*, Brussels, Politeia, 2014, 374; D. VOORHOOF, "Woord vooraf. Openbaarheid van bestuur, recht op informatie en politieke democratie" in D. VOORHOOF (ed.), *Tegenspraak-Cahier 12: Recht op openbaarheid van bestuur*, Antwerp, Kluwer, 1991, VIII.

⁷⁸ D. VOORHOOF, "Woord vooraf. Openbaarheid van bestuur, recht op informatie en politieke democratie" in D. VOORHOOF (ed.), *Tegenspraak-Cahier 12: Recht op openbaarheid van bestuur*, Antwerp, Kluwer, 1991, VII.

⁷⁹ F.e. Art. 104, (3), b New Municipality Law of 24 June 1988 (Nieuwe Gemeentewet), *BS* 3 September 1988; art. 51, (4), Flemish Municipality Decree of 15 July 2005 (Vlaams Gemeentedecreet), *BS* 31 August 2005; Art. 104 Province Law of 13 April 1836 (Provinciewet), *BS* 27 November 1891; Art. 51 Flemish Province Decree of 9 December 2005 (Vlaams Provinciedecreet), *BS* 25 December 2005; L.P. SUTENS, "Hoe belangrijk is openbaarheid en openheid van bestuur voor onze hedendaagse samenleving?" in R. JANVIER (ed.), *Openbaarheid en openheid van bestuur: (on) begrensde mogelijkheden?*, Bruges, die Keure, 1991, 6; J. VANDE LANOTTE, *Handboek Belgisch Publiekrecht*, Bruges, die Keure, 2013, 621.

⁸⁰ These are some of the benefits summed up: It leads to enhanced legal protection for citizens and allows citizens to genuinely exercise their right of appeal before a judicial body. It can also avoid unnecessary law suits of citizens who are uninformed. Moreover, besides the control of the legislative branch, it allows citizens to actively control the executive branch as well. This increased control can lead to better decisions and procedures. Furthermore, it involves citizens more in governance and lets them more actively participate in decision making processes. Consequently, they will interiorize government objectives as well. It enables citizens to truly exercise certain human and constitutional rights, such as freedom of speech, freedom of assembly and freedom of the press. Lastly, it can increase the public trust in the administration.

Proposition of the Government to insert art. 24ter in the Constitution concerning open government (Voorstel van de Regering tot invoeging van een artikel 24ter in de Grondwet betreffende de openbaarheid van bestuur), *Parl. P. Chamber* 1992-93, nr. 839/1, 5-6; CC 19 December 2013, nr. 2013/169, cons. B. 16.3; CS 18 June 1997, nr. 66.680; S.W. COUWENBERG, *Modern constitutioneel recht en emancipatie van de mens: liberale democratie als eerste emancipatiemodel*, Assen, Van Gorcum, 1981, 277; C. DOYEN-BIVER, "La législation sur l'accès aux documents administratifs. Aperçu de ses applications" in J.P. BOURS, M. DEPREZ and C. de Terwangne, *Transparance et droit à l'information*, Liège, ULg. Formation Permanente CUP, 2002, 15; K. JANSSEN, J. STEYAERT and R. VAN GOMPEL, *Transparantie van overheidsinformatie in Vlaanderen*, Bruges, die Keure, 2003, 46; T. REINER, *Openbaarheid van bestuur*, Brussels, Larcier, 2011, 7; F. SCHRAM, *De federale openbaarheidswetgeving*, Brussels, Politeia, 2014, 19-20; L.P. SUTENS, "Hoe belangrijk is openbaarheid en openheid van bestuur voor onze hedendaagse samenleving?" in R. JANVIER (ed.), *Openbaarheid en openheid van bestuur: (on) begrensde mogelijkheden?*, Bruges, die Keure, 1991, 7-8.

69. Consequently, the influence of the international sphere and citizen's movements led to the enactment of art. 32 of the Belgian Constitution and specific legislation.⁸¹

3.1.1. *Open Government as a Constitutional Right*

70. Art. 32 of the Constitution states that “everyone has the right to consult every administrative document and to receive a transcript, except in cases and under the conditions determined by the law, decree, or rule meant in art. 134.”⁸²

71. With this provision, the right to information became a constitutional human right. Its formulation bears quite some implications with regard to the scope of the right, of which I will sum up the most relevant below.

72. Firstly, it is a universal right. This means that anyone (also a legal entity)⁸³, regardless of his nationality can invoke it.⁸⁴ Moreover, the formulation implies that the rightholder does not need to demonstrate an interest.⁸⁵ Nevertheless, the legislator still has the power to restrict one's access to an administrative document for the lack of an interest, he can just not do so on an absolute and general basis.⁸⁶

73. Secondly, an administrative document is defined by the nature of the instance that possesses it.⁸⁷ Any type of information (written documents, photo's, video's,...), regardless of its form (studies, reports, statistics, contracts,...) or content should be made public, as long as it is in the possession of an administrative government.⁸⁸ Nonetheless, since the provision makes mention of a document, the right to information is dependent on the existence

⁸¹ Proposition of the Government to insert art. 24ter in the Constitution concerning open government (Voorstel van de regering tot invoeging van art. 24ter in de Grondwet betreffende de openbaarheid van bestuur), *Parl. P. Chamber* 1992-93, nr. 839/1, 1-4.

⁸² “Ieder heeft het recht elk bestuursdocument te raadplegen en er een afschrift van te krijgen, behoudens in de gevallen en onder de voorwaarden bepaald door de wet, het decreet of de regel bedoeld in artikel 134.”

⁸³ CS 14 October 1996, nr. 62.547.

⁸⁴ R. ANDERSEN, “Introduction” in V. MICHIELS (ed.) *La publicité de l'administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 18.

⁸⁵ CC 25 March 1997, nr. 17/97, B.2.3; CS 2 October 1997, nr. 68.610; CS 16 November 1999, nr. 83.494; M. BOES, “Openbaarheid van bestuur. Bevoegdheidsverdeling. De federale openbaarheidsregeling” in A. M. DRAYE, *Openbaarheid van bestuur in Vlaanderen, België en de Europese instellingen*, Leuven, Acco, 1996, 17-18.

⁸⁶ F. SCHRAM, *De federale openbaarheidswetgeving*, Brussels, Politeia, 2014, 39-40.

⁸⁷ Proposition of the Government to insert art. 24ter in the Constitution concerning open government, *Parl. P. Chamber* 1992-93, nr. 839/1, 5; L. MANISCALCO, “La notion de document administrative” in V. MICHIELS (ed.) *La publicité de l'administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 109-118.

⁸⁸ Proposition of the Government to insert art. 24ter in the Constitution concerning open government, *Parl. P. Chamber* 1992-93, nr. 839/1, 5; M. BOES, “Openbaarheid van bestuur. Bevoegdheidsverdeling. De federale openbaarheidsregeling” in A. M. DRAYE, *Openbaarheid van bestuur in Vlaanderen, België en de Europese instellingen*, Leuven, Acco, 1996, 15-16.

of such document and it does not impose any obligation on the administration to assemble loose information.⁸⁹

74. Of course, the question remains what instance qualifies as “administration”. The *travaux préparatoires* refer to art. 14 of the Coordinated Laws on the Council of State and its jurisprudence.⁹⁰ The Council of State decides on whether an institution is an administrative government based on a functional and an organic criterion, which often leads to discussion in concrete cases.⁹¹ Nevertheless, for our purpose, which is qualifying the Ministry of Defence, the situation is clear.⁹² The jurisprudence never doubted to qualify the Ministry of Defence as an administration.⁹³ Moreover, the *travaux préparatoires* of the Act of 22 March 1995 concerning the creation of federal ombudsmen summed up non-exhaustively “federal administrative governments” and included the Ministry of Defence.⁹⁴ Consequently, no discussion exists here on the administrative character of the Ministry of Defence.

75. Thirdly, the Constitution lays down a passive right to information, which entails that someone must still file a request to obtain it.⁹⁵ Whereas certain laws impose an active duty on the government to make certain documents public, this cannot be derived from art. 32 of the Constitution.⁹⁶

76. Lastly, the right is not absolute and may be subject to exceptions enacted by the legislative branch.⁹⁷ However, the legislator does not have an endless discretion in enacting exceptions, according to the Constitutional Court and the Council of State. How much margin the legislator has, is a point of vivid discussion, fuelled by the *travaux préparatoires* on the one hand and the choice of the legislator to enact absolute exceptions on the other hand. The *travaux préparatoires* strongly emphasised that any exception to the right must have a relative character, which means that an administration would always have to weigh the interest of the legislator in protecting the information from disclosure

⁸⁹ K. JANSSEN, J. STEYAERT and R. VAN GOMPEL, *Transparantie van overheidsinformatie in Vlaanderen*, Bruges, die Keure, 2003, 80-81.

⁹⁰ Proposition of the Government to insert art. 24ter in the Constitution concerning open government, *Parl. P. Chamber* 1992-93, nr. 839/1, 5.

⁹¹ K. JANSSEN, J. STEYAERT and R. VAN GOMPEL, *Transparantie van overheidsinformatie in Vlaanderen*, Bruges, die Keure, 2003, 81-82; Y. MOSSOUX, “La notion d’autorité administrative” in V. MICHIELS (ed.) *La publicité de l’administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 51-109.

⁹² Y. MOSSOUX, “La notion d’autorité administrative” in V. MICHIELS (ed.) *La publicité de l’administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 67-68.

⁹³ CAAD 3 June 2013, nr. 2013-11, http://www.ibz.rm.gov.be/fileadmin/user_upload/fi/com/publicite/avis/2013/ADVIES-2013-11.pdf;

CAAD 13 August 2012, nr. 2012-56, http://www.ibz.rm.gov.be/fileadmin/user_upload/fi/com/publicite/avis/2012/ADVIES-2012-56.pdf.

⁹⁴ *Act. Chambre*, 1993-94, nr. 1436/7, 12-13. (*Hand. Kamer*, 1993-94, r. 1436/7, 12-13.)

⁹⁵ Information on Open Government by the Commission on Acces to Administrative Documents, <http://www.ibz.rm.gov.be/nl/commissies/openbaarheid-van-bestuur/openbaarheid-van-bestuur/>.

⁹⁶ F. SCHRAM, *De federale openbaarheidswetgeving*, Brussels, Politeia, 2014, 37-38.

⁹⁷ J. VANDE LANOTTE, *Handboek Belgisch Publiekrecht*, Bruges, die Keure, 2013, 621.

against the interest of the public in the impartment of information.⁹⁸ This of course clashes with legislation containing absolute exceptions and leads to diverging interpretations.

77. Generally speaking, both the Council of State and the Constitutional Court have already decided that the exceptions can never be enacted in a way that would render the right to information ineffective.⁹⁹ Exceptions should also be interpreted restrictively and cannot be invoked by analogy.¹⁰⁰ On their precise opinion on how much margin the legislator has with regard to absolute exceptions, I will elaborate in section 3.2.

78. With regard to the information on warfare, this leads us to the following provisional conclusion. Anyone should be able to demand information that is already assembled by the administration itself. Since the Ministry of Defence is considered to be an administration, the right also applies to military information. Nevertheless, we should now verify whether military information falls under an exception, taking in account the aforementioned constitutional restrictions to those exceptions. Whereas each government in Belgium has its own legislation on open government,¹⁰¹ the relevant law on military information is the federal Act on Open Government (Wet openbaarheid van bestuur) and the Classification Act (Classificatiewet).

3.1.2. *Act on Open Government of 11 April 1994*

79. The Act on Open Government regulates the accessibility of government documents of federal administrations and the exceptions to open government. Moreover, the Act also created a Commission on the Access to Administrative Documents, which gives non-binding, but mandatory advice to administrations on what to disclose.¹⁰²

a. Exceptions of the Act on Open Government

80. Art. 6 of the Act contains relative and absolute exceptions.¹⁰³ However, other exceptions can still be enacted in other laws, which the legislator has done in the Act of 11 December 1998 concerning the classification, the security

⁹⁸ Proposition of the Government to insert art. 24ter in the Constitution concerning open government, *Parl. P.* Chamber 1992-93, nr. 839/1, 5; M. BOES, "Openbaarheid van bestuur. Bevoegdheidsverdeling. De federale openbaarheidsregeling" in A. M. DRAYE, *Openbaarheid van bestuur in Vlaanderen, België en de Europese instellingen*, Leuven, Acco, 1996, 19.

⁹⁹ Adv. CS 6 February 1996, nr. L24.273/8; Project of decree concerning open government (Ontwerp van decreet betreffende de openbaarheid van bestuur), *Parl. P.* Fl. Parl., 1998-99, nr. 1334/1-Add., 31; CS 9 July 1999, nr. 81.740; CS 27 June 2001, nr. 97.056.

¹⁰⁰ Adv. CS 6 February 1996, nr. L24.273/8; CS 16 January 1998, nr. 70.844; CS 21 May 2001, nr. 95.677; Project of decree concerning open government, *Parl. P.* Fl. Parl., 1998-99, nr. 1334/1-Add., 31; CC 25 March 1997, nr. 17/97, B.2.2.

¹⁰¹ F. GRAVAR, "Origine et repartition des compétences" in V. MICHIELS (ed.) *La publicité de l'administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 31-32.

¹⁰² Art. 8 Act of 11 April 1994 on Open Government (Wet openbaarheid van bestuur), *BS* 30 June 1994. (Hereafter: Act on Open Government).

¹⁰³ It also contains facultative exceptions, but these are of little relevance to the research question.

authorizations, the security certificates and the security advices, also called the Classification Act.

81. According to Art. 6, §1, the relative exceptions are:

- The safety of the public
- The fundamental rights and freedoms of the governed
- The federal international relations of Belgium
- The public order, the safety or the defence of the country
- The detection or prosecution of criminal facts
- A federal economic or financial interest, the currency or the public credit
- The confidential character out of the nature of entrepreneurial- and industrial data that were imparted to the government
- The secrecy of the identity of the person who confidentially imparted the document or the information to the administrative government in order to declare a criminal fact or a fact that is deemed criminal.

82. As the law states that the administration must decline one's request when it determined that the interest of publicity does not weigh up against the aforementioned interests, the Commission on Access to Administrative Documents has developed a test in which three conditions should be met if the administration wants to refuse access under art. 6, §1 of the Act on Open Government.¹⁰⁴

- Firstly, the administration must invoke an interest that the law finds valuable to protect
- Secondly, publicity would damage the interest that is being protected
- Lastly, the interest of publicity does not weigh heavier than the damage being done to the protected interest.

83. Hence, in accordance with the intention behind art. 32 of the Constitution, the administration must always make an *in concreto* judgement and balance the interests of both parties, which is confirmed by the advice of the Commission on Access to Administrative Documents and the jurisprudence of the Council of State.¹⁰⁵

84. Art. 6, §2 of the Act also mentions absolute exceptions:

- Privacy, unless the person that is involved agreed with the disclosure, explanation or the written communication of the information
- An obligation of secrecy imposed by law

¹⁰⁴ F.e. CAAD 13 April 2005, nr. 2015-18, http://www.ibz.rmn.fgov.be/fileadmin/user_upload/fr/com/publicite/avis/2015/AVIS-2015-18.pdf; CAAD 12 January 2015, nr. 2015-06, http://www.ibz.rmn.fgov.be/fileadmin/user_upload/fr/com/publicite/avis/2015/ADVIES-2015-06.pdf; F. SCHRAM, *De federale openbaarheidswetgeving*, Brussels, Politeia, 2014, 118-120.

¹⁰⁵ CS 27 June 2001, nr. 97.056; F. SCHRAM, *De federale openbaarheidswetgeving*, Brussels, Politeia, 2014, 118-120.

- The secret of the deliberations of the federal Government and of the governments that depend on the federal executive power, or in which a federal government is involved

- The interests mentioned in art. 3 of the Act of 11 December 1998 concerning the classification, the security authorizations, the security certificates and the security advices

85. The administration must refuse access to these documents if their disclosure would damage one of the aforementioned interests, without balancing the interests of the two parties.¹⁰⁶ Seen the “relative character of exceptions” to art. 32 of the Constitution, art. 6, §2 is sometimes viewed as problematic, especially art. 6, §2, 4°, which contains many similar interests to the ones of art. 6, §1 of the Act on Open Government.¹⁰⁷ I will elaborate on this criticism below, when I discuss the application of these different provisions of the Act on Open Government and of the Classification Act.

3.1.3. *Classification Act*

86. Since the right to information is not absolute, one must take in account other relevant interests. With regard to access to military information, security interests are the most important angle to support a decline of access on. Consequently, the applicable law is the Act of 11 December 1998 concerning the classification, the security authorizations, the security certificates and the security advices.

87. Art. 3 of the Act states that information can be classified when non-authorized use can damage one of the interests below:

- The defence of the inviolability of the national territory and of the military defence plans
 - The fulfilment of the duties of the military forces
 - The inner security of the State, including the domain of nuclear energy, and the continuation of the democratic and constitutional order
 - The external security of the State and the international relations of Belgium
 - The scientific and economic potential of the country
 - Every other fundamental interest of the State
 - The security of the Belgian nationals abroad
 - The functioning of the decision-making bodies of the State
 - The security of the people who, according to art. 104, §2 of the Code of Criminal Procedure are under special protection measures

¹⁰⁶ Art. 6, §2 Act on Open Government; R. ANDERSEN, “Introduction” in V. MICHIELS (ed.) *La publicité de l’administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 19.

¹⁰⁷ COMMISSION ON THE ACCESS TO ADMINISTRATIVE DOCUMENTS, *Jaarverslag 2016*, http://www.ibz.rmm.fgov.be/fileadmin/user_upload/nl/com/openbaarheid/jaarverslagen/jaarverslag-CTB-2016.pdf; CAAD 29 September 2014, nr. 2014-77, http://www.ibz.rmm.fgov.be/fileadmin/user_upload/jfi/com/publicite/avis/2014/ADVIES-2014-77.pdf; F. SCHRAM, *De federale openbaarheidswetgeving*, Brussels, Politeia, 2014, 120-123; R. ANDERSEN, “Introduction” in V. MICHIELS (ed.) *La publicité de l’administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 20.

88. When these interests will be damaged by the disclosure of information, the administration can classify the documents. This entails that only people with a security authorization have access to the classified documents.¹⁰⁸ Furthermore, art. 26 of the Classification Law also explicitly excludes the application of the Act on Open Government to classified documents. Lastly, no judicial body, but only certain people within the administration can declassify documents.¹⁰⁹

3.2. APPLICATION OF ABSOLUTE AND RELATIVE EXCEPTIONS BY JUDICIAL BODIES

89. The Constitutional Court, the Council of State and the Commission on the Access to Administrative Documents have all taken different positions with regard to the constitutionality of the absolute exceptions of the Classification Act and art. 6,§2 of the Open Government Act. I will summarize each body's view below, in order to draw a conclusion on how strong the right to access to administrative documents is under Belgian law. This conclusion can subsequently serve to make an estimation of the chances of a citizen that wants to obtain administrative documents related to Belgium's participation in the war against ISIS.

3.2.1. *The Commission on access to Administrative Documents*

90. The Commission is the only instance that consistently pleads against the unconstitutionality of absolute exceptions, whether it be classified documents or the absolute exceptions of the Open Government Act.¹¹⁰

a. Classification Act

91. The black letter law is quite clear in case the information is classified: the Open Government Act is not applicable and only people with a security authorisation have access to the documents.¹¹¹ However, the Commission strongly doubts the constitutionality of this provision. The Commission criticised the current system of classification in its annual report and has strongly narrowed down its application.

¹⁰⁸ Art. 8 Act of 11 December 1998 concerning the classification and security clearance, security certificates and security recommendations (Wet betreffende de classificatie en de veiligheidsmachtigingen, veiligheidsattesten en veiligheidsadviezen), *BS* 7 May 1999. (hereafter: Classification Act).

¹⁰⁹ Art. 3 Royal Decree of 24 March 2000 concerning the execution of the Act of 11 December 1998 concerning the classification, the security authorizations, the security certificates and the security advices (Koninklijk besluit tot uitvoering van de wet van 11 december 1998 betreffende de classificatie en de veiligheidsmachtigingen, veiligheidsattesten en veiligheidsadviezen), *BS* 30 March 2000.

¹¹⁰ P.O. DE BROUX, D. DE JONGHE, R. SIMAR and M. VANDERSTRAETEN, "Les exceptions à la publicité des documents administratifs" in V. MICHIELS (ed.) *La publicité de l'administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 135-136; M. JOASSART, "Le secret en droit administratif" in V. CASSIERS, M. JOASSART, A. STROWEL and Q. VAN ENIS, *Le secret*, Limal, Anthemis, 2017, 13 and 18.

¹¹¹ Art. 8 and 26 Classification Act.

92. In the Commission's annual report of 2016, it emphasized the need to adjust the Classification Act in a manner that makes it compatible with art. 32 of the Constitution. It stressed that administrative documents are principally public and that absolute exceptions to this principle, such as the Classification Act creates, are unconstitutional. Consequently, the Commission recommended to change the Act in a manner that enables the access to those documents from the moment that the interest that demands secrecy ceases to exist. The Commission proposed a system of declassification that is based on either an automatic declassification after a certain amount of time or a periodic evaluation of the necessity of classification or an evaluation with each request for access to the documents.¹¹² While waiting for the lawmaker to revise the Act, the Commission seems to recommend the latter option in her advices.¹¹³

93. In an advice in 2012, the Commission held that the classification of a document is not sufficient to refuse access to the document. The applicant wanted to examine his file, which the author, the Intelligence Service refused on the basis of the Classification Act. The Commission decided that the refusal of access of the Intelligence Service was only justified if it can prove that the classification had taken place according to the rules and that the classification is still justified according to those rules.¹¹⁴

b. Absolute Exceptions of the Act on Open Governance

94. With regard to the absolute exceptions of art. 6,§2 of the Act of Open Government, the Commission finds the provision that has been inserted in 2010 (art. 6,§2,4^o) and that makes the interests of the Classification Act an absolute exception especially problematic.¹¹⁵ The interests are very similar to the interests of the relative exceptions and consequently the Act demands both to balance and not to balance interests for the same cases.¹¹⁶ Consequently, the Commission decided that when both absolute and relative exceptions are applicable for the same interests, the judge must apply the relative exceptions only.¹¹⁷ It supports this vision on the fact that publicity is the principle and that

¹¹² COMMISSION ON THE ACCESS TO ADMINISTRATIVE DOCUMENTS, *Annual Report 2016*, http://www.ibz.rnm.fgov.be/fileadmin/user_upload/nl/com/openbaarheid/jaarverslagen/jaarverslag-CTB-2016.pdf.

¹¹³ CAAD 20 December 2016, nr. 2016-129, http://www.ibz.rnm.fgov.be/fileadmin/user_upload/fi/com/publicite/avis/2016/ADVIES-2016-129.pdf.

¹¹⁴ CAAD 16 April 2012, nr. 2012-28, http://www.ibz.rnm.fgov.be/fileadmin/user_upload/fi/com/publicite/avis/2012/AVIS-2012-28.pdf; P.O. DE BROUX, D. DE JONGHE, R. SIMAR and M. VANDERSTRAETEN, "Les exceptions à la publicité des documents administratifs" in V. MICHIELS (ed.) *La publicité de l'administration. Vingt ans après, bilan et perspectives*, Brussels, Bruylant, 2015, 179.

¹¹⁵ COMMISSION ON THE ACCESS TO ADMINISTRATIVE DOCUMENTS, *Advice on the proposition of law to change the Act of 11 April 1994 on Open Government*, September 2014, nr. 2014-77, http://www.ibz.rnm.fgov.be/fileadmin/user_upload/fi/com/publicite/avis/2014/ADVIES-2014-77.pdf, 12-13.

¹¹⁶ CAAD 16 April 2012, nr. 2012-28, http://www.ibz.rnm.fgov.be/fileadmin/user_upload/fi/com/publicite/avis/2012/AVIS-2012-28.pdf.

¹¹⁷ CAAD 13 April 2015, nr. 2015-18, http://www.ibz.rnm.fgov.be/fileadmin/user_upload/fi/com/publicite/avis/2015/AVIS-2015-18.pdf.

the constitutional legislator stressed the relative character of exceptions to art. 32 of the Constitution.¹¹⁸

95. These interpretations lead to rather activist conclusions. Firstly, they find the regulations in the Royal Decree, holding that only certain members from the executive branch and no judges can declassify documents, is unconstitutional seen the relative character of exceptions. Secondly, once it is established that the exception falls under both §1 and §2 of art 6 of the Open Government Act¹¹⁹, one should apply the relative test. Hence, according to the reasoning of the Commission, it is possible for a judge to assess whether classification is justified and if it is not justified, to declassify the information and subject it to the relative exceptions test.

96. Yet, the importance of this position should be nuanced, seen the non-binding nature of their advice and the reluctance of the Council of State to follow these conclusions. Nevertheless, the Council of State's and the Constitutional Court's jurisprudence is evolving with regard to absolute exceptions, stimulated by the Commission's interpretations and recommendations. Hence, it is not absolutely unlikely that they take a similar point of view on the application of the Classification Act in the future.

3.2.2. *The Council of State*

97. The Council of State, who holds the competence to decide on these matters, consistently holds that the legislator can make absolute exceptions to the principle of open government as long as the administration verifies *in concreto* that the publicity of the documents would hurt certain grave interests.¹²⁰ Nevertheless, both in its advices on legislation and its jurisprudence, it has applied this principle a few times in an unusual manner, which makes the viewpoint of the Council of State not entirely predictable either.

98. It is a fact that at the time of the creation of art. 32 of the Constitution and the Act on Open Government, the Council of State did not view absolute exceptions as problematic, even though the *travaux préparatoires* of art. 32 state that exceptions must always be relative.¹²¹ Art. 32 was created at the same time of the Open Government Act and in its advices for the Act, the Council of State even recommended creating a separate category of absolute exceptions in the Act itself.¹²² The Council had understood that the government wanted to create absolute exceptions to publicity in separate laws and suggested to

CAAD 20 December 2016, nr. 2016-129, http://www.ibz.rm.gov.be/fileadmin/user_upload/fv/com/publicite/avis/2016/ADVIES-2016-129.pdf.

¹¹⁸ COMMISSION ON THE ACCESS TO ADMINISTRATIVE DOCUMENTS, *Advice on the proposition of law to change the Act of 11 April 1994 on Open Government*, June 2012, 2012-42, <http://www.ibz.rm.gov.be/nl/commissies/openbaarheid-van-bestuur/adviezen/>, 31.

¹¹⁹ For example, because the documents are unclassified and fall under art. 6, §2, 4° or because they were classified, but deemed unjustly classified by a judge and consequently fall under the same provision.

¹²⁰ CS 15 May 2014, nr. 227.394; CS 14 July 2014, nr. 228.066.

¹²¹ CS 7 June 2004, nr. 132.072, *CDPK* 2005, afl. 2, 396, note W. VAN LAETHEM.

¹²² Project of the law on Open Government, *Parl P*, Chamber 1993-94, nr. 1112/1, 36.

write this category into the Act on Open Government itself, which became art. 6,§2,2°.

99. In later judgements, the Council of State also never questioned the constitutionality of absolute exceptions. It held that no balancing of interests was necessary, however, the administration cannot invoke absolute exceptions without *in concreto* demonstrating that the interests aimed at would be damaged otherwise.¹²³

100. Nevertheless, in a remarkable judgement, the Council of State suddenly changed her view. In *Lybaert* in 2004, a woman that hoped to become an interpreter at the Court of first instance of Antwerp was refused the position, because of her file with the Intelligence Service.¹²⁴ When she subsequently demanded access to her file to defend herself, the Intelligence Service refused access on the basis of art. 6,§2,2°¹²⁵ and art. 6,§1, 3° and 4° of the Open Government Act.¹²⁶ Whereas art. 6,§2,2° was an absolute exception, the Council surprisingly held that an *in concreto* assessment was necessary, which involved a balancing of the interests of the woman and the interests of the administration.¹²⁷ In other words, the Council suddenly treated an absolute exception like a relative one. However, since it never repeated this assessment in later arrests, it does not have much weight 14 years after date to argue that the Council of State *de facto* does not accept absolute exceptions.

101. In conclusion, the Council of State does not seem to “relativise” absolute exceptions apart from in an isolated arrest and nowhere questions the consequences of the Classification Act. This would mean that in their view, from the moment that the document is classified or from the moment that the information constitutes a real danger to one of the interests in art. 3 of the Classification Act, no information can be disclosed.

3.2.3. *The Constitutional Court*

102. The Constitutional Court takes the position that the lawmaker can make absolute exceptions to art. 32 of the Constitution, as long as they are justified.¹²⁸ This means that the absolute exceptions must serve a legitimate objective, that they should be necessary and that the absolute exceptions must be proportional with regard to the envisaged objective.¹²⁹

¹²³ CS 15 May 2014, nr. 227.394; CS 14 July 2014, nr. 228.066.

¹²⁴ CS 7 June 2004, nr. 132.072, 1.1.

¹²⁵ Before art. 6,§2,4° was enacted in 2010, the administration relied on art 6,§2,2°, which provided an absolute exception to publicity when legislation demanded this. In this case, the Act of 30 November 1998 imposed secrecy.

¹²⁶ CS 7 June 2004, nr. 132.072, 1.3.

¹²⁷ CS 7 June 2004, nr. 132.072, 2.3.3.

¹²⁸ CC 19 December 2013, nr. 169/2013, *APT*, 2014, note D. RENDERS and G. CHARPENTIER, 592.

¹²⁹ CC 25 March 1997, nr. 17/97; P. POPELIER, *Procederen voor het Grandvettelijk Hof*, Antwerpen, Intersentia, 106 and 120.

103. However, the Constitutional Court has become more demanding in the manner in which it conducts the test and has narrowed her idea of a “justified absolute exception”. In older jurisprudence, we find the classic test. For instance, in the arrest of 25 March 1997, the Constitutional Court dealt with a decree of the Flemish Community that narrowed down who may possess an interest in disclosure of personal files to certain categories of people and consequently established an absolute exception. Ultimately, while the Court did not oppose the idea of an absolute exception, the Court found the exception disproportional in view of its objective (protecting private life) and held it to be unconstitutional.¹³⁰

104. In the arrest of 15 September 2004, the Constitutional Court applied the test in a similar manner. The legislator had added a provision to a law on nuclear energy that stated that information on nuclear material and all documents related to nuclear material are not subject to the Open Government Act.¹³¹ In reaction to this provision, the applicant contended that the vagueness of the term ‘nuclear material and documents related to it’ broadened to scope of the exception to the extent that it violated art. 32 of the Constitution.¹³² The Court, however, held that the exception was justified. The legislator had a legitimate objective, more specifically protecting the security of the state and the Court found the exception necessary.¹³³ Moreover, since the legislator had defined the term nuclear material in a satisfactory manner, the Court deemed the provision to be proportional.¹³⁴

105. In its arrest of 19 December 2013, however, the Court made its assessment stricter. The Wallonian legislator had established a Commission to provide advice on permits for weapon export in its decree of 21 June 2012.¹³⁵ In this decree, the legislator had also stipulated that the Commission’s advice on weapon permits was not an administrative document in the sense of the Wallonian Open Government Decree.¹³⁶ By narrowing the definition of an “administrative document”, the legislator had created a general exception to principle of open government, which had to be justified. The Court found the objective of the Wallonian government legitimate, which is providing security

¹³⁰ CC 25 March 1997, nr. 17/97.

¹³¹ Art. 2bis Act of 15 April 1994 concerning the protection of the population and the environment against the dangers arising from ionizing radiation and concerning the Federal Agency for Nuclear Control and to regulate the transfer of certain staff members of the Service security of State with regard to nuclear energy (Wet van 15 april 1994 betreffende de bescherming van de bevolking en van het leefmilieu tegen de uit ioniserende stralingen voortvloeiende gevaren en betreffende het Federaal Agentschap voor Nucleaire Controle en tot regeling van de overdracht van sommige personeelsleden van de Dienst Veiligheid van de Staat op het gebied van de kernenergie) *BS* 29 July 1994.

¹³² CC 15 September 2004, nr. 150/2004, B.4.1.

¹³³ CC 15 September 2004, nr. 150/2004, B.6.1.

¹³⁴ CC 15 September 2004, nr. 150/2004, B.8.

¹³⁵ Decree of 21 June 2012 concerning the import, export, transport and transfer of civil weapons and defence related products (Décret relatif à l'importation, à l'exportation, au transit et au transfert d'armes civiles et de produits liés à la défense), *BS* 5 July 2012; CC 19 December 2013, nr. 169/2013, B.1.1. and B.2.1.

¹³⁶ Art 21 Decree of 21 June 2012 concerning the import, export, transport and transfer of civil weapons and defence related products, *BS* 5 July 2012; Open Government Decree of 30 March 1995 (Décret relatif à la publicité de l'Administration), *BS* 28 June 1995.

and protecting sensitive information concerning competition or international relations.¹³⁷

106. Then the Court made a remarkable move and gave a new content to the condition of necessity.¹³⁸ It summed up the interests of the Wallonian Open Government Decree that allow the refusal of disclosure and held that the legislator did not demonstrate that the relative exceptions of the Wallonian Open Government Decree were insufficient to protect the interest of the Wallonian government.¹³⁹ In other words, the Wallonian government did not satisfactorily demonstrate the necessity of creating a new provision beside the already existing exceptions of the decree. Consequently, the measure was also not proportionate with regard to its objective.

107. The arrest demonstrates a clear evolution in the jurisprudence of the Court. When the Court in 2004 decided whether a similar general exception was justified, it did not ask the question whether the existing protection of the Open Government Act was insufficient in a manner that made an extra general exception necessary.¹⁴⁰

108. In the case of the Classification Act, many similar interests to the exceptions of the Wallonian Open Government Decree are protected. Hence, under the new necessity test, it is not unlikely that the Court deems it to be unconstitutional. Consequently, in the future the Court may decide differently in cases where the absolute exception does not add anything to the relative exceptions of the Open Government Act.

109. The same reasoning counts for the absolute exceptions of art. 6§2 of the Open Government Act. Since the legislator has added art. 6§2,4° to the Open Government Act, many of the relative and absolute exceptions serve the same aims. Consequently, it is not implausible that the Constitutional Court finds in the future that the relative exceptions of art. 6§1 of the Open Government Act are applicable when the administration cannot demonstrate a necessity to resort to the absolute exceptions of art. 6§2 of the Act.

¹³⁷ CC 19 December 2013, nr. 169/2013, B.21.2.

¹³⁸ CC 19 December 2013, nr. 169/2013, *APT*, 2014, noot D. RENDERS and G. CHARPENTIER, 592.

¹³⁹ The interests protected in the Wallonian Open Government Decree are mostly similar to the ones of the Open Government Act.

Art 6 Open Government Decree of 30 March 1995, *BS* 28 June 1995; CC 19 December 2013, nr. 169/2013, B.21.2.

¹⁴⁰ CC 19 December 2013, nr. 169/2013, *APT*, 2014, noot D. RENDERS and G. CHARPENTIER, 592.

3.3. APPLICATION LEGISLATION AND JURISPRUDENCE TO MILITARY INFORMATION

110. Hence, in order to assess whether one has a right under Belgian law to know the date, location and number of air strikes that the Belgian army conducted in the war against ISIS, one needs to know whether the information is classified and what the consequences are.

111. Since 2014, the military has commenced to classify all this kind of information.¹⁴¹ As the effect of the Constitutional Court's judgement remains limited to the specific case of 2013, proceedings to obtain this information will be fruitless under the current law. Even if the Council of State would deem the military's reasons for classification insufficient, there is currently no legal basis for a judge to declassify the information.

112. However, a few options should be raised, seen the debate on absolute exceptions.

113. Firstly, in proceedings to obtain disclosure, the Council of State can disapply (as a response to a plea of illegality)¹⁴² the Royal Decree that only allows certain members of the administration to declassify information.¹⁴³ The fact that no one can check whether the disclosure of certain information constitutes a real danger for the State, (not even resorting to a test of balancing the two interests, but purely checking the existence of the legitimate aim), is a very far reaching absolute exception. Yet, the likelihood that this will happen is small. The Council of State has never indicated any objection against the functioning of the Classification Act. Moreover, there is no pressure from the Constitutional Court, which has never explicitly called into question the inability of national judges to declassify a document and the view of the Commission does not bind them.

114. Secondly, the Council of State could also ask the Constitutional Court via a preliminary ruling whether the Classification Act is compatible with art. 32 of the Constitution. On the one hand, the aforementioned inability of judges to declassify documents can be challenged and on the other hand, the absolute nature of the exception (thus, whether the necessity is demonstrated not to balance the interests) can be questioned. Seen the Constitutional Court's earlier necessity test and the current piling of protective measures, the Court may be inclined to find the current classification laws disproportionate. Even if it does so, the question remains to what extent: only the fact that judges cannot declassify documents (in which case an absolute exception would be

¹⁴¹ X., "Maken Belgische F-16's geen burgerslachtoffers, of worden ze niet geteld?", *Vredesactie* April 2017, <https://www.vredesactie.be/nl/nieuws/maken-belgische-f-16s-geen-burgerslachtoffers-worden-ze-niet-geteld>; Interview with researcher of Vredesactie, Lene Jacobs en Fien De Meyer.

¹⁴² On the basis of 159 Constitution.

¹⁴³ Art. 3 Royal Decree of 24 March 2000 concerning the execution of the Act of 11 December 1998 concerning the classification, the security authorizations, the security certificates and the security advices, *BS* 30 March 2000; J. VANDELANOTTE, *Handboek Belgisch Publiekrecht*, Bruges, die Keure, 2013, 797-801.

allowed) or also the fact that no balancing is required (in which one must assess the case in the light of relative exceptions)? In the first hypothesis, the administration will only have to pass the absolute exceptions test after declassification, which is establishing that the information constitutes a real danger to “the fulfilment of the duties of the military forces”, “the external security of the state” or “the security of Belgian nationals abroad”.¹⁴⁴ In the second hypothesis, the judge will have to apply the test of relative exceptions and weigh the interest of transparency against the interest of “the safety or the defence of the country”.¹⁴⁵ The slightly different test in the first and second hypothesis can have significant consequences in the current case. The risk of data-mining can endanger the three interests mentioned above, which makes the case of the military quite strong in the first hypothesis. This is less the case in the second hypothesis, where a balance should be made.¹⁴⁶

115. In conclusion, under the current state of the law, citizens do not have a right to military information. The classified nature constitutes an absolute bar and even if the information were not classified, the Council of State only has the power to annul the decision, after which the whole procedure to request access can start again.¹⁴⁷ Nevertheless, questions can be raised concerning the constitutionality of the current state of the law.

¹⁴⁴ Art 3, §1, b, d, g, Classification Act.

¹⁴⁵ Art. 6, §1 Act on Open Government.

¹⁴⁶ For a concrete weighing of interests, see the conclusion of the assessment under the ECHR, where a similar balancing test takes place.

¹⁴⁷ Interview met medewerkers Lene Jacobs en Fien De Meyer van Vredesactie.

4. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHT TO INFORMATION

4.1. THE EXISTENCE OF A RIGHT TO INFORMATION UNDER THE ECHR

4.1.1. *Early Stages: No Right under art. 10 ECHR*

a. The Travaux Préparatoires

116. Article 10 of the European Convention of Human Rights provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

117. Unlike the Universal Declaration of Human Rights of 1948¹⁴⁸ and the International Covenant on Civil and Political Rights (hereafter: ICCPR)¹⁴⁹, the ECHR does not explicitly recognise a right to access to information.¹⁵⁰ It grants the right to receive and impart information, but does not mention a right to seek information.

118. This issue was brought up during the preparatory stage. Influenced by the views favourable of a right to information that played at the UN during the

¹⁴⁸ Art. 19 Resolution 217 (III) of the General Assembly of the United Nations (10 December 1948, *UN Doc. A/RES/217 (III)* (1948). (Universal Declaration of Human Rights).

¹⁴⁹ Art. 19 International Covenant on Civil and Political Rights.

¹⁵⁰ G. COHEN-JONATHAN, "Article 10" in L.E. PETTITI, E. DECAUX and P.-H. IMBERT, *La Convention Européenne des Droits de l'Homme*, Paris, Economica, 374; D.J. HARRIS, M. O'BOYLE, E. P. BATES and C.M. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 620; A. MASON, "The relationship between Freedom of Expression and Freedom of Information" in J. BEATSON and Y. CRIPPS, *Freedom of Expression and Freedom of Information*, Oxford, Oxford University Press, 225-229; R. PINTO, *La liberté d'information et d'opinion en droit international*, Paris, Economica, 96; S. SEDLEY, "Information as a Human Right" in J. BEATSON and Y. CRIPPS, *Freedom of Expression and Freedom of Information*, Oxford, Oxford University Press, 243.

drafting of the ICCPR, the issue was also discussed during the preparatory works for the ECHR.¹⁵¹

119. At the end of the drafting process, the Committee of Experts proposed two versions of article 10. Since they deemed the choice between both a political decision, they left it to the Committee of Ministers to decide.¹⁵²

120. The first proposal (A or A/2) followed the method of generally enumerating the rights that had to be safeguarded and was mainly supported by France, Italy and Belgium.¹⁵³ The second proposal (B or B/2) on the contrary defined very precisely which rights had to be protected and comprised as a result a narrower scope.¹⁵⁴ The main supporter of the latter proposal was the UK, that believed that the rights should be formulated very precisely before any institutions are being created.¹⁵⁵ Only proposal A or A/2 mentioned the right to seek information.¹⁵⁶ In the end, the Committee of Ministers adopted the second draft of the Convention and hence the right to seek information is not included in the ECHR.¹⁵⁷

121. However, it must be mentioned that in the course of deciding which version to adopt, no traces of debate have been found with regard to the right of information.¹⁵⁸ Hence, it could be argued that there was no explicit rejection of the idea in the final process and that the debate turned rather around the general question of whether the rights in the Convention should be defined narrowly or not before the creation of a court, instead of the in- or exclusion of the right to information.¹⁵⁹ The fact that the UK, who was the main proponent of the second proposal, was explicitly in favour of a right to information, supports this argument.

¹⁵¹ Until 1954, the Commission on Human Rights had been preparing draft versions for an “International Covenant on Human Rights”. This preparatory work has eventually debouched into the ICCPR and the International Covenant on Economic, Social and Cultural Rights.

Resolution 313 (IV) of the General Assembly of the United Nations (20 October 1949), *UN Doc. A/RES/313(IV)* (1949); *ECHR Doc. DH* (56) 15 (1956), 7 [*travaux préparatoires* on art 10 ECHR]; M.J. BOSSUYT, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff, 1987, XIX-XXI.

¹⁵² *ECHR Doc. DH* (56) 15 (1956), 14 [*travaux préparatoires* on art 10 ECHR]; BATES, E., *The Evolution of the European Convention on Human Rights*, Oxford, Oxford University Press, 2010, 82.

¹⁵³ BATES, E., *The Evolution of the European Convention on Human Rights*, Oxford, Oxford University Press, 2010, 82-83.

¹⁵⁴ *ECHR Doc. DH* (56) 15 (1956), 12 [*travaux préparatoires* on art 10 ECHR]; BATES, E., *The Evolution of the European Convention on Human Rights*, Oxford, Oxford University Press, 2010, 82-84.

¹⁵⁵ BATES, E., *The Evolution of the European Convention on Human Rights*, Oxford, Oxford University Press, 2010, 82-83.

¹⁵⁶ R. PINTO, *La liberté d’information et d’opinion en droit international*, Paris, Economica, 96.

¹⁵⁷ *ECHR Doc. DH* (56) 15 (1956), 14 [*travaux préparatoires* on art 10 ECHR]; P.N. DIAMANDOUROS, “Vers la reconnaissance d’un droit d’accès aux informations détenues par les autorités” D. SPIELMANN, M. TSIRLI and P. VOYATZIS, *La Convention européenne des droits de l’homme, un instrument vivant*, Brussels, Bruylant, 2011, 135.

¹⁵⁸ G. COHEN-JONATHAN, “Article 10” in L.E. PETTITI, E. DECAUX and P.-H. IMBERT, *La Convention Européenne des Droits de l’Homme*, Paris, Economica, 367; R. PINTO, *La liberté d’information et d’opinion en droit international*, Paris, Economica, 96.

¹⁵⁹ E. BATES, *The Evolution of the European Convention on Human Rights*, Oxford, Oxford University Press, 2010, 82-84.

b. Early Jurisprudence

122. During the first decades of the Convention, the European Court of Human Rights also consistently refused to read a right to information in art. 10 ECHR. However, gradually, it opened a possibility to obtain certain information by linking it to the right to private and family life under art. 8 ECHR.¹⁶⁰

123. After the European Commission on Human Rights raised the idea once,¹⁶¹ the Court discussed the link between a right to information and art. 8 ECHR explicitly in *Leander v. Sweden* and *Gaskin v. UK*.

124. In *Leander v. Sweden*, Mr. Leander was dismissed from his new job at a Naval Museum for the outcome of a personnel check. Since the authorities refused to communicate the motivation for this decision, he was unable to defend himself. Hence, he tried to obtain the information via art. 8 and 10 ECHR.¹⁶²

125. While the Court was very brief and decided in rejecting a right under art. 10 ECHR,¹⁶³ it did create this possibility under art. 8. Even though the Court ruled that because of the exception of art. 8 §2, no violation of art. 8 was found, it did connect the right to access to information to the right to private life, whenever this is affected. This can be derived from its statement that “both the storing and the release of such information, which were coupled with a refusal to allow Mr. Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8 §1”.¹⁶⁴

¹⁶⁰ P.N. DIAMANDOUROS, “Vers la reconnaissance d’un droit d’accès aux informations détenues par les autorités” in D. SPIELMANN, M. TSIRLI and P. VOYATZIS, *La Convention européenne des droits de l’homme, un instrument vivant*, Brussels, Bruylant, 2011, 135 ; R.C.A. WHITE and C. OVEY, *The European Convention on Human Rights*, Oxford, Oxford University Press, 2010, 440-441.

¹⁶¹ In *X v. the Federal Republic of Germany*, it declared the case inadmissible to the Court, but did not reject the idea of a right to seek information. More specifically, it held that art. 10 does not only grant a right of access to general sources of information, but that the Court left the idea open that it “may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance for its own position”. ECHR 3 October 1979, nr. 8383/78, X/the Federal Republic of Germany; P. COPPEL, *Information Rights Law and Practice*, London, Hart Publishing, 88.

¹⁶² ECtHR 26 March 1987, nr. 9248/81, *Leander/Sweden*, §9-17.

¹⁶³ The ECtHR made clear that art. 10 only compels the State to refrain from interfering with the impartation of information *inter privatos*: “The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.” ECtHR 26 March 1987, nr. 9248/81, *Leander/Sweden*, §74; F. LEHNE and P. WEISMANN, “The European Court of Human Rights and Access to Information”, *International Human Rights Law Review* 2014, 305.

¹⁶⁴ ECtHR 26 March 1987, nr. 9248/81, *Leander/Sweden*, §48.

- 126.** Also in *Gaskin v. United Kingdom* the Court rejected the idea of a general right of access to information deducted from art. 10, but it did hold that the right to private life, comprised in art. 8 ECHR, was breached for refusing access.
- 127.** Gaskin, who had been received into care by the Liverpool City Council his entire childhood, contended that he had been ill-treated by some of his foster parents. When Gaskin asked access to his case records, which could serve as evidence in a suit for damages for negligence, his order for discovery was dismissed.¹⁶⁵
- 128.** With respect to art. 10, the Court reaffirmed briefly its aforementioned *Leander* judgement and excluded the idea of a general right.¹⁶⁶ However, it did find a breach of art. 8 ECHR, because the State in *Gaskin* had failed to meet a positive obligation to secure the right to respect for private and family life by not allowing him access to the files.¹⁶⁷
- 129.** Both cases demonstrate that until the 90's the ECHR strongly narrowed down the scope of a right to information. Only when information, in both cases information concerning themselves, could interfere with their private life, such a right existed, but not at all in a general sense.¹⁶⁸
- 130.** In 1998, however, the Court ruled the landmark case *Guerra v. Italy*, which significantly broadened the scope of the right to access to information and brought it closer to the type of information that is relevant for our case. It held that not only personnel information, such as medical and police records, but also information of public interest can be demanded from the State.¹⁶⁹ However, it refused to derive it from a general right of access to information in art. 10, but again connected it to the right to private life of art. 8.¹⁷⁰
- 131.** In *Guerra v. Italy*, the air pollution emanating from a chemical factory seriously endangered the health of the inhabitants of the city of Manfredonia.¹⁷¹ Besides their complaint that the government had not taken sufficient protective measures, they also contended that the State had failed to

¹⁶⁵ ECtHR 7 July 1989, nr. 10454/83, *Gaskin/United Kingdom*, §10-29.

¹⁶⁶ ECtHR 7 July 1989, nr. 10454/83, *Gaskin/United Kingdom*, §50-53.

¹⁶⁷ ECtHR 7 July 1989, nr. 10454/83, *Gaskin/United Kingdom*, §49.

¹⁶⁸ P. COPPEL, *Information Rights Law and Practice*, London, Hart Publishing, 88-89; D.J. HARRIS, M. O'BOYLE, E. P. BATES and C.M. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 620-621; W. HINS and D. VOORHOOF, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights", *European Constitutional Law Review* 2007, nr. 3(1), 117-120.

¹⁶⁹ P. COPPEL, *Information Rights Law and Practice*, London, Hart Publishing, 87 and 89; S. SEDLEY, "Information as a Human Right" in J. BEATSON and Y. CRIPPS, *Freedom of Expression and Freedom of Information*, Oxford, Oxford University Press, 243-244.

¹⁷⁰ P.N. DIAMANDOUROS, "Vers la reconnaissance d'un droit d'accès aux informations détenues par les autorités" in D. SPIELMANN, M. TSIRLI and P. VOYATZIS, *La Convention européenne des droits de l'homme, un instrument vivant*, Brussels, Bruylant, 2011, 137-138.

¹⁷¹ ECtHR 12 February 1998, nr. 14967/89, *Guerra/Italy*, §12-18.

provide information on the risks, which they were obliged to do according to national legislation.¹⁷²

132. The Court upheld its restrictive view that art. 10 does not impose any broader obligation for the State than refraining from impeding one to receive information that others are willing to impart and related this to cases of freedom of press.¹⁷³ However, two important advancements have been made with regards to the right of access to information.

133. On the one hand, the Commission (but not the Court) did conceive art. 10 as imposing a positive obligation of transparency.¹⁷⁴ It held: “Article 10 imposed on States not just a duty to make available information to the public on environmental matters, a requirement with which Italian law already appeared to comply, by virtue of section 14(3) of Law no. 349 in particular, but also a *positive obligation to collect, process and disseminate* such information, which by its nature could not otherwise come to the knowledge of the public.”¹⁷⁵ It hereby referred to a resolution of the Parliamentary Assembly of the Council of Europe on nuclear energy that “public access to clear and full information... must be viewed as a basic human right”.¹⁷⁶

134. On the other hand, the Court broadened the scope of the right to information under art. 8 ECHR. It concluded that not only personnel information, but also information of public interest could affect the private life of citizens and therefore imposed a positive obligation of transparency.¹⁷⁷

135. These ideas have set the tone for a new stream of judgements.

4.1.2. *Information of public interest affecting freedom of speech*

136. Over the past decade, the Court has moved away from its early findings in *Leander* and *Gaskin* and followed the threads the Commission had given in *Guerra*. This evolution runs parallel to the expressions of the members of the Council of Europe in favour of access to information, which culminated in the Council of Europe Convention on Access to Documents which has not yet entered into force.¹⁷⁸ In 2006 it recognised for the first time a right of access to information under art. 10. Subsequently, it took the Court another ten years to rule a landmark case herein clearly formulating the criteria it takes into

¹⁷² ECtHR 12 February 1998, nr. 14967/89, *Guerra/Italy*, §39.

¹⁷³ ECtHR 12 February 1998, nr. 14967/89, *Guerra/Italy*, §53.

¹⁷⁴ S. SEDLEY, “Information as a Human Right” in J. BEATSON and Y. CRIPPS, *Freedom of Expression and Freedom of Information*, Oxford, Oxford University Press, 244.

¹⁷⁵ ECtHR 12 February 1998, nr. 14967/89, *Guerra/Italy*, §52.

¹⁷⁶ Resolution 1087 of the General Assembly of the Council of Europe (26 April 1996), §4.

¹⁷⁷ ECtHR 12 February 1998, nr. 14967/89, *Guerra/Italy*, §56-60.

¹⁷⁸ Council of Europe Convention on the Access to Official Documents of 18 June 2009, *CETS* nr. 205; Recommendation on Access to Official Documents (2002)2 of the Council of Europe (21 February 2002); Recommendation on a European Policy on Access to Archives (2000)13 of the Council of Europe (13 July 2000); W. HINS and D. VOORHOOF, “Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights”, *European Constitutional Law Review* 2007, nr. 3(1), 114-117.

consideration. I will firstly sketch the evolution of the most noteworthy case law of that decade, because the Court mentioned clearly in 2016 that the criteria given should be considered in the light of previous case law.¹⁷⁹

a. A first and vague recognition of a right to information under art. 10

137. In the admissibility decision of *Sdružení Jihočeské Matky v. Czech Republic*, the Court concluded for the first time that art. 10 ECHR can be applied in a question of right to information. In this case the applicant, who was an NGO concerned with environmental protection, requested information with respect to the construction of the nuclear power station of Temelín.¹⁸⁰ Even though the Court declared the NGO's application inadmissible, it did overturn its previous stringency to apply art. 10 ECHR to cases of access to information.

138. Although the ECtHR reiterated its previous jurisprudence of i.a. *Leander* and *Guerra* and emphasised that art. 10 ECHR does not contain a general right to access to information,¹⁸¹ it then held that *Sdružení Jihočeské Matky* possessed this right under art. 10. Without establishing any greater principles or clarifying why it distinguished the case from previous judgements, it admitted that the rejection of the government of the NGO's request to consult the relevant administrative documents constituted an intrusion of the NGO's right to information.¹⁸²

139. Eventually, it did not declare art. 10 violated, because it considered the rejection of the Czech government justified and proportional in the light of art. 10 (2) ECHR. However, the Court's emphasis on the fact that the requested documents did not concern information on the environmental impact of the nuclear power station, but construction details indicated that the Court was willing to conclude a violation of art. 10 in future cases concerning information of public interest.¹⁸³

¹⁷⁹ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §157.

¹⁸⁰ ECtHR 10 July 2006, nr. 19101/03, Sdružení Jihočeské Matky/Czech Republic, A.

¹⁸¹ ECtHR 10 July 2006, nr. 19101/03, Sdružení Jihočeské Matky/Czech Republic, 1.1., §2.

¹⁸² ECtHR 10 July 2006, nr. 19101/03, Sdružení Jihočeské Matky/Czech Republic, 1.1., §3: "En l'occurrence, la requérante a demandé de consulter des documents administratifs qui étaient à la disposition des autorités et auxquels on pouvait accéder dans les conditions prévues par l'article 133 de la loi sur les constructions, contesté par la requérante. Dans ces conditions, la Cour admet que le rejet de ladite demande a constitué une ingérence au droit de la requérante de recevoir des informations"; W. HINS and D. VOORHOOF, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights", *European Constitutional Law Review* 2007, nr. 3(1), 123-126.

¹⁸³ P. N. DIAMANDOUROS, "Vers la reconnaissance d'un droit d'accès aux informations détenues par les autorités" in D. SPIELMANN, M. TSIRLI and P. VOYATZIS, *La Convention européenne des droits de l'homme, un instrument vivant*, Brussels, Bruylant, 2011, 145.

b. A right to information for social watchdogs

140. Three years later, in the *Társaság a Szabadságjogokért v Hungary* case, the Court met this expectation indeed.

141. In *Társaság*, a Hungarian MP lodged a complaint before the Constitutional Court for abstract review of recent amendments to the Criminal Code relating to drug-related offences.¹⁸⁴ The applicant, which is an NGO aimed at the promotion of human rights, is also active in the field of drug-policy and thus had an interest in the public disclosure of the complaint.¹⁸⁵ When it requested access under national law, the judiciary refused.¹⁸⁶

142. The ECtHR found that this refusal to grant access to the complaint constituted a violation of art. 10, which is without doubt a revolutionary move of its stance on information rights. Nevertheless, it is crucial to understand the nuances and reasoning of the Court, because the decision expressly states that the Convention scarcely allows a general right to access to information to be derived from it.¹⁸⁷

143. The Court's conclusion of a breach draws on the comparison between this human rights NGO and the press, which both function as society's watchdogs and who instigate informed public debate.¹⁸⁸ It is an established view of the Court that art. 10 should impede authorities from arbitrarily restricting the press to impart information of public interest, because this would be detrimental for the public debate.¹⁸⁹ Since *Társaság* has the same aim, more specifically informing the public of the content of the complaint, the Court conferred the same protection to the applicant.

144. Subsequently, the Court interpreted the government's prohibition to restrict the flow of information to an extent that in the present case the government was under the obligation to disclose the complaint. On the one hand, the information at hand was ready and available and did not require any further action of the government than disclosing it.¹⁹⁰ On the other hand, the applicant's function to safeguard democracy and informed public debate through the impartation of information should be protected. Hence, art. 10 only obliges the State to impart information to a body which exercises a

¹⁸⁴ ECtHR 14 April 2009, nr. 37374/05, *Társaság a Szabadságjogokért/Hungary*, §7.

¹⁸⁵ ECtHR 14 April 2009, nr. 37374/05, *Társaság a Szabadságjogokért/Hungary*, §9.

¹⁸⁶ ECtHR 14 April 2009, nr. 37374/05, *Társaság a Szabadságjogokért/Hungary*, §11-15.

¹⁸⁷ ECtHR 14 April 2009, nr. 37374/05, *Társaság a Szabadságjogokért/Hungary*, §35; P.N. DIAMANDOUROS, "Vers la reconnaissance d'un droit d'accès aux informations détenues par les autorités" in D. SPIELMANN, M. TSIRLI and P. VOYATZIS, *La Convention européenne des droits de l'homme, un instrument vivant*, Brussels, Bruylant, 2011, 146.

¹⁸⁸ ECtHR 14 April 2009, nr. 37374/05, *Társaság a Szabadságjogokért/Hungary*, §27-28.

¹⁸⁹ ECtHR 26 November 1991, nr. 13585/88, *Observer and Guardian/United Kingdom*; ECtHR 25 June 1992, nr. 13778/88, *Thorgeir Thorgeirson/Iceland*; ECtHR 14 April 2009, nr. 37374/05, *Társaság a Szabadságjogokért/Hungary*, §26.

¹⁹⁰ ECtHR 14 April 2009, nr. 37374/05, *Társaság a Szabadságjogokért/Hungary*, §36.

fundamental function with respect to public debate and which would be impeded from exercising its function if the information were withheld.¹⁹¹

c. Judicial elaboration of *Társaság* principles

145. After the landmark case of *Társaság*, the Court reaffirmed its view on numerous occasions and elucidated who can be considered a social watchdog and what the substance of the obligation holds.

c.1. “Public watchdogs”

146. In three subsequent judgements, the Court clarified its view on whose freedom of speech implies a right to access to information besides NGO’s as *Társaság*.

147. In *Kenedi v. Hungary* case, the Court included researchers dealing with sensitive information in the protection of social watchdogs. Kenedi was an established historian who published work on the functioning of dictatorial and totalitarian regimes.¹⁹² With regards to a study on the functioning of the Hungarian State Security Service of the Ministry of the Interior, he had unsuccessfully requested the Ministry access to documents which were once classified information, but had lost its classified nature through time.¹⁹³ In response, the Court briefly recalled *Társaság* and held (without recognizing that this significantly broadens the scope of a “public watchdog”): “The Court emphasises that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant’s right to freedom of expression”.¹⁹⁴

148. In *Shapovalov v. Ukraine*, the issue was considered under circumstances where a journalist requested access to certain documents within the framework of its research on electoral fraud during the Ukrainian presidential elections of 2004.¹⁹⁵ Whereas the Court held art. 10 not to be violated, it did confirm the applicability of the principles of *Társaság* in the case of journalism.¹⁹⁶

¹⁹¹ P. COPPEL, *Information Rights Law and Practice*, London, Hart Publishing, 90-91; P.N. DIAMANDOUROS, “Vers la reconnaissance d’un droit d’accès aux informations détenues par les autorités” in D. SPIELMANN, M. TSIRLI and P. VOYATZIS, *La Convention européenne des droits de l’homme, un instrument vivant*, Brussels, Bruylant, 2011, 146.

¹⁹² ECtHR 26 May 2009, nr. 31475/05, *Kenedi/Hungary*, §6.

¹⁹³ ECtHR 26 May 2009, nr. 31475/05, *Kenedi/Hungary*, §7-25.

¹⁹⁴ ECtHR 26 May 2009, nr. 31475/05, *Kenedi/Hungary*, §43; P.N. DIAMANDOUROS, “Vers la reconnaissance d’un droit d’accès aux informations détenues par les autorités” in D. SPIELMANN, M. TSIRLI and P. VOYATZIS, *La Convention européenne des droits de l’homme, un instrument vivant*, Brussels, Bruylant, 2011, 147-148.

¹⁹⁵ ECtHR 31 July 2012, nr. 45835/05, *Shapovalov/Ukraine*, §5-15.

¹⁹⁶ “The Court notes that the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom ... As a result, they may no longer be able to play their vital role as “public watchdogs,” and their ability to provide accurate and reliable information may be adversely affected”. ECtHR 31 July 2012, nr. 45835/05, *Shapovalov/Ukraine*, §68.

149. A third clarification and broadening of the scope of the term “social/public watchdog”¹⁹⁷ occurred in *Austrian Agricultural Land Association*. The applicant was a registered association that did research on past and present transfers of agricultural and forest land and that requested in this context all decisions made by the Tyrol Real Property Transactions Commission.¹⁹⁸ The Commission’s task was to determine whether a transaction should be approved with the eye on preserving the land for agricultural use and forestry and avoiding the proliferation of second homes.¹⁹⁹ With the decisions requested, the applicant envisaged contributing to the legislative process by submitting comments on draft laws.²⁰⁰

150. While stressing the importance of the press’ and social watchdogs’ contributions to the public debate,²⁰¹ the Court conferred the corresponding protection to the applicant, without elaborating much on why the applicant should be conceived as exercising the function of the press or of social watchdogs.

151. In previous case law, the applicants have always intended to influence the public debate in a similar manner to the press. In contrast, the Austrian Agricultural Land Association aims to comment on draft legislation, which is a political approach that certainly differs from the press’ influence on the public debate through directly distributing information.²⁰² Thus, it can be concluded that the ECtHR again widened the scope of the *Társaság* principles, contending that its judgement was just a mere application of previous findings.

152. Lastly, in *Guseva v. Bulgaria*, the applicant was not an NGO nor a body of the press, but was nevertheless offered the same protection. Yet, it was clear that the Court did not suddenly want to grant a general right to any individual requesting information of public interest. The applicant was a member and representative of an organisation concerned with animal rights.²⁰³ Although she acted in her private capacity and not on behalf of the organisation, the Court was satisfied with her aim of distributing information on the treatment of animals to the public to grant her similar protection as to the press and social watchdogs.²⁰⁴ Hence, the Court does not seem to make a strict division anymore between individuals and institutions, as long as their objective is one of contributing to the public debate.

¹⁹⁷ The ECtHR uses both terms interchangeably and does not expound on where the nuance lies. F. LEHNE and P. WEISMANN, “The European Court of Human Rights and Access to Information”, *International Human Rights Law Review* 2014, 309.

¹⁹⁸ ECtHR 28 November 2013, nr. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung/Austria*, §5.

¹⁹⁹ ECtHR 28 November 2013, nr. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung/Austria*, §6.

²⁰⁰ ECtHR 28 November 2013, nr. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung/Austria*, §35.

²⁰¹ ECtHR 28 November 2013, nr. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung/Austria*, §33-34.

²⁰² F. LEHNE and P. WEISMANN, “The European Court of Human Rights and Access to Information”, *International Human Rights Law Review* 2014, 309-310.

²⁰³ ECtHR 17 February 2015, nr. 6987/07, *Guseva/Bulgaria*, §6-8.

²⁰⁴ ECtHR 17 February 2015, nr. 6987/07, *Guseva/Bulgaria*, §36-41.

153. This reasoning is in line with the joint concurring opinions of Judge Sajó and Judge Vučinić in *Youth Initiative For Human Rights v. Serbia* in which they state the following: “In the world of the Internet the difference between journalists and other members of the public is rapidly disappearing. There can be no robust democracy without transparency, which should be served and used by all citizens”.²⁰⁵

c.2. Information “ready and available”

154. Whereas the Court emphasised in *Társaság* that the State’s obligation to provide certain information did not contain any further effort than abstaining from interfering with the flow of information, more specifically merely releasing the documents it already held, it did not uphold this requirement very strictly in subsequent case law. It factually created some obligations on the State that exceed the obligation to release information ready and available.

155. For instance, In *Austrian Agricultural Land Association*, the information was not in a state of readiness and availability. The decisions of the Commission contained personal data, which all had to be anonymised. As stressed by Judge Møse in his dissenting opinion, the anonymization of the high volume of decisions requested (\pm 400-500 over a period of five years) would amount to a workload that has a significant negative impact on the fulfilment of the Tyrol Real Property Transactions Commission’s own tasks.²⁰⁶

156. Even though the applicant offered to pay the cost of anonymising all the personal data, this burden was enough for the Austrian Constitutional Court and Judge Møse to hold the Commission’s decision compatible with art. 10 ECHR: the interference was proportionate in the light of 10 (2) ECHR.²⁰⁷ Nonetheless, the Court found the State’s objections “relevant, but not sufficient” and considered the Commission’s complete refusal disproportionate.²⁰⁸ Hence, the Court appears to be willing to impose a substantial positive obligation on the State to provide information.²⁰⁹

157. Also in *Youth Initiative for Human Rights v. Serbia* the data were not ready and available. The applicant was an NGO monitoring the implementation of transitional law in order to ensure respect for human rights, democracy and the rule of law.²¹⁰ To this aim, it requested data on how many people had been subjected to electronic surveillance in 2005.²¹¹ Although the Information

²⁰⁵ ECtHR 26 June 2013, nr. 48135/06, *Youth Initiative for Human Rights/Serbia*, Joint Concurring Opinion of Judges Sajó and Vučinić.

²⁰⁶ ECtHR 28 November 2013, nr. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung/Austria*, Partly Dissenting Opinion of Judge Møse, §8-9.

²⁰⁷ ECtHR 28 November 2013, nr. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung/Austria*, Partly Dissenting Opinion of Judge Møse.

²⁰⁸ ECtHR 28 November 2013, nr. 39534/07, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung/Austria*, §47.

²⁰⁹ F. LEHNE and P. WEISMANN, “The European Court of Human Rights and Access to Information”, *International Human Rights Law Review* 2014, 312-313.

²¹⁰ ECtHR 26 June 2013, nr. 48135/06, *Youth Initiative for Human Rights/Serbia*, §5.

²¹¹ ECtHR 26 June 2013, nr. 48135/06, *Youth Initiative for Human Rights/Serbia*, §6.

Commissioner and the Supreme Court of Serbia both ruled that the request should be fulfilled, the intelligence agency refused and eventually also contended that it did not possess the data requested anymore.²¹²

158. The Court took the intelligence agency's argument into consideration that the information was not "ready and available", because they did not hold the information anymore. Nevertheless, it found its argument to be "unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response".²¹³

159. Moreover, the joint concurring opinions of Judge Sajó and Judge Vučinić specifically aim at strengthening this obligation. With the eye on remaining in conformity with developments in international law and on the general need of access to information, they voiced the following opinion.²¹⁴ "The difference between the State's negative and positive obligations is difficult to determine in the context of access to information. Given the complexity of modern data management the simple lack of a prohibition of access may not suffice for the effective enjoyment of the right to information."

160. Furthermore, in *Roşianu v. Romania*, the Court again obliged authorities to disclose information that would have entailed considerable work. The applicant, who presented a television programme wanted to inform the public on how public funds were invested by the municipal administration.²¹⁵ It requested relevant information from the mayor and subsequently successfully litigated to obtain it, but the mayor did not disclose the documents at any point.²¹⁶ The ECtHR ruled art. 10 to be violated, even though the information was not ready and available. The Court justified its findings by emphasising that the mayor had only raised the complexity of compiling the information in defence of ignoring the deadline by which he had to deliver it and not as a general problem that could justify the breach of art. 10 (1) ECHR.²¹⁷

d. The principles of *Magyar Helsinki Bizottság v. Hungary*

161. Over the past ten years, the ECtHR clearly developed a jurisprudence that gradually recognises a right to access to information, even though it contends that it is only an elaboration of previous principles. Moreover, this position entailed that they never provided a clear framework with relevant criteria, as demonstrated above.

162. In 2015 in *Guseva v. Bulgaria*, Judge Mahony and Judge Wojtyczek openly criticized this practice of the Court in their dissenting opinions. Judge Mahony

²¹² ECtHR 26 June 2013, nr. 48135/06, Youth Initiative for Human Rights/Serbia, §7-10.

²¹³ ECtHR 26 June 2013, nr. 48135/06, Youth Initiative for Human Rights/Serbia, §25.

²¹⁴ ECtHR 26 June 2013, nr. 48135/06, Youth Initiative for Human Rights/Serbia, Joint Concurring Opinion of Judges Sajó and Vučinić.

²¹⁵ ECtHR 24 June 2014, nr. 27329/06, Roşianu/Romania, §6-7.

²¹⁶ ECtHR 24 June 2014, nr. 27329/06, Roşianu/Romania, §8-23.

²¹⁷ ECtHR 24 June 2014, nr. 27329/06, Roşianu/Romania, §67.

mostly disapproved that the Court consistently took into consideration whether there was national law granting the right to information.²¹⁸ He held the opinion that it was detrimental to legal certainty that the international content of art. 10 could be changed according to domestic legislation, to which Judge Wojtyczek agrees.²¹⁹

163. Judge Wojtyczek's objections were even more severe. He recognised that there is a democratic lacuna with regards to information rights, but that this should not be solved by recognising rights in the Convention that initially were not present.²²⁰ Referring to the rules of treaty interpretation of the Vienna Convention²²¹, he opposed the Court's *de facto* overruling of *Leander* and imposition of a positive obligation on States without providing legal arguments.²²² Moreover, he also criticized the distinction that was created between press-like bodies and individuals, who now have different rights to information.²²³

164. As a result, the Court felt obliged to respond to the criticisms and in the landmark case *Magyar Helsinki Bizottság v. Hungary* it set out a vast jurisprudence and criteria. In the present case, the applicant was a human rights NGO that requested from police departments the names and the number of appointments of public defenders with the eye on evaluating the system of public defence.²²⁴ Although most departments granted access (with or without legal challenge), two persisted in their denial of access, because they wanted to protect the privacy of the people involved.²²⁵

165. The Court first recalled the principles of the Vienna Convention. These principles required them to take in regard common international and domestic legal standards and as a supplementary means the *travaux préparatoires*.²²⁶ They took note that internationally and nationally there had been a continuous evolution towards a right to information.²²⁷ This led them to conclude that they were not prevented from interpreting art. 10 ECHR as including a right of access to information. With respect to the *travaux préparatoires* they found that combined with the present evolution, they did not delimit the Court's interpretation.²²⁸

²¹⁸ ECtHR 17 February 2015, nr. 6987/07, *Guseva/Bulgaria*, Dissenting Opinion of Judge Mahoney, §4.

²¹⁹ ECtHR 17 February 2015, nr. 6987/07, *Guseva/Bulgaria*, Dissenting Opinion of Judge Wojtyczek, §6.

²²⁰ ECtHR 17 February 2015, nr. 6987/07, *Guseva/Bulgaria*, Dissenting Opinion of Judge Wojtyczek.

²²¹ Art. 31-33 Vienna Treaty on the Law of Treaties of 23 May 1969, nr. 18232, *United Nations Treaty Series*, vol. 1155, 331.

²²² ECtHR 17 February 2015, nr. 6987/07, *Guseva/Bulgaria*, Dissenting Opinion of Judge Wojtyczek, §3-4.

²²³ ECtHR 17 February 2015, nr. 6987/07, *Guseva/Bulgaria*, Dissenting Opinion of Judge Wojtyczek, §7.

²²⁴ ECtHR 8 November 2016, nr. 18030/11, *Magyar Helsinki Bizottság/Hungary*, §11-16.

²²⁵ ECtHR 8 November 2016, nr. 18030/11, *Magyar Helsinki Bizottság/Hungary*, §17-30.

²²⁶ ECtHR 8 November 2016, nr. 18030/11, *Magyar Helsinki Bizottság/Hungary*, §118-125.

²²⁷ ECtHR 8 November 2016, nr. 18030/11, *Magyar Helsinki Bizottság/Hungary*, §138-148.

²²⁸ ECtHR 8 November 2016, nr. 18030/11, *Magyar Helsinki Bizottság/Hungary*, §134-137.

166. Subsequently, the ECtHR set out four relevant principles with regards to the scope of the right. Firstly, it recalled that the purpose of the information request must be the actor's own exercise of freedom of expression, more specifically, to inform the public debate with the information requested.²²⁹ Secondly, the nature of the information sought must be of public interest, which can of course not debouch into sensationalism or voyeurism.²³⁰ Thirdly, they stressed the press-like role of the applicant. Importantly, they did not exclude individuals from having this role, given that they aim at reaching a greater public, such as popular users of social media, bloggers or researchers.²³¹ Fourthly, they emphasised that the information should be ready and available. Nevertheless, if this was not the case because of the State's own practice, the domestic authority cannot rely on this requirement.²³² Furthermore, the Court also added that this right exists, regardless of the content of domestic legislation.²³³

167. In sum, it can be concluded that since *Magyar* the ECtHR undoubtedly established a jurisprudence recognising access to information of public interest under aforementioned conditions.

4.2. RIGHT TO INFORMATION ON WARFARE

168. In order to conclude whether Belgians have a right to obtain military information, we should first verify whether in this concrete case the Convention and the jurisprudence of the Court confer such a right. Subsequently, we should investigate whether the Belgian government is justified in denying the right under 10 (2) ECHR.

4.2.1. *Applicability of art 10 (1) ECHR*

a. Purpose of the information request

169. Under the first principle of *Magyar*, one only has a right to certain information when access is requested with the aim of exercising its own freedom to receive and impart information and ideas to others.²³⁴ Since we depart from the assumption that an NGO or an individual which strives to inform the public about civilian casualties requests the information, the first condition should not pose any problems. Peace Action, the NGO that filed already several requests also falls under this description.

b. Nature of the information sought

170. Secondly, the Court holds that the information should concern matters of public interest. It clarifies this concept by elaborating that citizens may

²²⁹ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §158-159.

²³⁰ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §160-163.

²³¹ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §164-168.

²³² ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §169-170.

²³³ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §131-132.

²³⁴ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §158-159.

legitimately take an interest in them, because it would affect the life of the community or because the matter could give rise to considerable controversy. Sensationalism or voyeurism, however, is not of public interest.²³⁵

171. The information requested in the Belgian case are details on airstrikes in order to determine whether Belgium violates international humanitarian law. Bare locations and dates can hardly give rise to voyeurism, so this information does not seem to be excluded. Moreover, given the gravity of violations of international law and the controversial character of allegations of breaches thereof, citizens may legitimately take an interest in obtaining the information that allows them to know whether these breaches occurred or not. Consequently, the second condition seems fulfilled.

c. The role of the applicant

172. As a logical consequence of the two conditions above, the applicant must have a special role in receiving and imparting information of public interest to other citizens. Previous case law indicates that public watchdogs, such as journalists, NGO's, researchers, bloggers, etc. can qualify as a suitable applicant.²³⁶

173. In the assumption that the information is requested in order to verify compliance with humanitarian law and to impart these results with the public, it is very likely that the applicant will fall under one of the aforementioned categories.

d. Ready and available information

174. Lastly, the Court stresses that the request cannot aim at information that still needs to be collected by the government.²³⁷ In the present case, this will not constitute a problem, since the documents already exist: information on airstrikes is imparted each month to a Parliamentary Commission.

e. Conclusion

175. As long as the information on air strikes is requested with the aims mentioned in my research question, the Belgian government is under the obligation to impart this information under art. 10 (1) ECHR. Furthermore, it is irrelevant to the Court whether this right exists under Belgian law.²³⁸ However, the *ratio legis* of laws that prohibit the impartation, like the Classification Law, may trigger the applicability of 10 (2) ECHR, under which Belgium can justify its refusal to give access to information.

²³⁵ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §162.

²³⁶ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §164-168.

²³⁷ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §169-170.

²³⁸ ECtHR 8 November 2016, nr. 18030/11, Magyar Helsinki Bizottság/Hungary, §131-132.

4.2.2. *Applicability of art 10 (2) ECHR*

176. If the Belgian government can demonstrate that the three cumulative conditions of art. 10 (2) ECHR are fulfilled, it is justified in restricting access to military information. The exception must be prescribed by law and necessary in a democratic society. The Court normally divides the latter condition into whether the State invoked a legitimate aim and whether the State's measure was 'necessary', for which it has developed a specific test.

a. Prescribed by law

177. The impartation of military information should have a firm written or unwritten legal basis.²³⁹ The Court considers this condition to be fulfilled if the restrictive norms are (1) accessible and (2) foreseeable.²⁴⁰ The first subtest means that the citizen "must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case".²⁴¹ Since the legal sources, judgements of courts and doctrinal interpretations are publicly available, this condition does not pose any problems. With regard to the foreseeability, however, a factual interpretation of the current Belgian practice will have to bring clarity.

178. The Court has held on numerous occasions that a norm is only foreseeable when it allows a citizen if he is able (if need be with appropriate advice) to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.²⁴² The Court of course takes into account that the law is always undetermined to a certain extent, since it needs to be able to keep up with evolving perceptions in society.²⁴³

179. In the case of access to information, the law is clear, but is differently applied by different instances. The Commission gives advices that are entirely contrary to the Council of State and the Constitutional Court's latest judgement of 2013 seems to suggest an evolution in interpretation of the right to information. Hence, the question could be asked as to whether the law is foreseeable. For the following reasons I believe the condition to be fulfilled, even though the judicial interpretation of the law is not uniform.

180. In cases where the Court has deemed the law to be insufficiently foreseeable, it concerned cases with the following type of problems. Firstly, sometimes the government read in certain legal texts restrictions that could only be recognised as such under a very extensive interpretation of certain

²³⁹ D. J. HARRIS, M. O'BOYLE, E. P. BATES and C.M. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 649-652.

²⁴⁰ B. RAINEY, E. WICKS and C. OVEY, *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 310.

²⁴¹ ECtHR 26 April 1979, nr. 6538/74, *Sunday Times/UK*, §49.

²⁴² ECtHR 26 April 1979, nr. 6538/74, *Sunday Times/UK*, §49; ECtHR 2 August 1984, nr. 8691/79, *Malone/UK*, §66; ECtHR 25 May 1988, nr. 10737/84, *Müller/Switzerland*, §29.

²⁴³ D. J. HARRIS, M. O'BOYLE, E. P. BATES and C.M. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 650.

terms. Such an extensive interpretation is indeed hardly foreseeable.²⁴⁴ Secondly, in other cases it was not sufficiently clear that the specific form under which the restriction took place was allowed.²⁴⁵ For example, in *Malone v. UK*, it was generally accepted that postal and telephone communications could be searched with a warrant of the Home Secretary, but the concrete legal basis of this specific restriction to art. 8 ECHR was not entirely clear and consequently there were no clear limits to the discretion of the executive power.²⁴⁶ In the *RTBF v. Belgium* case, there were legal texts related to a certain type of restriction of the freedom of speech, but there was significant disagreement in the judiciary as to whether they applied.²⁴⁷

181. Even though the latter judgement resembles the situation with regard to the limits on the right to information, it differs in two important ways. Firstly, in our case the sort of restriction is clear: the Ministry of Defence will not impart the information. In the case of *RTBF v. Belgium*, on the contrary, it was disputed whether there was a legal basis in the constitution allowing for preventive measures against the broadcasting of a TV programme.²⁴⁸ In other words, contrary to *RTBF v. Belgium*, that the Ministry of Defence can take the restrictive measure of non-disclosure of military information is clear, just not in which cases it applies exactly. Secondly, in *RTBF v. Belgium*, there was disagreement in the judiciary in the sense that different instances decided differently, but also the same bodies, depending on the circumstances.²⁴⁹ That is not the case here, the Commission and the Council of State interpret the legal framework internally consistently. The legal uncertainty is limited, because the Commission's different interpretation from the Council of State is non-binding. Moreover, it would be premature to say that one arrest of the Constitutional Court changed this. Consequently, a party requesting military information will still be able to foresee that its request may be denied on the aforementioned legal texts.

b. Legitimate aims

182. The Court rarely questions the legitimate aim invoked by the State and concentrates in its assessment on whether the aim can also pass the necessity-test. On the rare occasions it did, it concerned an aim not mentioned in the particular article or it was manifestly invoked to cover up the true, illegitimate aim.²⁵⁰ In the case of military information there is no doubt that the Court will

²⁴⁴ ECtHR 2 August 2001, nr. 37119/97, N.F./Italy; ECtHR 25 January 2005, nr. 37096/97, Karademirci/Turkey, §31-43; ECtHR 18 March 2008, nr. 36370/02, Piroglu and Karakaya/Turkey, §50-56.

²⁴⁵ See also f.e. ECtHR 24 April 1990, nr. 11105/84, Huvig/France; ECtHR 24 April 1990, nr. 11801/85, Kruslin/France; ECtHR 26 June 2012, nr. 26828/06, Kurić and others/Slovenia; ECtHR 11 April 2013, nr. 20372/11, Vyerentsov/Ukraine.

²⁴⁶ ECtHR 2 August 1984, nr. 8691/79, Malone/UK.

²⁴⁷ ECtHR 29 March 2011, nr. 50084/06, RTBF/Belgium.

²⁴⁸ ECtHR 29 March 2011, nr. 50084/06, RTBF/Belgium, §96-111.

²⁴⁹ ECtHR 29 March 2011, nr. 50084/06, RTBF/Belgium, §5-35.

²⁵⁰ ECtHR 10 July 1998, nr. 26695/95, Sidiropoulos and others v. Greece, §38; ECtHR 30 June 2015, nr. 41418/04, Khoroshenko/Russia, §113-115.

accept that the State's refusal to share the information serves one of the legitimate aims of art. 10 (2).

183. The legitimate aims provided for in art. 10 (2) ECHR are interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

184. Most logically, the government will identify national security interests as its legitimate aim. It could add territorial integrity or public safety, which is often read together with interests of national security.²⁵¹ However, the government cannot invoke the aim of preventing the disclosure of information received in confidence, since the request is aimed at information on Belgian airstrikes and not on information imparted by other members of the Coalition in the framework of their joint operations.

c. Necessary in a democratic society

185. It is not sufficient for the State's measure to serve a legitimate aim, the measure must also be 'necessary'. This should be understood under the form of a proportionality test: the measure must be taken to respond to a pressing social need and the interference with the rights protected cannot be greater than is necessary to address that pressing social need.²⁵²

186. The Court provides some general guidelines as to how to apply this test.²⁵³ Firstly, it stresses that the exceptions should be interpreted narrowly, since they constitute a restriction to a right. Secondly, one should not go as far as to give the term 'necessary' the meaning of 'indispensable', neither as to downplay its meaning to 'desirable', 'reasonable' or 'useful'. Thirdly, it is not up to Court to decide what would be a proportionate measure, the Court should assess whether the State did not exceed its margin of discretion in a disproportionate way.

187. Moreover, certain authors have already distilled from case law which factors the Court finds significant in its assessment.²⁵⁴ In this sense, it can be derived that the Court is more restrictive towards exceptions when it considers

²⁵¹ B. RAINEY, E. WICKS and C. OVEY, *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford, Oxford University Press, 2017, 359.

²⁵² ECtHR 25 March 1983, nr. 5947/72, nr. 6205/73, nr. 7052/75, nr. 7061/75, nr. 7107/75, nr. 7113/75, nr. 7136/75, Silver/UK, §97; B. RAINEY, E. WICKS and C. OVEY, *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford, Oxford University Press, 2017, 350-351.

²⁵³ ECtHR 7 December 1976, nr. 5493/72, Handyside/UK, §48-50; ECtHR 25 March 1983, nr. 5947/72, nr. 6205/73, nr. 7052/75, nr. 7061/75, nr. 7107/75, nr. 7113/75, nr. 7136/75, Silver/UK, §97.

²⁵⁴ D. J. HARRIS, M. O'BOYLE, E. P. BATES and C.M. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 510-521; B. RAINEY, E. WICKS and C. OVEY, *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford, Oxford University Press, 2017, 360-368.

rights that deeply touch upon an individual's existence.²⁵⁵ Furthermore, the nature of a democratic society may constrain the use of certain justifications.²⁵⁶ Moreover, the Court is also unlikely to rule that a measure is disproportionate when there does not exist a European consensus in regard to the issue at state.²⁵⁷ Lastly, the more important the interest that is being protected, the less strict the Court is in its assessment.²⁵⁸ National security, for instance, is an interest that is estimated to be highly important by the Court.²⁵⁹

188. However, these general guidelines are insufficient to make a concrete assessment in the present case. Such an assessment is a difficult task, since the right to information under art. 10 is quite young and there is no relevant case law yet concerning this type of restrictions to the new right under art. 10 (2) ECHR. As a consequence, I analysed two types of cases which resemble the case at hand to an extent that analogies can be made. Firstly, I chose cases in which there was a discussion on whether the State could refuse to disclose secret documents that have the status of evidence in court proceedings. Secondly, I selected cases in which secret documents had been made public and where the government alleged that this did not fall any longer under the freedom of speech under art. 10 ECHR.

c.1. Disclosure of secret documents in court proceedings

189. The Court has built up a jurisprudence on the disclosure of secret documents in court proceedings in two types of situations. On the one hand, it has ruled whether the State's refusal to give the defendant access to this 'secret' evidence is a violation of art. 6 ECHR, which grants the right to adversarial proceedings. On the other hand, it has decided whether the State's rejection of the ECtHR's request to gain access to 'secret' evidence violates art. 38 ECHR, which ensures the cooperation of the State Parties in the proceedings before the Court.²⁶⁰

²⁵⁵ ECtHR 22 October 1981, nr. 7525/76, Dudgeon/UK, §52; ECtHR 26 March 1985, nr. 8978/80, X and Y/The Netherlands, §27;

²⁵⁶ ECtHR 6 September 1978, nr. 5029/71, Klass/Germany, §49; ECtHR 22 October 1981, nr. 7525/76, Dudgeon/UK, §53; ECtHR 25 March 1985, nr. 8734/79, Barthold/Germany, §58.

²⁵⁷ ECtHR 13 June 1979, nr. 6833/74, Marckx/Belgium, §41; ECtHR 22 October 1981, nr. 7525/76, Dudgeon/UK, §60; ECtHR 26 October 1988, nr. 10581/83, Norris/Ireland, §46; ECtHR 22 April 1997, nr. 21830/93, X, Y and Z/UK, §44.

²⁵⁸ ECtHR 24 November 1986, nr. 9063/80, Gillow/UK, §56; ECtHR 24 March 1988, nr. 10465/83, Olsson/Sweden, §62; ECtHR 26 November 1991, nr. 13585/88, Observer and Guardian/UK, §63; ECtHR 20 September 1994, nr. 13470/87, Otto-Preminger-Institut/Austria, §50; D. J. HARRIS, M. O'BOYLE, E. P. BATES and C.M. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 515-520.

²⁵⁹ H. FENWICK "Post 9/11 UK counter-terrorism cases in the European Court of Human Rights: a 'dialogic'

approach to rights protection or appeasement of national authorities?" in F. F. DAVIS and F. DE LONDRAS (eds.), *Critical Debates on Counter-Terrorism Judicial Review*, Cambridge, Cambridge University Press, 2014, 303-304; B. RAINEY, E. WICKS and C. OVEY, Jacobs, White and Ovey: *The European Convention on Human Rights*, Oxford, Oxford University Press, 2014, 330.

²⁶⁰ Art. 38 European Convention of Human Rights.

190. With regard to the first type of cases, the Court has developed a very nuanced, case-by-case approach. Case law makes clear that the Court attaches great importance to whether the trial proceedings as a whole can compensate for the non-disclosure of secret documents to the defendant.²⁶¹ For instance, it found a violation of art. 6 ECHR in the case of *Rowe and Davis v. UK*,²⁶² where it was the prosecution who decided on the non-disclosure of the evidence, while it did not find a violation in *Jasper v. UK*²⁶³ and *Fitt v. UK*²⁶⁴ in which the law had been reviewed and where under the new legal provisions it was the trial judge who decided on this.

191. Concerning non-disclosure for national security reasons, the Court took a similar approach in the recent cases of *Ternovskis v. Latvia* and *Regner v. The Czech Republic*. Both applicants were denied a position for reasons of a negative security clearance and subsequently could not gain access to the negative decision for national security reasons.²⁶⁵ In *Ternovskis*, the Court declared art. 6 ECHR violated, however, not just because of the non-disclosure of reasons, but because the procedure as a whole was unfair (f.e. the applicant was also denied a hearing).²⁶⁶ *Regner* provides some clarity on the elements that the Court finds relevant in this holistic assessment. In its argumentation for a non-violation, the Court mainly stressed that the national judge had access to all the classified documents on which the Authority based itself and could impose the disclosure of the documents, as well as quash an arbitrary decision of the Authority.²⁶⁷

192. Under art. 38 ECHR, the “holistic view” doctrine of art. 6 ECHR does not apply, the State’s only means of justifying non-disclosure is by making a refusal out of national security concern acceptable. In order to satisfy this requirement, the State must bring adequate factual arguments and not just use the national security exception as a general phrase, which the Court already established in the early case of *Nolan v. Russia*.²⁶⁸

193. In a second case, the Court deepened its reasoning and clarified its standards with regard to lawful refusal of access. *Janowiec and Others v. Russia* concerns the highly sensitive issue of the Katyn massacre of ten thousands of Polish prisoners of war by the USSR forces in the Second World War.²⁶⁹ For

²⁶¹ J. P. LOOF, *Mensenrechten en staatsveiligheid: verenigbare grootheden?*, Nijmegen, Wolf Legal Publishers, 2005, 327-332.

²⁶² ECtHR 16 February 2000, nr. 28901/95, *Rowe and Davis/UK*.

²⁶³ ECtHR 16 February 2000, nr. 27052/95, *Jasper/UK*.

²⁶⁴ ECtHR 16 February 2000, nr. 29777/96, *Fitt/UK*.

²⁶⁵ ECtHR 29 April 2014, nr. 33637/02, *Ternovskis/Latvia*, §5-29; ECtHR 19 September 2017, nr. 35289/11, *Regner/The Czech Republic*, §9-22.

²⁶⁶ ECtHR 29 April 2014, nr. 33637/02, *Ternovskis/Latvia*, §65-75.

²⁶⁷ ECtHR 19 September 2017, nr. 35289/11, *Regner/The Czech Republic*, §152.

²⁶⁸ ECtHR 12 February 2009, nr. 2512/04, *Nolan and K./Russia*, §51-57.

²⁶⁹ The case reached the ECtHR for the following reasons. Janowiec and the other applicants are descendants of Polish prisoners of war who were on the lists of the people who were at the camps where the massacres took place, but of who the execution was never confirmed, since only a few per cents of the victims had been identified. They sought the recognition of their ancestors as victims of the massacre, which would make ‘rehabilitation’ and the payment of damages possible. The recognition of this status, however, was impossible, because this was dependent upon criminal

our purpose, the Court's reaction on Russia's refusal to grant access in the ECtHR proceedings to the classified decision that terminated the criminal investigations on the massacre is quite interesting.

194. The Court found the refusal to be a violation of art. 38 ECHR²⁷⁰ and it showed itself quite strict towards the State's margin of appreciation. It held that the State should be able to give the Court a satisfactory explanation based on solid and reasonable grounds for treating the documents as secret or confidential.²⁷¹ Moreover, it explicitly stated that Russia had not balanced its interest properly to the public interest in a transparent investigation.²⁷² Furthermore, it held that even in the cases of national security, when it concerns fundamental human rights, a State's decisions should be open to challenge in proceedings before an independent body.²⁷³

195. The Court's case law on art. 6 and 38 ECHR is interesting to analyse with the eye on disclosure of military information, because an analogy can be made between the (not absolute) right to access to the evidence of the State under art. 6 and 38 and the (also not absolute) right to information under art. 10. Of course, one should always keep in mind the important difference between the two: in the cases above, disclosure of evidence does not automatically equal disclosure to the general public.²⁷⁴ Nevertheless, some interesting inferences can be made from the aforementioned case law.

196. Under the "holistic approach" of art. 6, it does not seem to be accepted that a litigant instead of a judge decides whether the evidence be disclosed.²⁷⁵

investigations, which Russia had terminated. For a long time, the USSR had alleged that it were the Nazi's that had killed the Polish prisoners of war and only with the fall of the iron curtain, it became clear that it was Russia's responsibility. Russia conducted investigations for more than a decade, but terminated this in a decision of 21 September 2004, for the reason that the offender had passed away. ECtHR 21 October 2013, nr. 55508/07, Janowiec/Russia, §13-96.

²⁷⁰ ECtHR 21 October 2013, nr. 55508/07, Janowiec/Russia, §190-216.

²⁷¹ ECtHR 21 October 2013, nr. 55508/07, Janowiec/Russia, §205.

²⁷² "Finally, they did not perform a balancing exercise between the alleged need to protect the information owned by the Federal Security Service, on the one hand, and the public interest in a transparent investigation into the crimes of the previous totalitarian regime and the private interest of the victims' relatives in uncovering the circumstances of their death, on the other hand." ECtHR 21 October 2013, nr. 55508/07, Janowiec/Russia, §214.

²⁷³ "However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. If there was no possibility of challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention." ECtHR 21 October 2013, nr. 55508/07, Janowiec/Russia, §213.

²⁷⁴ For instance, "The Court emphasises, lastly, that legitimate national security concerns may be accommodated in its proceedings by means of appropriate procedural arrangements, including restricted access to the document in question under Rule 33 of the Rules of Court and, in extremis, the holding of a hearing behind closed doors. Although the Russian Government were fully aware of those possibilities, they did not request the application of such measures, even though it is the responsibility of the party requesting confidentiality to make and substantiate such a request." ECtHR 21 October 2013, nr. 55508/07, Janowiec/Russia, §215.

²⁷⁵ ECtHR 16 February 2000, nr. 28901/95, Rowe and Davis/UK; ECtHR 16 February 2000, nr. 27052/95, Jasper/UK; ECtHR 16 February 2000, nr. 29777/96, Fitt/UK; J. P. LOOF,

Also in the *Regner* judgement, the Court attached a lot of weight to the national court's ability to access the classified documents and to control whether the Authority's qualification of them as such was justified.²⁷⁶ This taken together with the Court's remark in *Janowiec* that when fundamental rights are concerned even decisions concerning national security should be revisable before an independent body, raises questions about the compatibility with the Convention of the treatment of classified information in Belgium. One could argue that currently, Belgians are not able to exercise their fundamental right to information, because no declassification procedure exists and judges are not capable of declaring a document unduly classified.²⁷⁷ Furthermore, whether the non-disclosure of military information is justified under the convention will according to the *Janowiec* judgement depend on whether the State has "solid and reasonable grounds" that make it trump "the public interest in transparent investigations".²⁷⁸

c.2. 10 ECHR and the unauthorized impartation of secret documents

197. In the second group of cases, some insiders have leaked classified information to the public. The rulings of the Court on the link between these types of action and the right to freedom of speech, can give us some indications as to how it views States' measures for security reasons against the impartation of secret documents. In the 90's, the Court ruled two significant cases, *Spycatcher v. UK*, and *Hadjianastassiou v. Greece*, in which it took a rather restrictive approach. However, at about the same time that the Court developed its jurisprudence with regard to the right to information, it also developed a jurisprudence that protects whistle blowers under certain circumstances.

198. In *Spycatcher*, the UK had imposed injunctions on the Observer and the Guardian, to retain them from reporting on the sensitive content of a book that a former MI5 member had written without permission after his emigration to Australia.²⁷⁹ In this case, the Court ruled that these injunctions had not led to a violation of the newspapers' right to freedom of expression.²⁸⁰ Even though the unlawful activities described in the book were of public interest and the author had first sought to persuade the government to institute investigations against the MI5 for its unlawful behaviour, the Court believed the interference compliant with art. 10 ECHR.²⁸¹

Mensenrechten en staatsveiligheid: verenigbare grootheden?, Nijmegen, Wolf Legal Publishers, 2005, 327-332.

²⁷⁶ ECtHR 19 September 2017, nr. 35289/11, *Regner/The Czech Republic*, §152.

²⁷⁷ COMMISSION ON THE ACCESS TO ADMINISTRATIVE DOCUMENTS, *Annual Report 2016*, http://www.ibz.rrn.fgov.be/fileadmin/user_upload/nl/com/openbaarheid/jaarverslagen/jaarverslag-CTB-2016.pdf.

²⁷⁸ ECtHR 21 October 2013, nr. 55508/07, *Janowiec/Russia*, §205 and 214.

²⁷⁹ ECtHR 26 November 1991, nr. 13585/88, *Observer and Guardian/UK*, §9-44.

²⁸⁰ J. P. LOOF, *Mensenrechten en staatsveiligheid: verenigbare grootheden?*, Nijmegen, Wolf Legal Publishers, 2005, 256-258.

²⁸¹ ECtHR 26 November 1991, nr. 13585/88, *Observer and Guardian/UK*, §61-65.

199. It argued that on the one hand reports from newspapers on the content of a book that simultaneously formed the object of trial proceedings in Australia aiming at impeding its publication, would deprive the Attorney General, who had instituted these proceedings for the UK from truly exercising its right to a fair trial under art. 6 ECHR.²⁸² On the other hand, they found that the UK had remained within its margin of discretion, because the injunction only restrained the newspapers from using the author as a source²⁸³ and because the unfiltered nature of the leak made it “improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security”.²⁸⁴ Also, the Court did find a violation of art. 10 in a later period, when the injunctions were affirmed by the House of Lords after that the content of the book had already been divulged, because the UK had lost the trial proceedings in Australia and the book had been published in the US.²⁸⁵

200. A few guidelines can be distilled from this judgement. The Court clearly gives a lot of leeway to the States’ margin of discretion when it comes to national security concerns, since the most prominent security risk for the UK here was that its citizens would find out of its own unlawful practices. However, the Court did impose some boundaries to its discretion. Firstly, by finding a violation in the later period, the Court stressed that the UK should always have to be capable of making a security concern credible and should not use the exception to deter future whistle blowers.²⁸⁶ Secondly, it carried a lot of weight for the Court that the newspapers’ freedom of expression would interfere with another right under the Convention, such as art. 6 ECHR. Lastly, it can be deduced from the Court’s argumentation that it may be more restrictive towards the State if the information would have been filtered in a way that the questions of public concern would outweigh national security interests.

201. Another significant case from the 90’s in this regard is the case of *Hadjianastassiou v. Greece*. Hadjianastassiou, a Greek captain in the air force and an aeronautical engineer had written a study for a private company on guided missiles, in which he had reused much of the information he had used for his study for the army on another guided missile. Even though the national court recognized that the information was of minor importance, it nevertheless imposed a prison sanction. The ECtHR held that this sentence did not violate art. 10 ECHR.²⁸⁷

202. This judgement demonstrates that the Court gives quite some leeway to the States with regard to their margin of discretion.²⁸⁸ It found “that the

²⁸² ECtHR 26 November 1991, nr. 13585/88, Observer and Guardian/UK, §61-63.

²⁸³ In other words, the newspapers were not prohibited to report on the issues, if they would investigate them and obtain information via other sources. ECtHR 26 November 1991, nr. 13585/88, Observer and Guardian/UK, §64.

²⁸⁴ ECtHR 26 November 1991, nr. 13585/88, Observer and Guardian/UK, §61.

²⁸⁵ ECtHR 26 November 1991, nr. 13585/88, Observer and Guardian/UK, §66-70.

²⁸⁶ ECtHR 26 November 1991, nr. 13585/88, Observer and Guardian/UK, §69.

²⁸⁷ ECtHR 16 December 1992, nr. 12945/87, Hadjianastassiou/Greece.

²⁸⁸ J. P. LOOF, *Mensenrechten en staatsveiligheid: verenigbare grootheden?*, Nijmegen, Wolf Legal Publishers, 2005, 258-259.

disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security."²⁸⁹

203. However, one should be cautious to make a full analogy here. In the case of Hadjianastassiou, there was no public interest at play. He and the private company for which he delivered the study had only financial motivations.²⁹⁰ Moreover, commentators have asserted that the Court has reduced the margin of appreciation in the area of freedom of expression in the armed forces in later case law.²⁹¹ Hence, the possibility exists that Court is more restrictive towards the State in the case of public interest issues nowadays and more recent cases seem to confirm this.

204. The Court has established a case law over the past decade in which it protects whistle blowers from reprisals under the following conditions.²⁹² Firstly, the information disclosed should cover an issue of public interest that is so strong that it can override a legally imposed duty of confidence. Secondly, the whistle blower must have had no other effective means of remedying the wrongdoing it discovered. Thirdly, if the divulging of the information leads to damage for the State, this damage should not outweigh the interest of the public in having the information revealed. Fourthly, the whistle blower is not protected if he acted out of a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain. Fifthly, the whistle blower should have acted in good faith, which implies that he had to believe at the moment of bringing out the information that the information was true and that it was in the public interest to disclose it. Lastly, the Court takes in account the severity of the reprisal to determine whether the State exceeds its margin of discretion.

205. The Court already hinted at these principles in 2008 in the 'safer' case of *Guja v. Moldova*, where a *civil* (read: not-public) servant leaked *unclassified* documents to the press from which could be deduced that certain politicians were successfully exerting pressure on the Prosecutor to protect some police men against who investigations were pending for ill-treatment and illegal detention.²⁹³ Moreover, within the Council of Europe, initiatives have already

²⁸⁹ ECtHR 16 December 1992, nr. 12945/87, Hadjianastassiou/Greece, §45.

²⁹⁰ ECtHR 16 December 1992, nr. 12945/87, Hadjianastassiou/Greece, §11.

²⁹¹ However, the facts of more recent cases are do not concern the impartation of secret information, hence it is less interesting to take those more recent cases up in this analysis. RESEARCH DIVISION OF THE ECtHR, *National Security and European case-law*, November 2013, <https://rm.coe.int/168067d214>, 40.

²⁹² ECtHR 8 January 2013, nr. 40238/02, Bucur and Toma/Romania, §94-120; COUNCIL OF EUROPE, *Whistleblowers and their freedom to impart information*, May 2017, <https://rm.coe.int/factsheet-on-whistleblowers-and-their-freedom-to-impart-information-ma/16807178d9>, 1.

²⁹³ ECtHR 12 February 2008, nr. 14277/04, Guja/Moldova; D. KAGIAROS, "Protecting 'national security' whistleblowers in the Council of Europe: an evaluation of three approaches on how to balance national security with freedom of expression", *The International Journal of Human Rights* 2015, 413.

been taken to increase the protection of whistle blowers.²⁹⁴ The Committee of Ministers has issued a Recommendation in 2014²⁹⁵ and the Parliamentary Assembly has issued a Recommendation and a Resolution in 2010.²⁹⁶

206. Subsequently, the Court listed up these principles in *Bucur and Toma v. Romania*.²⁹⁷ Bucur worked for the Romanian secret service and learnt that his department was committing many unlawful telephone taps. He tried, without success, to remedy this internally and ultimately brought out the news, for which he incurred a prison sentence. It is noteworthy that in this case, comparable to *Spycatcher*, the Court did find a violation of art. 10. Hence, it can be argued that if the information disclosed remains limited to issues of public interest and does not compete with other rights under the Convention, such as art. 6, but only with interests, such as national security, the relevant aspects of the test above could be used as well for determining the State's margin of discretion in the case of access to military information.

c.3. Conclusion

207. A few conclusions can be made based on the principles and case law above.

208. Firstly, there are strong indications that the current system of declassification is incompatible with the ECHR. Under the Court's holistic approach, it seems necessary that a judge must be able to review whether information is rightly qualified, which is currently not the case in Belgium.

209. Secondly, it seems that the appropriate test in this case is a balancing test rather than marginally verifying whether the State has not exceeded its discretion. The general principle that the nature of a democratic society may limit the recourse to certain justifications,²⁹⁸ seems to inspire judgements where the public interest plays an important role. On the one hand, in cases of disclosure of evidence, the Court implicitly²⁹⁹ and explicitly³⁰⁰ favoured an

²⁹⁴ D. KAGIAROS, "Protecting 'national security' whistleblowers in the Council of Europe: an evaluation of three approaches on how to balance national security with freedom of expression", *The International Journal of Human Rights* 2015, 411-413.

²⁹⁵ Recommendation of the Committee of Ministers of the Council of Europe (30 April 2014), *CoE Doc. CM/Rec* (2014)7.

²⁹⁶ Resolution 1729 of the Parliamentary Assembly of the Council of Europe (29 April 2010); Recommendation 1916 of the Parliamentary Assembly of the Council of Europe (29 April 2010).

²⁹⁷ ECtHR 8 January 2013, nr. 40238/02, *Bucur and Toma/Romania*; D. KAGIAROS, "Protecting 'national security' whistleblowers in the Council of Europe: an evaluation of three approaches on how to balance national security with freedom of expression", *The International Journal of Human Rights* 2015, 413.

²⁹⁸ ECtHR 6 September 1978, nr. 5029/71, *Klass/Germany*, §49; ECtHR 22 October 1981, nr. 7525/76, *Dudgeon/UK*, §53; ECtHR 25 March 1985, nr. 8734/79, *Barthold/Germany*, §58.

²⁹⁹ In its holistic assessment, the Court clearly makes sure that the rights are balanced in the overall picture, rather than just checking whether the State has exceeded its margin of discretion.

³⁰⁰ "Finally, they did not perform a balancing exercise between the alleged need to protect the information owned by the Federal Security Service, on the one hand, and the public interest in a transparent investigation into the crimes of the previous totalitarian regime and the private interest

approach in which the different rights are being balanced. On the other hand, in the different parts of the “whistle blowers test”, one can also clearly distinguish a rationale aiming at finding a balance between acting in good faith in the public interest and protecting national security. I believe that the cases of *Spycatcher* and *Hadjianastassiou*, which favoured rather a “margin of discretion” approach cannot convincingly be used as an objection to this conclusion. Firstly, *Hadjianastassiou* did not concern a case of public interest and thus doesn’t affect “the democratic nature of society” as such. Secondly, these cases were ruled before the development of a right to information and of the whistle blowers protection, which makes their current value questionable.

210. Hence, the compatibility of the Ministry of Defence’s refusal to impart information with art. 10 ECHR, will depend on a factual assessment by the Court in which it weighs both interests.

211. On the one hand there is a public interest in disclosure, due to the deficiencies in the current intransparent systems that control the military. The major discrepancy between civilian deaths counted by external parties and by the Coalition and Belgium and the limited methods of the Coalition to verify these deaths indicate that by solely relying on the internal assessments of the Coalition and Belgium, one cannot control sufficiently whether Belgium complies with humanitarian law. Moreover, the transparency to the Parliament Commission does not mitigate this problem.

212. On the other hand, the impartation of this information can lead to the risk of data-mining, an important security risk. If ISIS for example is able to intercept Belgian troops this way, this can endanger the life of our soldiers and their operations.

213. I personally think that in this particular case, the public interest outweighs the interest of national security for the following reasons. One can question the probability that the data-mining risk occurs. The Coalition has consistently reduced the territory of ISIS, which means that most of their data on airstrikes is no longer relevant now. In other words, if someone can deduct their flight route from the data, it is of no use to him, since they don’t operate anymore in that area and they will not use the flight route anymore. Consequently, only in the case that ISIS will expand its territory again, which is improbable, the data may endanger the operations again. This argument is supported by the fact that other states do not seem to fear data-mining and do impart data on airstrikes, according to the Airwars Reports. Moreover, the Ministry of Defence also does not seem to consider less restrictive measures than systematic classification of their data by f.e. supporting the strengthening the powers of the Parliamentary Commission or releasing some data of the least dangerous kind.

of the victims’ relatives in uncovering the circumstances of their death, on the other hand.” ECtHR 21 October 2013, nr. 55508/07, Janowiec/Russia, §214.

214. Of course, this is a factual assessment and the Court can always attach different weight to different elements, this particular case study is not clear cut at all. Moreover, this factual assessment is confined to this case only and its conclusions cannot be automatically transposed to other cases.

5. CONCLUSION

215. This analysis of the law and practice concerning information right led to the following findings.

216. The legal framework regulating information rights in Belgium may not conform the Constitution and the ECHR. The fact that only certain members from the executive branch can declassify information is particularly problematic. While on the Belgian level it still remains to be seen how the Constitutional Court's jurisprudence will evolve concerning absolute exceptions, the jurisprudence of the ECtHR appears much more decided in holding that it is disproportionate not to provide for any judicial checks on the administration's power to refuse disclosure of documents.

217. Moreover, especially the combination of the recent development of a right to information and of the protection for whistle blowers support the conclusion that the Court favours a balancing of interests test, rather than merely verifying whether the State did not exceed its broad margin of discretion, which leans more closely to the "absolute exceptions" test in Belgium. Consequently, it can be doubted whether the absolute exceptions that have been enacted conform the ECHR.

218. Concerning the concrete question on military transparency, the answer of the ECtHR will depend on a factual assessment while balancing the interests of the military and the public. There are compelling arguments on both sides and a lot will depend on the concrete circumstances of when, what and for what reasons disclosure is demanded. However, my overall appreciation of the facts leads me to a conclusion in favour of transparency.

219. Ultimately, I would like to observe that in any case Belgium will always have to keep on striving to uphold its democratic character. A full-grown democracy embraces civil participation and openness as the ultimate touchstone of legitimacy of its acts. While there can always exist compelling reasons not to impart certain information, this cannot be used as an empty excuse, which is the reality when one employs unverifiable absolute exceptions. Hopefully the evolutions in human rights law can help foster Belgium's adherence to democratic principles.