

INTERNATIONALIZING THE RIGHT TO KNOW:
CONCEPTUALIZATIONS OF ACCESS TO INFORMATION IN HUMAN RIGHTS LAW

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ABSTRACT

CHERYL BISHOP: Internationalizing the Right to Know: Conceptualizations of Access to Information in Human Rights Law
(Under the direction of Cathy Packer, Pd.D.)

Currently there exists a global movement promoting institutional transparency and freedom of information legislation. Conceptualizing access to government-held information as a human right is one of the latest developments in this global trend promoting access to information. The purpose of this dissertation is to identify and analyze the various conceptualizations being used to promote access to government information as a human right. This dissertation also assesses the strength and weaknesses of each conceptualization and assesses which conceptualization holds the greatest promise for ensuring the broadest right of access to information.

Conceptualizations were identified by examining international human rights law (particularly human rights treaties), normative arguments of international inter-governmental organizations (particularly the United Nations), and nongovernmental organizations. Four conceptualizations were identified: the freedom-of-expression conceptualization, which bases a right to information on the right to freedom of expression; the information-privacy conceptualization, which bases a right to information on the right to privacy; the right-to-a-healthy environment conceptualization, which links information rights to a right to a healthy environment; and the right-to-truth conceptualization, which bases a right to information on individual and societal rights to know about serious human rights abuses.

To

My mother Kathleen Mary Bishop

whose love, support, and acumen nourish my soul and feed my intellect.

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CHAPTER I

ACCESS TO INFORMATION AS A HUMAN RIGHT

In the first opinion of its kind from an international human rights tribunal, the Inter-American Court on Human Rights¹ ruled that access to government information is a human right. The September 2006 ruling stated: “[T]he right to freedom of thought and expression includes the protection of the right of access to State-held information.”² The case began in 1998 when the Chilean government refused to release information regarding a major U.S. logging project in Chile to a Chilean environmental organization.³ A number of South American human rights groups filed a petition with the Inter-American Commission on Human Rights⁴ claiming that the withholding of information violated Chileans’ human

¹ The Inter-American Court is an organ of the American Convention on Human Rights. It consists of seven judges and hears individual and state complaints against state parties to the convention. The court can settle controversies about the interpretation and applications of the Convention, and give opinions regarding compatibility of state law and the Convention provisions. Under its advisory jurisdiction, it interprets the provisions of the American Convention and other human rights treaties within the Inter-American system. American Convention on Human Rights, Nov. 22, 1969, chap. 8, 1144 UNT.S. 123 [hereinafter American Convention]. See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 544-55 (6th ed. 2003).

² Claude Reyes et al. v. Chile, Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 77 (Sept. 19, 2006); see also *Open Society Justice Initiative, International Tribunal Makes Landmark Ruling on Access to Information* (Oct. 12, 2006), http://www.justiceinitiative.org/db/resource2?res_id=103448.

³ The requested information was about the Río Cóndor Project, an extensive timber logging operation by U.S. company Forestal Trillium on the Island of Tierra del Fuego in Chile.

⁴ In 1959 the Inter-American Commission on Human Rights was established as an independent organ of the Organization of American States, and it held its first session one year later. In 1969 the American Convention on Human Rights was adopted. The convention further defined the role of the commission and created the Inter-American Court of Human Rights. According to the convention, once the commission determines a case is admissible and meritorious, the commission will make recommendations and, in some cases, present the case to the Inter-American Court for adjudication. The Inter-American Court hears these cases, determines liability

rights. In March 2005, the Inter-American Commission found that Chile had violated the plaintiffs' rights under Article 13 of the American Convention on Human Rights, which states: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds."⁵ The commission urged Chile to release the information and recommended that Chile bring its domestic laws into conformity with the American Convention so as to guarantee citizen access to public information.⁶ After Chile refused, the commission referred the case to the Inter-American Court on Human Rights. Agreeing with the commission, the court ruled that Chile's failure to release the information violated citizens' rights to freedom of expression.⁷

The court's decision that access to government-held information is a human right is the latest development in a global movement promoting access to information.⁸ This movement has contributed to the proliferation of freedom of information (FOI) statutes and constitutional provisions guaranteeing access to information. Currently, nearly 70 countries have adopted access laws, over half of which were adopted within the last ten years.⁹ Today rights to official government information also are guaranteed in at least 49 national

under relevant regional treaties and agreements, and assesses and awards damages and other forms of reparations to victims of human rights violations. *See* BROWNIE, *supra* note 1, at 544-55.

⁵ American Convention, *supra* note 1, at art. 13.

⁶ Marcel Claude Reyes v. Chile, Inter-Am. C.H.R., Case 12.108, Report No. 60/03, ¶ 222 (2003).

⁷ Inter-Am. Ct. H. R. (ser. C) No. 15 (2006).

⁸ This movement includes several international and regional nongovernmental organizations (NGOs) promoting access to government information, such as Transparency International, Article 19's Global Campaign for Freedom of Expression, the Open Society Justice Initiative, the Global Transparency Initiative, Access-Info Europe, and the Commonwealth Human Rights Initiative. *See also* ANN FLORINI, THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD (2007); ANN FLORINI, THE COMING DEMOCRACY: NEW RULES FOR RUNNING A NEW WORLD (2003); BURKART HOLZNER & LESLIE HOLZNER, TRANSPARENCY IN GLOBAL CHANGE: THE VANGUARD OF THE OPEN SOCIETY (2006).

⁹ David Banisar, *Freedom of Information Around the World* (2006), available at <http://www.privacyinternational.org/foi/foisurvey2006.pdf> (last visited Mar. 22, 2008).

constitutions, 80 percent of which were written after 1989.¹⁰ Within the past five years, intergovernmental organizations such as the World Trade Organization and the World Bank also have changed their policies to allow greater access to their official records.¹¹ According to legal scholar and access expert Thomas Blanton: “[M]aking good use of both moral and efficiency claims, the international freedom-of-information movement stands on the verge of changing the definition of democratic governance. The movement is creating a new norm, a new expectation, and a threshold requirement of any government to be considered a democracy.”¹²

It is not surprising that such developments are occurring now. Within the last century, democracy has spread around the globe. Today, 64 percent of all governments worldwide are democratic.¹³ According to foreign relations scholar Fareed Zakaria, “What was once a peculiar practice of a handful of states around the North Atlantic has become the standard form of government for humankind.”¹⁴ Zakaria explained that “democratization” entails not

¹⁰ CONSTITUTIONS OF THE COUNTRIES OF THE WORLD; A SERIES OF UPDATED TEXTS, CONSTITUTIONAL CHRONOLOGIES AND ANNOTATED BIBLIOGRAPHIES, 20 vols. (A.P. Blaustein & G.H. Flanz, eds., 1971-2006).

¹¹ International economic organizations, such as the International Monetary Fund, the World Bank, and the World Trade Organization, also are being pressured by international NGOs and legal experts to be more democratic and accountable to the public. In order for this to occur, it is argued, transparency, which often includes access to official documents, is essential. See Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927 (2004); John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 U. KAN. L. REV. 521 (2004); Hetty Kovach et al., *One World Trust Global Accountability Report: Power without Accountability* (2003), available at <http://www.oneworldtrust.org/documents/GAP20031.pdf> (last visited Mar. 22, 2008); Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank*, 53 INT'L SCI. J. 569 (2001).

¹² Thomas Blanton, *The World's Right to Know*, FOREIGN POLICY 50, 56 (July/Aug 2002).

¹³ Freedom House, *Freedom in the World 2008: Selected Data*, available at <http://www.freedomhouse.org/uploads/fiw08launch/FIW08Tables.pdf> (last visited Mar. 22, 2008).

¹⁴ FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 13 (2003).

just politics, but “a way of life.”¹⁵ In the process of democratization, he argued, “hierarchies are breaking down, closed systems are opening up, and pressures from the masses are now the primary engine of social change.”¹⁶

Conceptualizing access as a human right is one of the latest developments in the global trend promoting access. Many international nongovernmental organizations,¹⁷ legal scholars,¹⁸ and reports from United Nations entities¹⁹ have argued that access to information is an emerging human right. Many of those making this claim argue that access to information is linked to the right to freedom of expression.²⁰ This conceptualization of a right to access is illustrated by the aforementioned Inter-American Court of Human Rights opinion, which explicitly linked a right of access to the right to freedom of expression.²¹ However, linking a right of access to rights of free expression is only one of several conceptualizations being used to advance access as a human right. Access as a human right also has been linked to a right to a healthy environment²² and a right to good health.²³

¹⁵ *Id.* at 14.

¹⁶ *Id.*

¹⁷ *E.g.* the Commonwealth Human Right Initiative, a non-partisan, international nongovernmental organization, stated in a document, *What is the Right to Information?*: “Many people believe that access to information is a fundamental human right. This belief is reflected in international human rights instruments, the most significant being the *Universal Declaration of Human Rights*. . . . Freedom of expression presupposes something to express. Therefore, access to information is inextricably tied to freedom of expression. The words ‘to seek, receive, and impart’ are set out in the *Universal Declaration* as if they were the constituent parts of one indivisible right.” *Available at* <http://www.humanrightsinitiative.org/programs/ai/rti/rti/what.htm#1> (last visited Mar. 22, 2008).

¹⁸ *See infra* at pp. 17-37.

¹⁹ *See, e.g., infra* pp. 49-50 and notes 198-203.

²⁰ *See infra* pp. 20-28.

²¹ *Claude Reyes et al. v. Chile*, Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 77 (Sept. 19, 2006).

²² *See infra* pp. 32-35.

The purpose of this dissertation is to identify and analyze the various conceptualizations being used to promote access to government-held information²⁴ as a human right.²⁵ This dissertation also assesses the strength and weaknesses of each conceptualization and assesses which conceptualization holds the greatest promise for ensuring the broadest right of access to the information. Conceptualizations were identified by examining international human rights law (particularly human rights treaties), normative arguments of international inter-governmental organizations (particularly the United Nations) and nongovernmental organizations, and the work of legal scholars.

²³ See *infra* pp. 29-32.

²⁴ This includes a general right to access information held by the government, including information provided at meetings, as well as rights that create positive obligations on government to proactively provide important information. This dissertation is not investigating a right to access to information that is generally available to the public or a right of individuals and/or the media to gather and provide information. The term “access to information” and “right of access” will be used to mean access to government-held information. The term “freedom of information” is not being used. This is to ensure that there is no confusion between the right of access to government-held information and the term “freedom of information,” which was first used in a 1946 UN General Assembly resolution, which stated, “Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated.” G.A. Res. 59(I), ¶ 1 (Dec. 14, 1946). This statement often has been used to argue that access to government-held information is a human right, but the following paragraph states that the right “implies the right to gather, transmit, and publish news anywhere and everywhere without fetters.” *Id.* at ¶ 2. In 1948 the United Nations also hosted a freedom of information conference that was charged in part with creating a Convention on Freedom of Information, of which a final draft was never created. This convention was mostly concerned with the free flow of information across borders and said nothing about government information. See generally INGER OSTERDAHL, FREEDOM OF INFORMATION IN QUESTION: FREEDOM OF INFORMATION IN INTERNATIONAL LAW AND THE CALLS FOR A NEW WORLD INFORMATION AND COMMUNICATION ORDER (NWICO) (Vol. 11, 1992); HILDING EEK, FREEDOM OF INFORMATION AS A PROJECT OF INTERNATIONAL LEGISLATION: A STUDY OF INTERNATIONAL LAW MAKING (1953).

²⁵ I leave for future research the larger “meta questions” concerning the creation of new human rights. These questions include the underlying process of and means of creating new human rights (and whether access to government information is a human right as a matter of law) and arguments for and against a proliferation of new rights, as opposed to a core of well-entrenched and more widely-accepted ones. For the purpose of this investigation, I take as self-evident that human rights do exist and that new rights can be and are created within the context of the international legal community. See *infra* pp. 13-4 for a brief discussion of soft law. The following is a sampling of the variety of discussions related to these larger questions. COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press 2005, 1999) (1971); Philip Alston & Bruno Simma, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principle*, 12 AUST. Y.B. INT’L L. 82 (1992); Arthus M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Right*, 25 GA. J. INT’L & COMP. L. 99 (1995).

Identifying and analyzing the different conceptualizations of access in human rights law and within the global debate regarding access is important for several reasons. Although he did not use the term “conceptualization,” legal scholar and former judge for the International Court of Justice Christopher Weeramantry argued that identifying the conceptualizations of access to information is important.²⁶ He stated that “an examination of the right to information will reveal at once that there are numerous facets of this vast topic which range beyond the purely political, into the realm of social, economic, cultural and technological information.”²⁷ Weeramantry argued that several “formulations” of this right exist and need to be delineated in order to understand “its status in international law and domestic legal systems.”²⁸

This research can help improve the quality and clarity of the current international discussions regarding access to information and, more specifically, regarding access as a human right. Access to information as a human right is a new and innovative way of envisioning access, but as Judge Weermantry observed, this right has not been fully identified. He wrote, “Its concepts and procedures have yet to be developed considerably but the first broad brush strokes delineating the right have appeared on the canvas of human rights.”²⁹

Also, this research can bring clarity to lawmaking, thereby improving its results. Understanding the principles and assumptions of the different conceptualizations can help

²⁶ Christopher Gregory Weeramanthy, *Access to Information: A New Human Right. The Right to Know*, 4 ASIAN Y.B. OF INT’L LAW 99, 101 (1994).

²⁷ *Id.*

²⁸ *Id.* at 99-100.

²⁹ *Id.* at 111.

lawmakers understand the different purposes of access, informing the drafting and implementation of national access legislation as well as international treaties.

Finally, international human rights law often has an impact on other areas of the law. For example, governments may pass national legislation in order to comply with human rights law or to respond to the pressures of its normative influence. Several new democracies have incorporated specific provisions from human rights treaties into their constitutions.³⁰

What occurs in international law can also have an effect on national courts. In the recent United States Supreme Court case *Roper v. Simmons*,³¹ involving the constitutionality of the use of the death penalty for those under 18 years of age, the Court's opinion was influenced by international laws and norms. Writing for the majority, Justice Anthony Kennedy stated: "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."³² In his opinion, Kennedy referred to provisions against the death penalty in the United Nations Convention on the Rights of the Child and "parallel prohibitions contained in other significant international covenants," citing the Political Covenant, among others.³³

³⁰ *E.g.* The Bulgarian constitution states, "Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others." *Konstitutsiya na Balgariya* [Constitution] art. 41(2) (Bulgaria); The Columbian constitution states, "Every person has a right to access to public documents except in cases established by law." Political Constitution of Columbia art. 74.

³¹ 543 U.S. 551 (2005).

³² *Id.* at 578.

³³ *Id.* at 576. *See also* *Lawrence v. Texas*, 539 U.S. 558 (2003) (arguing that a 1981 European Court of Human Rights case is an example that Western civilization does not condemn homosexuality); *see generally, e.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005). *But see* *Simons v. Roper*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (arguing that "the basic premise of the Court's argument – that American law

An Introduction to International Human Rights Law

In order to identify, analyze, and compare the different conceptualizations of access to information as a human right, it is essential to examine and understand international human rights law and the role of non-governmental organizations. The following section will provide a brief overview of the history of international human rights law, the different sources of human rights law, and the contributions of nongovernmental organizations in human rights norm setting, promotion, and monitoring.

The History of Human Rights Law

Although the concept of basic human rights has been around for centuries,³⁴ the Charter of the United Nations,³⁵ which created the United Nations, laid the foundation of current international human rights law. Article 55 of the Charter states, in part, that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁶ Article 56 of the Charter requires member nations to “pledge themselves” to this goal.³⁷ Although some human rights were protected by treaties before the Charter, according to legal scholar Thomas Buergenthal, the Charter “ushered in a worldwide movement in which states, intergovernmental, and nongovernmental organizations are the principal players in an ongoing

should conform to the laws of the rest of the world – ought to be rejected out of hand”); Republican Senator Tom DeLay called the *Roper* decision “outrageous” in part because it referred to international law (Jesse J. Holland, *DeLay Criticizes Supreme Court Justice Kennedy, Activist Republican Judges*, ASSOC. PRESS (Apr. 20, 2005)).

³⁴ See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 4-28 (2d ed. 2003).

³⁵ UN Charter, signed 26 June 1945, 59 Stat. 1031, T.S. 993 (entered into force 24 Oct., 24 1945).

³⁶ UN Charter, art. 55(c).

³⁷ UN Charter, art. 56.

struggle over the role the international community should play in promoting and protecting human rights.”³⁸

Buergenthal described human rights as a “dynamic and ongoing process that has its normative basis in the Charter of the United Nations. The Charter in turn has given rise to a vast body of international and regional human rights law and the establishment of numerous international institutions and mechanisms designed to promote and supervise its implementation.”³⁹

The United Nations Charter also mandated the creation of a commission to promote human rights. Thus the Commission on Human Rights was created in 1946.⁴⁰ Its first task was to create formal human rights standards, which ultimately became the Universal Declaration of Human Rights (UN Declaration).⁴¹ The UN Declaration is considered by many as one of the greatest achievements of the last century.⁴² Adopted in December of 1948, the catalysts for the UN Declaration, according to scholar Johannes Morsink, were the horrors of World War II and the Nazi Holocaust, which created a need for a “reaffirmation and reiteration of the existence of human rights.”⁴³ Enshrined within the UN Declaration’s 30

³⁸ Thomas Buergenthal, *The Nominative and Institutional Evolution of Human Rights*, 19 HUM.RTS. Q. 703, 703-04 (1997).

³⁹ *Id.*

⁴⁰ *See supra* note 4.

⁴¹ SCOTT N. CARLSON & GREG GISVOLD, *PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (2003).

⁴² *See, e.g.*, Michael J. Dennis, *The Fifty-Fourth Session of the UN Commission on Human Rights*, 93 AM. J. INT’L L. 1, 246 (1999); John Humphrey, *The Revolution in International Law of Human Rights, Address Before the American Bar Association*, in 4 HUMAN RIGHTS 205, 205 (1974).

⁴³ Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 257, 258 (1993).

articles are universal rights for all peoples including rights to political participation, privacy, and freedom of expression.⁴⁴

Although the UN Declaration has tremendous influence globally, it is not legally binding.⁴⁵ After drafting the UN Declaration, the Commission was assigned the task of creating a legally-binding human rights instrument. After years of negotiations among UN member states, two treaties were adopted in 1966: the International Covenant on Civil and Political Rights (the Political Covenant)⁴⁶ and the International Covenant on Economic, Social and Cultural Rights⁴⁷ (the Social Covenant). Both treaties clarify the rights set out in the UN Declaration. Collectively, the human rights provisions of the United Nations Charter, the UN Declaration, the Political Covenant, and the Social Covenant are referred to as the “International Bill of Human Rights.” The fact that about three quarters of the UN member states (more than 150 of the total 192 states)⁴⁸ have ratified the two legally-binding covenants demonstrates human rights’ universal appeal.⁴⁹ Since the ratification of these two

⁴⁴ The Universal Declaration of Human Rights, G.A. Res 217 A (III), UN Doc. A/RES/217 A (III) (Dec.10, 1948) [hereinafter UN Declaration].

⁴⁵ Some scholars argue that some or all of the provisions of the UN Declaration are now international customary law. See, e.g., John Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character in HUMAN RIGHTS: THIRTY YEARS AFTER THE DECLARATION* (B.G. Ramcharan ed., 1979); Louis B. Sohn, *Human Rights Law of the Charter*, 12 TEXAS INT’L L.J. 129 (1977).

⁴⁶ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 19, 1966) [hereinafter Political Covenant]. The covenant is a United Nations treaty based partly on the Universal Declaration of Human Rights. It consists of 51 articles, which guarantee the right to own property, the right to nationality, and the right to freedom of expression, among others.

⁴⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter Social and Cultural Covenant].

⁴⁸ UN Press Release, UN Doc. Org/1469 (July 3, 2006).

⁴⁹ Anne Peter, *Why Obey International Law? Global Constitutionalism Revisited*, 11 INT’L LEGAL THEORY 39, 48-49. For more on the historical evolution of human rights, see Buergenthal, *supra* note 39; Theodoor C. van Boven, *Distinguishing Criteria of Human Rights*, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 43 (Karel Vasak ed., vol. 1).

treaties, several more human rights treaties have been adopted under the auspices of the United Nations, including the Convention on the Elimination of All Forms of Discrimination Against Women,⁵⁰ the Convention on the Rights of the Child,⁵¹ and the Convention on the Elimination of All Forms of Racial Discrimination.⁵² Several regional treaties also have been created, including the African Charter on Human and Peoples' Rights,⁵³ the American Convention on Human Rights,⁵⁴ and the Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁵

Although specific human rights have been codified into legally-binding instruments, debates often arise regarding how individual human rights provisions ought to be interpreted. As human rights law evolves, new arguments are constantly being made regarding what constitutes specific human rights. These arguments often reinterpret specific human rights provisions as giving more expansive rights than originally intended. The arguments regarding rights of access to information – arguments made by legal scholars, nongovernmental organizations, and human rights tribunals and treaty committees alike –illustrate the evolutionary nature of human rights law.⁵⁶

⁵⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 513 [hereinafter Women's Convention].

⁵¹ Convention on the Right of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Children's Convention].

⁵² International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter Convention against Racism].

⁵³ African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter].

⁵⁴ American Convention, *supra* note 1.

⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (Nov. 4, 1950) [hereinafter European Convention].

⁵⁶ *See, e.g.*, Inter-Am. Ct. H.R. Advisory Opinion, The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law, OC-16/99, ¶ 114 (Oct. 1, 1999) (arguing that “[h]uman rights treaties are living instruments, the interpretation of which has to follow the evolution of times and the conditions of present-day life”).

Sources of Human Rights Law

There are several sources of international human rights law. For the purposes of this dissertation the following sources of law were examined: treaty law, which is a form of hard law and is legally binding, and soft law, which is influential but not legally-binding.⁵⁷

Treaties are the most common source of international human rights law. Treaties impose legally-binding obligations on countries that sign them.⁵⁸ According to international law, a treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”⁵⁹ It is important to note that not all treaties are called treaties. They also are known as conventions, agreements, or charters. What matters is that those states that ratify such an agreement agree to be bound by law. Although treaties are legally-binding, provisions for monitoring compliance vary widely. Some treaties, such as the European Convention, have created traditional judicial mechanisms such as the European Court on Human Rights.⁶⁰ Other treaties have committees that hear individual complaints and monitor compliance.⁶¹ Still others have no complaint or

⁵⁷ There also are customary law and “general principles of law.” Customary law is developed when provisions of international treaties, declarations, or resolutions become pervasive on an international scale. Some have argued that many of the provisions of the Universal Declaration of Human Rights, which is not legally binding, have become customary law. *See supra* note 45. These sources of law will not be examined because, in general, arguments that access is a human right under international customary law or general principles of law are not being made, and the evidence is difficult to retrieve.

⁵⁸ In 1969, a UN conference adopted the Vienna Convention on the Law of Treaties (VCLT), which codifies the rules nations were using in their treaty practices. 1155 U.N.T.S. 331 (May 23, 1969) [hereinafter VCLT].

⁵⁹ *Id.* at art. 2.

⁶⁰ European Convention, *supra* note 55, at arts. 33-4.

⁶¹ First Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 383 (Dec. 16, 1966).

compliance mechanisms at all. As will be discussed below, non-governmental organizations often play a powerful role in monitoring compliance with human rights treaties.

Soft law, though not legally-binding, can be very influential.⁶² Legal scholar Francis Snyder defined soft law as “rules of conduct which in principles have no legally binding force but which nevertheless may have practical effects.”⁶³ This “practical effect” can occur through the normative influence of soft law. The Universal Declaration of Human Rights is an example of soft law because it creates no obligations on governments, yet it has come to be very influential.⁶⁴ Soft law can include international declarations and the recommendations and general comments of committees created by human rights treaties, such as the Human Rights Committee, which hears individual complaints⁶⁵ and monitors⁶⁶ compliance of the Political Covenant.⁶⁷ The reports and decisions of the Inter-American Commission on Human Rights are also examples of soft law. It also can include the decisions of UN special rapporteurs.⁶⁸ It is within soft law that many of the arguments that access to information is a

⁶² See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000).

⁶³ Francis Snyder, *The Effectiveness of EC Law*, in IMPLEMENTING EC LAW IN THE UK (1995).

⁶⁴ See Morsink, *supra* note 43.

⁶⁵ If a state party to the Political Covenant is also a party to the First Optional Protocol, then the Committee can receive and consider communications from individuals claiming to be the victims of violations of any of the rights in the Covenant. First Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 383 (Dec. 16, 1966).

⁶⁶ Political Covenant, *supra* note 46, at art. 41.

⁶⁷ Dinah Shelton, *Commentary and Conclusions*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449-63, 451 (2000).

⁶⁸ *Id.*

human right are made. Human rights law is constantly evolving, and soft law can greatly influence the direction of that evolution.⁶⁹

The Role of Non-governmental Organizations

Non-governmental organizations contribute to human rights in three distinct ways. They help create the agenda regarding human rights laws and norms; they promote the importance of human rights; and they help monitor nations' compliance with human rights laws.

According to legal scholar Dinah Shelton, international human rights law generally “progresses through similar stages: issue identification, debate, adoption of nonbinding declarations, negotiation of binding agreements (treaties), establishment of supervisory institutions and procedures, and further elaboration of the rights through decisions and judgments of the supervisory institutions.”⁷⁰ Non-governmental organizations are influential at every step of this process. Shelton maintained that non-governmental organizations are the “engine for virtually every advance made by the United Nations in the field of human rights since its founding.”⁷¹

Menno Kamminga argued that NGOs “often play a key role in creating awareness of the need to adopt international instruments and even in the drafting of such instruments.”⁷²

⁶⁹ See A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L AND COMP. LAW Q. 901 (1999) (arguing that the “role of soft law as an element in international law-making is now widely appreciated, and its influence throughout the international law is evident”).

⁷⁰ Dinah Shelton, *Human Rights*, in MANAGING GLOBAL ISSUES 424, 438-42 (P.J. Simmons & Chantal de Jonge Oudraat eds., 4th ed. 2001).

⁷¹ *Id.*

⁷² Menno T. Kamminga, *The Evolving Status of NOGs under International Law: A Threat to the Inter-State System?*, in NON-STATE ACTORS AND HUMAN RIGHTS 93, 101 (Philip Alston ed., 2005).

Kamminga further maintained, “It is no exaggeration to suggest that some of the most important international legal instruments of recent years would not have seen the light without the input of NGOs.”⁷³

NGOs also are particularly influential in the creation and propagation of soft law. They are often the organizers of and major participants in international conferences that produce resolutions and declarations. For example, the 1992 Rio Declaration on Environment and Development, which enumerates specific rights to a healthy environment, is the product of such a conference.⁷⁴

Nongovernmental organizations also play a large role in monitoring states’ human rights practices. According to Ann Marie Clark, NGOs were involved at “crucial junctures in strengthening the expectation that states be held accountable for human right practices in the 20th century, as international and regional human rights norms were elaborated in response to problematic country cases.”⁷⁵ For example, some international nongovernmental organizations have pressured countries to add access-to-information provisions to their national constitutions in order to uphold the countries’ international human rights obligations. In 2005 the international NGO Article 19, Global Campaign for Freedom of Expression,⁷⁶

⁷³ *Id.*

⁷⁴ See United Nations Conference on Environment and Development (June 3-14, 1992), Rio de Janeiro, Braz., Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter Rio Declaration]. The declaration stems from the United Nations Conference on Environment and Development, also known as the Rio Summit, Earth Summit. Along with 172 governments, more than 2,400 NGOs participated. See United Nations Conference on Environment and Development (1992), *available at* <http://www.un.org/geninfo/bp/enviro.html> (last visited Mar. 23, 2008).

⁷⁵ Ann Marie Clark, *Non-Governmental Organizations and their Influence on International Society*, 48 J. OF INT’L AFFAIRS 507, 508 (1995).

⁷⁶ Article 19, the Global Campaign for Freedom of Expression, is an international NGO that promotes “freedom of expression and the free flow of information as fundamental human rights that underpin all others.” *Available at* <http://www.article19.org>.

wrote to the Zambian Constitutional Review Commission, which was re-writing Zambia's constitution, stating that Zambia's constitution should include an access-to-information provision in order to comply with international human rights law. The letter argued that "it is well-established under international law that democracy requires that the public has access to . . . information."⁷⁷ While it is still under debate whether "it is well-established" that access to information is, in fact, a universal human right under international human rights law,⁷⁸ it is clear that NGOs are vigorously propagating it as such.⁷⁹

This review of the history of human rights, sources of human rights law, and the role of nongovernmental organizations reveals the evolutionary nature of human rights. Consequently, it is clear that when exploring conceptualizations of a right of access in human rights law, it is important to examine not only hard law but also soft law and the contributions of non-governmental organizations. According to Hurst Hannum, "Whether 'hard' or 'soft' law, binding or nonbinding, each set of norms and principles contributes to the evolving definition of human rights."⁸⁰

⁷⁷ Nov. 8, 2005, letter from Article 19 Global Campaign for Free Expression to the Secretariat of the Constitutional Review Commission of Zambia, *available at* <http://www.article19.org/pdfs/letters/zambia-constitution-letter.pdf> (last visited Mar. 23, 2008).

⁷⁸ *See infra* p. 22.

⁷⁹ Ultimately, the Zambian government rejected the proposal to add a provision guaranteeing access to information, arguing that such a provision would compromise national security. *See Government opposing constitutional guarantees for access to information, press freedom and confidentiality of sources*, *available at* <http://www.ifex.org/frleftz/content/view/full/70237/> (last visited Apr. 5, 2008).

⁸⁰ Hurst Hannum, *Implementing Human Rights: An Overview of NGO Strategies and Available Procedures*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 19* (Hurst Hannum ed., 4th ed. 2004).

Access to Information as a Human Right: A Review of the Literature

There exists a large body of literature discussing both the growth of transparency as an international norm and the importance of access to government information.⁸¹ However, very little scholarly work examines the proposition that access to government information is a human right, and only one author has attempted to delineate explicit conceptualizations of such a right. Although scholarly literature directly relevant to this dissertation is scarce, the literature does include writings by three prominent national and international judges who indicate that the concept of access to information as a human right may be a significant area for more in-depth analysis. As of this writing, only one legal expert, former judge for the International Court of Justice C.G. Weerantmantry, has endeavored to identify various conceptualizations of access to information as a human right. The other scholars undertaking this topic mainly investigate whether, as a matter of law, access to information is a human right. Several find that access to government information as a human right is not broadly recognized in international human rights law; nonetheless, they asserted that a right of access is emerging. Other scholars argue that access currently is a human right. Although these scholars, with the exception of Weerantmantry, do not explicitly discuss conceptualizations of access in their analyses, various conceptualizations often are implied within their work.

This literature review will begin with a discussion of Weerantmantry's conceptualizations of access to information as a human right. Then the literature review will examine additional literature that implies four distinct conceptualizations. These conceptualizations are freedom of expression, the right to health, the right to a healthy environment, and the right to information privacy.

⁸¹ See generally Florini (2003), Florini (2007), Holzner & Holzner, *supra* note 8.

Conceptualizing Access

Legal scholar and former judge for the International Court of Justice C.G.

Weeramantry is the only legal expert who explicitly articulated different conceptualizations of access.⁸² Weeramantry argued that a right to information has been evolving over time in human rights law. He stated that “concepts and procedures have yet to be developed considerably but the first broad brush strokes delineating the right have appeared on the canvas of human rights.”⁸³ There are several “conceptual underpinnings” of a right to know, he argued, and they need to be delineated in order to understand “[the right’s] status in international law and domestic legal systems.”⁸⁴ Weeramantry also argued that although the expression “right to know” is well established in legal scholarship, it generally has been understood in terms of political rights, for example, a right linked to freedom of expression. He maintained that “an examination of the right to information will reveal at once that there are numerous facets of this vast topic which range beyond the purely political, into the realm of social, economic, cultural and technological information.”⁸⁵

Although Weeramantry use the term “conceptual underpinnings,” not “conceptualization,” he did delineate six conceptualizations of access to information as a human right. Weeramantry’s conceptualizations are based on his view that a right of access is an ancillary right to a variety of other human rights, which can be found at the global, national, and individual level.

⁸² Weeramantry, *supra* note 26, at 111.

⁸³ *Id.*

⁸⁴ *Id.* at 99-100.

⁸⁵ *Id.* at 101.

First, at the international level, Weeramantry conceptualized access to information as ancillary to the human right to world peace. If world peace is a human right, he argued, this right is incomplete without a right to know. He argued that “[d]istorted or incomplete information results in distorted or unbalanced attitudes and from these result tensions of international peace.”⁸⁶ Second, at the national level, Weeramantry conceptualized access to information as ancillary to the right to self-governance. “[I]f self-government is a human right,” he argued, “it can therefore be similarly argued that access to information on which self-government depends is likewise a human right.”⁸⁷ This is because self-government relies on the consent of informed citizens. If citizens are not informed, they cannot truly consent to be self-governed. Third, on an individual level, Weeramantry conceptualized access to information as an ancillary right to numerous rights such as the right to health and a healthy environment. In all cases, these rights require “ancillary rights” to the information necessary for the exercise of the right in question.⁸⁸

Weeramantry’s fourth conceptualization is the right to information about all human rights. In order for any given human right to be exercised, citizens must have access to information about that specific right; therefore, governments are obligated to inform citizens about human rights.⁸⁹ The fifth conceptualization is individuals’ right to personal information gathered about them by governments.⁹⁰ The sixth conceptualization is the right to information needed to ensure a “right to communicate.” Weeramantry argued that the right to

⁸⁶ *Id.*

⁸⁷ *Id.* at 102.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See infra* pp. 101-28, for a discussion of information privacy.

communicate and the right of access to information are corollaries of one another. Although Weeramantry did not define the right to communicate, his discussion indicates that the right to communicate is based on the right to freedom of expression. This right is guaranteed for individuals as well as media.

In discussing these conceptualizations, Weeramantry maintained that a right to information imposes obligations not only on government, but also on “all those who withhold information which an individual is entitled to receive – be they governments, corporations, quasi-governmental agencies or individuals.”⁹¹ This suggests that a right to information also applies to private entities, such as corporations.⁹²

Unlike the scholars whose works will be examined next, Weeramantry envisaged rights of access in sweeping terms. These rights include both individual and collective rights. For example, the right to world peace is a collective right, whereas the right to information privacy exists as an individual right. Weeramantry also understood a right of access in terms of social and economic rights, not just political rights. Several of the conceptualizations outlined by Weeramantry also are suggested by several of the scholars discussed below.

Freedom-of-Expression Conceptualization

Seven scholars specifically discussed a human right of access to government information as being linked to the political right of freedom of expression. Only one scholar argued that access to information is a fundamental human right. The other scholars argued

⁹¹ Weeramantry, *supra* note 26, at 111.

⁹² See Ejan Mackaay, *The Public's Right to Information*, in INFORMATION LAW TOWARD THE TWENTY-FIRST CENTURY 167, 171-72 (Willem F. Korthals Altes, et al. eds., 1991) (discussing a right to information from non-governmental sources).

that access to information is an emerging right. These arguments suggested several rationales for linking a right of access to freedom of expression, all of which envisage access purely as a political right. The rationales include the concepts that access is essential for self-governance, prevention of government abuse, and direct political participation in decision-making. Also, similar to Weeramantry's analysis, most scholars understood access as a supporting right. Only one scholar explicitly stated that access is a right with an independent value. Arguments discussing access to information as a human right are discussed first followed by the suggested rationales for linking access to freedom of expression.

International lawyer and legal scholar Toby Mendel has been at the forefront of arguing that access to information is a human right. As head of the law program of the nongovernmental organization Article 19, the Global Campaign for Freedom of Expression,⁹³ he has authored numerous reports on access to information as a human right, many in cooperation with United Nations programs. Although his scholarly publications are limited, his international influence regarding access to information issues is not.⁹⁴

According to Mendel in the *Comparative Media Law Journal*, governments are under increasing obligation to give effect to the right to freedom of information.⁹⁵ After surveying several international human rights instruments⁹⁶ and national court rulings, he concluded that

⁹³ Article 19, *supra* note 76.

⁹⁴ Mendel has authored numerous papers and books for the United Nations, including a model Freedom of Information Law that was adopted by the UN Human Rights Committee. He also regularly presents workshops on access to information.

⁹⁵ Toby Mendel, *Freedom of Information: An Internationally Protected Human Right*. 1 COMP. MEDIA L.J., 39 (2003).

⁹⁶ The European Court of Human Rights; the International Covenant on Civil and Political Rights; the UN Commission on Human Rights, and the UN Special Rapporteur on Freedom of Opinion and Expression.

“freedom of information is now widely recognized as a fundamental human right.”⁹⁷ He maintained that “[t]he primary human right or constitutional source of the right to freedom of information is the fundamental right to freedom of expression.”⁹⁸ As an example of the right to freedom of information grounded in the right to freedom of expression, Mendel referred to article 19 of the Political Covenant.⁹⁹ He argued that article 19 implies a right to freedom of information:

[F]reedom to *receive* information prevents public authorities from interrupting the flow of information to individuals and . . . freedom to *impart* information applies to communications by individuals. It would then make sense to interpret the inclusion of freedom to *seek* information, particularly in conjunction with the right to receive it, as placing an obligation on government to provide access to information it holds.¹⁰⁰

Former Chief Justice of the High Court of Australia Anthony Mason also argued that the relationship between freedom of expression and freedom of information is evident in international human rights treaties, such as the Political Covenant, which include the freedom to “seek, receive and impart information.”¹⁰¹ That being said, after careful examination of article 19 of the Political Covenant,¹⁰² Mason concluded that as a matter of human rights law, access to government information is not a human right. Instead the language of article 19 only implies a right to receive otherwise “generally accessible information,” not an obligation on governments to impart information, unless that information pertains to the individual

⁹⁷ Mendel, *supra* note 95, at 66.

⁹⁸ *Id.* at 40.

⁹⁹ *See* Political Covenant, *supra* note 46.

¹⁰⁰ Mendel, *supra* note 95, at 40.

¹⁰¹ Anthony Mason, *The Relationship Between Freedom of Expression and Freedom of Information*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* 225, 225 (Jack Beatson & Yvonne Cripps eds., 2000). *See* Political Covenant, *supra* note 46, at art. 19(2).

¹⁰² *Id.* at 225.

seeking the information.¹⁰³ Nonetheless, Mason maintained that the “essentiality of freedom of expression and information to modern liberal democratic government” as well as the emergence of freedom of information legislation and disclosure requirements of international institutions “may lead to the implication in article 19 of such an obligation.”¹⁰⁴

Alasdair Roberts, legal scholar and international freedom of information expert, also acknowledged that access to government information, although currently not a human right, is an emerging one.¹⁰⁵ Roberts also argued that Article 19 of the Political Covenant¹⁰⁶ implies that the right to information is an “adjunct of the right to freedom of expression and opinion.”¹⁰⁷ Although currently there exists no positive obligation on governments to provide information, he argued, such an obligation “would not impose a burden greater than that already imposed by existing policies to promote freedom of expression.”¹⁰⁸ Governments have often interpreted the right to freedom of expression as creating positive obligations on government, such as establishing public broadcasting facilities or restricting media concentration; therefore, he argued, it is not inconceivable that a positive obligation to disclose information could emerge.¹⁰⁹

Current European Court of Human Rights (European Court) Judge Loukis Loucaides also wrote that there is an emerging trend to recognize access to government information as a

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 227.

¹⁰⁵ Alastair Roberts, *Structural Pluralism and the Right to Information*, 513 U OF TORONTO L.J. 243, 260 (2001).

¹⁰⁶ See Political Covenant, *supra* note 46.

¹⁰⁷ Roberts, *supra* note 105, at 259.

¹⁰⁸ *Id.* at 261.

¹⁰⁹ *Id.*

human right.¹¹⁰ He also understood the right to information and the right to freedom of expression as corollaries of one another.¹¹¹ Writing in 1995, he acknowledged that the European Court had not ruled that governments have a positive obligation to provide information, but he also stated that the court had not ruled it out.¹¹² Nonetheless, Loucaides argued that article 10 of the European Convention,¹¹³ the freedom of expression provision,¹¹⁴ *should* include positive obligations on governments. He stated:

[I]t is submitted that the correct approach should be that the State has an obligation to impart information in areas of public interest to the press and to all other persons that have a legitimate interest in such information except in cases where the imparting information is restricted by law in accordance with the provisions of the second paragraph of Article 10. This should be so in order to make the right of the individual and the public to receive information and ideas meaningful.¹¹⁵

After surveying the legal landscape of U.S. Supreme Court, Swiss Supreme Court, and European Court of Human Rights decisions, legal expert Ton A.L. Beers also concluded that although access to government information is not yet a fundamental right, it is an “emerging”

¹¹⁰ LOUKIS G. LOUCAIDES, *ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS* (1995).

¹¹¹ *Id.* at 20.

¹¹² In 1998 the European Court ruled that article 10 generally does not impose a positive obligation on governments to impart information. It only prohibits governments from interfering with a person’s freedom to receive information that others are willing to impart. Eight of the 20 judges suggested in separate opinions that positive obligations to collect and disseminate information might exist in some circumstances. *Guerra and Others v. Italy*, Eur. Ct. H.R. (Feb. 19, 1998) *available at* <http://www.echr.coe.int/eng>. According to Giorgio Malinverni, the ECHR Ad Litem Judge representing Switzerland, drafters of article 10 purposely left out the right “to seek” information because of fear that it might create positive obligations on governments. Giorgio Malinverni, *Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights*, 4 HUM. RTS. L.J 443, 449 (1983).

¹¹³ *See* European Convention, *supra* note 55.

¹¹⁴ *Id.* at art. 10 (stating in part, “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.”)

¹¹⁵ Loucaides, *supra* note 110, at 22-23.

right.¹¹⁶ Legal expert Ejan Mackaay also argued that currently there is no fundamental human right of access to information, but he maintained, the right does exist “in principle, in furtherance of the openness of government required in a society based on democracy and the rule of law.”¹¹⁷

In making their arguments about access to information as a human right, these authors implied several rationales for linking a right of access to the right to freedom of expression. All of these rationales related to the process of democratic self-governance. Some arguments, such as those of Mendel and Beers, include several rationales. Other scholars’ arguments were more specific, such as access preventing government abuse and promoting political participation.

Mendel argued that without freedom of information, democracy and the entire system that protects human rights will not function properly. According to Mendel, this makes access to information a “foundational human right, upon which all others depend.”¹¹⁸ He asserted that this right to information can be broken down into three distinct, yet related, rights. The first is a broad right of access to information from public bodies. According to Mendel, this right “reflects the principle that public bodies do not hold information on their own behalf, but rather for the benefit of all members of the public.”¹¹⁹ Only an overriding public interest in withholding information can limit this right. The second right is the right to receive important

¹¹⁶ Ton A.L. Beers, *The Public’s Right to Information*, in *INFORMATION LAW TOWARD THE TWENTY-FIRST CENTURY* 181, 214 (Willem F. Korthals Altes et al. eds., 1991).

¹¹⁷ Mackaay, *supra* note 92, at 175.

¹¹⁸ Mendel, *supra* note 95, at 40.

¹¹⁹ *Id.* at 39.

information from the government. This right creates a positive obligation on governments to “publish and widely disseminate key categories of information of public interest.”¹²⁰ Although Mendel gave no examples of this right, it seems likely that information on environmental hazards or human rights obligations would be included in this right. Mendel referred to the third right, a “right to truth,”¹²¹ as an emerging right. This right requires governments to give the public accurate facts about “serious incidents of human rights abuse and other traumatic social events, such as a major rail disaster or sickness.”¹²² Mendel argued that this right goes beyond simply allowing the public access to public documents; it requires that governments thoroughly investigate the incident and make the results public.¹²³ Mendel’s rationale for linking freedom of expression and freedom of information is the broad concept that information is essential for democratic functioning.

Just as Mendel did, Beers distinguished among different types of access. He argued that in order to understand access rights, it is important to differentiate among types of

¹²⁰ *Id.*; contra Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23 *MIJIL* 977, 977 (2002) (arguing that “[o]ne might expect to encounter such a privilege in our victim-centered system of international human rights protection – especially within the progressive jurisprudence of the Inter-American Court. Yet, it is simply not to be found as a substantive, explicit right.”).

¹²¹ Many scholars have argued that governments have an obligation to investigate and prosecute gross human rights violations as a necessary step in the remedial process, and some have argued that these obligations exist under international customary law. See generally Viviana Krsticevic, *How Inter-American Human Rights Litigation Brings Free Speech to the Americas*, 4 *SW. J. L. & TRADE AM.* 209 (1997); Juan Méndez, *Responsibility for Past Human Rights Violations: An Emerging “Right to the Truth”*, in *TRUTH AND JUSTICE: IN SEARCH OF RECONCILIATION IN SURINAME* 43 (Alfredo Forti & Georgine de Miranda eds., 1999); Jo Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 *B.U. INT’L L.J.* 333 (1994).

¹²² Mendel, *supra* note 95, at 39

¹²³ *Id.*

access.¹²⁴ Beers found that there is official access, party access, personal access, and public access.¹²⁵ Official access refers to the right of public officials to obtain government documents. For example, under official access, legislators are often granted access to highly sensitive documents to which ordinary citizens are denied access. Party access is access to documents that are of interest to a party engaged in an administrative or judicial procedure. The right to one's own personal information in control of the government is the right of personal access. Finally, public access refers to the right of all members of the public to access government information.

Beers argued that these distinctions are important for several reasons. First, the legal basis and purpose for granting access often changes based on who receives the information: official access promotes the “proper fulfillment of the duties of the public authorities;” party access ensures the rights of parties regarding legal matters; and personal access is aimed at protecting the right to privacy.¹²⁶ There are six basic rationales for public access to documents, according to Beers. These are: furthering free expression, thwarting abuse of government power, ensuring an informed electorate, improving public debate, enabling effective participation in the creation of law and policy, and furthering good governance

¹²⁴ Beers also defined the terms “government” and “government information.” Government “signifies all activities of a legislative, executive and judicial nature on the national, regional and local levels.” Beers distinguished between two types of government information, “documentary” information and “non-documentary” information. The former includes any written record or recording, whereas the latter consists of “any information not documented on a record or recording which can be obtained when one is present at a meeting or a proceeding, as well as by visiting a building or some other facility.” Examples of the latter include non-recorded statements made during a meeting, the atmosphere in a courtroom, and conditions in a prison. Beers, *supra* note 116, at 180-81.

¹²⁵ *Id.* at 178.

¹²⁶ *Id.*

practices.¹²⁷ Second, he maintained that the “value and weight of the rights can vary, which may have an influence on the scope of each right and the corresponding degree of secrecy.”¹²⁸

Mackaay and Loucaides specifically argued that a right of information is essential to thwart government abuse. According to Mackaay, “[T]he origin of the public’s right to information . . . [i]s born out of struggle against the abuse of government power, of which secrecy is one element.”¹²⁹ Loucaides argued that without a presumption of government openness, the “way will be open to abuses by the State”¹³⁰ One of the main functions of openness is the effective functioning of democracy, he maintained, “through a proper exercise of political rights and a control of the government by a well informed press and public.”¹³¹

Both Mason¹³² and Joseph Stiglitz, a Columbia University professor and former senior vice president and chief economist of the World Bank, argued that a right of access to information is essential to promote democratic participation. According to Stiglitz, the “meaningful participation in a democratic process requires informed participants.”¹³³ In a democratic society, he reasoned, there is a basic right to know about what the government is doing and why.¹³⁴

¹²⁷ *Id.* at 179.

¹²⁸ *Id.*

¹²⁹ Mackaay, *supra* note 92, at 170.

¹³⁰ Loucaides, *supra* note 110, at 19.

¹³¹ *Id.*

¹³² Mason, *supra* note 101, at 230.

¹³³ Joseph Stiglitz, *On Liberty, the Right to Know, and Public Disclosure: The Role of Transparency in Public Life*, Oxford Amnesty Lecture Address at Oxford U.K. (Jan. 27, 1999) (transcript available at http://www2.gsb.columbia.edu/faculty/jstiglitz/download/2001_On_Liberty_the_Right_to_Know_and_Public.pdf).

¹³⁴ *Id.*

Stiglitz also argued that information “gathered by public officials at public expense is owned by the public.”¹³⁵ This argument is similar to Mendel’s contention that governments hold documents in the interest of the public.¹³⁶ Mason further argued that in non-democratic jurisdictions the introduction of rights to freedom of expression and information rights can lead to democratic governance.¹³⁷

Although most of the scholars agreed that access to information currently is not a human right, most argued that it is an emerging right linked to the right of freedom of expression. Their arguments indicated several rationales for linking a right of access to freedom of expression. These included facilitating democracy, prevention of government abuse, and political participation. These rationales demonstrate that the authors understood a right of access to be a political right in the sense that it is necessary to enable effective democratic governance. One author suggested that access rights were not limited to citizens of democratic societies. In fact, he argued, the enforcement of freedom of expression and access rights in nondemocratic cultures could actually be a catalyst for democratic change. Most scholars understood access as a supporting right in that it was necessary to give effect to other rights. This is in line with the literature on access to environmental and health information. Only one scholar explicitly stated that access is a right with an independent value.

¹³⁵ *Id.*

¹³⁶ Mendel, *supra* note 95, at 39.

¹³⁷ Mason, *supra* note, at 230.

Right-to-Health Conceptualization

One scholar has written about the relationship between the right to health and the right to information.¹³⁸ Legal expert Sandra Coliver specifically discussed women's right to reproductive health information. Just as some of the previous scholars have argued, Coliver maintained that the right to freedom of expression includes a right to information.¹³⁹ She also conceded that historically the right of access to information has not included positive obligations on government to provide information. But when rights of freedom of expression and access to information are taken together with a cluster of several other recognized human rights,¹⁴⁰ she argued, "concrete and immediate obligations on governments" emerge.¹⁴¹ According to Coliver, the rights to freedom of expression and information acts as a "channel through which other fundamental, though less well-defined, rights can be made the subject of immediate protection by" international and national courts.¹⁴² The government obligations created by this cluster of rights include not only negative obligations, such as not interfering with abortion information, but also positive obligations on government to provide the "information necessary for reproductive health and choice."¹⁴³ Citing several decisions from

¹³⁸ Cf. Geoffrey A. Hoffman, *In Search of an International Human Right to Receive Information*, 25 LOY. L.A. INT'L & COMP. L. REV. 165 (2003) (arguing that several international conventions give women the right to receive health and reproductive information, but these rights do not necessarily create positive obligations on governments to provide information).

¹³⁹ Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice Under International Law*, in THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION, 38 (Sandra Coliver ed., 1995).

¹⁴⁰ These rights comprise: freedom of expression and information, equality and non-discrimination, right to life, right to health, right to dignity, liberty and security, right to private and family life, and the right to decide freely and responsibly on the number and spacing of one's children. *Id.* at 45-57.

¹⁴¹ Coliver, *supra* note 139, at 39.

¹⁴² *Id.* at 41.

¹⁴³ *Id.* at 45.

regional human rights courts,¹⁴⁴ she argued that these positive obligations “draw support from the growing recognition that governments are obliged to take positive measures to ensure that individuals are able to exercise their fundamental rights.”¹⁴⁵

Coliver enumerated several affirmative government obligations regarding women’s reproductive health and choice, one of which specifically requires governments to proactively provide information. According to Coliver, “Governments are obliged to take concrete steps towards providing adequate and accessible information, education and counseling about reproductive health, especially to adolescents, women in rural areas and other at high risk.”¹⁴⁶ These specific obligations, she argued, stem directly from the combined rights of freedom of expression and information, health, privacy, and the right to be free from discrimination.¹⁴⁷

Although a right to health is a social right as opposed to a political right, Coliver concluded, in part, that the rights to freedom expression and information are necessary to give effect to this right. Again, the right of access is understood as a supporting right. Coliver also argued that governments have an obligation to proactively provide important information. This is similar to arguments made by the following scholars’ discussions of a right to environmental information.

¹⁴⁴ See, e.g., *Gaskin v. United Kingdom*, Eur. Ct. H.R. (ser. A) ¶ 38 (1989) (stating that “there may be positive obligations inherent in an effective ‘respect’ for family life”); *Velásquez Rodríguez Case*, Inter-Am. C.H.R.(ser. C), No. 4, ¶ 172 (July 29, 1988) (ruling that “an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State” and that the state’s responsibility was not predicated on the act itself, but instead was due to “the lack of due diligence to prevent the violation or to respond as required by the Convention”).

¹⁴⁵ Coliver, *supra* note 139, at 62.

¹⁴⁶ *Id.* at 70.

¹⁴⁷ *Id.* at 71.

Right-to-a-Healthy-Environment Conceptualization

There is a growing trend toward recognizing a human right to a healthy environment,¹⁴⁸ and three scholars specifically argued that a right to a healthy environment includes a right of access to information. This right creates a positive obligation on governments to provide environmental information to the public.¹⁴⁹

According to legal scholar Sumudu Atapattu, the source of this right to information stems from citizens' rights to participate in environmental decision-making processes and the right to "seek redress for the vindication of environmental rights . . . recognized" under international environmental law.¹⁵⁰ In this light, according to Atapattu, the purpose of the right to information is to promote "principles of transparency and accountability which are essential in a democratic society."¹⁵¹ Legal scholar Richard Desgangne agreed that access to information about the environment facilitates citizen engagement in environmental decision-making. Desgangne understood a right to information as one of the procedural "environmental rights." These procedural rights comprise a right to information about activities that may cause environmental harm for persons likely to be affected, a right to

¹⁴⁸ See Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 96 (2002); Richard Desgangne, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263 (1995); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000). See generally Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359 (2004).

¹⁴⁹ See Rio Declaration, *supra* note 74, and Aarhus Convention, *infra* note 526 and accompanying text.

¹⁵⁰ Atapattu, *supra* note 148, at 96.

¹⁵¹ *Id.* at 96.

participate in the decision-making process when actions are likely to cause environmental harm, and a right of recourse before administrative or judicial agencies.¹⁵²

After analysis of the European Convention, Desgangne concluded that three separate rights to environmental information exist under the convention. First, there is right of access to information held by all public authorities. Second, there exists a positive obligation on governments to provide environmental information without the need for a formal request. Finally, a right to a healthy environment creates a positive obligation on governments to provide opportunities for public participation in environmental decision-making. This includes providing the information necessary for effective public engagement.¹⁵³ In other words, governments must not only provide information when it is requested, they must also proactively disseminate information.

Legal scholar Michelle Leighton Schwartz argued that a right to environmental information is an evolving right.¹⁵⁴ Like several of the previously discussed scholars, Schwartz based her argument on the idea that access to information is a necessary component of the right to political participation. For this right to be fully realized, she argued, governments must disclose relevant information when citizens request it, as well as proactively provide information when necessary to avert “potentially serious harm.”¹⁵⁵

According to Schwartz, this right stems from two separate sources of law. The first is the fundamental right to freedom of expression recognized in many international

¹⁵² Desgangne, *supra* note 148, at 285.

¹⁵³ *Id.* at 286.

¹⁵⁴ Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 369-70 (1993).

¹⁵⁵ *Id.* at 371.

instruments.¹⁵⁶ She acknowledged that historically the right to freedom of expression has not obligated governments to disclose information sought by the public. Nevertheless, she argued that the right of individuals “to seek, receive and impart information and ideas through any media regardless of frontiers”¹⁵⁷ should include a “‘right of access’ to government-held environmental information where that information would affect the health of a specific individual or group of individuals.”¹⁵⁸ Similar to Weeramantry’s articulation of economic and social rights, Schwartz understood freedom of expression as a supporting right to the right to a healthy environment.

Schwartz took her argument one step further than Atapattu and Desgagne and argued that a second potential source of law providing a right to environmental information is international customary law.¹⁵⁹ Although, historically, international environmental law has been limited to obligations that governments have toward one another, according to Schwartz, there is an emerging trend in customary international law that “recognizes the informational duties that states owe to individuals within and outside their borders.”¹⁶⁰ Schwartz further argued that numerous international instruments advance governmental obligations to ensure public access to environmental information and decision-making,¹⁶¹ concluding:

Read together, the great number of treaties and international instruments that enshrine this principle evidence an evolving right under customary

¹⁵⁶ See, e.g., UN Declaration, *supra* note 44, at art. 19; Political Covenant, *supra* note 46, at art. 19(2).

¹⁵⁷ Schwartz, *supra* note 154.

¹⁵⁸ *Id.* at 371.

¹⁵⁹ See *supra* note 57 for an explanation of customary law.

¹⁶⁰ Schwartz, *supra* note 154, at 371.

¹⁶¹ See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context, 30 I.L.M. 800 (Feb. 25, 1991); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP Doc. UNEP/IG.80/3, art. 13 (Mar. 22, 1989); Rio Declaration, at *supra* note 74.

international law – a right that obligates states to provide the public with information and access to governments’ environmental decisions. This right should be incorporated into human rights doctrine, because it is fundamental to the enjoyment and protection of other human rights.¹⁶²

Similar to several of the previously discussed scholars, these authors view a right of access as facilitating political participation. However, in this conceptualization, the type of information involved is quite narrow. Desgangne referred to access as a procedural right. This is similar to the idea of access as a supporting right proposed by other scholars. Just as Coliver argued, both Desgangne and Schwartz concluded that a right to environmental information also includes positive obligations on government to proactively provide crucial information.

Information-Privacy Conceptualization

Four authors suggested an information-privacy conceptualization that involves the right to obtain personal information held by the government. According to legal scholars David Banisar and Simon Davies, a general right to privacy is a growing international trend. They observed that “nearly every country in the world recognizes a right of privacy in their constitution.”¹⁶³ Rights to privacy also are recognized in international and regional human rights treaties. The authors asserted that “privacy has become one of the most important human rights issues of the modern age.”¹⁶⁴ A more recent related trend is to recognize rights

¹⁶² Schwartz, *supra* note 154, at 371.

¹⁶³ David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Law and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 4 (1999).

¹⁶⁴ *Id.* at 3.

of access to personal information held by the government.¹⁶⁵ For example, the Chechnyan Constitution states, “[C]ollection, storage, utilization and dissemination of information about the private life of individuals is not allowed without their prior consent.”¹⁶⁶ This idea of information privacy involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records.

Several of the previously discussed authors suggested a human right of access to personal information held by the government. Both Mason and Weeramantry argued that the rapid growth of information technologies has created a significant relationship between freedom of information and rights to privacy that needs to be addressed. This relationship, Mason argued, is one of the more important developments in understanding access to information as a human right.¹⁶⁷ According to Weeramantry, the “dramatic increase in our ability to collect and store data” is leading to an “information-based society . . . in which information means power.”¹⁶⁸ This power can be used responsibly only in the context of a “right to full information, on which that power depends.”¹⁶⁹ Weeramantry’s discussion of this right suggests that people have a right to personal information that others – governments or corporations – gather about them. Beers’ framework, discussed above, also suggests information privacy as a conceptualization of access to information.¹⁷⁰

¹⁶⁵ *Id.* at 6.

¹⁶⁶ Chechnyan CONST., at art. 21.

¹⁶⁷ Mason, *supra* note 101, at 239.

¹⁶⁸ Weeramantry, *supra* note 26, at 102.

¹⁶⁹ *Id.*

¹⁷⁰ Beers, *supra* note 116, at 178.

Conclusion

Several scholars have assessed whether access to government information is a human right. Although not always explicitly stated, several conceptualizations were suggested from these arguments. Of these conceptualizations, four main conceptualizations were identified. These comprise: freedom of expression, right to health, right to a healthy environment, and right to information privacy.

Most of the scholars understood a right of access to information as a supporting right that is essential in order for other human rights to be truly realized. Some scholars referred to a right of information as an “ancillary right”; another called it a “procedural” right. Both imply that access to information plays a subordinate role to the right or rights that it is facilitating. Nonetheless, the arguments make clear that other human rights are dependent on access to information in order to ensure that human rights are guaranteed. Mendel referred to a right of access as a “foundational right,” which, based on the above arguments, seems more accurate.

With the exception of Weeramantry, none of the scholars attempted to explicitly delineate conceptualizations of a human right of access to information. It is clear from the literature that access as a human right is an emerging concept, yet there is no consensus regarding the rationales and limitations of the right and to whom the right applies. Clearly, there is a need for research that precisely identifies, analyzes, and compares the various emerging conceptualizations of access as a human right. That is the goal of this dissertation.

Research Questions

This dissertation addresses the following research questions:

RQ1: How has access to information as a human right been conceptualized?

To fully explicate each conceptualization identified through this research, the following subset of research questions is asked of each conceptualization:

- A. What is the rationale behind the right of access?
- B. Who has the right to information?
- C. To what type of information does the right apply?
- D. What are the limitations of the right?

RQ2: What are the relative strengths and weaknesses of each conceptualization?

RQ3: Which conceptualization (or set of conceptualizations) holds the greatest promise for ensuring the broadest right of access to the information?

Method

This dissertation presents a legal analysis of human rights treaties, documents, and reports from international and regional human rights entities; decisions of regional human rights courts; and materials from nongovernmental organizations that promote access to information (see Appendix I for a detailed list). Documents were assessed for explicit and implicit references to access to government information as a human right. Specifically, the dissertation includes analysis of documents from four broad sources.

The first source of documents is the United Nations Charter-based bodies. UN Charter-based bodies are entities created by the UN's founding document, the Charter of the United Nations. These documents include minutes and resolutions of the UN General Assembly and documents of the Human Rights Council and Commission on Human Rights. In 2006, the council replaced the commission. The mission of the council, as well as the now-defunct commission, is to address human rights violations. This is accomplished, in part, through reports from nations regarding the status of human rights in their countries and reports about individual nations' human rights compliance from the council (and commission prior to 2006). This dissertation analyzes these reports as well as the minutes of meetings during which they were discussed.

The UN international human rights treaties and their monitoring bodies are the second source of documents. Currently, there are six UN international human rights treaties in force (see Appendix I). Each of these treaties has a committee that monitors implementation of the treaty. The committees are created in accordance with the provisions of the specific treaty that they monitor. Similar to the Human Rights Council and the Commission on Human Rights, the committees monitor compliance and address human rights violations. The main

difference is that the committees' mandates are limited to the specific treaty that created them. The treaty committees generate several different types of documents. These include general comments, which interpret specific provisions of the treaty; annual reports about the work of the committee, which are submitted to the UN General Assembly; reports to state signatories of the treaty regarding compliance; and minutes of meetings with state signatories regarding state compliance. State signatories also provide reports about their compliance to the committee. One UN treaty, the International Covenant on Civil and Political Rights, empowers the committee to hear individual complaints and issue opinions regarding state violations of the treaty provisions. Only countries that signed the Optional Protocol are subject to the complaint process. All of these documents – general comments, the reports, minutes, and opinions – are included in the analysis.

The third source of documents is the three regional human rights treaties – the American Convention on Human Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples Rights – and their monitoring bodies. Two of these treaties have human rights courts that hear individual complaints – the European Court of Human Rights and the Inter-American Court of Human Rights. Each of these treaties also has a body that issues reports regarding states' compliance.

Finally, this study assessed documents of seven international nongovernmental organizations (see Appendix I). These organizations were chosen because they are the most prominent and influential organizations in this area. This was determined by their high profiles within the human rights literature and UN documents.

Only documents generated after 1985 were assessed because, according to preliminary research, no pertinent documents were generated before 1985. This also is consistent with the

development of a global movement promoting access to information, which began in the late 1980s to early 1990s.¹⁷¹

Documents from United Nation entities and the treaties were retrieved from three different UN databases.¹⁷² Documents from the three regional human right instruments were retrieved from their online databases.¹⁷³ Documents pertaining to the American Convention on Human Rights were limited to those documents that have been translated into English. Documents from the nongovernmental organizations were collected by searching their websites¹⁷⁴ and the database Factiva, which includes press releases and news from nongovernmental organizations.

Study Limitations

This dissertation has several limitations. First, it is beyond the scope of this research to determine the specific parameters of the human right of access to information in international or regional human rights law. Instead the focus was on identifying, analyzing, and comparing the various conceptualizations pertaining to access to information as a human right.

¹⁷¹ See *infra* pp. 2-3 and accompanying notes 8-16.

¹⁷² The UN Official Document System database at <http://documents.un.org/welcome.asp?language=E>; the UN Bibliographic Information System at <http://unbisnet.un.org/>; and the UN treaty database at <http://www.unhchr.ch/tbs/doc.nsf>.

¹⁷³ These include: European Court of Human Rights and the European Commission of Human Rights from HUDOC Portal at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>; Council of Europe at <http://www.coe.int/t/e/general/search.asp>; Inter-American Court of Human Rights at <http://www.corteidh.or.cr/buscadores.cfm>; Inter-American Commission at <http://www.cidh.org/search/advcidh.asp>; American Human Rights Database available at <http://www.wcl.american.edu/humright/digest/>; African Commission on Human and Peoples' Rights at http://www.achpr.org/english/_info/news_en.html.

¹⁷⁴ Because not all websites have high-quality search engines, these searches were conducted through Google Advance Search, which allows one to search a specific website or domain. http://www.google.com/advanced_search?hl=en.

This research also does not assess the various conceptualizations of access that are suggested by the recently enacted statutory and constitutional law of several countries. Half of all governments that have passed freedom of information legislation have done so within the last ten years; many governments have created new constitutions that include rights of information; and several constitutional courts have interpreted constitutional provisions as implying rights of access. These statutes, constitutions, and court decisions are not analyzed in this research.

Finally, this research does not explore whether governments are complying with international human rights law or their own national access-to-information legislation. While that is an important question, it is beyond the scope of this dissertation.

CHAPTER 2

Analysis of international human rights documents identified four conceptualizations of access to government-held information as a human right: the freedom-of-expression conceptualization, the right-to-the-truth conceptualization, the information-privacy conceptualization, and the right-to-a-healthy-environment conceptualization. Although each of these conceptualizations stands on its own, their elements often overlap. For example, rationales for the freedom-of-expression and right-to-a-healthy-environment conceptualizations both include the importance of information in facilitating democratic participation. The rest of this chapter is dedicated to explicating the freedom-of-expression conceptualization. The other conceptualizations are explicated in subsequent chapters.

THE FREEDOM-OF-EXPRESSION CONCEPTUALIZATION

The most common conceptualization of access to government-held information as a human right links a right of access to government information to the right of freedom of expression. Central to the freedom-of-expression conceptualization is the idea that citizens must have access to government information in order to effectively exercise their right to freedom of expression. This conceptualization understands freedom of expression and information as tantamount to a free society. For example, according to a 1985 ruling of the Inter-American Court of Human Rights, “[A] society that is not well informed is not a society

that is truly free.”¹⁷⁵ The UN Special Rapporteur¹⁷⁶ on the promotion and protection of the right to freedom of opinion and expression wrote in his 1994 annual report: “Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.”¹⁷⁷ Within this conceptualization, the right to be informed includes access to government information. Without government information, according to the Special Rapporteur for Freedom of Expression for the Inter-American Commission on Human Rights, “the political benefits that flow from a climate of free expression cannot be fully realized.”¹⁷⁸ The following sections will discuss the conceptualization’s rationales, to whom this right to information is conferred, the type of information to which the right applies, and the limitations of the right.

Freedom-of-Expression Conceptualization – Rationales of the Right

The freedom-of-expression conceptualization includes three rationales for linking a right to government-held information to the right to freedom of expression: the seek-and-receive, self-governance, and good-governance rationales. These rationales are not mutually

¹⁷⁵ Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 (ser. A) No. 5, ¶ 70 (Nov. 13, 1985).

¹⁷⁶ The United Nations and several other international bodies use the term special rapporteur as a title for an expert with a specifically mandated function.

¹⁷⁷ UN Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1995/32, ¶ 35 (Dec. 14, 1994) [hereinafter 1994 Report of the UN Sp. Rapp.]. This view was reiterated in the special rapporteur’s 1996 report, ECOSOC Comm. on H.R. *Report of the Sp. Rapp.*, UN Doc. E/CN.4/1997/31, ¶ 5 (Feb. 4, 1997).

¹⁷⁸ 2003 Annual Report of the Inter-American Commission on Human Rights, 2003 Report of the Special Rapporteur for Freedom of Expression [hereinafter 2003(a) Report of the OAS Sp. Rapp.], at 4, Inter-Am. C.H.R., OAS Doc. OEA/Ser.G, CP/doc.3790/03 (Aug. 29, 2003).

exclusive, and concepts that are part of one rationale often overlap with concepts that are part of the other rationales.

Seek-and-Receive Rationale

The most common rationale for linking a right of access to information to the right to freedom of expression is the idea that citizens must be able to seek and receive information if they are to enjoy a meaningful freedom of expression. The seek-and-receive rationale of the freedom-of-expression conceptualization links the rights to seek and receive information found in several human rights instruments to a right of access to government-held information.

The rights to seek and receive information are explicitly present in the Universal Declaration of Human Rights (UN Declaration),¹⁷⁹ the International Covenant on Civil and Political Rights (Political Covenant),¹⁸⁰ and the American Convention on Human Rights (American Convention).¹⁸¹ All of those human rights instruments proclaim a right to freedom of expression that explicitly includes the freedom “to seek, receive and impart information.”¹⁸²

¹⁷⁹ UN Declaration, *supra* note 44.

¹⁸⁰ Political Covenant, *supra* note 46.

¹⁸¹ American Convention, *supra* note 1.

¹⁸² Article 19 of the UN Declaration states, “Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” *Supra* note 44, at art. 19. Article 19 of the Political Covenant states, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice.” *Supra* note 46, at art. 19(2). Article 13 of the American Convention states: “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds.” *Supra* note 1, at art. 13(1).

The freedom of expression provision of the African Charter on Human and People's Rights (African Charter)¹⁸³ only guarantees a right to receive information, but recently, the African Commission on Human and Peoples' Rights¹⁸⁴ (African Commission) moved to include the right to seek information as well. In 2002, it adopted the Declaration of Principles on Freedom of Expression in Africa, which states, "Freedom of expression and information, including the right to seek, receive and impart information and ideas . . . is a fundamental and inalienable human right and an indispensable component of democracy."¹⁸⁵ The European Convention on Human Rights contains rights to receive and impart information but not a right to seek information.¹⁸⁶

Several human rights bodies, such as the Inter-American Court on Human Rights (Inter-American Court) and the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN freedom of expression special rapporteur),¹⁸⁷

¹⁸³ Article 9 states that "[e]very individual shall have the right to receive information" and that "[e]very individual shall have the right to express and disseminate his opinions within the law." African Charter, *supra* note 53. The Charter was adopted by the Organization of African Unity [hereinafter OAU], an intergovernmental organization that was formed in 1963 and comprised 53 African states. As of July 2001, the OAU has been succeeded by the African Union.

¹⁸⁴ The African Commission on Human and People's Rights [hereinafter African Commission] oversees the compliance and implementation of the treaty. It has promotional and quasi-judicial functions, which include the power to interpret the treaty in terms of current international law. According to the African Charter, the responsibilities of the African Commission include the duties "to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations" and "[i]nterpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU." *Id.* at art. 45.

¹⁸⁵ African Commission Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res. 62 (XXXII) (Oct. 2002) [hereinafter African Declaration].

¹⁸⁶ Article 10 of the European Convention on Human Rights states in part: "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." European Convention, *supra* note 55, at art. 10.

¹⁸⁷ This special rapporteur interprets article 19 of the UN Declaration and the Political Covenant. In 1993 the UN Commission on Human Rights created the position of special rapporteur on the promotion and protection of the rights to freedom of opinion and expression. The resolution that created the position stated that the special

as well as numerous NGOs, have linked the rights to seek and receive information to a right of access to government information. This places a positive obligation on governments to provide information. Often it is not clear what this obligation specifically entails, but at a minimum it seems to include passage of freedom-of-information legislation. The difference between a right to receive information and a right to seek information is not always clear, but as will be discussed below, it does appear that a right of access is more contingent on the right to seek information than on the right to receive it.

The Inter-American Court was the first international human rights court to rule that access to information is a human right.¹⁸⁸ The 2006 ruling was based on the rights to seek and receive information that are guaranteed in the American Convention. In *Reyes et al. v Chile*, the court ruled:

By expressly stipulating the right to “seek and receive information,” article 13 of the Convention protects the right of all individuals to request access to State-held information. . . . Consequently, this article protects the right of the

rappporteur is to “gather all relevant information . . . of discrimination against, threats or use of violence and harassment, including persecution and intimidation, directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression as affirmed in the Universal Declaration of Human Rights and, where applicable, the International Covenant on Civil and Political Rights.” ECOSOC, Comm. on H.R. Res. 1993/45, UN Doc. E/CN.4/RES/1993/45, ¶ 13 (Mar. 5, 1993). He also is mandated to gather information and lobby governments regarding these rights, and to accept individual complaints. The resolution also requests that the special rapporteur submit an annual “report covering the activities relating to his or her mandate, noting the work being conducted by other mechanisms of the Commission and Sub-Commission which touches on the right to freedom of expression and opinion, containing recommendations to the Commission and providing suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations, as affirmed in the Universal Declaration of Human Rights and, where applicable, the International Covenant on Civil and Political Rights.” *Id* at ¶ 13-18. In 2002, the special rapporteur was further mandated to “transmit urgent appeals and communications to states with regard to individuals or professionals in the field of information who have been reported to be discriminated against, threatened with the use of violence, persecuted, intimidated or harassed for seeking to exercise or to promote the exercise of the right to freedom of opinion and expression; undertake fact-finding country visits; and submit annual reports on activities, identification of trends and methods of work, and addressing specific thematic issues to the Commission.” ECOSOC, Comm. on H.R. Res. 2002/48, UN Doc. E/CN.4/RES/2002/48 (Apr. 23, 2002). The mandate has continued to be extended. *See* ECOSOC, Comm. on H.R. Res. 2003/42, UN Doc. E/CN.4/RES/2003/42 (2003); ECOSOC, Comm. on H.R. Res. 2004/42, UN Doc. E/CN.4/RES/2004/42 (Apr. 19, 2004); and the Human Rights Council Res., UN Doc. A/HRC/7/L.24, ¶ 4 (Mar. 25, 2008) (encouraging the special rapporteur to “consider approaches taken to access to information with a view to sharing best practices”).

¹⁸⁸ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 77 (Sept. 19, 2006).

individual to receive such information and the positive obligation of the State to provide it.¹⁸⁹

Although the court did not elaborate on this line of reasoning, it did rely heavily on the conclusions of the Inter-American Commission on Human Rights (Inter-American Commission).¹⁹⁰ The Inter-American Commission also had reviewed the case and submitted its conclusions to the Inter-American Court. Those conclusions are detailed in the court's decision.¹⁹¹

The Inter-American Commission's submission to the court distinguished between the words "seek" and "receive," arguing, "Given that the freedom to receive information should prevent public authorities from interrupting the flow of information to individuals, the word *seek* would logically imply an additional right."¹⁹² This additional right, the commission further reasoned, creates a positive obligation on government to provide information. This is because the American Convention requires that the least restrictive interpretation¹⁹³ be applied to the convention's provisions;¹⁹⁴ therefore, the commission stated, "an interpretation of the word 'seek' that protects the right of access to state-held information is appropriate."¹⁹⁵

¹⁸⁹ *Id.* at ¶ 77.

¹⁹⁰ In 1959 the Inter-American Commission on Human Rights was established as an independent organ of the OAS, and it held its first session one year later. In 1969 the American Convention on Human Rights was adopted. The convention further defined the role of the commission and created the Inter-American Court of Human Rights. According to the convention, once the commission determines a case is admissible and meritorious, the commission will make recommendations and, in some cases, present the case to the Inter-American Court for adjudication, which is what occurred in *Reyes*. The Inter-American Court hears these cases, determines liability under relevant regional treaties and agreements, and assesses and awards damages and other forms of reparations to victims of human rights violations. *See* BROWNLIE, *supra* note 1, at 544-55.

¹⁹¹ *Reyes et al. v. Chile* at ¶ 58.

¹⁹² *Reyes v. Chile* Inter-Am. Comm. Application to the Inter-Am. Ct., ¶ 57 (July 8, 2005).

¹⁹³ American Convention, *supra* note 1, at art. 29.

¹⁹⁴ *Id.*

¹⁹⁵ *Reyes v. Chile* Inter-Am. Comm. Application to the Inter-Am. Ct., *supra* note 192, at ¶ 59.

The Inter-American Commission Special Rapporteur for freedom of expression (OAS special rapporteur)¹⁹⁶ also has discussed why article 13 of the American Convention creates a positive obligation on governments to provide information. According to the special rapporteur, arguments that article 13 only creates negative rights, for example the right to be free from government interference, are problematic because “government is always obliged to take positive steps to ensure that individuals may safely exercise their fundamental rights.”¹⁹⁷ In other words, the very act of signing the American Convention creates positive obligations on governments.

The UN Commission on Human Rights (UN Commission)¹⁹⁸ and the UN freedom of expression special rapporteur also have linked the rights to seek and receive information¹⁹⁹ to a right of access to government information. The interpretation of this right has evolved over time from a right to generally accessible information to a right that specifically includes government information. In 1994 the UN freedom of expression special rapporteur wrote that

¹⁹⁶ Created by the Inter-American Commission, the Office of the Special Rapporteur for Freedom of Expression and Information is a permanent office with functional independence and its own budget. The Inter-American Commission created the office, and it operates within the juridical framework of the commission. *See* articles 40 and 41 of the American Convention. *See also* article 18 of the Statute of the Inter-American Commission on Human Rights. *See generally* Santiago A. Canton, *The Role of the OAS Special Rapporteur for Freedom of Expression in Promoting Democracy in the Americas*, 56 U. MIAMI L. REV. 307 (2002).

¹⁹⁷ 2003(a) Report of the OAS Sp. Rapp., *supra* note 178, at 5.

¹⁹⁸ The United Nations Commission on Human Rights was created in 1946 in response to the United Nations Charter (UN Charter, signed June 26, 1945, 59 Stat. 1031, T.S. 993 (entered into force Oct. 24, 1945)). The charter mandated that a commission promoting human rights be established. The commission is the only human rights organ that is mandated by the UN Charter. It was the first international body empowered to promote human rights internationally and was responsible for the drafting of the covenant and the declaration. Although as a policymaking entity its pronouncements are not legally-binding, it has been very successful in drafting international human rights norms. HOWARD TOLLEY, *THE UN COMMISSION ON HUMAN RIGHTS* xiii (1987). The Commission on Human Rights was a subsidiary body of the UN Economic and Social Council and was assisted in its work by the Office of the United Nations High Commissioner for Human Rights. The commission was the primary mechanism to promote human rights compliance at the United Nations until March 2006, when it was replaced by the Human Rights Council. *See* G.A. Res. 251, UN GAOR, 60th Sess., Doc. A/Res/60/252 (Apr. 2006). *See generally* *Special Issue: Reform of the UN Human Rights Machinery*, 7 HUM. RTS. L. REV. 7 (2007).

¹⁹⁹ Political Covenant, *supra* note 46, at art. 19(2).

the right of access to information “entails the right to seek information inasmuch as this information is generally accessible. It is subject to debate whether the press and other media can derive any privileged right to seek information above and beyond generally accessible information.”²⁰⁰ Four years later, in his 1998 report, the special rapporteur, for the first time, explicitly stated that access to government information is a human right. He wrote that “the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government.”²⁰¹ He further stated that “in countries where the right to information is most realized, access to governmental information is often guaranteed by freedom of information legislation.”²⁰² In his 2004 report, he wrote:

Although international standards establish only a general right to freedom of information, the right of access to information, especially information held by public bodies, is easily deduced from the expression “to seek [and] receive . . . information” as contained in articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.²⁰³

Since then, the special rapporteur has continued to state that access to government information is a human right linked to the right of freedom of expression. Often these

²⁰⁰ 1994 Report of UN Sp. Rapp., *supra* note 177, at ¶ 34. In reference to the special rapporteur’s report, a 1995 resolution of the Commission on Human Rights requested that the special rapporteur “develop further his commentary on the right to seek and receive information and to expand on his observations.” ECOSOC, Comm. on H.R. Res. 1995/40, UN Doc. E/CN.4/RES/1995/40, ¶ 17 (Mar. 3, 1995). The commission reiterated its request in two subsequent resolutions. *See* ECOSOC, Comm. on H.R. Res. 1996/53, UN Doc. E/CN.4/RES/1996/53, ¶ 12(d) (Apr. 19, 1996); ECOSOC, Comm. on H.R. Res. 1997/27, UN Doc. E/CN.4/RES/1997/27 (Apr. 11, 1997).

²⁰¹ ECOSOC, Comm. on H.R. 1998 Report of Sp. Rapp., UN Doc. E/CN.4/1998/40, ¶ 12 (Jan. 28, 1998). This was reiterated in the special rapporteur’s 1999 report, ECOSOC, Comm. on H.R. 1999 Report of Sp. Rapp., UN Doc. E/CN.4/1999/64 (Jan. 29 1999).

²⁰² *Id.* at 1998 Report of UN Sp. Rapp., ¶ 12.

²⁰³ 2004 Report of the UN Sp. Rapp., *supra* note 203, at ¶ 39.

statements link governments' passage of freedom-of-information legislation to ensuring the right to freedom of expression.

The UN freedom of expression special rapporteur's statements on this matter have been approved by the UN Commission on numerous occasions.²⁰⁴ The UN Commission also has recognized the right of access to government information. In a 2005 resolution, the commission stressed "the importance of full respect for the freedom to seek, receive and impart information, including the fundamental importance of access to information, to democratic participation, to accountability and to combating corruption."²⁰⁵ The resolution further called on states to "adopt and implement laws and policies that provide for a general right of public access to information held by public authorities"²⁰⁶ in order to comply with article 19,²⁰⁷ the freedom of expression provision of the Political Covenant.

The special rapporteur undertakes fact-finding visits to countries and then submits reports on these visits to the countries and the commission. In several reports, the special rapporteur has stated that the right to seek and receive information includes a right of access to government information. For example, in the 2000 report on a visit to Sudan, the special rapporteur expressed concern over the lack of freedom-of-information legislation. He stated that "everyone has the right to seek, receive and impart information and that this imposes a

²⁰⁴ ECOSOC, Comm. on H.R. Res. 1995/40, UN Doc. E/CN.4/RES/1995/40, ¶ 2 (Mar. 3, 1995); ECOSOC, Comm. on H.R. Res. 1997/27, UN Doc. E/CN.4/RES/1997/27 (Apr. 11, 1997); ECOSOC, Comm. on H.R. Res. 1998/42, UN Doc. E/CN.4/RES/1998/42, ¶ 2 (Apr. 17, 1998).

²⁰⁵ ECOSOC, Comm. on H.R. Res. 2005/38, preamble, UN Doc. E/CN.4/RES/2005/38 (Apr. 19, 2005).

²⁰⁶ *Id.* at ¶ 4(1).

²⁰⁷ Political Covenant, *supra* note 46, at art. 19(2).

positive obligation on States to ensure access to information.”²⁰⁸ He urged the government to ensure that future legislation comply with article 19 of the Political Covenant.

The Human Rights Committee,²⁰⁹ which monitors the implementation and compliance of the Political Covenant, also issues reports on states’ compliance with the Political Covenant.²¹⁰ Although the committee has not explicitly stated that the rights to seek and receive information include the right of access to government information, it often has made strong statements linking the passage of freedom-of-information legislation to compliance with article 19, which guarantees a right to freedom of expression.²¹¹ It also is clear that many states understand article 19 as creating a positive obligation on states to provide access

²⁰⁸ ECOSOC, Comm. on H.R. 2000 Report of Sp. Rapp, UN Doc. E/CN.4/2000/63/Add.1, ¶ 42 (Mar. 3, 2000). *See also* the 2000 Ireland report, which praised Ireland’s freedom-of-information law, stating that the “right to freedom of opinion and expression includes the right to seek and receive information, which also means that citizens have the right to obtain information of public interest and have the right to inspect official documents.” ECOSOC, Comm. on H.R. 2000 Report on the Mission to Ireland, UN Doc. E/CN.4/2000/63/Add.2, ¶ 53 (Jan. 10, 2000). In a 1999 report on Hungary, the special rapporteur expressed concern about Hungary’s state secrets legislation. The report stated that “[t]he right to freedom of opinion and expression includes the right to seek and receive information, which also means that citizens have the right to get information of public interest and have the right to inspect official documents.” This statement was in reaction to a newspaper editor being jailed for publishing government information on a proposed hydroelectric dam. The report also stated that a document cannot be considered non-public unless it was classified through an official procedure. ECOSOC, Comm. on H.R., 1999 Report of UN Sp. Rapp, Report of the Mission to Hungary, UN Doc. E/CN.4/1999/64/Add.2, ¶ 47-9 (Jan. 29 1999).

²⁰⁹ The committee consists of eighteen experts who are elected by states but do not represent any nation. *See* Political Covenant, *supra* note 46, at art. 28.

²¹⁰ These reports, called concluding observations, are in response to required reports from signatory governments. Under article 40 of the Political Covenant, states are required to submit reports to the Human Rights Committee detailing implementation of the covenant within one year of ratification and then when the committee requests reports. In practice this has been about every four years. The committee then meets with government representatives to discuss compliance and the reports submitted by governments about their compliance. The committee then issues its concluding observations about the governments’ compliance. *See* Political Covenant, *supra* note 46, at art. 40.

²¹¹ UN Human Rights Committee (HRC) Summary Minutes, UN Doc. CCPR/C/SR.1478, ¶ 20-24 (Apr. 4, 1996); UN HRC List of Issues for Liechtenstein, UN Doc. CCPR/C/81/L/LIE (May 7, 2004); UN HRC Summary Minutes, UN Doc. CCPR/C/SR.1478, ¶ 20 (Apr. 4, 1996); UN HRC Concluding Observations on India, CCPR/C/70/Add.81, ¶ 12 (Aug. 4, 1997); UN HRC Concluding Observation of Ukraine, UN Doc. CCPR/C/79/Add.52 (July 26, 1995); UN HRC Concluding Observations on Ireland, UN Doc. A/55/40, ¶ 442-51 (July 24, 2000); UN HRC Concluding Observations on Lithuania, UN Doc. CCPR/C/79/Add.87 (Nov. 19, 1997).

to government information.²¹² For more than a decade, states have been including in their reports references to access to information when discussing their compliance with article 19. Although ten years ago these references were scarce, they are now commonplace. Many states simply list in their discussions of article 19 that they have freedom-of-information legislation.²¹³ Others specifically explain that freedom-of-information legislation is part of complying with article 19. For example, a 2000 report from Trinidad and Tobago specifically stated that the “right to receive information” was given legal recognition by a new freedom-of-information law, which gave the public access to government information.²¹⁴

Other states have detailed their court decisions and elaborated state positions on access to information. In its 1998 report, Israel detailed its supreme court precedent on the right of the public to receive information. The Israeli Supreme Court held that the “right to know”

²¹² Although it is clear that many states understand article 19 of the Political Covenant as creating a positive obligation, a few states have explicitly stated that it does not. The United Kingdom, in its 1994 fourth periodic report, went even further and stated that measures ensuring open government “may assist freedom of opinion and expression but . . . they are not measures which are required to give effect to the rights conferred by article 19.” The report stated that the right to seek, receive, and impart information did not refer to “guaranteeing access to information owned by another.” UN HRC State Report of the United Kingdom, UN Doc. CCPR/C/95/Add.3, ¶ 72 (Dec. 19, 1994). The 1997 Austrian report to the Human Rights Committee stated that decisions of the Austrian Constitutional Court understood a right of access to information only for publicly accessible information. The Austrian report gave an example of a recent case involving a customs officer who seized an individual’s periodical. According to the report, the court ruled that “while there is no obligation on the part of the state to ensure access to information or to provide information itself, an obstruction through the active intervention by state organs of the procurement of and search for publicly available information was only admissible if provided for by law.” UN HRC State Report of Austria, UN Doc. CCPR/C/83/Add.3, ¶ 204 (Oct. 15, 1997). The report stated that “[a]s far as particular cases are concerned, the question of how far the freedom to seek information extends is still not settled.” The report did explain that the Austrian Constitution provided a limited obligation on the part of the state to impart information about its activities, but that this obligation was not derived from the right to freedom of information. *Id.*

²¹³ For example, Canada listed federal as well as all provincial legislation relating to access to government information in its fourth periodic report. UN HRC State Report of Canada, UN Doc. CCPR/C/103/Add.5 (Oct. 15, 1997). The government of Georgia detailed its freedom-of-information legislation and pointed out weaknesses to be amended. UN HRC State Report of Georgia, UN Doc. CCPR/C/GEO/2000/2, ¶ 459 (Feb. 26, 2001). The 1995 Hong Kong report highlighted recent measures taken to improve public access to information including an administrative code on public access to government information. UN HRC State Report of United Kingdom, UN Doc. CCPR/C/95/Add.4, ¶ 242-244 (Aug. 7, 1995).

²¹⁴ UN HRC State Report of Trinidad and Tobago, UN Doc. CCPR/C/TTO/99/3, ¶ 246 (Feb. 22, 2000). The third and fourth periodic reports were submitted as one document.

includes “publicizing of the decisions and actions of government authorities and the access of the media to information held by public bodies on matters of public interest.”²¹⁵ The report admitted that “disclosure of information by government authorities has not yet become as firmly rooted in practice as it is in the decisions of the Supreme Court.”²¹⁶ In order to remedy this, the report stated, the government was in the process of enacting freedom-of-information legislation.²¹⁷

The Human Rights Committee also has the authority to receive and rule on individual complaints regarding human rights abuses.²¹⁸ To date, it has only heard one complaint pertaining to government information and article 19. That complaint was filed after a newspaper publisher was refused the same access as other reporters to the Canadian Press Gallery, a private organization that administers the accreditation for journalists to attend Canadian parliamentary proceedings.²¹⁹ Robert Gauthier argued that his rights under article 19²²⁰ were violated because “the government of Canada prevents him to seek and receive

²¹⁵ UN HRC State Report of Israel, UN Doc. CCPR/C/81/Add.13, ¶ 604 (Apr. 9, 1998).

²¹⁶ *Id.* at ¶ 605.

²¹⁷ *Id.*

²¹⁸ The ability to hear individual complaints is created by the First Optional Protocol to the Political Covenant. Only citizens of signatory nations to the Covenant that also sign and ratify the First Optional Protocol can bring complaints. The United States is not a signatory nation. Although these decisions are binding, there is no enforcement mechanism except diplomatic pressure. Optional Protocol to the Political Covenant, G.A. Res. 2200A (XXI), 21 UN Doc. GAOR Supp. (no. 16), UN Doc. A/6316 (1966) 999 U.N.T.S. 302, entered into force Mar. 23, 1976.

²¹⁹ UN HRC Communication no. 633/1995, *Gauthier v. Canada*, CCPR/C/65/D/633/1995 (May 5, 1999). Gauthier fought for more than ten years to receive membership in the Parliamentary Press Gallery. Canada, in its submission to the committee, said Gauthier did not receive a press pass because he had been uncooperative in providing enough information to determine whether he was eligible. Gauthier contended that he had cooperated and that the rules were whimsical. *Id.* at ¶ s 2.5 and 4.9.

²²⁰ “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Political Covenant, *supra* note 46, at art. 19(2).

information and observe proceedings on behalf of his readers, and prohibits his access to facilities and services provided for the media”²²¹ including access to press releases, itineraries of public officials, and the Library of Parliament. Canada argued that all citizens have access to Parliament through a three-tiered pass system. The press pass grants access to the media facilities of Parliament and is only given to accredited members of the Press Gallery. Canada also claimed that Gauthier was not significantly disadvantaged because parliamentary proceedings were broadcast to the public.

The committee did not accept Canada’s argument. It stated, “[I]n view of the importance of access to information about the democratic process . . . the Committee does not accept the State party’s argument and is of the opinion that the author’s exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information.”²²² Although this ruling is narrow in that it applies to a government restriction on information that was accessible to other journalists, it does indicate that in some circumstances, the Human Rights Committee understands the right to seek and receive information as including a right of access to information held by the government.

As stated above, the African Charter includes a right to receive information but not a right to seek information. The 2002 African Commission’s adoption of the Declaration of Principles on Freedom of Expression in Africa, an elaboration of the guarantee of freedom of expression within the African Charter,²²³ changed that. Not only did the declaration incorporate the right to seek information, it also explicitly stated that “respect for freedom of

²²¹ *Id.* at ¶ 8.2.

²²² *Id.* at ¶ 13.5.

²²³ *See* African Charter, *supra* note 53

expression, as well as the right of access to information held by public bodies and [private] companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy.”²²⁴

In 2007, the African Commission also expanded the mandate of the Special Rapporteur on Freedom of Expression in Africa²²⁵ to include overseeing implementation and compliance of the right of access to government information.²²⁶ The resolution states in part that the “right of access to information, which is a component of the fundamental right to freedom of expression, is indeed covered by the mandate of the Special Rapporteur.”²²⁷

Many NGOs also argue that the rights to seek and receive information include a right of access to government information. Several NGOs have stated this proposition in communications to governments regarding freedom-of-information legislation. For example, the NGO Article 19 wrote in a memorandum to the Ugandan government:

In these international human rights instruments, freedom of information was not set out separately but was instead included as part of the fundamental right to freedom of expression. Freedom of expression, as noted above, includes the right to seek, receive and impart information. Freedom of information, including the right to access information held by public authorities, is a core element of the broader right to freedom of expression.²²⁸

²²⁴ African Declaration, *supra* note 185, at preamble and section 4.

²²⁵ The OAS special rapporteur was created in 2004 to investigate and analyze member states’ compliance with the right to freedom of expression. The rapporteur’s mandate includes country visits, public interventions, and the submission of country reports to the African Commission. *See* African Commission Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa, ACHPR/Res. 71 (XXXVI) 04 (Dec. 2004).

²²⁶ African Commission Resolution the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, ACHPR/Res. 122 (XXXXII) (2007).

²²⁷ *Id.* at preamble.

²²⁸ Article 19, *Memorandum on the Ugandan Access to Information Bill, 2004 (Bill No. 7)*, 3 (May 2004), available at <http://www.article19.org/pdfs/analysis/uganda-bill-no.-7.pdf> (last visited Oct. 10, 2008). *See also* Access Info Europe, *Analysis and Recommendations For Strengthening Montenegro’s Law on Free Access to Information*, 5 (Apr. 30, 2007), available at <http://www.access-info.org/?id=23> (last visited Oct. 10, 2008); Access Info Europe, *Submission to UK Government on Draft Regulation on Limits and Fees for FOI Requests* (Mar. 8, 2007), available at <http://www.access-info.org/?id=23> (last visited Oct. 10, 2008); Article 19,

Numerous NGO reports on access to information also explicitly state that the rights to seek and receive information found in the UN Declaration and Political Covenant includes a right of access to government information.²²⁹ Several acknowledge that the right to government information is vague but then use the statements from the UN freedom of expression special rapporteur²³⁰ to argue that the right has evolved over time to include a right to government information.²³¹

Memorandum on the Law of the Republic of Uzbekistan on "Principles of and Guarantees for Freedom of Information," 2-4 (June 2004) available at <http://www.article19.org/pdfs/analysis/uzbekistan-law-on-protection-of-state-secrets-.pdf> (last visited Oct. 10, 2008); Article 19, *Memorandum on the Draft Malawian Access to Information Bill*, 3 (March 2004), available at <http://www.article19.org/pdfs/analysis/malawi-access-to-info-bill-march-2004.pdf> (last visited Oct. 10, 2008); Article 19, *Memorandum on the Proposal for the Adoption of the Law on Free Access to Information of the Former Yugoslav Republic of Macedonia*, 1 (Oct. 2004), available at <http://www.article19.org/pdfs/analysis/macedonia-freedom-of-information-oct-2004.pdf> (last visited Oct. 10, 2008); Article 19, *Memorandum on the Macedonian Law on Free Access to Public Information*, 2 (Nov. 2003), available at <http://www.article19.org/pdfs/analysis/macedonia-freedom-of-information-oct-2004.pdf> (last visited Oct. 10, 2008); Article 19, *Memorandum on Mozambique's Draft Bill on Access to Sources of Information*, 2 (June 2005), available at <http://www.article19.org/pdfs/analysis/mozambique-july-2005.pdf> (last visited Oct. 10, 2008); Article 19, *Memorandum on the Draft Paraguayan Free Access to Public Information Law*, 2 (Feb. 2004), available at <http://www.article19.org/pdfs/analysis/paraguay-access-to-information-feb-2004.pdf> (last visited Oct. 10, 2008); Article 19, *Memorandum on Nepal's Draft Public Information Act*, 2 (Jan. 2004), available at <http://www.article19.org/pdfs/analysis/nepal-information-act-jan-2004.pdf> (last visited Oct. 10, 2008); Article 19, *Memorandum on Two Drafts of the Law on Access to Public Information of Argentina*, 4 (July 2005), available at <http://www.article19.org/pdfs/analysis/argentina-access-to-public-information.pdf> (last visited Oct. 10, 2008).

²²⁹ See, e.g., Banisar, *Freedom of Information around the World 2006*, *supra* note 9, at 9-10; Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth*, 12-13 (2003), available at http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm (last visited Oct. 10, 2008); Maja Daruwala & Venkatesh Nayak (eds.), Commonwealth Human Rights Initiative, *Our Rights, Our Information: Empowering people to demand rights through knowledge*, 10 (2007), available at http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf (last visited Oct. 10, 2008); Open Society Justice Initiative, *The Rising Tide: Freedom of Information in Southeast Europe, Report of a Meeting held in Zagreb, Croatia, 20-22 March 2003*, 2 (July 2003), available at http://www.justiceinitiative.org/db/resource2?res_id=102074 (last visited Oct. 10, 2008); Article 19, *Under Lock and Key: Freedom of Information and the Media in Armenia, Azerbaijan and Georgia*, 10-1 (Apr. 2005), available at http://www.freedominfo.org/documents/FOI_and_Media_in_the_South_Caucasus_English.pdf (last visited Oct. 10, 2008).

²³⁰ See 1998 Report of UN Sp. Rapp, *supra* note 201.

²³¹ At least two NGO reports state that the rights to seek and receive information do not currently include a right to government information. "There is as yet no fixed international standard governing the right of access to information held by public bodies. International treaty law, as it currently stands, establishes only a general right to freedom of information." Open Society Justice Initiative, *Transparency & Silence, A Survey of Access to Information Laws and Practices in 14 Countries*, 27 (2006), available at http://www.soros.org/initiatives/osji/articles_publications/publications/transparency_20060928 (last visited Oct. 10, 2008).

Thus far the European Court of Human Rights has not ruled that the right to freedom of expression explicitly recognized in the European Convention includes a right to government information. Unlike the Political Covenant and the American Convention, the European Convention contains only the right to receive information, not the right to seek information.²³² Although the court has repeatedly recognized that the right to receive information includes “the right of the public to be properly informed”²³³ and “the public’s right to be informed of a different perspective,”²³⁴ thus far, the court has refused to recognize a right of access to government information. In three separate cases, the court has ruled that the freedom of receive information cannot be construed as imposing on the government positive obligations to collect and disseminate information.²³⁵ In each case, the court used language to limit the holdings to “circumstances such as those of the present case.”²³⁶ This

Oct. 10, 2008); “Article 19 of the Universal Declaration of Human Rights – a universal right of all ‘to seek, receive and impart information ...’ – is a starting point for legislating for access to information, but it only takes us so far. It is aimed at curtailing government censorship rather than promoting government transparency. Thus the task of the reformer is to place flesh on the bones of Article 19, and to do so for social as well as economic reasons.” Transparency International, *2003 Global Corruption Report*, 9 (2003), available at http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2003 (last visited Oct. 10, 2008).

²³² European Convention, art. 10, *supra* note 55. According to Giorgio Malinverni, European Court of Human Rights Ad Litem Judge representing Switzerland, drafters of article 10 purposely left out the right “to seek” information because of fear that it might create positive obligations on governments. Giorgio Malinverni, *Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights*, 4 HUM. RTS. L.J. 443, 449 (1983).

²³³ *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A), ¶ 64-6 (1979); *Open Door and Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A) ¶ 55 (1992). *See also* *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A), ¶ 41 (1986); *Thorgeir Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A), ¶ 63 (1992).

²³⁴ *Sener v. Turkey*, 2000 Eur. Ct. H.R. 377, ¶ 46 (2000).

²³⁵ *See* *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A), ¶ 74 (Mar. 26, 1987) (holding that “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.”); *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A), ¶ 52 (1989) (holding “in the circumstances of the present case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual”); *Guerra and others v. Italy*, 26 Eur. Ct. H.R. 357, ¶ 53 (1998) (holding that “freedom [to receive information] cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.”)

suggests that the court has not definitively ruled out such an obligation.²³⁷ In fact, in a 2006 ruling determining the admissibility of a complaint under the European Convention,²³⁸ the court held that article 10, the freedom of expression provision of the European Covenant,²³⁹ granted a Czech environmental NGO a right of access to government documents regarding the design and construction of a nuclear reactor.²⁴⁰ Referring to previous court precedent, the court stated that “it is difficult to deduce from the Convention a general right of access to data and documents of an administrative nature.”²⁴¹ This notwithstanding, the court held that, under the circumstances of the case – in which the NGO was a party to an administrative proceeding reviewing the environmental impact of the reactor – the rejection of the NGO’s request for information interfered with “its right to receive information” under article 10.²⁴² Ultimately, the court ruled that the Czech authorities had properly justified their refusal to provide the information, but the important point is that article 10 was considered to be applicable in the first place.²⁴³

²³⁶ *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A), ¶ 74 (Mar. 26, 1987).

²³⁷ According to the court, “While the Court is not formally bound to follow its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. . . . It is of critical importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.” *Christine Goodwin v. United Kingdom*, Eur. Ct. H.R., ¶ 74 (2002).

²³⁸ Committees of three judges act as a filter for applications. By unanimous vote, the judges may declare individual applications inadmissible in clear circumstances, and their decision is final. *See* European Convention, *supra* note 55, at art. 35.

²³⁹ European Convention, *supra* note 55, at art. 10.

²⁴⁰ *Sdružení Jihočeské Matky v. Czech Republic*, Eur. Ct. H.R., App. no. 19101/03 (July 10, 2006).

²⁴¹ *Id.* at ¶ 26.

²⁴² *Id.* at ¶ 10.

²⁴³ Some scholars argue that the recent decision by the Inter-American Court, *Claude Reyes v. Chile*, will have a significant impact on the European Human Rights System. “The Court’s decision may prompt the European

The following sections will discuss the self-governance rationale and the good-governance rationale. The self-governance rationale is based on the idea that access to government information is essential for democracy because in order for citizens to give their consent or to participate in the political process, they must have access to government information. The good-governance rationale is based on the concept that access to government information is necessary in order to hold governments accountable for their actions and to help prevent government abuse and corruption. The two rationales are not mutually exclusive and are often presented together in human rights documents. Certainly government corruption will hamper citizen participation; nonetheless, these two concepts represent two separate rationales because the latter rationale is not always contingent on the former. In other words, democratic governance is not essential in order for access to government information to help prevent and expose government corruption.

Self-Governance Rationale

In a variety of areas, the Inter-American human rights system has emphasized the role of access to government information for effective self-governance. In the *Reyes et al. v. Chile* decisions, both the Inter-American Court and the Inter-American Commission emphasized the role of freedom of expression and information in a democracy. Both cited the following Inter-American Court advisory opinion when declaring that freedom of expression includes a right to government information:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion.

Court to broaden its interpretation of the right to access information in all instances, and not only in cases where the lack of information threatens the exercise of other fundamental human rights.” Anna Cabot & Suzanne Shams, *Updates from the Regional Human Rights Systems*, 14 NO. 2 HUM. RTS. BRIEF 60, 61 (2007).

It is also a conditio[n] sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.²⁴⁴

The Inter-American Court ruling further declared in *Reyes* that the “State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions.”²⁴⁵

The court’s decision in *Reyes* also referred to the Inter-American Democratic Charter, which was adopted in 2001 by the General Assembly of the Organization of American States (OAS).²⁴⁶ The legally-binding Democratic Charter²⁴⁷ sets forth principles of democracy as well as a framework for political action by the OAS when the democratic practices of a member country are jeopardized. The *Reyes* court linked two articles of the charter to contend that access to government information is essential for healthy democracies and for

²⁴⁴ Inter-Am. Ct. Advisory Opinion OC-5/85, *supra* note 175, at ¶ 70 (Nov. 13, 1985).

²⁴⁵ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 86 (Sept. 19, 2006).

²⁴⁶ *Id.* at ¶ 79. The Organization of American States (OAS) is an international organization headquartered in Washington, D.C. Its members are the 35 independent states of the Americas. The OAS is a multilateral forum “for strengthening democracy, promoting human rights, and confronting shared problems such as poverty, terrorism, illegal drugs and corruption.” The general assembly is its supreme decision-making body whereby member countries set major policies and goals. It gathers the hemisphere’s ministers of foreign affairs once a year in regular session. Ongoing actions are guided by the permanent council, made up of ambassadors appointed by the members. *See* http://www.oas.org/key_issues/eng/.

²⁴⁷ The Inter-American Democratic Charter was adopted on Sept 11, 2001, by a special session of the General Assembly of the OAS in Lima, Peru. It is an Inter-American instrument with the central aim of strengthening and upholding democratic institutions in the nations of the Americas. The charter, which is binding on all 34 of the currently active OAS member states, spells out what democracy entails and specifies how it should be defended when it is threatened. The charter pronounces maintenance of “the rule of law” and “the separation of powers and independence of the branches of government” as essential to any democracy, and it prohibits any “unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.” Inter-American Democratic Charter, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01), 40 ILM (2001) 1289, art. 19 (Sept. 11, 2001) [hereinafter Democratic Charter]. The charter is a resolution of the general assembly of the OAS. The charter sets forth principles of democracy and a framework for political action by the OAS when the democratic order of a member state is at risk or unconstitutionally interrupted. *See* T. D. Rudy, *A Quick Look at the Inter-American Democratic Charter of the OAS: What Is It and Is It ‘Legal’?* 33 SYRACUSE J INT’L L AND COMMERCE 237 (2005).

citizens to participate politically in society. Article 4 of the charter states that “[t]ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.”²⁴⁸ Article 6 states: “It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.”²⁴⁹ These two provisions, when taken together, according to the court, create a right of access to government information.

Also, starting in 2003, the OAS general assembly every year has passed a resolution on strengthening democracy through access to public information.²⁵⁰ These resolutions set out specific mandates to promote passage and effective implementation of access-to-information legislation of member countries.²⁵¹ Each of these resolutions emphasizes the relationship between self-governance and access to government information. For example, a 2003 resolution stated:

[A]ccess to public information is a requisite for the very functioning of democracy, greater transparency, and good governance and that, in a representative and participatory democratic system, the citizenry exercises its constitutional rights, inter alia, the rights to political participation, the vote,

²⁴⁸ Democratic Charter, *id.* at art. 4.

²⁴⁹ Democratic Charter, *id.* at art. 6.

²⁵⁰ OAS G.A. Res., Access to Public Information: Strengthening Democracy, AG/RES.1932 (XXXIII-O/03) (June 10, 2003); OAS G.A. Res. Access to Public Information, OAS Doc. AG/RES. 2057 (XXXIV-O/04) (June 8, 2004); Access to Public Information, OAS Doc. AG/RES. 2121 (XXXV-O/05) (June 7, 2005); OAS G.A. Res. Access to Public Information, OAS Doc. AG/RES. 2252 (XXXVI-O/06) (June 6, 2006); OAS G.A. Res. Access to Public Information, OAS Doc. AG/RES.2288 (XXXVII-O/07) (June 5, 2007).

²⁵¹ *See, e.g.*, OAS G.A. Res. Access to Public Information, AG/RES. 2057 (XXXIV-O/04) (June 8, 2004) (instructing the special rapporteur to help member countries draft and implement freedom-of-information legislation).

education, and association, by means of broad freedom of expression and free access to information.²⁵²

The first paragraph of each resolution states that the general assembly resolves to “affirm that everyone has the freedom to seek, receive, access, and impart information and that access to public information is a requisite for the very exercise of democracy.”²⁵³

As mandated by several OAS general assembly resolutions,²⁵⁴ the OAS special rapporteur includes a section on access to information in his annual reports. In light of these mandates, the OAS special rapporteur’s 2003 annual report included a section on the theoretical framework behind a right of access to government information. The role of government information in a democracy was heavily emphasized in his analysis. According to the report:

It is widely acknowledged that without access to state-held information, the political benefits that flow from a climate of free expression cannot be fully realized. . . . Access to information promotes accountability and transparency within the States and enables a robust and informed public debate. In this way, access to information empowers citizens to assume an active role in government, which is a condition for sustaining a healthy democracy.²⁵⁵

²⁵² 2003 OAS G.A. Res. Access to Public Information, *supra* note 250, at the preamble.

²⁵³ *Id.* at ¶ 1. *See also* 2004 OAS G.A. Res. Access to Public Information, 2005 OAS G.A. Res. Access to Public Information; 2006 OAS G.A. Res. Access to Public Information; 2007 OAS G.A. Res. Access to Public Information, *supra* note 250.

²⁵⁴ 2003 OAS G.A. Res. Access to Public Information, *supra* note 250, at ¶ 6; 2004 OAS G.A. Res. Access to Public Information, *supra* note 250, at ¶ 7; 2005 OAS G.A. Res. Access to Public Information, *supra* note 250, at ¶ 6 (June 7, 2005); 2006 OAS G.A. Res. Access to Public Information, *supra* note 250, at ¶ 9; 2007 OAS G.A. Res. Access to Public Information, *supra* note 250, at ¶ 10 (June 5, 2007). The OAS special rapporteur has been including sections on access to information in its annual reports since the first report in 1998. The 2003 resolution was the first time the general assembly mandated the inclusion of information on access to information.

²⁵⁵ *See* 2003 Annual Report of the Inter-Am. Comm. on H.R., Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.118, doc. 5 rev, Chap. IV, ¶ 13 (Dec. 29, 2003) [hereinafter 2003b Report of the OAS Sp. Rapp.]. The special rapporteur also has linked political participation to the right to information in several other annual reports. *See, e.g.*, 1999 Annual Report of the Inter-Am. Comm. on H.R., Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.106, doc. 3 rev., 19-20 (2000) [hereinafter 1999 Report of the OAS Sp. Rapp.]; 2000 Annual Report of the Inter-Am. Comm. on H.R., Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.111, doc. 20 rev., 20

Several of the OAS special rapporteur's reports on country visits have stated that access to information is one of the most effective instruments for strengthening democracy.²⁵⁶ For example, in its 2005 report on Columbia, he wrote that access to information "enables robust and informed debate" and "empowers citizens to assume an active role in government, which is a condition for sustaining a healthy democracy."²⁵⁷ A report on Venezuela also stated that access to government information strengthens democratic institutions and therefore Venezuela should ensure that effective guarantees of access exist.²⁵⁸

The Declaration of Principles on Freedom of Expression,²⁵⁹ which interprets article 13 of the American Convention and was approved in 2000 by the Inter-American Commission, also makes this link between access to information and democracy. The preamble to the

(2001) [2000 Report of the OAS Sp. Rapp.]. The special rapporteur also has made this link in reports of country visits on compliance. *See, e.g.*, the 2001 Report of the OAS Sp. Rapp. on the Situation of Freedom of Expression in Paraguay, OAS Doc. OEA/Ser.L/V/II.110, Doc.52, ¶ 27 (Mar. 9, 2001) [hereinafter OAS Sp. Rapp. Report on Paraguay]; 2003 Report of the OAS Sp. Rapp. on the Situation of Freedom of Expression in Panama, OAS Doc. OEA/Ser.L/V/II.117, Doc. 47, ¶ 130-1 (July 3, 2003) [hereinafter OAS Sp. Rapp. Report on Panama]; 2003 Report of the OAS Sp. Rapp. on the Situation of Freedom of Expression in Haiti, OAS Doc. OEA/Ser.L/V/II.117, Doc. 48, ¶ 28 (July 15, 2003) [hereinafter OAS Sp. Rapp. Report on Haiti].

²⁵⁶ OAS Sp. Rapp. Report on Paraguay, *id.* at ¶ 27; OAS Sp. Rapp. Report on Panama, *id.* at ¶ 131; OAS Sp. Rapp. Report on Haiti, *id.* at ¶ 28; Report of the OAS Special Rapporteur on the Situation of Freedom of Expression in Columbia, OAS Doc. OEA/Ser.L/V/II, Doc. 51, ¶ 127 (Aug. 31, 2005).

²⁵⁷ OAS Sp. Rapp. Report on Columbia, *id.* at ¶ 127.

²⁵⁸ 2003 Report of the OAS Sp. Rapp. on the Situation of Freedom of Expression in Venezuela, OAS Doc. OEA/Ser.L/V/II.118, doc. 4 rev. 2, at ¶ 481-82 (Dec. 29, 2003) [hereinafter OAS Sp. Rapp. Report on Venezuela].

²⁵⁹ *See* 2000 Report of the OAS Sp. Rapp., *supra* note 255 at 19-23 [hereinafter Inter-Am. Comm. Freedom of Expression Declaration]. The Declaration of Principles on Freedom of Expression was approved by the Inter-American Commission at its 108th regular session in October 2000. According to the OAS special rapporteur, the declaration was created "[f]ollowing widespread debate among different civil society organizations" and "constitutes a basic document for interpreting Article 13 of the American Convention on Human Rights. Its adoption not only serves as an acknowledgment of the importance of safeguarding freedom of expression in the Americas, but also incorporates international standards into the Inter-American system to strengthen protection of the right [to freedom of expression]." *Id.* at 23. The declaration was also positively acknowledged by the UN special rapporteur. *See* ECOSOC Comm. H.R., 2001 Report of the UN Sp. Rapp., UN Doc. E/CN.4/2001/64, ¶ 11 (Feb. 13, 2001).

declaration states in part that “guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of governmental activities and the strengthening of democratic institutions.”²⁶⁰ The fourth principle of the declaration states that governments have an obligation to guarantee a right of access to government information.²⁶¹ In his 2000 annual report, the OAS special rapporteur dedicated a section of the report to interpreting the principles of the declaration. Regarding the fourth principle, the OAS special rapporteur wrote that “[w]ithout the information that every person is entitled to, it is clearly impossible to exercise freedom of expression as an effective vehicle for civic participation or democratic oversight of government management.”²⁶²

The UN Human Rights Committee also has linked democratic self-governance to access to government information. In its 1995 *Gauthier v. Canada*²⁶³ ruling, the committee linked article 25 of the Political Covenant, which guarantees a right to political participation,²⁶⁴ to article 19.²⁶⁵ According to the committee, the two rights together “impl[y] that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.”²⁶⁶ The committee also has stressed the importance of access to government

²⁶⁰ Inter-Am. Comm. Freedom of Expression Declaration, *id.* at preamble.

²⁶¹ *Id.* at principle 4.

²⁶² 2000 Report of the OAS Sp. Rapp., *supra* note 255, at ¶ 19.

²⁶³ UN HRC Commission no. 633/1995, *Gauthier v. Canada*, UN Doc. CCPR/C/65/D/633/1995 (May 5, 1999). .

²⁶⁴ *See* Political Covenant, *supra* note 46, art. 25.

²⁶⁵ *Id.* at art. 19(2).

²⁶⁶ UN HRC Commission no. 633/1995, *Gauthier v. Canada*, UN Doc. CCPR/C/65/D/633/1995, ¶ 13.4 (May 5, 1999).

information in its responses to country reports.²⁶⁷ For example, during a meeting about Mauritius' country report, a committee member, arguing that the country needed freedom-of-information legislation in order to comply with article 19, stated that "there could be no democracy without freedom of information."²⁶⁸ Several country reports also make this link. In discussing its compliance with article 19, Thailand's country report stated its constitutional provision guaranteeing access to government information is important because "[i]n the democratic system of government, people are considered to be the owner of sovereignty. They have the right to check and have opinion on administration of the government and its agencies and officials freely."²⁶⁹

The UN freedom of expression special rapporteur, who issues reports on countries' progress in guaranteeing a right to freedom of expression, also has stated that access to government information is essential for democracy. For example, in his 2002 report on Argentina, he wrote that freedom-of-information legislation "was needed in order to comply with the internationally recognized principles of publicizing government acts, that freedom of access to information is a prerequisite for democratic participation."²⁷⁰

In a 2000 annual report, the UN freedom of expression special rapporteur stated that access to information "is a right upon which free and democratic societies depend. It is also a

²⁶⁷ See *supra* note 219, explaining country reports.

²⁶⁸ UN HRC Summary Minutes, UN Doc. CCPR/C/SR.1478, ¶ 24 (Apr. 4, 1996). See also UN HRC Concluding Observations on India, *supra* note 211; UN HRC Concluding Observations on Lithuania, *supra* note 211; UN HRC Concluding Observations on Ukraine, *supra* note 211.

²⁶⁹ UN HRC Thailand Initial Report, UN Doc. CCPR/C/THA/2004/1, ¶ 466 (Aug. 2, 2004). See also UN HRC Sri Lanka Fourth Periodic Report, UN Doc. CCPR/C/LKA/2002/4, at ¶ 362 (Oct. 18, 2002); UN HRC Liechtenstein Initial Report, UN Doc. UN Doc. CCPR/C/LIE/2003/1, ¶ 147 (July 8, 2003); UN HRC Finland Fifth Periodic Report, UN Doc. CCPR/C/FIN/2003/5, ¶ 263 (July 24, 2003).

²⁷⁰ UN Comm. H.R. Mission to Argentina, UN Doc. E/CN.4/2002/75/Add.1, ¶ 107 (Jan. 17, 2002); See also UN Comm. H.R., 2000 Report on Mission to Ireland, ¶ 75, *supra* note 208; UN Comm. H.R. 2004 Report on Mission to Poland, UN Doc. E/CN.4/2004/5, ¶ 334 (Jan. 26, 2004).

right that gives meaning to the right to participate.”²⁷¹ In the 2005 annual report, the special rapporteur devoted a section of the report to the implementation of a right to access to information. In that section he wrote that “the right of access to information held by public bodies has become a benchmark of democratic development.”²⁷² A 2005 UN Commission on Human Rights resolution also stressed the importance of access to information for democracy and urged governments to pass legislation in order to comply with article 19.²⁷³

Since 1999, the UN freedom of expression special rapporteur, the OAS special rapporteur, and the media representative on freedom of the media for the Organization for Security and Co-operation in Europe (OSCE)²⁷⁴ have issued eight joint declarations on freedom of expression, three of which address access to government information. In all three of these, access is linked to democratic participation.²⁷⁵ For example, the 1999 declaration states, “Implicit in freedom of expression is the public's right to open access to information

²⁷¹ 2000 Report of the UN Sp. Rapp., *supra* note 208, at 42.

²⁷² 2004 Report of the UN Sp. Rapp., *supra* note 203, at ¶ 38.

²⁷³ UN Comm. H.R. Res. 2005/38, UN Doc. E/CN.4/RES/2005/38, preamble and ¶ 4(l) (Apr. 19, 2005).

²⁷⁴ The Organization for Security and Co-operation (OSCE) is an inter-governmental organization with 56 member countries from all over the globe. According to its website, “It offers a forum for political negotiations and decision-making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation, and puts the political will of the participating States into practice through its unique network of field missions.” See OSCE website at <http://www.osce.org/>.

²⁷⁵ 1999 International Mechanisms for Promoting Freedom of Expression Joint Declaration by UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe, and the OAS Special Rapporteur for Freedom of Expression, ESCOR Comm. on H.R., 1999 Report of the Sp. Rapp., Annex I, UN Doc. E/CN.4/2000/63 (Jan. 18, 2000) [hereinafter 1999 Freedom of Expression Joint Declaration]; 2004 FOE Joint Declaration by UN Special Rapporteur, Media Representative of OSCE, and OAS Special Rapporteur, adopted in Dec. 2004, ESCOR Comm. on H.R., 2005 Report of the Sp. Rapp., UN Doc. E/CN.4/2006/55, Annex 1 (Dec. 30, 2005) [hereinafter 2004 Freedom of Expression Joint Declaration]; 2006 FOE Joint Declaration by UN Special Rapporteur, Media Representative of OSCE, and OAS Special Rapporteur, Annual Report of the Inter-American Comm., 2006 Report of the OAS Sp. Rapp., Vol. II, OEA/Ser.L/V/II.127 Doc. 4, 109 (Mar. 3, 2007) [[hereinafter 2006 Freedom of Expression Joint Declaration].

and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.”²⁷⁶

The Declaration of Principles on Freedom of Expression in Africa²⁷⁷ and the African Commission resolution adopting the Charter also make this link. The resolution states that “freedom of expression, as well as the right of access to information held by public bodies and [private] companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy.”²⁷⁸

Several NGO declarations also recognize the importance of access to government information to democratic participation. Most notably are the 1995 Johannesburg Principles²⁷⁹ and the 1999 Public’s Right to Know Principles on Freedom of Information Legislation,²⁸⁰ both of which have been influential with the UN Commission on Human

²⁷⁶ 1999 Freedom of Expression Joint Declaration, *id.* at ¶ 5..

²⁷⁷ African Declaration, *supra* note 185.

²⁷⁸ *Id.*

²⁷⁹ UN Comm. H.R., 1996 Report of Sp. Rapp., UN Doc. E/CN.4/1996/39, Annex (Mar. 22, 1996) [hereinafter Johannesburg Principles]. According to their introduction, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information were created in 1995 by “experts in international law, national security and human rights” and are “based on international and regional law and standards relating to the protection of human rights, evolving state practice, and the general principles of law recognized by the community of nations.” The group of experts was convened by the NGO Article 19 in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand in Johannesburg, South Africa. The Johannesburg Principles have been cited in numerous human rights documents. *See, e.g.*, UN Doc. E/CN.4/1996/37, ¶ 82 (Mar. 1, 1996) (stating that “[t]he [UN] Special Rapporteur will from time to time refer to these standards to the extent that they are applicable to his mandate”); UN Comm. H.R. Report on Mission to Malaysia, UN Doc. E/CN.4/1999/64/Add.1, ¶ 52 (Dec. 23, 1998) (suggesting that countries abide by the Johannesburg Principles); UN Comm. H.R. Report on the Mission to Turkey, UN Doc. E/CN.4/1997/31/Add., ¶ 47 (Feb. 11, 1997); UN Comm. H.R. Report on Mission to Argentina, UN Doc. E/CN.4/2002/75/Add.1, ¶ 110 (Jan. 17, 2002) (encouraging governments to refer to the Johannesburg Principles); OAS G.A. Res. Access to Public Information: Strengthening Democracy, 2004, *supra* note 250; OAS G.A. Res. Access to Public Information: Strengthening Democracy, 2006, *supra* note 250 (acknowledging the principles in preamble to the resolution); OAS Sp. Rapp. on Haiti, *supra* note 255, at ¶ 31 (referring to the Johannesburg Principles “as a guide to reconciling the competing interests of national security and freedom of information”).

²⁸⁰ Article 19, Principle of Freedom of Information Legislation: The Public’s Right to Know (the Right to Know Principles”, *available at* <http://www.article19.org/pdfs/standards/righttoknow.pdf> (last visited Oct. 10, 2008). The Principles of FOI have been cited in numerous human rights documents. *See, e.g.*, OAS 1999 Annual

Rights and the Inter-American Commission on Human Rights. The Public's Right Know: Principles on Freedom of Information Legislation states: "Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society." The Johannesburg Principles on National Security, Freedom of Expression and Access to Information also state that freedom of information is vital to democratic society.²⁸¹

Good-Governance Rationale

The good-governance rationale is based on the idea that access to information is necessary in order to hold governments accountable and to discover and prevent government corruption.²⁸² Although closely linked to the self-governance rationale, the good-governance rationale is concerned with mitigating government abuse. Within this rationale it often is

Report, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.111, Doc. 3 rev., Vol. III, at 88; UN Comm. on H.R. Res. 2001/47, preamble, UN Doc. E/CN.4/RES/2001/47 (2001). The principles were also endorsed by the UN Special Rapporteur, UN Comm. H.R. 2000 Report of Sp. Rapp., *supra* note 208, at ¶ 44.

²⁸¹ See Johannesburg Principles, *supra* note 279, at preamble?

²⁸² It is important to note that there are several anti-corruption treaties, some of which have provisions on access to government information. Because they are not human rights treaties, they are beyond the scope of this research. The UN Convention Against Corruption calls on all member states to adopt legislation criminalizing various forms of corruption, including bribery, embezzlement, trading in influence, and concealment of proceeds. See UN Convention Against Corruption, G.A. Res. 4, UN GAOR, 58th Sess., Agenda Item 108, UN Doc. A/RES/58/4 (2003). In March 1997, the Organization for American States adopted the Inter-American Convention Against Corruption, criminalizing transnational bribery in the Western Hemisphere. See Inter-American Convention Against Corruption, OAS, 35 I.L.M. 724 (Mar. 29, 1996). In May 1997, the European Union adopted the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union. See European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 O.J. (C 195) 1. The African Union adopted the African Union Convention on Preventing and Combating Corruption, which came into force in August 2006. The Convention requires that signatories criminalize a wide range of public sector and private sector bribery, protect whistleblowers, and adopt a framework for cross-border enforcement. See Convention on Preventing and Combating Corruption, July 11, 2003, 2nd Sess., Afr. Union, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (last visited Aug. 1, 2008).

argued that access to information can help prevent governments' despotic or authoritarian tendencies that undermine democratic governance.

The argument that access to information can help mitigate government corruption is particularly evident within the Inter-American human rights regime. The OAS special rapporteur has expressed concern about the level of corruption in Latin American countries. In his 2001 report, he stated that corruption had “seriously affected the stability of democracies in the hemisphere.”²⁸³ He further argued that access to information is necessary to combat this problem:

[C]orruption can only be combated effectively through a combination of efforts designed to raise the level of transparency in respect of government activities. Accordingly, any policy designed to obstruct access to information with respect to government activities poses the risk of promoting corruption within the institutions of the state, and thus weakening democracies. Access to information represents a means of preventing such illegal practices, which are inflicting great harm on the countries of the hemisphere.²⁸⁴

In 1998, the Inter-American Commission argued that access to information deters corruption. The 1998 annual report stated, “The legitimacy of government decisions thus depends largely on the degree to which they are made public, since only through public scrutiny can the risks of corruption and despotism inherent in state secrets or acts of power not open to public view be avoided.”²⁸⁵ In the 1999 report, the OAS special rapporteur argued that “to abridge freedom of expression and information is to abridge or diminish the

²⁸³ Annual Report of the Inter-Am. Comm. H.R. 2001, Vol. III, Report of the Sp. Rapp., Inter. Am. C.H.R. Doc. OEA/Ser.L/V/II.114, doc. 5 rev, 107 (Apr. 16, 2002).

²⁸⁴ *Id.*

²⁸⁵ Annual Report of the Inter-Am. Comm. H.R. 1998 Annual Report, Inter. Am. C.H.R. Doc. OEA/Ser.L/V/II.102, Doc. 6 Rev., ¶ 20 (Apr. 16, 1999).

citizens' control over their public officials and to transform democracy into a system where authoritarianism can find fertile ground for imposing itself upon the will of society.”²⁸⁶

The Inter-American Court's decision in *Reyes* also suggested that access to information can help hold governments accountable. As stated previously, the Inter-American Court ruling in *Reyes v. Chile* stated that access to information is necessary for democratic participation. The court's decision further declared that access to government information is necessary so citizens “can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.”²⁸⁷ The OAS special rapporteur in several reports assessing countries' compliance with the American Convention, also has stressed the importance of access to information to fight corruption,²⁸⁸ and the UN Commission on Human Rights and the current Human Rights Council²⁸⁹ have made the link between access to information and government corruption.²⁹⁰

Several NGO publications also discuss the importance of access to information in helping to fight corruption. For example, the NGO Transparency International, which

²⁸⁶ 1999 Report of the OAS Sp. Rapp, *supra* note 255, at 19-20.

²⁸⁷ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 87 (Sept. 19, 2006).

²⁸⁸ Report of the OAS Sp. Rapp. on Paraguay, *supra* note 255, at ¶ 32; Report of the OAS Sp. Rapp. on Panama, *supra* note 255, at ¶ 129; Report of the OAS Sp. Rapp. on Columbia, *supra* note 256, at ¶ 130.

²⁸⁹ For an explanation of the replacement of the Commission on Human Rights with the Human Rights Council, see *supra* note 198.

²⁹⁰ Comm. H.R. Res. 2005/38, UN Doc. E/CN.4/Res/2005/38, preamble (Apr. 19, 2005) (stating that access to information is “fundamentally important” to “combating corruption”); Human Rights Council Resolution 7/36, Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/Res/7/36, preamble (Mar. 28, 2008) (stating that access to information is fundamental to preventing corruption).

publishes an annual report on the state of corruption globally, dedicated several chapters in its 2003 report to the relationship between access to information and corruption. Government secrecy, the report argued, is particularly problematic in countries that have recently transitioned from authoritarian regimes to democracies. A healthy access-to-information regime is therefore necessary to prevent corruption and ensure healthy democracies.²⁹¹ Three years later, Transparency International published a guide, *Using the Right to Information as an Anti-Corruption Tool*, that trains “anti-corruption” activists to effectively use and fight for access legislation.²⁹²

The NGO Commonwealth Human Rights Initiative published a 2003 report, *Open Sesame: Looking for the Right to Information in the Commonwealth*, which argues that access to information is necessary to unearth corruption. According to the report: “The right to access information acts as a source of light to be shone on the murky deals and shady transactions that litter corrupt governments. It enables civil society and especially the media to peel back the layers of bureaucratic red tape and political sleight of hand and get to the ‘hard facts.’”²⁹³

Freedom of Expression Conceptualization – To Whom the Right is Conferred

Within the freedom-of-expression conceptualization, the right of access to government information belongs to all citizens. Citizens delegate responsibilities to government representatives who then act on the behalf of all citizens; therefore, any information or

²⁹¹ Transparency International, *2003 Global Corruption Report*, *supra* note 231, at 8.

²⁹² Transparency International, *Using the Right to Information as an Anti-Corruption Tool* (2006), http://www.transparency.org/global_priorities/other_thematic_issues/access_information (last visited Aug. 10, 2008) [TI Anti-Corruption Tool].

²⁹³ *Open Sesame: Looking for the Right to Information in the Commonwealth*, *supra* note 229, at 20.

documents generated in this process belong to the people. In this sense, government information is understood as a public good. Because government information is owned by the public, citizens do not have to show a direct interest in the information in order to have a right of access to it.

It is not always clear whether a person must be a citizen in order to access government information. The terms “citizens,” “everyone,” and “people” often are used interchangeably. Although within this conceptualization all citizens have equal rights to government information, there also is acknowledgement that those who are disadvantaged within society and the media have a special need for government information. Government information is seen as empowering the disenfranchised to gain equality within society. The media, on the other hand, are seen as facilitating citizens’ rights to government information. This section will discuss citizens’ right to government information, the significance of this right to the disenfranchised, and the role of the media in facilitating the right.

According the Inter-American Court in the *Reyes* decision the right to information is both an individual and a societal right. The court stated:

The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.²⁹⁴

The OAS general assembly has repeatedly recognized that government information belongs to the people. In all five of its resolutions on access to information, the first principle states that government information belongs to everyone. The OAS special rapporteur also has

²⁹⁴ Reyes v. Chile, at ¶ 77.

made it clear that government information belongs to the people. Referring to the right of access to government information in his 2000 report interpreting the principles of the Declaration of Principles on Freedom of Expression,²⁹⁵ he wrote:

This right acquires even greater significance because it is closely related to the principle of transparency in administration and the public nature of government activities. The State is a vehicle for ensuring the common good. In this context, the owner of the information is the individual who has delegated the management of public affairs to his or her representatives.²⁹⁶

This exact language was reiterated in the OAS special rapporteur's 2003 report on Panama's implementation of the American Convention's freedom of expression provision.²⁹⁷ In a 2003 report on Haiti, he wrote that because access to information is "one of the basic pillars of any democracy," it is the "Haitian people, who delegated to representatives the handling of public affairs, who should have the information. The State, in this regard, is a means for attaining the common well-being."²⁹⁸

The UN freedom of expression special rapporteur also has stated this view in numerous reports. For example, in a section in his 2000 report on implementing a right of information, he wrote that he was

concern[ed] about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs in that the decisions of Governments, and the implementation of policies by public institutions, have a direct and often immediate impact on their lives and may not be undertaken without their informed consent.²⁹⁹

²⁹⁵ See 2000 Report of the Sp. Rapp., *supra* note 208.

²⁹⁶ *Id.* at 18. See also 1999 Report of the OAS Sp. Rapp., *supra* note 255, at 29 (stating that "[i]t is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right of information").

²⁹⁷ 2003 OAS Sp. Rapp. Report on Panama, *supra* note 255, at ¶ 128.

²⁹⁸ 2003 OAS Sp. Rapp. Report on Haiti, *supra* note 255, at ¶ 28.

²⁹⁹ ECOSOC, UN Comm. H.R., 2000 Report of the UN Sp. Rapp. UN Doc. E/CN.4/2000/63, ¶ 43 (Jan. 18, 2000). See also 2004 Report of the UN Sp. Rapp., *supra* note 203, at ¶ 41, 1997 Report of the UN Sp. Rapp., *supra* note 177, at ¶ 5.

A 2006 joint declaration of the UN special rapporteur, the OAS rapporteur, and the OSCE media representative also stated, “Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information.”³⁰⁰ The African Commission’s Declaration of Principles on Freedom of Expression in Africa also makes this point, stating: “Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information.”³⁰¹

Several NGOs also have stated that everyone has a right to government information. For example, the NGO Commonwealth Human Rights Initiative’s 2003 report *Open Sesame: Looking for the Right to Information in the Commonwealth* states:

Information is a public good like clean air and drinking water. It belongs not to the state, the government of the day or civil servants, but to the public. Officials do not create information for their own benefit alone, but for the benefit of the public they serve, as part of the legitimate and routine discharge of the government’s duties. Information is generated with public money by public servant paid out of public funds. As such, it cannot be unreasonably kept from citizens.³⁰²

The influential 1995 Johannesburg Principles³⁰³ and the 1999 Public’s Right to Know Principles on Freedom of Information Legislation also state that this right belongs to everyone.³⁰⁴

³⁰⁰ 2006 Joint Declaration, *supra* note 275, at ¶ 2.

³⁰¹ African Declaration, *supra* note 185, at part 4, ¶ 1.

³⁰² *Open Sesame: Looking for the Right to Information in the Commonwealth*, *supra* note 299, at 10.

³⁰³ See, Johannesburg Principles, *supra* note 279.

³⁰⁴ See Right to Know Principles, *supra* note 280. See also the Lagos Declaration on the Right of Access to Information, ¶ 1, available at Media Rights Agenda, <http://www.mediarightsagenda.org/right%20to%20foi.html> (lasted visited Oct. 15, 2008) [hereinafter Lagos Declaration]. According to the Lagos Declaration’s introduction, the declaration was adopted at the Regional Workshop on Freedom of Information Africa held

Within this conceptualization, the right to government information also means that the public does not have to show a direct interest in the information. For example, the Inter-American Court wrote in *Reyes v. Chile*, “The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.”³⁰⁵

In a 2003 report on the Panama, the OAS special rapporteur chastised the government for requiring that those requesting government information must show a “direct personal interest” in the information. According to the special rapporteur, this requirement was “inconsistent” with the American Convention and international standards.³⁰⁶ The UN special rapporteur also has stated that no grounds for requesting the information should be required.³⁰⁷ This concept is reiterated in Article 19’s Principles of Freedom of Information Legislation,³⁰⁸ the Lima Principles,³⁰⁹ and the Lagos Declaration.³¹⁰

Within this conceptualization, the right to information is also seen as being particularly important for the poor and disenfranchised because government information can help the poor better their lives. In a 2003 report, the OAS special rapporteur stated:

September 2006 and organized by Media Rights Agenda and the Open Society Justice Initiative. The workshop was attended by representative of 30 NGOs from 16 African countries. Expert presentations were given by representatives from FOI advocates from Albania, Bulgaria, and the United States.

³⁰⁵ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 77 (Sept. 19, 2006).

³⁰⁶ 2003 Report of the OAS Sp. Rapp. on Panama, *supra* note 255, at ¶ 137-8.

³⁰⁷ 2005 Report of the UN Sp. Rapp., *supra* note 275, at ¶ 41.

³⁰⁸ Right to Know Principles, *supra* note 280, at 2.

³⁰⁹ UN Doc. E/CN.4/2001/64, Annex II, principle 1 (2001) [hereinafter Lima Principles]. The Lima Principles were adopted by the Seminar on Information for Democracy held in Lima Peru in Nov. 2000. The OAS Special Rapporteur helped draft the principles. These principles have been referenced in all OAS General Assembly resolutions on access to information. They also were welcomed by the UN Special Rapporteur on Freedom of Expression in his 2001 annual report, *id.* at ¶ 10.

³¹⁰ See Lagos Declaration, *supra* note 304, at ¶ 1.

[A]ccess to information is also a critical tool in the alleviation of socioeconomic injustice. The poor often suffer from a lack of access to information about the very services that the government offers to help them survive. Disenfranchised groups need access to information about these services as well as the many other decisions made by government and private agencies that profoundly affect their lives.³¹¹

Often access to information is understood as ensuring that the poor are able to participate in society. The OAS special rapporteur made this point in a 2002 report on freedom of expression and poverty. “[I]t is the poor who are least able to obtain information about the decisions and public policies that affect them directly, thus denying them information that is vital to their lives, such as information about free services, awareness of their rights, access to justice, etc.”³¹² He went on to assert, “Encouraging and promoting information access among the poorest sectors of the hemisphere’s societies will enable their active and informed participation regarding the design of public policies and measures that directly affect their lives.”³¹³ The OAS special rapporteur further asserted that the poor are disproportionately affected by government corruption, which can be ameliorated by access to government information. “Lack of access to information clearly places the neediest sectors of society in a vulnerable situation vis-à-vis potential abuses by private citizens and acts of corruption on the part of state agencies and their officers,” he said.³¹⁴

The NGO Commonwealth Human Rights Initiative published a report in 2008 based on the premise that access to information empowers the poor. The report provides numerous

³¹¹ 2003b Report of the OAS Sp. Rapp. Report, *supra* note 255, at chap IV, ¶ 17.

³¹² Annual Report of the Inter-Am. C.H.R., 2002 Report of the OAS Sp. Rapp., OEA/Ser.L/V/II.117 Doc. 1 rev. 1, 123 (Mar. 7, 2003).

³¹³ *Id.* at 123. *See also* Report of the 2004 UN Sp. Rapp., *supra* note 203, at ¶ 37.

³¹⁴ *Id.* at 124. *See also* Reyes v. Chile Inter-Am. Comm. Application to the Inter-Am. Ct., *supra* note 192 at ¶ 48; 2003a Report of the OAS Sp. Rapp., *supra* note 178.

case studies to illustrate this point. For example, in India, a group of the poorest citizens in New Delhi rallied together to demand information about why poor families were having problems obtaining basic necessities using their government food ration cards. As a result of the organized inquiries, the New Delhi government changed its ration-card system.³¹⁵

Although within this conceptualization, media do not have greater rights to government information than individuals, the freedom-of-expression conceptualization does recognize that media play an important role in facilitating citizens' right to government information. This role is to act as a "watchdog" over government to prevent and uncover government abuse. A report from the NGO Article 19 expresses this concept succinctly:

[T]he media do not have a special right to information; rather it is a right pertaining to all people. Nevertheless, the media are key players in exercising this right. . . . The media are a vital force in the democratic system of checks and balances because they take a leading role in shaping public opinion. They help expose corruption and malpractice. Only with unobstructed access to government-held information can the media stimulate political debate and function as a communication channel between the authorities and the public.³¹⁶

In this sense, the media can be understood as facilitating the social dimension of the right to information as opposed to the individual dimension, as explained in the Inter-American Court's decision, *Reyes v. Chile*,³¹⁷ discussed previously.³¹⁸

³¹⁵ *Our Rights Our Information: Empowering People to Demand Rights through Knowledge*, *supra* note 229, at 19; *See also* 2003 Global Corruption Report, *supra* note 231, at 15-16.

³¹⁶ *Under Lock and Key: Freedom of Information and the Media in Armenia, Azerbaijan and Georgia*, *supra* note 229, at 15.

³¹⁷ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151 (Sept. 19, 2006).

³¹⁸ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 77 (Sept. 19, 2006) (arguing that those requesting information do not have to show a direct interest in the information).

The OAS general assembly has repeatedly emphasized the role of media in disseminating government information. In four of its five resolutions on access to government information, it has stated that media facilitate citizens' right to information.³¹⁹ The Lima Principles also acknowledge that media facilitate a right to information. The principles state that "in furtherance of the individual's right to information, journalists must be guaranteed conditions and facilities to access information and have the right to disseminate it in the exercise of their profession."³²⁰ In a report on access to information, the NGO Commonwealth Initiative wrote:

Where the media is unable to get reliable information held by governments and other powerful interests, it cannot fulfill its role to the best of its abilities. Journalists are left to depend on leaks and luck or to rely on press releases and voluntary disclosures provided by the very people they are seeking to investigate. . . . A sound access regime provides a framework within which the media can seek, receive and impart essential information accurately and is as much in the interests of government as it is of the people.³²¹

In facilitating citizens' right to government information, the media are often seen as acting as a watchdog over government. In several country reports, the UN special rapporteur has made this connection. For example, in his report on Ireland, he wrote:

[A] democracy can only work if the citizens and their elected representatives are fully informed. Therefore, with the exception of a few types of documents, it is desirable to make government documents public in order to allow the citizen to know how public funds are disbursed. Thus, the Special Rapporteur notes that it is indispensable that journalists should have access to information held by public authorities, granted on an equitable and impartial basis, so they can carry out their role as a watchdog in a democratic society.³²²

³¹⁹ 2004 OAS G.A. Res. Access to Public Information, 2005 OAS G.A. Res. Access to Public Information; 2006 OAS G.A. Res. Access to Public Information; 2007 OAS G.A. Res. Access to Public Information, *supra* note 250.

³²⁰ Lima Principles, *supra* note 309, at principle 5.

³²¹ *Open Sesame: Looking for the Right to Information in the Commonwealth*, *supra* note 229, at 21.

³²² UN Comm. H.R. Mission to Ireland, *supra* note 208, at ¶ 75. *See also* UN Comm. H.R. Mission Argentina, *supra* note 270, at ¶ 168; UN Comm. H.R. Mission Poland, *supra* note 270, at ¶ 70.

The OAS special rapporteur also has made this link. In a 2002 report he wrote that the right of access to government information helps journalists to “expose corrupt practices for public scrutiny and to guarantee the participation of all segments of society in public policy decisions that affect their daily lives.”³²³

Freedom of Expression Conceptualization – The Type of Information Guaranteed

Within the freedom-of-expression conceptualization, citizens have a right of access to all government information, except information that is explicitly limited for justifiable reasons that will be discussed in a subsequent section. This presumption of disclosure is based on the idea that citizens are the owners of government information. As discussed previously, information is understood as public good that governments hold on behalf of citizens. For example, the OAS special rapporteur argued that the presumption of disclosure is based in the idea that “information held by public authorities is not acquired for the benefit of the officials that control it, but for the public as a whole.”³²⁴ The presumption of disclosure often is referred to as the principle of maximum disclosure. Often this presumption extends to meetings of public bodies, courts, and legislative proceedings. Sometimes the type of information included in this right is information held by private entities such as private corporations, although this claim has been made only by NGOs and not by any of the other human rights bodies. The freedom-of-expression conceptualization also requires that governments proactively provide information that is of a public interest even when the

³²³ 2002 Report of the OAS Sp. Rapp., *supra* note 312, at 103.

³²⁴ 2003a Report of the OAS Sp. Rapp., *supra* note 178, at 7-8.

information is not requested. This will be referred to as the proactive requirement. The following sections will discuss the principle of maximum disclosure and the proactive requirement.

The Principle of Maximum Disclosure

The human rights bodies within the Inter-American system have consistently recognized the principle of maximum disclosure. For example, in the Inter-American Court decision *Reyes v. Chile*,³²⁵ the court succinctly stated the principle, writing that “in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.”³²⁶

In a detailed 2004 report on implementing the right of access to information, the UN special rapporteur stated that all information held by public bodies should be public unless subject to legitimate exemptions.³²⁷ The 2004 joint declaration of the OAS and UN special rapporteurs and the OSCE media representative also emphasized this principle, stating that the “right to access information held by public authorities is a fundamental human right,” which

³²⁵ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151 (Sept. 19, 2006).

³²⁶ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 92 (Sept. 19, 2006); *See also* Inter-American Comm. H.R. Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1, ¶ 284 (Oct. 22, 2002); 2002 Report of the OAS Sp. Rapp., *supra* note 312, at ¶ 129; Inter-Am. Comm. H.R., 2004 Report of the OAS Sp. Rapp., OEA/Ser.L/V/II.122 doc. 5 rev. 1, 7 (Feb. 23, 2005); 2003a Report of the OAS Sp. Rapp., *supra* note 178, at 7-8 (arguing that “the foundation of any compliant access to information law is a presumption that all information held by public bodies should be subject to disclosure, which is sometimes referred to as the ‘principle of maximum disclosure’”).

³²⁷ 2005 Report of the UN Sp. Rapp., *supra* note 275, at ¶ 39; *See also* 1998 Report of the UN Sp. Rapp., *supra* note 201, at ¶ 12 (stating that the right of access to information should be the rule rather than the exception).

should be “based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”³²⁸

Maximum disclosure is the first principle of the NGO Article 19’s influential publication, *The Public’s Right to Know: Principles of Freedom of Information Legislation*.³²⁹ This publication has been adopted or referred to by the OAS and UN special rapporteurs, the Inter-American Commission, and the UN Human Rights Committee. The publication states:

The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right.³³⁰

The principle of maximum disclosure also has been emphasized in communications to governments by the UN and OAS special rapporteurs and NGOs. For example, in a 2001 OAS special rapporteur report to Paraguay, the rapporteur chided the government for not having criteria for classifying information, arguing that the “general principle is that information should be public” except information that is legitimately limited by legislation.³³¹

³²⁸ 2004 Joint Declaration, *supra* note 275, at ¶ 1.

³²⁹ *Public’s Right to Know Principles*, *supra* note 280.

³³⁰ *Id.* at 2.

³³¹ Report of the OAS Sp. Rapp. on Paraguay, *supra* note 55, at ¶ 30. *See also* Report of the OAS Sp. Rapp. on Panama, *supra* note 255, at ¶ 130 (arguing that there must be a presumption of disclosure and that restrictions must be the exception rather than the rule); Open Society Justice Initiative, Comments on Macedonian Draft Freedom of Information, 2, *available at* http://www.justiceinitiative.org/db/resource2?res_id=102246 (lasted visited Oct. 22, 2008) (stating that “law must clearly establish that all information held by government bodies and other bodies performing public functions or receiving public funds are in the public domain” unless provided for by law); Access Info Europe, Mongolia: Draft Law on Freedom of Information, p. 2, *available at* <http://www.access-info.org/data/File/publications/Access%20Info%20Analysis%20Mongolian%20FOI%20draft%2029%20May%202006.doc>. (May 29, 2006) (stating that “[t]his draft FOI law should be modified to introduce a clear ‘presumption of openness’ that applies to all information held by public bodies”).

Often the principle of maximum disclosure requires that the term information be interpreted very broadly. According to a 2003 OAS special rapporteur report, in order for governments to comply with the American Convention, they must pass freedom-of-information legislation with “broad definitions of the type of information that is accessible.”³³² Citing the Public’s Right to Know Principles, the report stated:

The right of access to information that is protected by the American Convention implicitly contains a broad understanding of the word “information,” and States must match this breadth in their own laws. The public should have access to all records held by a public body, regardless of the sources or the date of production. In addition, “information” encompasses all types of storage or retrieval systems, including documents, film, microfiche, video, photographs, and others.³³³

The UN freedom of expression special rapporteur also stated that all information is included regardless of the “types of storage” or “retrieval systems.”³³⁴ This includes information from “all bodies performing public functions, including governmental, legislative and judicial bodies.”³³⁵

Public attendance at meetings of governing bodies also is included in this right. For example, according to the OAS special rapporteur, all meetings are open to the public, including administrative proceedings, court hearings, and legislative proceedings³³⁶

³³² 2003a Report of the OAS Sp. Rapp., *supra* note 178, at 7.

³³³ *Id.* at 8. Principle 1 of the Public’s Right to Know Principles state in part: “Information includes all records held by a public body, regardless of the form in which the information is stored . . . and the date of production. The legislation should also apply to records which have been classified, subjecting them to the same test as all other records.” The principles further state that for “purposes of disclosure of information, the definition of ‘public body’ should focus on the type of service provided rather than on formal designations.” This includes “all branches and levels of government.” *Supra* note 280.

³³⁴ 1998 Report of the UN Sp. Rapp., *supra* note 201, at ¶ 14.

³³⁵ 2005 Report of the UN Sp. Rapp., *supra* note 275, at ¶ 39.

³³⁶ 2003a Report of the OAS Sp. Rapp., *supra* note 178, at 8. *See also* Report on Terrorism and Human Rights, *supra* note 326, at ¶ 287 (stating that all meetings of governing bodies are presumptively open); 2000 Report of the UN Sp. Rapp., *supra* note 208, at ¶ 44 (stating that meetings of governing bodies also should be

Several NGO declarations and reports include information from private entities, which include corporations and international organizations, as part of the right to information. The Public's Right to Know Principles state:

Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Inter-governmental organisations should also be subject to freedom of information regimes based on the principles set down in this document.³³⁷

Often the right to information from the private sector is based on whether a private entity performs a “public function.” For example, the Declaration of Cancun states that transparency principles should apply to “private businesses to the extent that the information is related to their public functions or use of public resources, or affects the enjoyment of human rights.”³³⁸

presumptively open); Right to Know Principles, *supra* note 280, at principle 5 (stating that “meetings of public bodies should be open to the public”).

³³⁷ Right to Know Principles, *supra* note 280, at principle 5. *See also* TI Anti-Corruption Tool, *supra* note 292, at 5 (arguing that the “right of citizens to know what governments, international organizations and private corporations are doing, and how public resources are allocated, directly reflects anti-corruption concerns. Corruption flourishes in darkness and so any progress towards opening governments and intergovernmental organizations to public scrutiny is likely to advance anti-corruption efforts.”).

³³⁸ Declaration of Cancun, ¶ 5, *available at* www.justiceinitiative.org/db/resource2?res_id=102602 (last visited Oct. 22, 2008). The Declaration of Cancun was adopted by NGOs at the third meeting of the Freedom of Information Commissioners held Feb. 22-24, 2005, in Cancun, Mexico. The meeting included FOI commissioners, ombudsmen, government officials, and NGOs. *See also* the Declaration of Chapultepec, principle 3, 1998 Report of the OAS Sp. Rapp, *supra* note 285, at annex F (arguing that “authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector”). According to the OAS Sp. Rapp., the Chapultepec Declaration “is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression.” 1998 Report of the OAS Sp. Rapp., *id.* at 27. The Declaration was drafted by the Inter-American Press Association and “contains 10 fundamental principles for the protection of freedom of expression in our hemisphere. Prominent persons are signing it in growing numbers. Numerous Heads of State and Government of the hemisphere have signed it.” *Id.* *See also* the Lagos Declaration, *supra* note 304, at principle 3 (arguing that the “right to information applies to all public bodies and private bodies performing public functions.”); Open Society Justice Initiative, Ten Principles on the Right to Know (2008), principle 3, *available at* www.justiceinitiative.org/Principles/index (last visited Oct. 22, 2008) (stating that the “public has a right to receive information in the possession of any institution funded by the public and private bodies performing public functions, such as water and electricity providers”). According to the introduction to the Principles, “The Justice Initiative works with partner organizations to promote implementation of [FOI] laws and to press for adoption of robust laws that entrench the Right to Know. To assist these efforts, the Justice Initiative has

The Proactive Requirement

Often governments also are obligated to proactively publish information even if the information is not requested. Citing the Public's Right to Know Principles, the OAS special rapporteur stated in a 2003 report that "public bodies should be under a presumptive obligation to publish key information, including: operational information, the types of information which the body holds, any requests, and the content of any decision or policy affecting the public, along with reasons for the decision and background material."³³⁹ In a report to Panama, the OAS special rapporteur also recommended that the government amend its FOI legislation to include "provisions requiring that public agencies automatically publish certain types of documents that are of significant public interest."³⁴⁰

Also citing the Public's Right to Know Principles, the UN freedom of expression special rapporteur has stated that the right of access to information includes an obligation on government to proactively provide information: "Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public."³⁴¹ Both the 2004³⁴² and 2006³⁴³ joint declarations of the

developed the following principles, in consultation with our partners, based on international law and standards and the comparative law and practice in these 68 countries. These principles represent evolving international standards on how governments should respect the Right to Know in law and practice." *Id.* See also the Right to Know Principles, *supra* note 280, principle 1 (arguing that "public bodies" include "private bodies which carry out public functions (such as maintaining roads or operating rail lines)").

³³⁹ 2003a Report of the OAS Sp. Rapp., *supra* note 178, at 8. The Public's Right to Know Principles principle 2 states in part, "Public bodies should be under an obligation to publish key information." This includes publishing and disseminating widely documents of "significant public interest." At a minimum this information should include "operation information," "requests, complaints or other direct actions" from the public, guidelines for public input, the type of information the public bodies hold, and all decisions or policies affecting the public. Public's Right to Know Principles, *supra* note 280, at principle 2.

³⁴⁰ Report of the OAS Sp. Rapp. to Panama, *supra* note 255, at ¶ 131.

³⁴¹ 2000 Report of the UN Sp. Rapp., *supra* note 208, at ¶ 44.

OAS and UN special rapporteurs and the OSCE media representative state that governments should make available information on topics of public interest.

Freedom-of-Expression Conceptualization – Limitations on the Right

The freedom-of-expression conceptualization does not recognize that the right of access to information is absolute and includes limitations on the right. In order for these limitations to be valid, governments must clearly define each restriction within the law. When information is withheld, the government must provide a justification and ensure that an appeal process is in place. These will be referred to as procedural obligations. In order to be considered legitimate, limitations must satisfy a significant public interest, which must be narrowly drawn and balanced with the public's interest in receiving the information. Governments carry the burden of proof to show that the limitation serves a legitimate interest that outweighs the public's right to know. The specific limitations that are considered legitimate within this conceptualization include "protection of national security, public order, or public health or morals" and "respect for the reputation of others."³⁴⁴ Of these limitations, only national security has been addressed in detail within the human rights documents; therefore, the discussion on the specific limitations will be limited to national security. The following section will discuss the procedural obligations required of governments, general requirements ensuring that limitations are legitimate and properly applied, and the national security exception.

³⁴² 2004 Joint Declaration, *supra* note 275, at ¶ 2.

³⁴³ 2006 Joint Declaration, *supra* note 275, at ¶ 3.

³⁴⁴ See Political Covenant, *supra* note 46, at art. 19(3); American Convention, *supra* note 1, at art. 13(2).

Procedural Obligations

The freedom-of-expression provisions of article 13³⁴⁵ of the American Convention and article 19³⁴⁶ of the Political Covenant require that restrictions on the right to seek and receive information must be established in law. In the *Reyes* decision, the Inter-American Court reiterated this requirement after the Chilean government did not cite provisions of Chilean law or legal precedent to justify withholding information. The court argued that restrictions “must have been established by law to ensure that they are not at the discretion of public authorities. Such laws should be enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”³⁴⁷ Citing one of its advisory opinions, the court further explained that the term “law” is not “synonymous for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of public authorities; authorities with no other formal limitation than that such restriction be set out in provisions of a general nature.”³⁴⁸

The Inter-American Commission stated in its *Reyes* decision that the government’s decision to withhold information was clearly discretionary, stating:

The Commission considers that such broad powers of discretion conferred on governmental agencies regarding whether or not to disclose public information

³⁴⁵ *Id.* at Political Covenant, art. 19(2).

³⁴⁶ American Convention, *supra* note 1, at art. 13. *See also* Comm. on H.R. Res., UN Doc. E/CN.4/2005/L.52, ¶ 3(l) (Apr. 15, 2005) (calling upon states to “adopt and implement laws and policies that provide for a general right of public access to information held by public authorities, which may be restricted only in accordance with article 19 of the [Political Covenant].”).

³⁴⁷ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, ¶ 89 (Sept. 19, 2006).

³⁴⁸ *Id.* at ¶ 89, citing The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Ser. A, No. 6, ¶ 34 (May 9, 1986). Article 30 of the American Convention states, “The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.” *See* American Convention, *supra* note 1, at art. 30..

make it possible for public officials or agencies to withhold information that may be of great public interest, but that officials or agencies prefer to remain confidential for personal or other reasons. This frustrates the nature and purpose of the guarantee of access to information, which is to enable the public to oversee the actions of public officials and agencies to ensure the proper functions of the government in a democracy. An access to information law should provide clear guidance for public officials, setting forth specific categories of information that are exempt from disclosure.³⁴⁹

On several occasions, the OAS special rapporteur has communicated to governments that they are required to enact laws that explicitly detail any restrictions on the right to information.³⁵⁰ The UN freedom of expression special rapporteur also has emphasized this requirement. For example, in a report regarding countries' implementation of access-to-information legislation, the rapporteur expressed concern that laws were being implemented poorly. He wrote:

Several countries have indeed adopted legislation on the right of access to information, but concern remains about their capacity to implement those laws in an effective way. In many countries, public bodies and bodies performing public functions continue to retain information and treat it in a confidential manner, even though there is no legal or other reason for this.³⁵¹

Several NGO principles also reflect this idea. For example, the Johannesburg Principles state that “any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to

³⁴⁹ Reyes v. Chile Inter-Am. Comm. Application to the Inter-Am. Ct., *supra* note 192, at ¶ 21. *See also* Inter-Am. Ct. Advisory Opinion OC-5/85, *supra* note 175, at ¶ 39(b) (stating that any restrictions must be established by law).

³⁵⁰ *See* 2003 Report of the OAS Sp. Rapp. on Panama and 2003 Report of the OAS Sp. Rapp. on Haiti, *supra* note 255. *See also* 2003 Report of the OAS Sp. Rapp. on Venezuela, *supra* note 258, at ¶ 482.

³⁵¹ 2004 Report of the UN Sp. Rapp., *supra* note 203, at ¶ 39. *See also* 2000 Report of the UN Sp. Rapp., UN Doc. E/CN.4/2000/63, ¶ 44 (Jan. 18, 2000), African Declaration, *supra* note 185, at section IV, part 1.

foresee whether a particular action is unlawful.”³⁵² According to the Lima Principles, “information shall not be kept secret on the basis of unpublished regulations.”³⁵³

When information is withheld, the government body withholding the information must provide a justification. As stated previously, in the *Reyes* decision, the Inter-American Court argued that article 13 includes a right to information. According to the court, this right places an obligation on the governments to provide a “justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.”³⁵⁴ According to the facts of the case, the government of Chile had not supplied a reason for withholding the information until required to do so by the court. The court concluded that the government

did not prove that the restriction responded to a purpose allowed by the American Convention, or that it was necessary in a democratic society, because the authority responsible for responding to the request for information did not adopt a justified decision in writing, communicating the reasons for restricting access to this information in the specific case.³⁵⁵

The UN freedom of expression special rapporteur also has stated that justification for withholding information is required. For example, a 2005 report stated that “refusals should be made in writing and detail the grounds for not disclosing the information, as established in law.”³⁵⁶ According to the Lima Principles, “Any person or official who refuses to provide

³⁵² See Johannesburg Principles, at *supra* note 279, at principle 1.1(a). See also Right to Know Principles, *supra* note 280, at principle 4.

³⁵³ See Lima Principles, *supra* note 309, at principle 8. See also Lagos Declaration, *supra* note 304, at principle 6; OSJI Comments of the Macedonian Draft FOI Law, *supra* note 228, at 2; Access Info Europe, Mongolia: Draft Law on Freedom of Information, *supra* note 228.

³⁵⁴ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, at ¶ 77 (Sept. 19, 2006).

³⁵⁵ *Id.* at ¶ 95 (Sept. 19, 2006).

³⁵⁶ 2004 Report of the UN Sp. Rapp., *supra* note 203, at ¶ 42. See also 1998 Report of the UN Sp. Rapp., *supra* note 201, at ¶ 14.

access to requested information will have to justify this refusal in writing and demonstrate that the information is included in the restricted category of exceptions.”³⁵⁷

The right to information also includes a right to appeal a government decision that denies information. This right to appeal requires that appeals are provided by an independent and impartial body. According to the 2006 joint declaration of the OAS and UN special rapporteurs and the OSCE media representative: “Individuals should have the right to submit a complaint to an independent body alleging a failure properly to apply an information disclosure policy, and that body should have the power to consider such complaints and to provide redress where warranted.”³⁵⁸ The Lima Principles state that “[i]f the person seeking the information so requests, an impartial and competent judicial authority may review such refusal and may order the release of the information.”³⁵⁹

Legitimate Limitations and the Public Interest

Under the freedom-of-expression conceptualization of a right of access, limitations on the right to information must be narrowly constructed and serve a significant public interest that outweighs the public interest in receiving the information. Governments have the burden of proof to show that the interest in withholding the information outweighs the public’s right to know.

³⁵⁷ See Lima Principles, *supra* note 309, at principle 8. See also Lagos Declaration, *supra* note 304, at principle 6.

³⁵⁸ 2006 Joint Declaration, *supra* note 275, at ¶ 5. See also 2004 Joint Declaration, *supra* note 275, at ¶ 7 (arguing that there must exist a right to appeal to “an independent body with full powers to investigate and resolve such complaints”); 2005 Report of the UN Sp. Rapp., *supra* note 275, at ¶ 42; 1998 Report of the UN Sp. Rapp., *supra* note 201, at ¶ 14; African Declaration, *supra* note 185, at section IV, part 2.

³⁵⁹ Lima Principles, *supra* note 309, at principle 8. See also Lagos Declaration, *supra* note 304, at principle 8; Right to Know Principles, *supra* note 280, at principle 5.

In the Inter-American Court's *Reyes* decision, the court stated that restrictions imposed on the right to information must correspond to a purpose outlined in article 13, paragraph two, which permits restrictions "necessary to ensure . . . respect for the rights and reputation of others" or "the protection of national security, public order, or public health or morals."³⁶⁰ According to the court, restrictions on information also

must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.³⁶¹

The court further stated that governments carry the burden of proof to show that the restriction complies with these requirements.³⁶²

The Inter-American Commission, in its *Reyes* decision, argued that the "proportionality principle" means that governments must not only show that the restriction relates to one of the stated aims in article 13, paragraph two, they must show that "disclosure threatens to cause substantial harm to that aim and that the harm to the aim must be greater than the public interest in having the information."³⁶³ As did the court, the commission concluded that Chile failed to show that withholding the information was justified by an aim stated in article 13:

[T]he state did not present any arguments to show that disclosure of the information would cause substantial harm to these aims and that such harm

³⁶⁰ See American Convention, *supra* note 1, at art. 13(2).

³⁶¹ *Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151, at ¶ 91 (Sept. 19, 2006).

³⁶² *Reyes et al. v. Chile*, at ¶ 93.

³⁶³ *Reyes v. Chile* Inter-Am. Comm. Application to the Inter-Am. Ct., *supra* note 192, at ¶ 21. See also Inter-Am. Ct. Advisory Opinion OC-5/85, *supra* note 175, at ¶ 69.

would outweigh the public interest in disclosure of the information. On the other hand, it is clear to the Commission that there is a substantial public interest in the disclosure of the information requested.³⁶⁴

The 2003 OAS special rapporteur's annual report included a section on the theoretical framework behind a right of access to government information. The rapporteur's discussion on limitations on the right to information closely corresponds to the arguments of the Inter-American Court and Commission in the *Reyes*³⁶⁵ decisions.³⁶⁶ In making his arguments, the rapporteur relied heavily on the NGO Article 19 Right to Know Principles, which established a three-part test to determine when information can be limited: (1) "the information must relate to a legitimate aim listed in the law;" (2) the "disclosure must threaten to cause substantial harm to that aim;" and (3) "the harm to the aim must be greater than the public interest in having the information."³⁶⁷ In interpreting the test, the rapporteur argued that a legitimate justification to withhold information not only must be compatible with article 13 of the convention, it also must be "defined narrowly and precisely, both in terms of content and duration."³⁶⁸ For

³⁶⁴ *Reyes v. Chile* Inter-Am. Comm. Application to the Inter-Am. Ct., *id.* at ¶ 21. *See also* Inter-Am. Ct. Advisory Opinion OC-5/85, *id.* at ¶ 46 (arguing that a "compelling government interest" is not simply a "law that performs a useful or desirable purpose"; it must also must "clearly outweigh the social" need for freedom of expression and information and be "proportionate and closely tailored to the accomplishment of the legitimate government objective necessitating it").

³⁶⁵ *See Reyes et al. v. Chile*, 2006 Inter-Am. Ct. H. R. (ser. C) No. 151 (Sept. 19, 2006); *Reyes v. Chile* Inter-Am. Comm. Application to the Inter-Am. Ct., *id.*

³⁶⁶ *See also* Inter-Am. Comm. H.R. Report on Terrorism and Human Rights, *supra* note 326, at ¶ 286-87 (arguing that the three-part test of principle 4 of the Right to Know Principles applies to restrictions on article 13 of the American Convention).

³⁶⁷ *See* 2003b Report of the OAS Sp. Rapp., *supra* note 255, at chap. IV, ¶ 45. *See also* Right to Know Principles, *supra* note 280, at principle 4.

³⁶⁸ *Id.* at ¶ 45.

example, he argued, information classified in the name of national security can be legitimately withheld only for the period of time that the threat exists.

The UN Human Rights Committee also has emphasized the importance of narrowly drawn limitations on access to information. The 2001 report to Uzbekistan regarding implementation of article 19 of the Political Covenant chastised the government for its overbroad state-secrets legislation. The report stated that “restrictions on the freedom to receive and impart information are too wide to be consistent with article 19 of the Covenant. The State party should amend the [state-secrets law] to define and considerably reduce the types of issues that are defined as ‘state secrets and other secrets,’ thereby bringing this law into compliance with article 19 of the Covenant.”³⁶⁹ In the Human Rights Committee’s decision, *Gauthier v. Canada*,³⁷⁰ involving a newspaper publisher who was denied access equal to other reporters to attend Canadian parliamentary proceedings, the committee ruled in favor of the publisher in part because the rules of the accreditation system were not “specific, fair and reasonable” or transparent.³⁷¹

³⁶⁹ UN HRC Concluding Observations on Uzbekistan, A/56/40 vol. I, ¶ 79 (2001). *See also* UN HRC Concluding Observations on Great Britain and Northern Ireland, A/57/40 vol. I, ¶ 7 (2002) (arguing that the government “should ensure that its powers to protect information genuinely related to matters of national security are narrowly utilized and limited to instances where it has been shown to be necessary to suppress release of the information”).

³⁷⁰ *See* UN HRC Commission no. 633/1995, *Gauthier v. Canada*, CCPR/C/65/D/633/1995, ¶ 13.6 (May 5, 1999).

³⁷¹ UN HRC Commission no. 633/1995, *Gauthier v. Canada*, CCPR/C/65/D/633/1995, ¶ 13.6 (May 5, 1999). *See also* 2000 Report of the UN Sp. Rapp., *supra* note 208, at ¶ 44 (Jan. 18, 2000) (arguing that a “refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of legitimate aims which may justify nondisclosure should be provided in the law and exceptions should be narrowly drawn as to avoid including material which does not harm the legitimate interest”); 2004 Joint Declaration, *supra* note 275, at ¶ 4 (arguing that the “right of access should be subject to a narrow, carefully tailored system of exception”).

As stated above, in order to limit disclosure of information, governments also must show that the disclosure will cause a substantial harm that is not outweighed by the public's interest in the information. In assessing whether disclosure of information will cause a substantial harm, the OAS special rapporteur asserted in a 2003 report that governments must "consider both the short and long term consequences of the disclosure."³⁷² For example, he stated:

[E]xposing a pattern of bribery in the legislature may have negative consequences for the stability of the public body in the short term. However, in the long term it will help eliminate corruption and strengthen the legislative branch. Thus, the *overall* effect of disclosure must be substantially harmful in order to justify an exception.³⁷³

The substantial harm also must be greater than the public's right to know. According to the OAS special rapporteur's 2003 report, this "involves an explicit balancing of the harm in question with public interest in releasing the information."³⁷⁴ Exposure of bribery in the legislature, he reasoned, may harm legislators' right to privacy, but it is not a harm greater than the public's interest in having the information.³⁷⁵

The 2004 joint declaration of the UN and OAS special rapporteurs and the OSCE media representative also made this point:

Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public

³⁷² See 2003b Report of the OAS Sp. Rapp., *supra* note 255, at chap IV ¶ 46.

³⁷³ *Id.* at chap IV, ¶ 47.

³⁷⁴ *Id.* at chap IV, ¶ 48.

³⁷⁵ *Id.* at ¶ 48.

authority seeking to deny access to show that the information falls within the scope of the system of exceptions.³⁷⁶

Quoting the Johannesburg Principle, the UN freedom of expression special rapporteur's 1999 report explicitly stated that "the public's interest in knowing the information shall be a primary consideration in all laws and decisions conceding the right to obtain information."³⁷⁷ The Lima Principles give concrete examples of information in the public interest:

The public interest takes precedent over secrecy. Information must be released when the public interest outweighs any harm in releasing it. There is a strong presumption that information about threats to the environment, health, or human rights, and information revealing corruption should be released, given the high public interest in such information.³⁷⁸

National Security Limitations

When limiting the right to information for national security purposes, the same procedures and requirements regarding limitations apply. As stated above, the limitations must be established in law; written justifications for denial of information must be provided; and a process for appealing the decision must be in place. Also, the limitations must be narrowly drawn and serve a significant public interest that outweighs the public interest in receiving the information, and the burden of proof is on the government. Simply claiming that the significant public interest is one of national security is not enough to meet this burden of proof. According the Johannesburg Principles, a "state may not categorically deny access

³⁷⁶ 2004 Joint Declaration, *supra* note 275, at ¶ 4. *See also* 2006 Joint Declaration, *supra* note 275, at ¶ 4 (arguing that access should be granted unless "disclosure would cause serious harm to a protected interest" and "this harm outweighs the public interest in accessing the information").

³⁷⁷ 1999 Report of the UN Sp. Rapp., *supra* note 201, at ¶ 22(e). *See* Johannesburg Principles, *supra* note 279, at principle 13.

³⁷⁸ Lagos Declaration, *supra* note 304, at principle 7.

to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.”³⁷⁹

According to the OAS special rapporteur, the “process of evaluation required to adequately justify a denial of access to state-held information takes on particular urgency and importance when the legitimate aim in question is that of protecting national security.”³⁸⁰ This requires that the restrictions be “highly scrutinized in order to determine where they are legitimate.”³⁸¹

The OAS special rapporteur has expressed concern in country reports regarding excessive secrecy and over-classification of information. In his reports to Haiti and Venezuela, the rapporteur suggested that classified material be reviewed by an independent mechanism to ensure that national-security interests were appropriately balanced with the public interest in the right to know.³⁸² The UN freedom of expression special rapporteur, in a 1998 report, expressed concern that governments were over-classifying information:

States in every region and with different structures of government continue to classify far more information than could be considered necessary. "Necessary" in this context means that serious harm to the State's interest is unavoidable if

³⁷⁹ Johannesburg Principles, *supra* note 279, at principle 12. *See also* Lima Principles, *supra* note 309, at principle 8 (stating that “withholding information under a broad and imprecise definition of national security is unacceptable”). *See also* 2004 Joint Declaration, *supra* note 275, at ¶ 13 (arguing that “[c]ertain information may legitimately be secret on grounds of national security or protection of other overriding interests” but “secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label ‘secret’ for purposes of preventing disclosure of information which is in the public interest”).

³⁸⁰ 2003b Report of the OAS Sp. Rapp., *supra* note 255, at chap IV ¶ 49.

³⁸¹ *Id.*

³⁸² 2003 OAS Sp. Rapp. Report on Venezuela, *supra* note 258, at ¶ 483; 2003 OAS Sp. Rapp. Report on Haiti, *supra* note 258, at ¶ 30.

the information is made public and that this harm outweighs the harm to the rights of opinion, expression and information.³⁸³

When information is legitimately withheld for national-security purposes, release of that confidential or classified information by a public authority or journalist should not be punished if the information is of public interest or obtained legally. According to the 2004 joint declaration of the UN and OAS special rapporteurs and the OSCE media representative, journalists and civil servants should not be held accountable for leaked information:

Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information.³⁸⁴

The 1999 report of the UN freedom of expression special rapporteur noted with concern that several governments “have attempted to prosecute civil servants and others who make available public information which has been classified.”³⁸⁵ The Lima Principles more conservatively stated that disclosure of classified information should not be punished if “the public’s interest in knowing the information outweighs the consequences of disclosure.”³⁸⁶

³⁸³ 1998 Report of the UN Sp. Rapp., *supra* note 201, at ¶ 13.

³⁸⁴ 2004 Joint Declaration, *supra* note 275, at ¶ 11. *See also* 2006 Joint Declaration, *supra* note 275, at ¶ 1 (arguing that it is up to “public authorities to protect the legitimately confidential information they hold” and that “journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it”).

³⁸⁵ 1998 Report of the UN Sp. Rapp., *supra* note 201, at ¶ 13.

³⁸⁶ Lima Principles, *supra* note 309 at principle 9.

Conclusion

The freedom-of-expression conceptualization is based on the idea that citizens must have access to government information in order to effectively exercise their right to freedom of expression. Within this conceptualization, freedom of expression and information are considered as essential to a free, democratic society. Three central rationales were discovered for linking a right to government-held information to the right to freedom of expression: the seek-and-receive, self-governance, and good-governance rationales.

The seek-and-receive rationale is based on the rights to seek and receive information that are present in several international human rights instruments such as the Political Covenant, the American Convention, and the UN Declaration. Although the difference between the two rights is not always clear, these rights often have been interpreted as including a right of access to government information that places an obligation on governments to provide information. At a minimum this obligation seems to include the requirement that governments pass freedom-of-information legislation.

The self-governance rationale is based on the importance of citizens' informed consent in a democracy. In order for citizens to give their consent to be governed or effectively participate in the political process, they must have access to government information. The good-governance rationale is based on the importance of information to hold governments accountable for their actions and to prevent government abuse and corruption. The two rationales are not mutually exclusive and are often discussed together in human rights documents.

Within the freedom-of-expression conceptualization, government information is understood as a public good belonging to the people. Governments, acting as representatives

of the people, hold information on behalf of all citizens. In this context government does not own the information, citizens do; therefore, citizens do not have to show a direct interest in the information in order to request access to it. It is not always clear whether citizenship is required to access government information. At a minimum, information belongs to all citizens of a given country, but often it is expressed that the right to information belongs to all people regardless of citizenship. Within this conceptualization, there is recognition that marginalized groups and the media have a distinctive need for government information. This understanding does not give greater rights of access to information to the disadvantaged or the media, but this understanding acknowledges that information in these contexts fulfills important societal needs. Information is particularly important for the disenfranchised because it is seen as empowering the disenfranchised to gain equality within society. Information for the media is crucial because media facilitate citizens' rights to information.

Because information is owned by the people, the freedom-of-expression conceptualization requires that there is a presumption of disclosure. In other words, all information within the control of government should be disclosed unless there are legitimate and significant justifications to withhold it. This often is referred to as the principle of maximum disclosure. To help facilitate the democratic process, governments also are required to proactively provide information that is of a public interest even when the information is not requested.

Within the freedom-of-expression conceptualization, the right of information is not absolute. Governments can limit the disclosure of information, but this conceptualization requires governments to meet strict standards in order to justify nondisclosure. Limitations must be explicitly established in law. When information is withheld, governments are

required to provide a written justification and to ensure that citizens have access to an appeal process. Limitations on information must be based a significant public interest, must be narrowly drawn and interpreted, and must be balanced in favor of the public's interest in receiving the information. It is up to governments to prove that the restriction on disclosing information serves a legitimate interest that outweighs the public's right to know. Within this conceptualization, it is acknowledged that the protection of national security is a legitimate justification to withhold information; nonetheless, any limitation on information based on national security must abide by the same requirements as other restrictions.

CHAPTER 3

THE INFORMATION-PRIVACY CONCEPTUALIZATION

The information-privacy conceptualization of access to information recognizes that individuals have a right to access government documents containing information that pertains directly to them. This allows individuals to know the specific information the government has gathered about them, to assess the information's accuracy, and to correct the information if it is false or misleading. The OAS special rapporteur explained that the right of access to personal information is important because having control over "personal information is essential in many areas of life, since the lack of legal mechanisms for the correction, updating or removal of information can have a direct impact on the right to privacy, honor, personal identity, property and accountability in information gathering."³⁸⁷ This right to access personal information has become significant with the advent of new technologies that make it much easier for the government to store and access personal data. According to the OAS special rapporteur:

Widespread use of computers and the Internet has meant that the State and private sector can gain rapid access to a considerable amount of information about people. It is therefore necessary to ensure that there are specific channels for rapid access to information that can be used to modify any incorrect or outdated information contained in electronic databases.³⁸⁸

³⁸⁷ 2000 Report of the OAS Sp. Rapp, chap. 2, *supra* note 255, at ¶12. The point was reiterated in the special rapporteur's 2001 report, 2001 Report of the OAS Sp. Rapp, chap. 3, *supra* note 283, at 28.

³⁸⁸ 2000 Report of the OAS Sp. Rapp, chap. 2, *supra* note 255, at ¶13.

In order to further explore the right-to-privacy conceptualization, it is necessary to discuss the different sources of the right of access to personal information. Unlike the freedom-of-expression conceptualization, which is based solely in the right to freedom of expression, the right-to-privacy conceptualization finds its roots in three separate rights: the right to privacy, the right to freedom of expression, and, in one articulation, the right to fair treatment while in detention. The following sections will discuss the bases for the right to personal information, the rationales for the right, to whom the right is conferred, the types of information guaranteed, and the limitations on the right.

Sources of the Right to Personal Information

Often the right of access to personal information is based on an individual's right to privacy that is recognized by several human rights treaties.³⁸⁹ In several rulings,³⁹⁰ the European Court of Human Right has recognized a right of access to government-held personal information based the right to privacy, which is guaranteed by article 8 of the European Convention.³⁹¹ For example, in *Rotaru v. Romania*, the court stated that “both the storing by

³⁸⁹ Article 8 of the European Convention states: “Everyone has the right to respect for his private and family life, his home and his correspondence.” Paragraph two delineates limitations, stating, “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” European Convention, *supra* note 55, at art. 8. Article 17 of the Political Covenant states, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation” and “[e]veryone has the right to the protection of the law against such interference or attacks.” Political Covenant, *supra* note 46, at art. 17.

³⁹⁰ See, e.g., *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A), ¶ 49 (July 7, 1989) (ruling that the right to private and family life included a positive obligation on the government to release personal files and that failure to do so violated Gaskin's rights); *Rotaru v. Romania*, App. No. 28341/95 Eur. Ct. H.R., ¶ 46 (May 4, 2000) (ruling that the storing and use of personal data by the Romanian intelligence services and absence of the possibility of refuting their accuracy was a violation of article 8).

³⁹¹ European Convention, *supra* note 55, at art. 8.

a public authority of information relating to an individual's private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in article 8 [of the European Convention].”³⁹² The court has been quite clear that this right is not based on article 10, the freedom-of-expression provision of the European Convention, stating 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” and therefore does not “embody an obligation on the Government to impart such information.”³⁹³

The UN Human Rights Committee, which monitors the implementation of and compliance with the Political Covenant, stated in a general comment that the right to privacy includes the right to access personal information held by the government. General comments are statements made by the committee to clarify to governments their obligations under the Political Covenant and to communicate interpretations of the covenant's articles.³⁹⁴ In interpreting article 17,³⁹⁵ the right-to-privacy provision of the Political Covenant, the committee stated, “In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes.”³⁹⁶ Several compliance reports from governments to the Human Rights Committee have listed the right of access to

³⁹² Rotaru v. Romania, App. No. 28341/95 Eur. Ct. H.R., ¶ 46 (May 4, 2000).

³⁹³ Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A), ¶ 74 (1987). *See also* Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser. A), ¶ 52 (July 7, 1989).

³⁹⁴ ALEX CONTE, ET AL., DEFINING CIVIL AND POLITICAL RIGHTS. THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (2004).

³⁹⁵ Political Covenant, *supra* note 46, at art. 19(2).

³⁹⁶ UN HRC General Comment 16, UN Doc. A/43/40 (1988)181, at ¶10 (1988).

personal information and the right to correct inaccurate personal information as an example of compliance with article 17 of the Political Covenant. For example in discussing article 17, Macedonia stated in its 2007 report to the Human Rights Committee that federal law ensures individuals the right of access to personal information and a means to correct the information, if needed.³⁹⁷ However, other such reports from governments have listed a right to personal information as complying with article 19, the freedom-of-expression provision of the Political Covenant.³⁹⁸

The right of access to personal information, which often is called *habeas data*,³⁹⁹ also has been based on the right to freedom of expression within the American Convention.⁴⁰⁰

³⁹⁷ UN H.R. C. The Former Yugoslav Republic of Macedonia Second Periodic Report, UN Doc. CCPR/C/MKD/2, ¶ 329 (Feb. 2, 2007). *See also* UN H.R. C. Argentina Third Periodic Report, UN Doc. CCPR/C/ARG/98/3, ¶ 149 (May 7, 1999); UN H.R. C. Austria Fourth Periodic Report, UN Doc. CCPR/C/AUT/4, ¶ 283 (Nov. 1, 2006); UN H.R. C. Australia Third Periodic Report, UN Doc. CCPR/C/AUS/98/3, ¶ 869 (July 2, 1999); UN H.R. C. Belgium Third Periodic Report, UN Doc. CCPR/C/94/Add.3, ¶ 187 (Oct. 15, 1997); UN H.R. C. Canada Fourth Periodic Report, UN Doc. CCPR/C/103/Add.5, ¶ 185 (Oct. 15, 1997); UN H.R. C. Columbia Fourth Periodic Report, UN Doc. CCPR/C/103/Add.3, ¶ 255 (Oct. 8, 1996); reiterated in 2002 State Report, UN H.R. C. Columbia Fifth Periodic Report, UN Doc. CCPR/C/COL/2002/5, ¶ 792 (Sept. 18, 2002); UN HRC Czech Republic Initial Report, UN Doc. CCPR/C/CZE/2000/1, ¶ 325 (May 4, 2000); UN H.R. C. Netherlands Third Periodic Report, UN Doc. CCPR/C/NET/99/3, ¶ 136 (Aug. 25, 2000); UN H.R. C. Portugal Third Periodic Report, UN Doc. CCPR/C/PRT/2002/3, ¶ 17.3 (June 6, 2002). At least two states have indicated that the right of access to personal information under article 19 of the Political Covenant and the right to correct it under article 17 of the Political Covenant, *See* UN H.R. C. Georgia Second Periodic Report, UN Doc. CCPR/C/GEO/2000/2, ¶ 424, 444 (Feb. 26, 2001); UN H.R. C. Ukraine Fifth Periodic Report, UN Doc. CCPR/C/UKR/99/5, ¶ 434 (Nov. 16, 2000).

³⁹⁸ *See* UN H.R. C. Argentina Third Periodic Report, UN Doc. CCPR/C/ARG/98/3, ¶ 149 (May 7, 1999); UN H.R. C. Australia Third Periodic Report, UN Doc. CCPR/C/AUS/98/3, ¶ 869 (July 2, 1999); UN H.R. C. Belgium Third Periodic Report, UN Doc. CCPR/C/94/Add.3, ¶ 187 (Oct. 15, 1997); UN H.R. C. Brazil Initial Report, UN Doc. CCPR/C/81/Add.6, ¶ 223 (Mar. 2, 1995); UN H.R. C. Canada Fourth Periodic Report, UN Doc. CCPR/C/103/Add.5, ¶ 185 (Oct. 15, 1997); UN H.R. C. Netherlands Third Periodic Report, UN Doc. CCPR/C/NET/99/3, ¶ 136 (Aug. 25, 2000); UN H.R. C. The Former Yugoslav Republic of Macedonia Second Periodic Report, UN Doc. CCPR/C/MKD/2, ¶ 329 (Feb. 2, 2007).

³⁹⁹ According to the Inter-American Commission, *habeas data* “refers to the right of any individual to have access to information referring to him and to modify, remove, or correct such information when necessary.” Inter-American Commission Report of the Situation of Human Rights Defenders in the Americas, Inter-Am. C.H.R., OAS Doc. OEA/Ser.L/V/II.124, Doc. 5, rev. 1, ¶87 (Mar. 7, 2006) [hereinafter OAS Report on H.R. Defenders].

⁴⁰⁰ *See* American Convention, *supra* 1, at art. 13.

Principle three of the Inter-American Commission's Declaration on Principles of Freedom of Expression⁴⁰¹ states, "Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it correct it and/or amend it."⁴⁰²

According to a 1999 OAS special rapporteur report:

The right to access information held by the government (public information) and *habeas data* both follow from the right to freedom of information. While the two are similar in that they have a similar objective, the information to which they grant access serves a clearly different function. The information in the first case is public in nature, and the right to that information is informed by the need to make the democratic system work better and scrutinize government. *Habeas data*, however, provides one the opportunity to request [personal] information housed in both government data banks and private data banks.⁴⁰³

This exact language regarding the difference between the right to public information and personal information also was used by the UN special rapporteur in a 2002 report on Argentina's compliance with article 19 of the Political Covenant.⁴⁰⁴ Also, on several occasions, compliance reports from governments to the Human Rights Committee have listed the right of access to personal information and the means to correct it as an example of compliance with article 19.⁴⁰⁵ The Declaration of Principles on Freedom of Expression in Africa also links the right of access to personal information to the right to freedom of

⁴⁰¹ Inter-Am. Comm. Freedom of Expression Declaration, *supra* note 259.

⁴⁰² *Id.* at principle 3.

⁴⁰³ 1999 Report of the OAS Sp. Rapp, *supra* note 255, at n. 42.

⁴⁰⁴ UN Sp. Rapp. Report on Mission to Argentina, UN Doc. E/CN.4/2002/75/Add.1, ¶ 104 (Jan. 17, 2002).

⁴⁰⁵ UN HRC Czech Republic Initial Report, UN Doc. CCPR/C/CZE/2000/1, ¶ 325 (May 4, 2000) (stating that a "specific sphere of the right to information is represented by citizens' access to files kept on them before 1989 by the former State Security Police."). See UN HRC Georgia Second Periodic Report, UN Doc. CCPR/C/GEO/2000/2, ¶ 444 (Feb. 26, 2001); UN HRC Ukraine Fifth Periodic Report, UN Doc. CCPR/C/UKR/99/5, ¶ 434 (Nov. 16, 2000).

expression, stating, “Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or private bodies.”⁴⁰⁶

The right to personal information also has been recognized as part of the right to fair treatment while in detention. As noted above, the Human Rights Committee has recognized the right of access to personal information based on the right to privacy and the right to freedom of expression; yet, in one of its only decisions regarding a right to government-held information, the committee held that withholding a prisoner’s medical records violated the right to fair treatment while in detention, which is guaranteed by article 10 of the Political Covenant.⁴⁰⁷ The committee ruled that the “consistent and unexplained denial of access to medical records” violated the complainant’s rights under article 10.⁴⁰⁸

The right of access to personal information has been based on three separate rights, which indicates that there can be more one than one source of a right to information within a conceptualization. Even though the right to personal information is based in different sources, this does not significantly affect how the right to personal information has been conceptualized. Even when the right is based on freedom of expression, the right to privacy

⁴⁰⁶ African Declaration, *supra* note 185, at principle IV(3).

⁴⁰⁷ Political Covenant, *supra* note 46, at art. 10 (stating, in part, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person to be treated with humanity and respect while in detention”).

⁴⁰⁸ UN HRC Communication no. 726/1996, *Zheludkov v. Ukraine*, CCPR/C/76/D/726/1996, ¶ 8.4 (Dec. 6, 2002). It is interesting to note that there was a consenting and a dissenting opinion regarding the majority ruling. In a dissenting opinion, a committee member wrote, “To conclude that the denial of access to medical records to a person deprived of his liberty, assuming such a denial is proved, constitutes ‘inhumane’ treatment and is contrary to ‘respect for the inherent dignity of the human person’ goes beyond the scope of the said paragraph and runs the risk of undermining a fundamental principle which must be above whimsical interpretations.” *Zheludkov v. Ukraine*, Individual Opinion by Rafael Posada. In a concurring opinion, a member argued that the right personal information held by the government should be absolute, stating that “a person’s right to have access to his or her medical records form part of the right of all individuals to have access to personal information concerning them . . . regardless of whether or not this refusal may have had consequences for the medical treatment.” *Zheludkov v. Ukraine*, Individual Opinion by Cecilia Medina.

often is evoked. For example, in the OAS special rapporteur's interpretations of the Inter-American Freedom of Expression principle, he stated that the first principle that *habeas data* is built upon is "the right [of individuals] to not have their privacy disturbed."⁴⁰⁹ Both the UN and OAS special rapporteurs on freedom of expression argued that the right to personal information plays two separate roles: as a private right it protects the privacy of individuals, and as a political right it helps ensure a healthy democracy.

It also is important to note that in-depth discussion regarding the specifics of a right of access to personal information is limited in these documents, particularly within those of NGOs. This may be because a general right of access to government information often is understood to include the right to personal information. For example, the principle of maximum disclosure discussed in Chapter Two presumes that all government information is accessible to the public unless there is a legitimate basis for withholding it.⁴¹⁰ Under this principle, access to personal information would be included; nonetheless, a separate information-privacy conceptualization of access to government information does exist as the following sections demonstrate.

The Information-Privacy Conceptualization – Rationales of the Right

Within the information-privacy conceptualization of access to government information, there are two central rationales that justify a right of access to personal

⁴⁰⁹ 2001 Report of the OAS Sp. Rapp, *supra* note 283, at ¶12. The Inter-Am. Comm. also reiterated the three premises. *See* Inter-American Commission Report of the Situation of Human Rights Defenders in the Americas, Inter-Am. C.H.R., OAS Doc. OEA/Ser.L/V/II.124, Doc. 5, rev. 1, ¶89 (Mar. 7, 2006).

⁴¹⁰ *See* Principle of Maximum Disclosure, *infra* pp. 81-85

information. These are the knowledge-about-self rationale and the government-accountability rationale.

Knowledge-about-Self Rationale

According to Toby Mendel of the NGO Article 19, the ability to gain knowledge about oneself is part of basic human dignity. Access to personal information, Mendel argued, is a “social goal as opposed to a political goal (protecting other rights). The right to access one’s personal information is part of basic human dignity.”⁴¹¹ This understanding of the right to personal information is evident in three European Court cases involving access to birth or childhood information. In all three cases, the court maintained that the personal information held in government files was important for the complainants’ understanding of themselves. Two of the cases, *Gaskin v. the United Kingdom*⁴¹² and *M.G. v. the United Kingdom*,⁴¹³ involved information about the complainants’ childhoods. The third case, *Odièvre v. France*,⁴¹⁴ pertained to information about the complainant’s birth mother.

In *Gaskin v. the United Kingdom*, Graham Gaskin, who was taken into care by social services at a very young age, wanted access to confidential case files that had been compiled by local authorities and contained reports by all those connected with his care. He was denied access to some of his files because several of the contributors, such as social workers,

⁴¹¹ Toby Mendel, *Freedom of Information: A Comparative Legal Study*, 4 (2004), http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_laws.pdf. For an updated version of this study, see Toby Mendel, *Freedom of Information: A Comparative Legal Study* (2d ed. 2008), http://portal.unesco.org/ci/en/file_download.php/fa422efc11c9f9b15f9374a5eac31c7efreedom_info_laws.pdf.

⁴¹² *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A) (July 7, 1989).

⁴¹³ *M.G. v. United Kingdom*, App. No. 39393/98 Eur. Ct. H.R. (Sept. 24, 2002).

⁴¹⁴ *Odièvre v. France*, App. No. 42326/98 Eur. Ct. H.R. (Feb. 13, 2003).

withheld permission because some information in their reports had been provided in confidence. Gaskin wanted the files because he believed that he was “ill-treated in care” and wanted to “obtain details of where he was kept and by whom and in what conditions in order to be able to help him to overcome his problems and learn about his past.”⁴¹⁵

The European Court determined that the government records in question provided Gaskin “a substitute record for the memories and experience of the parents. . . . It no doubt contained information concerning highly personal aspects of the applicant’s childhood, development and history and thus could constitute his principle source of information about his past and formative years.”⁴¹⁶ The court went on to state that the “respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification.”⁴¹⁷ The court concluded that “persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.”⁴¹⁸

The case *M.G. v. the United Kingdom* involved a similar request for information. As a child, the complainant periodically had been in the care of social services. He wanted his social services records because he believed he was physically abused as a child and needed all relevant information about his childhood “in order to come to terms with the emotional and

⁴¹⁵ Gaskin v. United Kingdom, at ¶ 11.

⁴¹⁶ *Id.* at ¶ 36.

⁴¹⁷ *Id.* at ¶ 39.

⁴¹⁸ *Id.* at ¶ 49.

psychological impact of any such abuse, and to understand his own subsequent behavior.”⁴¹⁹ He had been given limited access to the files, but he argued that he had a right to “unimpeded access” to his files.⁴²⁰ The European Court stated that the “social service records, which contain the principle source of information regarding significant periods of the applicant’s formative years, relate to his private and family life.”⁴²¹ Relying heavily on the *Gaskin* decision, the court ruled that the complainant’s interest in obtaining the documents outweighed the government’s interest in maintaining the confidentiality of social service records.⁴²²

The case *Odièvre v. France* involved Pascale Odièvre, who requested information about her birth mother from the French government. Odièvre had been given up for adoption and wanted to obtain identifying information about her natural family. She argued that the government’s refusal to give her the information she sought prevented her from knowing her personal history.⁴²³ The court said that the case related to the complainant’s private life because her “claim to be entitled, in the name of biological truth, to know her personal history is based on her inability to gain access to information about her origins and related identifying data.”⁴²⁴ Quoting *Gaskin*, the court emphasized that the vital interest in understanding one’s childhood and early development was protected under article 8 of the European

⁴¹⁹ M.G. v. United Kingdom, App. No. 39393/98 Eur. Ct. H.R. ¶ 26 (Sept. 24, 2002).

⁴²⁰ *Id.* at ¶ 26.

⁴²¹ *Id.* at ¶ 27-32.

⁴²² *Id.*

⁴²³ Odièvre v. France, App. No. 42326/98 Eur. Ct. H.R., ¶ 28 (Feb. 13, 2003).

⁴²⁴ *Id.* at 29.

Convention.⁴²⁵ In discussing whether article 8, the right-to-privacy provision, applied to the requested information, the court stated:

Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention.⁴²⁶

Although the court ruled that the protections in article 8 applied to information about one's birth mother, the court maintained that, in this case, the government's interest in preserving the anonymity of the birth mother outweighed *Odièvre's* interest in the information,⁴²⁷ which will be discussed below.

Government-Accountability Rationale

The government-accountability rationale for the information-privacy conceptualization understands the right of access to personal information as a vehicle to ensure that governments do not overstep their powers by storing false or misleading information about individuals, illegally gathering or using information on individuals, or allowing unauthorized individuals to access the information. According to the OAS special rapporteur, "[I]ndividuals have the right to use the habeas data writ as a mechanism to ensure accountability."⁴²⁸ This rationale is implied in the right to correct inaccurate personal information, a right often included in the right of access to personal information.

⁴²⁵ *Id.* at 42 (quoting *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A), ¶ 49 (July 7, 1989)).

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 49.

For example, in a 2000 report to Korea about its compliance with article 17, the right to privacy provision of the Political Covenant, the Human Rights Committee stated that the “lack of adequate remedies to correct inaccurate information in databases or to prevent its misuse or abuse is also of concern.”⁴²⁹ According to David Banisar of the NGO Privacy International, “A right of access and correction to personal files ensures that records on individuals are accurate and decisions are not based on out-of-date or irrelevant information.”⁴³⁰ The Human Rights Committee’s interpretation of article 17 stated, “If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”⁴³¹

The European Court on Human Rights addressed this issue in *Turek v. Slovakia*.⁴³² This case involved Ivan Turek, who was denied a security clearance he needed in order to work for the Slovakian government because it was determined that he had collaborated with the security agency of the former communist regime. Under a Slovakian lustration law,⁴³³

⁴²⁸ 2001 Report of the OAS Sp. Rapp, *supra* note 283, at ¶12. The Inter-Am. Commission also reiterated the three premises. *See* Inter-American Commission Report of the Situation of Human Rights Defenders in the Americas, Inter-Am. C.H.R., OAS Doc. OEA/Ser.L./V/II.124, Doc. 5, rev. 1, ¶89 (Mar. 7, 2006).

⁴²⁹ UN HRC Concluding Observations on Republic of Korea, UN Doc. A/55/40 vol. I, ¶ 149 (2000).

⁴³⁰ *See* Banisar, *supra* note 9, at 7.

⁴³¹ UN HRC General Comment 16, UN Doc. A/43/40, ¶10 (1988).

⁴³² *Turek v. Slovankia*, App. No. 57986/00 Eur. Ct. H.R. (Feb. 14, 2006).

⁴³³ According to David Banisar: “Following the transition to democracy, many countries have adopted laws to make available the files of the former secret police forces. These files are made available to individuals to see what is being held on them. In other countries, the files are limited to ‘lustration’ committees to ensure that individuals who were in the previous secret services are prohibited from being in the current government or at least their records are made public.” David Banisar, *Freedom of Information: International Trends and National Security*, conference paper presented at the Workshop on Democratic and Parliamentary Oversight of Intelligence Services held in Geneva, Switzerland, 8 (Oct. 3-5, 2002), http://www.humanrightsinitiative.org/programs/ai/rti/articles/foia_intl_trends_and_nat_sec.pdf.

citizens who collaborated with the former communist regime cannot hold certain government positions.⁴³⁴ Lustration is the act of vetting potential public officials for links to the communist-era security services. This was particularly common in Central and Eastern Europe after the fall of the Soviet Union.⁴³⁵ The allegations that Turek had collaborated also were made public in the news media and on the Internet.⁴³⁶ Turek refuted the information and requested access to the information about him in the government's files. He was denied the information because the files were classified. The court ruled that the government had not justified its need to withhold the information, stating, "If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities to contradict the security agency's version of the facts would be severely curtailed."⁴³⁷

The accountability rationale also is based on ensuring that unauthorized individuals have not obtained the personal information of others. The Human Rights Committee's general comment on article 17 of the Political Covenant⁴³⁸ stated:

Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. Thus it is necessary for individuals to access their personal information.⁴³⁹

⁴³⁴ Turek v. Slovakia, at ¶ 11.

⁴³⁵ Kieran Williams et al., *Explaining Lustration in Central Europe: a 'post-communist politics' approach*, 12 DEMOCRATIZATION 22 (2005).

⁴³⁶ Turek v. Slovakia, at ¶ 12.

⁴³⁷ *Id.* at ¶ 115. It is important to note that the court stated that state agencies may have legitimate grounds to withhold information, but that "in respect of lustration proceedings, this consideration loses much of its validity" because those proceedings are, "by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services." *Id.*

⁴³⁸ Political Covenant, *supra* note 46, at art. 17.

⁴³⁹ *Id.*

Often the rationale that the right to personal information is necessary to hold governments accountable specifically refers to security and intelligence agencies, which by design collect and store personal information. In this sense, the right is seen as preventing the arbitrary or illegitimate use of personal data.⁴⁴⁰

In a 2001 report, the OAS special rapporteur emphasized that the right of access to personal information can ensure that security and intelligence agencies are held accountable for their actions. The special rapporteur said that “with respect to the accountability aspect of the *habeas data* writ, it should be stressed that in some countries in the hemisphere, this procedure is an important mechanism for monitoring the activities of State security or intelligence agencies.”⁴⁴¹ The special rapporteur further stated:

The action of *habeas data* entitles the injured party, or his family members, to ascertain the purpose for which the data was collected and, if collected illegally, to determine whether the responsible parties are punishable. Public disclosure of illegal practices in the collection of personal data can have the effect of preventing such practices by these agencies in the future.⁴⁴²

Although the information-privacy conceptualization understands the right to personal information held by the government as an individual right, the OAS special rapporteur’s statement above implies that the right also could be political in nature in that it could lead to public exposure of government wrong-doing.

⁴⁴⁰ 2001 Report of the OAS Sp. Rapp, chap. 3, *supra* note 283, at 39.

⁴⁴¹ 2000 Report of the OAS Sp. Rapp., chap. 2, *supra* note 255, at ¶14.

⁴⁴² 2001 Report of the OAS Sp. Rapp., chap. 3, *supra* note 283, at 36. These ideas were reiterated in the special rapporteur’s 2000 report, 2000 Report of the OAS Sp. Rapp., chap. 2, *supra* note 255, at ¶14. It is important to note that the European Court of Human Rights has ruled in at least two cases that the lack of access to personal information held by intelligence agencies was a violation of article 8 of the European Convention, although the court did not discuss the rulings in terms of holding these agencies accountable. *See Rotaru v. Romania*, App. No. 28341/95 Eur. Ct. H.R. (May 4, 2000); *Segerstedt-Wiberg and Others v. Sweden*, App. No. 62332/00 Eur. Ct. H.R. (June 9, 2006).

The Information-Privacy Conceptualization – To Whom the Right is Conferred

Within the information-privacy conceptualization, the right to personal information pertains to all individuals who desire personal information about them held by the government, regardless of citizenship.⁴⁴³ Individuals do not have to indicate why they are requesting the information. According to the OAS special rapporteur, “The mere existence of personal data in public or private records is sufficient reason in itself for the exercise of this right.”⁴⁴⁴ The European Court of Human Rights stated that an individual does not have to show that the information is “sensitive” or that the government’s collection and storage of the information created a harm.⁴⁴⁵

According to the Guidelines for the Regulation of Computerized Personal Data Files created by the UN Commission on Human Rights and adopted by the UN General Assembly, all that is required to request personal information is proof of identity.⁴⁴⁶ Sometimes there are references to this right also belonging to individuals’ family members. For example, according to the OAS special rapporteur, family members of the individual also have a right to request the information from the government.⁴⁴⁷

⁴⁴³ See, e.g., African Declaration, *supra* note 185, at principle IV(3); UN HRC General Comment 16, UN Doc. A/43/40 (1988)181 at ¶10; Inter-Am. Comm. Freedom of Expression Declaration, *supra* note 259, at principle 3.

⁴⁴⁴ 2001 Report of the OAS Sp. Rapp., chap. 3, *supra* note 283, at 38. This also was made in the OAS special rapporteur’s 2000 report. See 2000 Report of the OAS Sp. Rapp., chap. 2, *supra* note 255, at ¶16.

⁴⁴⁵ *Amann v. Switzerland*, App. No. 27798/95 Eur. Ct. H.R., at ¶ 70 (Feb. 16, 2000).

⁴⁴⁶ Guidelines for the Regulation of Computerized Personal Data Files, C.H.R. Doc. E/CN.4/1990/72, principle 4 (Feb. 20, 1990). The guidelines were adopted by the UN General Assembly in 1990. See UN G.A. Res. 1990/46, UN Doc. A/Res/45/95 (Dec. 14, 1990).

⁴⁴⁷ 2001 Report of the OAS Sp. Rapp., chap. 3, *supra* note 283, at 36.

The Information-Privacy Conceptualization – The Type of Information Guaranteed

The type of information to which access is guaranteed within the information-privacy conceptualization is limited to information that specifically pertains to the requester of the information. Often this is referred to as personal information, personal data, or information about one's private life.

The European Court of Human Rights has stated that the right to private life must be interpreted broadly. According to the court, "[A]ny information relating to an identified or identifiable individual" held by the government is included.⁴⁴⁸ The court further stated: "[T]he term 'private life' must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings" and does not exclude "activities of a professional or business nature."⁴⁴⁹ Other types of the information that the court has found to be related to private life include information on one's birth⁴⁵⁰ and childhood,⁴⁵¹ social service records,⁴⁵² and any information collected and stored by intelligence agencies.⁴⁵³

The European Court also has ruled that information once in the public domain can be considered private if it is then collected and stored by the government. In 2000 the court stated: "Public information can fall within the scope of private life where it is systematically

⁴⁴⁸ *Amann v. Switzerland* at ¶ 65 (referring to the 1981 Council of Europe's Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Odièvre v. France*, App. No. 42326/98 Eur. Ct. H.R., ¶ 29 (Feb. 13, 2003).

⁴⁵¹ *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A), ¶ 36-37 (July 7, 1989).

⁴⁵² *M.G. v. United Kingdom*, App. No. 39393/98 Eur. Ct. H.R., ¶ 31 (Sept. 24, 2002).

⁴⁵³ *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A), ¶ 48 (1987); *Rotaru v. Romania*, App. No. 28341/95 Eur. Ct. H.R., ¶ 43 (May 4, 2000); *Segerstedt-Wiberg and Others v. Sweden*, App. No. 62332/00 Eur. Ct. H.R. ¶ 72 (June 9, 2006); *Turek v. Slovakia*, App. No. 57986/00 Eur. Ct. H.R., ¶ 100 (Feb. 14, 2006).

collected and stored in files held by public authorities. That is all the truer where such information concerns a person's distant past."⁴⁵⁴ This case involved an individual who sought access to personal files created 50 years earlier by the Romanian Intelligence Service. The files included information about the complainant's academic studies, his political activities, and his criminal record.⁴⁵⁵ In 2006, the court reiterated this point in a case involving information gathered by the Swedish Security Police. The information included radio programs and newspaper articles. According to the court, "[E]ven those parts of the information that were public since the information had been systematically collected and stored in files held by the authorities" can be considered private.⁴⁵⁶

As indicated above, the European Court has stated that an individual does not have to show that the information is "sensitive" in order to claim a right of access to information.⁴⁵⁷ Nor does an individual have to allege that the information is incorrect.⁴⁵⁸ The OAS special rapporteur has stated that information regarding one's property also is included.⁴⁵⁹ The OAS special rapporteur also has stated that individuals have a right to access information that is classified, if "entities of the state or the private sector obtain data improperly and/or illegally."⁴⁶⁰

⁴⁵⁴ Rotaru v. Romania at ¶ 43.

⁴⁵⁵ *Id.* at ¶ 44.

⁴⁵⁶ Segerstedt-Wiberg v. Sweden at ¶ 72.

⁴⁵⁷ Amann v. Switzerland, App. No. 27798/95 Eur. Ct. H.R., at ¶ 70 (Feb. 16, 2000).

⁴⁵⁸ Segerstedt-Wiberg v. Sweden at ¶ 71.

⁴⁵⁹ 2000 Report of the OAS Sp. Rapp., chap. 2, *supra* note 255, at ¶12; 2001 Report of the OAS Sp. Rapp., chap. 3, *supra* note 283, at 26; 2001 OAS Sp. Rapp. Report on Paraguay, *supra* note 255, at ¶ 21.

⁴⁶⁰ 2001 Report of the OAS Sp. Rapp., chap. 3, *supra* note 283, at 36.

Within this conceptualization, information held by nongovernment entities sometimes is included in the right of access to personal information. The Human Rights Committee included information from nongovernment entities in its general comment on article 17, the right-to-privacy provision of the Political Covenant. The comment stated that the right to privacy guaranteed by article 17 included the right to access personal information held by both “public authorities and private individuals or bodies.”⁴⁶¹ In a 1999 meeting with a representative of South Korea, the committee urged the South Korean government to provide a right of access to personal information from both public and private databases.⁴⁶² Several countries in their compliance reports to the committee noted in their sections on article 17 that their laws or constitutions included a right to data held by private entities.⁴⁶³

The OAS special rapporteur also has stated that the right of *habeas data* includes the right to information in “private databases.”⁴⁶⁴ This was emphasized in reports to Panama and Paraguay on the governments’ compliance with the American Convention.⁴⁶⁵ The Africa Declaration also includes a right of access to personal information held by private entities in the declaration’s right of access to personal information.⁴⁶⁶

⁴⁶¹ Political Covenant, *supra* note 46, at art. 17.

⁴⁶² UN HRC Summary Record of 1792th meeting, UN Doc. CCPR/C/SR.1792, ¶ 34 (Nov. 22, 1999).

⁴⁶³ UN H.R. C. Argentina Third Periodic Report, UN Doc. CCPR/C/ARG/98/3, ¶ 149 (May 7, 1999); UN H.R. C. Columbia Fourth Periodic Report, UN Doc. CCPR/C/103/Add.3, ¶ 255 (Oct. 8, 1996); reiterated in 2002 State Report, UN H.R. C. Columbia Fifth Periodic Report, UN Doc. CCPR/C/COL/2002/5, ¶ 792 (Sept. 18, 2002); UN H.R. C. Israel Initial Report, UN Doc. CCPR/C/81/Add.13, ¶ 507 (Apr. 9, 1998).

⁴⁶⁴ 2001 Report of the OAS Sp. Rapp., *supra* note 283, at ¶12.

⁴⁶⁵ 2003 OAS Sp. Rapp. Report on Panama, *supra* note 255, at ¶ 143; 2001 OAS Sp. Rapp. Report on Paraguay, *supra* note 255, at ¶ 21.

⁴⁶⁶ African Declaration, *supra* note 185, at principle IV(3).

The Information-Privacy Conceptualization – Limitations on the Right

As noted above, the right to access personal information is based on more than one right: a right to privacy, a right to freedom of expression, and a right to fair treatment while in detention. This inconsistency could affect how the limitations on the right of access to personal information are conceptualized. For example, the Political Covenant allows restrictions on the right to freedom of expression guaranteed under article 19 in order to protect reputations, national security, and public health or morals.⁴⁶⁷ The American Convention allows for similar restrictions.⁴⁶⁸ At the same time, the Political Covenant articulates no restrictions on the right to privacy. Thus far, neither the Inter-American Court nor the Human Rights Committee has weighed in on potential restrictions on the right to personal information guaranteed by the American Convention or the Political Covenant. The European Court of Human Rights, on the other hand, which understands the right to personal information as part of the right to privacy, has addressed in detail the limitations on this right.

According to paragraph two of article 8 of the European Convention, which sets out the limitations on the right to privacy:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁴⁶⁹

⁴⁶⁷ Political Covenant, *supra* note 46, at art. 19(3).

⁴⁶⁸ American Covenant, *supra* note 5, at art. 13.

⁴⁶⁹ European Covenant, *supra* note 55, at art. 8(2). The Guidelines for the Regulation of Computerized Personal Data Files similarly require that limitations are prescribed by law and “only if necessary to protect national security, public order, public health or morality.” Guidelines for the Regulation of Computerized Personal Data Files, C.H.R. Doc. E/CN.4/1990/72, principle 6 (Feb. 20, 1990). The guidelines were adopted by the UN General Assembly in 1990. *See* UN G.A. Res. 1990/46, UN Doc. A/Res/45/95 (Dec. 14, 1990).

According to the European Court's interpretation of article 8, in order to legitimately limit access to personal information, governments must clearly define restrictions within the law. The European Court has ruled that this means that the law denying access to personal information must be clear and its consequences must be "foreseeable" to the public. This also means that the law "must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities."⁴⁷⁰ The court explained these requirements in *Leander v. Sweden*.⁴⁷¹

The *Leander v. Sweden* case, discussed earlier, involved Torsten Leander, who had temporary employment as a technician at a navel museum in Sweden. After being denied a security clearance from the government, he was fired. He asked to see the information about him that had prompted the government to deny his security clearance and was denied access to the information for reasons of national security. In determining if the denial of information was "in accordance with the law," the court stated that the government's interference with article 8, the right to privacy provision in the European Covenant, must have some basis in domestic law. But, the court asserted, "Compliance with domestic law . . . does not suffice: the law in question must be accessible to the individual concerned and its consequences for him must also be foreseeable."⁴⁷² The court went on to explain that "foreseeability" means that "the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered

⁴⁷⁰ Segerstedt-Wiberg and Others v. Sweden, App. No. 62332/00 Eur. Ct. H.R., 76 (June 9, 2006).

⁴⁷¹ *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A) (1987).

⁴⁷² *Id.* at ¶ 50.

to resort to this kind of secret and potentially dangerous interference with private life.”⁴⁷³

According to the court, this means that the “law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity.”⁴⁷⁴ Ultimately, in *Leander* the court ruled that national security concerns justified the government’s restriction on information. Limitations on information based on national security will be discussed in more detail below.

In *Rotaru v. Romania*, the European Court ruled that a law allowing the government to collect and store information on individuals was not “in accordance with the law,” as required by article 8, because it contained “no explicit, detailed provision concerning the persons authorized to consult the file, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.”⁴⁷⁵ The court concluded that the “domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.”⁴⁷⁶ The court also noted that information gathered by the government based solely on political affiliations would not be considered “in accordance with the law.”⁴⁷⁷

⁴⁷³ *Id.* at ¶ 51. *See also* *Amann v. Switzerland*, App. No. 27798/95 Eur. Ct. H.R., ¶50 (Feb. 16, 2000); *Rotaru v. Romania*, App. No. 28341/95 Eur. Ct. H.R., ¶ 52 (May 4, 2000).

⁴⁷⁴ *Segerstedt-Wiberg v. Sweden*, at ¶ 76.

⁴⁷⁵ *Rotaru v. Romania*, at ¶ 57.

⁴⁷⁶ *Id.* at 61.

⁴⁷⁷ *Leander v. Sweden*, at ¶ 54; *Segerstedt-Wiberg and Others v. Sweden*, App. No. 62332/00 Eur. Ct. H.R., ¶ 79 (June 9, 2006).

A procedure to appeal denials of information must be in place in order to be “in accordance with the law.” In both *Gaskin* and *M.G.*, the European Court ruled that the government was in violation of article 8 because no such procedure was in place.⁴⁷⁸

In the context of national security, the court has stated that the requirement of foreseeability can be modified. According to the court in *Leander*, in the context of national security, foreseeability “cannot mean that an individual should be enabled to foresee precisely what checks will be made in his regard by the Swedish special police service in its efforts to protect national security.”⁴⁷⁹ The court further stated:

[W]here the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.⁴⁸⁰

In order for a limitation on access to personal information to be justified, the limitation also must have a legitimate aim that is “necessary in a democratic society.”⁴⁸¹ According to the court, the “notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.”⁴⁸² This was addressed in two cases, *Leander* and *Segerstedt-Wiberg v. Sweden*,⁴⁸³ both of which involved national security. In both cases the court unceremoniously agreed that the protection

⁴⁷⁸ *M.G. v. United Kingdom*, at ¶ 30; *Gaskin v. United Kingdom*, at ¶ 49

⁴⁷⁹ *Id.* at ¶ 51.

⁴⁸⁰ *Id.*

⁴⁸¹ European Convention, *supra* note 55, at art. 8(2).

⁴⁸² *Leander v. Sweden*, at ¶ 58.

⁴⁸³ *Segerstedt-Wiberg and Others v. Sweden*, App. No. 62332/00 Eur. Ct. H.R. (June 9, 2006).

of national security was a legitimate governmental aim.⁴⁸⁴ What was at stake in these cases, however, was whether the “interference” with the right to privacy was “proportionate” to that legitimate governmental aim.⁴⁸⁵

In *Leander* the European Court stated that when national security interests are involved, governments enjoy a wide “margin of appreciation”⁴⁸⁶ when balancing the rights of individuals with the need to protect national security. In other words, the government is given a certain degree of latitude in balancing these competing interests.

Referring to the government interest in withholding information, the court stated:

There can be no doubt as to the necessity, for the purpose of protecting national security, for the Contracting States to have laws granting the competent domestic authorities power, firstly, to collect and store in registers not accessible to the public information on persons and, secondly, to use this information when assessing the suitability of candidates for employment in posts of importance for national security.⁴⁸⁷

However, the court reasoned, it was still necessary to ensure that proper safeguards against government abuse were in place. According to the court, “[I]n view of the risk that a system

⁴⁸⁴ *Leander v. Sweden*, at ¶ 49; *Segerstedt-Wiberg v. Sweden*, at ¶ 87.

⁴⁸⁵ *Segerstedt-Wiberg v. Sweden*, at ¶ 88; *see also* *Leander v. Sweden*, at ¶ 59.

⁴⁸⁶ *Leander v. Sweden*, at ¶ 59. This concept has developed through the jurisprudence of the court and deals with the issue of balancing the discretion of signatories to the European Convention with the requirement that signatories abide by the Convention. The court articulated the margin of appreciation doctrine in the case, *Handyside v. United Kingdom*, stating: “The Court points out that the machinery of protection established by the Convention is subsidiary to the national system safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.” The Court went on to state, “By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them. . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.” 24 Eur. Ct. H.R. (ser. A), ¶ 47-48 (1976). According to Merrills: “The underlying idea is a simple one: that in respect of many matters the [Court] leaves the [signatory country] an area of discretion. However easy this is to state, its application in practice in concrete situations is fraught with difficulty.” J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 151 (2d ed. 1993).

⁴⁸⁷ *Leander v. Sweden*, at ¶ 59.

of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse.”⁴⁸⁸

The government invoked 12 separate safeguards that protected against abuse. Ultimately, the court decided that proper provisions to guard against abuse were in place. The court was particularly swayed by the supervision provided for by members of parliament, oversight from an independent board, and an ombudsman.⁴⁸⁹ The court concluded that when taking into account the “wide margin of appreciation” conferred on the government, “the interests of national security prevailed over the individual interests of the applicant.”⁴⁹⁰

In *Segerstedt-Wiberg v. Sweden*,⁴⁹¹ the European Court again balanced individuals’ rights of access to personal information against the government’s need to protect national security. This case involved five complainants, all of whom had requested information about them held by the Swedish Security Police. The complainants had received some of the information held in his government files, but they argued that they had a right to all of the information because the government had failed to show that they were connected to terrorism, espionage, or any other criminal activity.⁴⁹² Four of the requests were refused on the grounds that making the information available could jeopardize national security. The other request was refused because making the information available could risk effective crime prevention. According to the court:

⁴⁸⁸ *Id.* at ¶ 60.

⁴⁸⁹ *Id.* at ¶ 65.

⁴⁹⁰ *Id.* at ¶ 67.

⁴⁹¹ *Segerstedt-Wiberg and Others v. Sweden*, App. No. 62332/00 Eur. Ct. H.R. (June 9, 2006).

⁴⁹² *Id.* at ¶ 95.

[A] refusal of full access to a national secret police register is necessary where the State may legitimately fear that the provision of such information may jeopardise the efficacy of a secret surveillance system designed to protect national security and to combat terrorism. In this case the national administrative and judicial authorities involved all held that full access would jeopardise the purpose of the system. The Court does not find any ground on which it could arrive at a different conclusion.⁴⁹³

The court concluded that given the “wide margin of appreciation” that governments receive in national security cases, the government “was entitled to consider that the interests of national security and the fight against terrorism prevailed over the interests of the applicants in being advised of the full extent to which information was kept about them on the Security Police register.”⁴⁹⁴

Sometimes the right of access to personal information conflicts with another person’s right to privacy. This was at issue in the *Odièvre* case,⁴⁹⁵ which was discussed previously. Odièvre wanted access to information about her birth mother, but the government withheld the information arguing that disclosure would violate the privacy rights of the mother who had voluntarily decided not to have contact with her child. France had a law that allowed anonymous births to ensure that pregnant women who did not want to keep their babies would seek the medical care they needed.⁴⁹⁶ Although the European Court stated that Odièvre had a right to her childhood information,⁴⁹⁷ the court weighed that right against the mother’s right to anonymity. These two rights, the court admitted, “are not easily reconciled.”⁴⁹⁸ According to

⁴⁹³ *Id.* at ¶ 102.

⁴⁹⁴ *Id.* at ¶ 104.

⁴⁹⁵ *Odièvre v. France*, App. No. 42326/98 Eur. Ct. H.R. (Feb. 13, 2003).

⁴⁹⁶ *Id.* at ¶ 45.

⁴⁹⁷ *Id.* at ¶ 42.

⁴⁹⁸ *Id.* at ¶ 44.

the court, the right to privacy in article 8 of the European Convention is guaranteed to “everyone” and thus “applies to both the child and the mother.”⁴⁹⁹ In the end the court deferred to the state’s “margin of appreciation” and stated:

[T]he Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one’s origins, an issue that concerns the right to know one’s personal history, the choices of the natural parents, the existing family ties and the adoptive parents.⁵⁰⁰

The European Court came to a different conclusion in *Gaskin*⁵⁰¹ and *M.G.*,⁵⁰² which were discussed previously. In both cases, the complainants were denied access to personal records because in the United Kingdom access to personal records was contingent upon permission from third-party contributors to the files.⁵⁰³ In both cases, the court did not find that this requirement violated article 8, the right-to-privacy provision of the European Convention. However, the court did find a violation of article 8 because there was no appeal process for when a third party denied consent or was not available.⁵⁰⁴

NGO Article 19’s Model Freedom of Information Law also limits the right of access to personal information where granting the right “would involve the unreasonable disclosure of personal information about a natural third party.”⁵⁰⁵ Similar to the decisions of the

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at ¶ 49.

⁵⁰¹ *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A) (July 7, 1989).

⁵⁰² *M.G. v. United Kingdom*, App. No. 39393/98 Eur. Ct. H.R. (Sept. 24, 2002).

⁵⁰³ *Id.* at ¶ 27. *See also* *Gaskin v. United Kingdom*, at ¶ 25.

⁵⁰⁴ *Id.* at ¶ 30. *See also* *Gaskin v. United Kingdom* at ¶ 49.

⁵⁰⁵ Article 19, A Model Freedom of Information Law (2001), 14, at <http://www.article19.org/pdfs/standards/modelfoilaw.pdf>.

European Court, the model law makes exceptions to this limitation when the third party is no longer available to give consent.⁵⁰⁶

Conclusion

The information-privacy conceptualization of access to government information understands that individuals have a right to access government documents containing information that pertains directly to them. This conceptualization allows individuals to know what information the government has gathered about them, and it allows individuals to assess whether the information is accurate and to have the information corrected if it is not. There have been different approaches within the documents regarding the origin of the right to personal information. This conceptualization has been based on a right to privacy, a right to freedom of expression, and even the right to be treated with humanity while in detention. Nonetheless, basing the right to personal information on separate rights largely has not affected the way the right to personal information has been conceptualized.

Within the information-privacy conceptualization, the right to personal information pertains to all individuals wanting access to their personal information held by the government, regardless of citizenship. Individuals requesting access do not have to provide reasons for their requests. Both official government documents and documents held by private entities are including in the type of information that is guaranteed within this conceptualization.

The two rationales within this conceptualization are the knowledge-about-self rationale and the government-accountability rationale. The knowledge-about-self rationale

⁵⁰⁶ *Id.*

understands personal information as essential to understanding aspects about one's history. The right to personal information in this context is understood as a personal right. The government-accountability rationale understands access to personal information as a means to ensuring that governments do not abuse their powers by storing inaccurate information, illegally gathering or using personal information, or allowing unauthorized individuals to access the information. This is very similar to the good-governance rationale of the freedom-of-expression conceptualization. These rationales both understand access to personal information as a political right that helps hold governments accountable.

In order for restrictions on the right of access to personal information to be legitimate, they must be clearly stated in legislation. When matters of national security are involved, there must exist proper safeguards against abuse of power; nonetheless, in this context governments are given deference in deciding how best to balance competing interests. The right of access also can be limited when others' privacy interests are at stake, but proper appeals procedures must be in place.

CHAPTER 4

THE RIGHT-TO-A-HEALTHY-ENVIRONMENT CONCEPTUALIZATION

The right-to-a-healthy-environment conceptualization of access to information is based on the idea that human rights and environmental concerns are related. A right to environmental information in this context is seen as necessary to ensure that human rights, such as the right to life or health, are not violated and to facilitate public participation in environmental decision-making. Unlike the freedom-of-expression conceptualization, the right-to-a-healthy-environment has not been articulated in rich detail by a range of entities. For example, the nongovernmental organizations identified in this research rarely discuss environmental information specifically. Often when environmental information is mentioned, it is listed as one among many types of government information to which citizens have a right.⁵⁰⁷

In order to understand this conceptualization, it is necessary to understand the relationship between a healthy environment and human rights, which will be discussed in the following section. Subsequent sections will explicate the right-to-a-healthy-environment conceptualization by discussing rationales for a right to environmental information, to whom this right is conferred, the type of information involved, and the limitations on the right.

⁵⁰⁷ See, e.g., *Open Sesame: Looking for the Right to Information in the Commonwealth*, *supra* note 229, at 29; *Under Lock and Key: Freedom of Information and the Media in Armenia, Azerbaijan and Georgia*, *supra* note 229, 84.

The Right to a Healthy Environment

The right to a healthy environment has been understood in two ways: first, as a stand-alone right and, second, as a right linked to the fulfillment of substantive rights.⁵⁰⁸ The Inter-American and African human right regimes specifically have created a right to a healthy environment as a separate right. Article 11 of the Additional Protocol to the American Convention declares that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services” and that the government “shall promote the protection, preservation and improvement of the environment.”⁵⁰⁹ The African Charter also recognizes an environmental human right. According to the charter, “All people have a right to a safe and satisfactory environment favorable to their development.”⁵¹⁰ In 2002, the African Commission ruled in a complaint against Nigeria that the government violated this right. According to the commission, citizens’ right to a clean environment was violated because the government directly contaminated the environment and failed to protect the community from environmental harms caused by foreign oil companies. The commission asserted that “the right to a healthy environment . . . imposes clear obligations upon a

⁵⁰⁸ See generally Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights have been Recognized?*, 35 DENV. J. INT’L L. & POL’Y 129 (2006).

⁵⁰⁹ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, 28 I.L.M. 156 (Nov. 14, 1988). Article 11 is not, however, one of the rights in the Protocol that is subject to the petition procedure established by the American Convention. See Dinah Shelton, *Environmental Rights*, in PEOPLES’ RIGHTS 185 (Philip Alston ed., 2001). The OAS General Assembly has recognized the public’s right to live in a healthy environment. OAS GA Resolution, AG/Res 1819 (XXXI-O/01) (2001) (calling for OAS institutions to explore the relationship between human rights and the environment); OAS GA Resolution, AG/Res 1896 (XXXII-O/02) (2002); OAS GA Resolution, AG/Res 1926 (XXXIII-O/03) (2003) (encouraging international cooperation in human rights and the environment). The Inter-American Democratic Charter also recognizes a right to a healthy environment: “The exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the states of the Hemisphere implement policies and strategies to protect the environment.” Inter-American Democratic Charter, *supra* note 247, at art. 15.

⁵¹⁰ African Charter, *supra* note 53, at art. 24.

government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”⁵¹¹ This ruling is discussed in more detail below.

More commonly, the right to a healthy environment has been understood as linked to substantive rights, such as the right to health or the right to life.⁵¹² According to Judge Christopher Weeramantry of the International Court of Justice:

The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.⁵¹³

As far back as 1972, discussions were taking place about the relationship between human rights and the environment. In 1972, the United Nations organized the United Nations Conference on the Human Environment, which culminated in a final declaration, known as the Stockholm Declaration. The first principle of the declaration stated, “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a

⁵¹¹ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication No. 155/96, Case No. ACHPR/COMM/A044/1, African Comm. Hum. & Peoples’ Rts., ¶ 52 (May 27, 2002), *available at* <http://www.umn.edu/humanrts/africa/comcases/allcases.html>. The commission also ruled that the government violated citizens’ rights to non-discrimination, life, property, health, family, and protection from foreign exploitation (African Charter, *supra* note 53, at art.s 2, 4, 14, 16, 18(1), and 21, *id.* at ¶ 70. The European Court of Human Rights, on the other hand, ruled that in matters of environmental protections, a fair balance should be struck between the economic interest of the country and the conflicting interests of persons affected by noise disturbances from Heathrow airport, “but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.” *Hatton v. United Kingdom*, App. No. 36022/97, Eur. Ct. H.R., ¶ 122 (July 8, 2003).

⁵¹² For example, the Committee on Economic, Social and Cultural Rights has stated that the right to a healthy environment is one of the “underlying determinants of health” and is an integral element of the right to health as laid out in Article 12 (right to health) of the International Covenant on Economic, Social and Cultural Rights. The Right to the Highest Attainable Standard of Health, General Comment, UN Doc. E/C.12/2000/4 (Oct. 29, 2007). *See also* UN Comm. on H.R., Promotion of a Democratic and Equitable International Order, UN Doc. E/CN.4/2003/L.11/Add., art. 4(l) (Apr. 24, 2003) (stating that “a democratic and equitable international order requires, inter alia, the realization of. . . [t]he right of every person and all peoples to a healthy environment”).

⁵¹³ *See* Gabcikovo-Nagymaros Project (Hung. v. Slov.) Judgment ICJ, 37 ILM 162, ¶ 92 (1998).

quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁵¹⁴

Two decades later, the UN organized another conference on the environment, the UN Conference on Environment and Development, held June 1992 in Rio de Janeiro Brazil. As part of the build-up to the conference, a 1990 UN General Assembly reaffirmed the Stockholm Declaration, recognizing that “all individuals are entitled to live in an environment adequate for their health and well-being,” and “called upon Member States and intergovernmental and non-governmental organizations dealing with environmental questions to enhance their efforts towards ensuring a better and healthier environment.”⁵¹⁵

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities⁵¹⁶ also focused on the topic by creating a temporary special rapporteur on human rights and the environment to undertake a study of the environment and its relation to human rights (UN environmental special rapporteur).⁵¹⁷ This resulted in an extensive report that included a draft declaration of principles on human rights and the environment, which stated

⁵¹⁴ United Nations Conference on the Human Environment, June 5-16, 1972, Stockholm, Switz., Declaration of the United Nations Conference on the Human Environment [hereinafter Stockholm Declaration], 11 I.L.M. 1416, principle 1 (1972).

⁵¹⁵ Need to Ensure a Healthy Environment for the Well-Being of Individuals, G.A. Res. 45/94, U.N. Doc. A/RES/45/94, at ¶ 1-2 (Dec. 14, 1990).

⁵¹⁶ The sub-commission was established by the Commission on Human Rights at its first session in 1947 under the authority of the Economic and Social Council. In 1999 the sub-commission changed its name to the Sub-Commission on the Promotion and Protection of Human Rights. In 2006, pursuant to Human Rights Council resolution 5/1, all mandates, mechanisms, functions, and responsibilities of the sub-commission were assumed by the Human Rights Council Advisory Committee, which is “composed of 18 experts serving in their personal capacity, [to] function as a think-tank for the Council and work at its direction” HRC Res. Institution-building of the United Nations Human Rights Council, UN Doc. A/HRC/Res/5/1 ¶ 65 (June 18, 2007). The first session of the advisory committee was held in August 2008, *see* Report of the Advisory Committee on its First Session, UN Doc. A/HRC/AC/1/2 (Nov. 3, 2008).

⁵¹⁷ Decision 1989/108 on human rights and the environment, adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1989/58, 71 (Aug. 31, 1989).

in part, “Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.”⁵¹⁸

The UN Conference on Environment and Development culminated in the Rio Declaration on Environment and Development,⁵¹⁹ which was affirmed by the UN General Assembly.⁵²⁰ Principle one of the declaration states that “human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”⁵²¹

Following the UN conference, the UN Commission on Human Rights decided in 1995 to appoint a special rapporteur – a toxic products special rapporteur – to study the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.⁵²² This special rapporteur consistently has referenced human rights in his reports on environmental problem. For example, in a 2006 report, he stated:

⁵¹⁸ UN ECOSOC, Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report [hereinafter H.R. and Environ. Final Report], Draft Declaration of Principles on Human Rights and the Environment, principle 1, U.N. Doc. E/CN.4/Sub.2/1994/9, Annex I, (July 6, 1994) [hereinafter H.R. and Environ. Principles].

⁵¹⁹ See Rio Declaration, *supra* note 74, at principle 10.

⁵²⁰ UN General Assembly resolution, Dissemination of the Principles of the Rio Declaration on Environment and Development, GA Res. 48/190, UN Doc. A/Res/48/190 (Dec. 21, 1993).

⁵²¹ Rio Declaration, *supra* note 74, at principle 1.

⁵²² The special rapporteur is mandated for three years to investigate and monitor effects of dumping of toxic wastes, receive communications from individuals about human rights violations, make recommendations, and keep a list of countries and companies involved in toxic dumping. ECOSOC, Comm. H.R. Res. 1995/81, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, UN Doc. E/CN.4/RES/1995/81, ¶ 7 (Mar. 8, 1995). The decision was approved by the Economic and Social Council, UN Doc. ECOSOC Decision 1995/288 (July 25, 1995). The special rapporteur’s mandate has been approved every three years. ECOSOC, Comm. H.R. Res. 2001/35, UN Doc. E/CN.4/RES/2001/35, ¶ 10 (Apr. 20, 2001); ECOSOC Decision 2001/26, UN Doc. E/DEC/2001/262 (July 21, 2001); ECOSOC Decision 2004/251, UN Doc. E/DEC/2004/251 (Aug. 6, 2004); Human Rights Council, Resolution 9/1, UN Doc. A/HRC/RES/9/1 (Sept. 5, 2008).

A fundamental ingredient of rights-based approaches to toxic chemicals is the explicit linkage to human rights. The linkage to human rights brings a legal framework to the issue of toxic chemicals which ensures that solving the problems relating to such chemicals is more than just a good idea – it is legally enforceable. The simple but important linkage of human rights to strategies and frameworks aimed at regulating toxic transfers automatically brings into play the whole corpus of human rights norms, standards and principles⁵²³

The commission's resolutions on toxic and dangerous wastes also consistently refer to the human rights to life, health, and a sound environment for every individual and affirm that illicit traffic in and dumping of toxic and dangerous products and wastes are a serious threat to these rights.⁵²⁴

It is within this context of articulating a relationship between human rights and the environment that the concept of a right of access to environmental information was born. For example, principle 10 of the Rio Declaration affirms a right to environmental information and citizen participation in decision-making.⁵²⁵ In 2001, a new environmental treaty went into force that furthered the work of the UN conference and elaborated on principle 10 of the Rio Declaration. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter (the Aarhus Convention),⁵²⁶ requires governments to provide access to environmental information. Unlike traditional agreements that are designed to solve specific goals, the Aarhus Convention is based on the premise that

⁵²³ Report of the Special Rapporteur on adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights. ECOSOC, UN Doc. E/CN.4/2006/42, ¶ 56 (Feb. 20, 2006) [hereinafter Toxic Products special rapporteur 2006 report].

⁵²⁴ See, e.g., Comm. H.R. Res. 1995/81, *supra* note at preamble.

⁵²⁵ Rio Declaration, *supra* note 74, at principle 10.

⁵²⁶ UN Economic Commission on Europe (UNECE) Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters. ECE/CEP/43 (1998), entered into forced June 25, 1998, <http://www.unece.org/env/pp/treatytext.htm> [hereinafter Aarhus Convention]. As of Nov. 11, 2008, there were 42 parties to the Convention, <http://www.unece.org/env/pp/ratification.htm>. According to David Banisar, the convention has been a driving force in persuading many countries in the region to adopt a FOI law. Banisar, Freedom of Information around the World, *supra* note 9, at 11.

access to information, public participation in decision-making, and the guarantees of judicial recourse will facilitate better environmental outcomes. Principle 10 of the Rio Declaration and the Aarhus Convention will be discussed in more detail below.

The following sections will explicate the right to environmental information within the right-to-a-healthy-environment conceptualization. The next section will discuss the rationales of this right.

The Right-to-a-Healthy-Environment Conceptualization – Rationales of the Right

There are two main rationales for granting a right of access to environmental information. The first rationale understands access to environmental information as helping to ensure that human rights are not compromised by an unhealthy environment. For example, in her final report, the environmental rapporteur stated that “the right to information [is] highly relevant to human rights and the environment. Public access to information on request and the obligation of public authorities to disclose it irrespective of requests are essential for the protection of the environment and the prevention of environmental human rights problems.”⁵²⁷ Access to environmental information also is understood as necessary to ensure effective public participation in environmental decision-making. In this context, public input is seen as enhancing better environmental decision-making. The public-participation rationale often includes the protecting-rights rationale in its understanding of the right of environmental information. Effective public participation in environmental decision-making is not only seen

⁵²⁷ H.R. and Environ. Final Report, *supra* note 518, at ¶ 204. *See also* UN Doc. A/HRC/7/21, ¶ 67 (arguing that the Human Rights Council should “recognize explicitly the right to information as a precondition for good governance and the realization of all other human rights”) [hereinafter Toxic Products special rapporteur 2008 report].

as protecting the environment, but also as protecting individuals, communities, and countries from human rights abuses due to environmental problems.

Protecting-Rights Rationale

Two European Court of Human Rights cases link the right to environmental information to the right to respect for private and family life, guaranteed under article 8 of the European Convention.⁵²⁸ Both cases involved requests for information in order to assess environmental risks that might threaten the health of citizens.

In *Guerra v. Italy*,⁵²⁹ the European Court of Human Rights ruled that the Italian government's failure to provide information about risks from a chemical factory violated the complainants' rights under article 8. The complainants, 40 individuals from the town of Manfredonia, Italy, claimed that government had failed to provide information about the toxic hazards of a local chemical factory, which had been classified by the Italian government as a "high risk" to the community. According to the court, "[T]he direct effect of the toxic emissions on the [complainants'] right to respect for their private and family life means that Article 8 is applicable."⁵³⁰ The court further explained that article 8 creates a positive obligation on the government to protect families' rights.⁵³¹ Such an obligation, the court asserted, included the duty to provide the environmental information necessary for the families to determine the health risks of living near the factory so they could react appropriately. According to the court, the complainants

⁵²⁸ European Convention, *supra* note 55, at art. 8.

⁵²⁹ *Guerra and Others v. Italy*, App. No. 14967/89 Eur. Ct. H.R. (Feb. 19, 1998).

⁵³⁰ *Id.* at ¶ 57.

⁵³¹ *Id.* at ¶ 68.

waited, right up until the production of fertilizers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory. The government did not meet its positive obligation to “secure the [complainants’] right to respect for their private and family life.”⁵³²

In *McGinley v. United Kingdom*, the European Court also ruled that the right to respect for private and family life, guaranteed under article 8 of the European Convention,⁵³³ created an obligation on the government to provide environmental information. This case involved information about nuclear testing in the 1950s on Christmas Island in the Indian Ocean, which was then held by the United Kingdom. The complainants had witnessed the tests during their time in British military service and subsequently experienced ill health. They were denied war pensions because there was no evidence to suggest that their health problems were caused by their proximity to the testing. The complainants argued that the government had failed to provide the necessary individual health records and nuclear monitoring information that would help them show a correlation between their ill health and their exposure to the nuclear testing. The court stated, “Where a government engages in hazardous activities . . . which might have hidden adverse consequences on the health of those involved in such activities, . . . Article 8 requires an effective and accessible procedure be established which enables persons to seek all relevant and appropriate information.”⁵³⁴ Nonetheless, the court went on to assert that the government had provided proper procedures

⁵³² *Id.* at ¶ 60.

⁵³³ European Convention, *supra* note 55, at art. 8.

⁵³⁴ *McGinley and Egan v. United Kingdom*, App. No. 21825/93 and 23414/94 Eur. Ct. H.R., ¶ 101 (June 9, 1998).

for obtaining information but the complainants had not utilized them; therefore, the government had fulfilled its positive obligation under article 8.⁵³⁵

Public-Participation Rationale

The link between the right of access to environmental information and effective participation in environmental decision-making has been linked as far back as the 1972 Stockholm Declaration. Although it does not explicitly reference access to government information, the Stockholm Declaration stated that “education in environmental matters” is essential to “broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension.”⁵³⁶ The declaration also emphasized the importance of the “free flow of up-to-date scientific information and transfer of experience” in facilitating “the solution of environmental problems”⁵³⁷

The 1992 Rio Declaration, adopted at the United Nations Conference on the Human Environment, explicitly links the right of access to environmental information with effective environmental participation. The declaration states:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.⁵³⁸

⁵³⁵ *Id.* at ¶ 103.

⁵³⁶ Stockholm Declaration, *supra* note 514, at principle 19.

⁵³⁷ *Id.* at principle 20.

⁵³⁸ Rio Declaration, *supra* note 74, at principle 10.

In 1997 the Rio Declaration was endorsed by the UN General Assembly, which specifically resolved that “[a]ccess to information and broad public participation in decision-making are fundamental to sustainable development.”⁵³⁹

In what is widely accepted as the leading example of the implementation of principle 10 of the Rio Declaration,⁵⁴⁰ the Aarhus Convention went into force in 2001. According to a 2005 UN Secretary-General report, the Aarhus Convention “continues to represent the most advanced example of the link between the environment and human rights”⁵⁴¹ The Aarhus Convention was born out of a four-conference process called “Environment for Europe,”⁵⁴² which was created by the UN Economic Commission for Europe (ECE).⁵⁴³ Although it is a regional treaty, its global significance is widely recognized⁵⁴⁴ and it is open to non-ECE members to join.

The Aarhus Convention’s goal is “to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”⁵⁴⁵ The convention is unique in that it does not establish specific

⁵³⁹ UN General Assembly, Programme for the Further Implementation of Agenda 21, UN Res. A/Res/S-19/2, ¶ 108 (Sept. 19, 1997).

⁵⁴⁰ Science and Environment: Human Rights and the Environment as part of Sustainable Development, Report of the UN Secretary-General, UN Doc. E/CN.4/2005/96, ¶ 29 (Jan. 19, 2005).

⁵⁴¹ *Id.* at ¶ 51.

⁵⁴² For more information on these meetings, *see* Introducing the Aarhus Convention, <http://www.unece.org/env/pp/welcome.html>.

⁵⁴³ The United Nations Economic Commission for Europe was set up in 1947 by the UN Economic and Social Council. It is one of five regional commissions of the United Nations. The UNECE region encompasses the whole of Europe and five Central Asian countries, as well as Canada, Israel, and the United States, <http://www.unece.org/about/about.htm>.

⁵⁴⁴ Science and Environment: Human Rights and the Environment as part of Sustainable Development, Report of the UN Secretary-General, UN Doc. E/CN.4/2004/87, ¶ 17 (Feb. 6, 2004).

⁵⁴⁵ Aarhus Convention, *supra* note 526, at art. 1.

environmental goals, such as pollution controls, but instead implements a rights-based approach that provides citizens with rights to information, to participation in environmental decision-making, and to access to judicial recourse. According to the convention's preamble,

[I]n the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.⁵⁴⁶

Rights to information, participation in environmental decision-making, and access to judicial recourse are articulated within the three “pillars” laid out in the convention. The first pillar, public access to environmental information, creates rules and requirements for governments to disclose environmental and other relevant information.⁵⁴⁷ The second pillar, public participation in environmental matters, requires that the public and public interest groups be allowed to participate in environmental decision-making.⁵⁴⁸ The third pillar, access to judicial recourse, grants the public and public interest groups the right to seek judicial remedies when governments fail to comply with the first two pillars.⁵⁴⁹ All three pillars emphasize enforceable rights of citizens.

The UN environmental special rapporteur also firmly based the right of access to environmental information on the importance of public participation in a democratic society.

In her 1994 final report, she stated:

The right to information is frequently presented as an individual and group right which constitutes an essential attribute of the democratic processes and the principle of popular participation. Indeed, the concept of democratic

⁵⁴⁶ *Id.* at preamble.

⁵⁴⁷ *Id.* at articles 4 and 5.

⁵⁴⁸ *Id.* at articles 6, 7, and 8.

⁵⁴⁹ *Id.* at art. 9.

government as stated in article 21 of the Universal Declaration of Human Rights becomes meaningless unless individuals and groups have access to relevant information on which to base the exercise of the vote or otherwise express the will of the people.⁵⁵⁰

The draft principles on human rights and the environment included in the final report also link the right of access to environmental information to “effective public participation in environmental decision-making.”⁵⁵¹

The UN toxic products special rapporteur also has linked the right to environmental information to citizen participation in environmental decision-making. The special rapporteur’s 2008 annual report included a section highlighting the importance of the right to information and participation. This section borrowed heavily from the ideas presented in the final report of the UN environmental special rapporteur. In the 2008 report, the UN toxic products special rapporteur asserted that “the right to information and participation are both rights in themselves and essential tools for the exercise of other rights, such as the right to life, the right to the highest attainable standard of health, the right to adequate housing and others.”⁵⁵² In the report’s concluding statements, the special rapporteur declared that these rights place obligations on governments, stating, “Public access to information when requested and the obligation of public authorities to disclose and inform, irrespective of requests, are imperative for the prevention of environmental human rights problems and the protection of the environment.”⁵⁵³

⁵⁵⁰ H.R. and Environ. Final Report, *supra* note 518, at ¶ 209. This was also reiterated Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 66.

⁵⁵¹ H.R. and Environ. Principles, *supra* note 518, at principle 15.

⁵⁵² Toxic Products special rapporteur 2008 report, *supra* note 527, at summary.

⁵⁵³ *Id.* at ¶ 33.

Both the Inter-American Commission and the African Commission have linked the right of access to environmental information and participation in environmental decision-making. As noted previously, the African Commission ruled that the government of Nigeria violated citizens' right to a healthy environment by not protecting them from the harmful effects of oil production. The complaint was filed against the Nigerian government, which was involved in oil production in a consortium with the Shell Petroleum Development Corporation. The complaint alleged that the oil operations produced contamination that caused environmental degradation and health problems; that the consortium disposed of toxic wastes in violation of international environmental standards and caused numerous avoidable spills near villages, which poisoned much of the region's soil and water; that the government aided these violations by placing the state's legal and military powers at the disposal of the oil companies; and that the government's security forces killed innocent civilians and destroyed villages. The complaint also alleged that the government failed to monitor the activities of the oil companies, to provide information to local communities, and to conduct environmental impact studies.⁵⁵⁴ Referring to governments' obligations regarding their citizens' rights to a healthy environment and to good health guaranteed in the African Charter, the commission asserted:

[G]overnment compliance . . . must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.⁵⁵⁵

⁵⁵⁴ SERC v. Nigeria, ¶s 1-9.

⁵⁵⁵ *Id.* at ¶ 54.

The Nigerian government had failed to uphold these obligations, the commission concluded, by not providing information or allowing the affected communities to participate in decision-making about oil production nearby.⁵⁵⁶ The commission listed among the several specific obligations on the Nigerian government the duty to provide “information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.”⁵⁵⁷

In a 1997 study of the state of human rights protections in Ecuador, the Inter-American Commission on Human Rights devoted particular attention to the environmental rights of Ecuador’s indigenous peoples.⁵⁵⁸ The commission noted that it had been examining the human rights situation in the area of Oriente, Ecuador, for several years, in response to claims that oil production activities were contaminating the water, air, and soil, causing the people of the region to become sick and to have a greatly increased risk of serious illness.

The commission found that both the Ecuadoran government and residents of Oriente agreed that the environment was contaminated; the residents were exposed to the toxic byproducts of oil production in their drinking and bathing water, in the air, and in the soil. The Oriente residents stated that oil operations, especially the disposal of toxic wastes, jeopardized their lives and health. Many suffered skin diseases, rashes, chronic infections, and gastrointestinal problems. In addition, many claimed that the pollution of local waters contaminated fish and drove away wildlife, threatening food supplies.⁵⁵⁹

⁵⁵⁶ *Id.* at ¶ 55.

⁵⁵⁷ *Id.* at ¶ 71.

⁵⁵⁸ Inter-Am.C.H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1, (1997) [hereinafter OAS Report on Ecuador].

⁵⁵⁹ *Id.* at ¶ 6-18.

In its analysis of these human rights violations, the Inter-American Commission stated that “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention.”⁵⁶⁰ The commission further declared that the government is required to take positive measures to safeguard against human rights abuses such as denials of access to information. In its analysis, the commission argued that access to information is required in order for citizens to effectively participate in decision-making. The commission called on the government of Ecuador to implement legislation to strengthen environmental protections and in particular recommended that the government improve its systems for disseminating information about environmental issues, and enhance the transparency and opportunities for public input into environmental decision-making.⁵⁶¹ The commission elaborated that the right of access to environmental information is based in part on the right to seek, receive, and impart information, which is protected by article 13 of the American Convention.⁵⁶² The right to public participation is guaranteed under article 23 of the American Convention, which provides that every citizen shall enjoy the right “to take part in the conduct of public affairs, directly or through freely chosen representatives.”⁵⁶³ The Inter-American Commission concluded:

In the context of the situation under study, protection of the right to life and physical integrity may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights. The

⁵⁶⁰ OAS Report on Ecuador, *supra* note 558, at ¶ 30.

⁵⁶¹ *Id.* at ¶ 45-49.

⁵⁶² *Id.* at ¶ 40. *See* American Convention, *supra* note 1, at art. 13.

⁵⁶³ *Id.* at ¶ 41. *See* American Convention, *supra* note 1, at art. 23.

quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.⁵⁶⁴

It also is important to note that the Inter-American Court decision in *Reyes v. Chile* involved access to environmental information. As discussed previously, at issue was a deforestation project that “caused considerable public debate owing to its potential environmental impact.”⁵⁶⁵ The right of access to government information that the court conferred was based in part on the importance of furthering public debate and participation on environmental issues.⁵⁶⁶

The importance of environmental information specifically to ensure the participation of vulnerable populations, such as the poor and elderly, also has been addressed. According to a 2006 report of the UN toxic products special rapporteur:

Rights-based approaches promote the participation of all relevant actors – in particular the most vulnerable – in programming, implementation and monitoring. In this way, rights-based approaches promote “bottom-up” approaches to the issue of toxic chemicals, not “top-down.” They seek dialogue with people affected by toxic and dangerous products and wastes such as workers, farmers, local communities, civil society, people living in minority groups, indigenous peoples, women and others. In this regard, access to full information on chemicals is central to the meaningful participation of vulnerable groups.⁵⁶⁷

The Stockholm declaration also emphasized the importance of the right to environmental information and citizen participation in environmental decision-making for vulnerable populations. It states that environmental information “for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the

⁵⁶⁴ *Id.* at ¶ 39.

⁵⁶⁵ *Reyes v. Chile* at ¶ 73.

⁵⁶⁶ *Id.* at ¶ 86.

⁵⁶⁷ Toxic Products special rapporteur 2006 report, *supra* note 523, at ¶ 52.

basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension.”⁵⁶⁸

The Right-to-a-Healthy-Environment Conceptualization – To Whom the Right is Conferred

There has not been much elaboration regarding who specifically should receive the right of access to environment information. Often there is reference to individuals, communities, as well as countries. It is clear that at the very least the right belongs to those who might be affected by environmental harms.

The Aarhus Convention has explicitly stated that individuals do not have to show an interest in the environmental information they request.⁵⁶⁹ Without elaboration, the UN toxic products special rapporteur stated in a 2003 report on the right of access to environmental information that “information held by the State should be considered to be held in trust for the public, not as belonging to the Government.”⁵⁷⁰ Mostly, though, the right of access to environmental information has been discussed in relationship to those who are or could be harmed by environmental pollution.

The UN toxic products special rapporteur has referred to the right of access to environmental information as belonging to individuals, communities, and neighboring countries that are potentially affected by hazardous materials and conditions.⁵⁷¹ In *SERAC v. Nigeria*, the African Commission ruled that the government had an obligation to provide

⁵⁶⁸ Stockholm Declaration, *supra* note 514, at principle 19.

⁵⁶⁹ Aarhus Convention, *supra* note 526, at art. 4(1)(a).

⁵⁷⁰ Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 67.

⁵⁷¹ *Id.* at ¶ 37.

environmental information to “communities likely to be affected.”⁵⁷² Also, both of the European Court decisions, *Guerra v. Italy*⁵⁷³ and *McGinley v. United Kingdom*⁵⁷⁴ discussed above are predicated on the fact that the complainants had a direct interest in the information because they were potential victims of environmental harms. In *Guerra v. Italy*, the court stated that article 8 of the European Convention was applicable precisely because of “the direct effect of the toxic emissions on the [complainants’] right to respect for their private and family life.”⁵⁷⁵ The positive obligations on the government that ensued included providing the information necessary to assess health risks.⁵⁷⁶ The court in *McGinley v. United Kingdom* also indicated that the government’s positive obligation to provide information is to those potentially affected by hazardous activities.⁵⁷⁷

Sometimes reference is made to a right of access to environmental information for specific vulnerable populations. For example, the OAS report on Ecuador stated:

[W]hile environmental action requires the participation of all social sections, some, such as women, young people, minorities and the indigenous peoples, have not been able to directly participate in such processes for diverse historical reasons. Affected individuals should be able to be informed about and have input into the decisions which affect them.⁵⁷⁸

⁵⁷² Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights v Nigeria (2001), communication no 155/96, African Commission on Human and Peoples’ Rights, ¶ 71 (2001), available at: <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>.

⁵⁷³ *Guerra and Others v. Italy*, App. No. 14967/89 Eur. Ct. H.R. (Feb. 19, 1998).

⁵⁷⁴ *McGinley and Egan v. United Kingdom*, App. No. 21825/93 and 23414/94 Eur. Ct. H.R. (June 9, 1998).

⁵⁷⁵ *Guerra and Others v. Italy*, at ¶ 57.

⁵⁷⁶ *Id.* at ¶ 68.

⁵⁷⁷ *McGinley v. United Kingdom*, at ¶ 101. .

⁵⁷⁸ OAS Report on Ecuador, *supra* note 558, at ¶ 41.

The 1972 Stockholm Declaration also referenced vulnerable populations, stating, “Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension.”⁵⁷⁹

Often it is made clear that citizenship is not a requirement in order to request and receive information. According to the Aarhus Convention, the right to environmental information is for all people “without discrimination as to citizenship, nationality or domicile.”⁵⁸⁰ The final report of the UN environmental special rapporteur stated that the right to environmental information means that information should be available across state boundaries.⁵⁸¹

The right of access to environmental information also has been understood as belonging to countries; for example, the UN environmental special rapporteur refers to the right to environmental information as belonging to individuals, communities, *and* neighboring countries that could be affected by environmental problems.⁵⁸² According to the special rapporteur’s final report:

The right to information not only protects individuals and groups, but also Governments themselves. In this light, the Special Rapporteur is aware that in the context of human rights and the environment, the right to information may also be considered a right of States vis-à-vis other States or of States vis-à-vis transnational corporations. In this context a State’s access to information

⁵⁷⁹ Stockholm Declaration, *supra* note 514, at principle 19.

⁵⁸⁰ Aarhus Convention, *supra* note 526, at art. 3(9).

⁵⁸¹ H.R. and Environ. Final Report, *supra* note 518, at ¶ 204.

⁵⁸² *Id.* at ¶ 214.

would enable it to transmit the information to its residents and to otherwise protect the human rights of those residents.⁵⁸³

This right of countries to information clearly stems from the right of individuals to have access to information. The special rapporteur's report further noted:

[M]any conflicts have arisen between Governments because Governments of developed countries, transnational enterprises operating from the developed countries or international development banks do not provide full disclosure of potential dangers to human beings or to the environment for contemplated activities. Under these circumstances, individuals and groups have limited recourses because their own Governments may not have the relevant information.⁵⁸⁴

The Rio Declaration also provides for a right of access for countries. It states that governments must “immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States.”⁵⁸⁵ States also are obligated to provide relevant environmental information regarding “activities that may have a significant adverse transboundary environmental effect.”⁵⁸⁶

The Right-to-a-Healthy-Environment Conceptualization – The Type of Information Guaranteed

Only the Aarhus Convention has been explicit about the types of environmental information included within this right of access. Mostly, the particulars of what comprises environmental information have not been articulated. Often environmental information is referred to generally, for example the Rio Declaration refers to “access to information

⁵⁸³ *Id.* at ¶ 215.

⁵⁸⁴ *Id.* at ¶ 216.

⁵⁸⁵ Rio Declaration, *supra* note 74, at principle 18.

⁵⁸⁶ *Id.* at principle 19.

concerning the environment.”⁵⁸⁷ Information about potential environmental harms also is mentioned. For example, in *SERAC v. Nigeria*, the African Commission required the Nigerian government to provide information not only on environmental harms but also on potential health and environmental risks.⁵⁸⁸ Similar to the freedom-of-expression conceptualization, the healthy-environment conceptualization requires governments to proactively disseminate information, even if a request has not been made. Also, similar to both the freedom-of-expression and information-privacy conceptualizations, information from private entities often is included.

The Aarhus Convention defines environmental information quite specifically. According to the convention, environmental information is “any information in written, visual, aural, electronic or any other material form” that concerns the “state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.”⁵⁸⁹ This includes “factors affecting or likely to affect the elements of the environment,” such as “substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, . . . and cost-benefiting and other economic analyses and assumptions used in environmental decision-making.”⁵⁹⁰ Environmental information also includes information on the “state of human health and safety, conditions of human life,

⁵⁸⁷ *Id.* at principle 10. See also UN General Assembly Resolution Programme for the Further Implementation of Agenda 21, UN Doc. UN Res. A/Res/S-19/2, ¶ 108 (Sept. 19, 1997).

⁵⁸⁸ *SERAC v. Nigeria*, at ¶ 71.

⁵⁸⁹ Aarhus Convention, *supra* note 526, at art. 2(3)(a).

⁵⁹⁰ *Id.* at art. 2(3)(b).

cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment” or factors affecting or likely to affect the elements.⁵⁹¹ The Aarhus definition is all-encompassing in that it includes general information about the health of the environment as well as information about potential harms that could result from environmental problems.

There also has been concern that information needs to be presented in a timely and comprehensible manner. According to the final report of the UN environmental special rapporteur, “[T]he right to information relating to the environment requires that information be relevant and comprehensible.”⁵⁹² In addressing problems that NGOs have reported when they have attempted to access information about the environment, the UN toxic products special rapporteur expressed concerns regarding the “difficulty of timely access to pertinent, full and usable information” and stated that often information is disclosed in “drips and drabs or in such a way as to be unusable.”⁵⁹³ The Aarhus Convention also requires that information be easily accessible and comprehensible.⁵⁹⁴

Proactive Requirement

Within the healthy-environmental conceptualization, governments are also required to proactively provide information to the public even when information is not requested. The UN environmental special rapporteur declared that a right to environmental information

⁵⁹¹ *Id.* at art. 2(3)(c).

⁵⁹² H.R. and Environ. Final Report, *supra* note 518, at ¶ 204.

⁵⁹³ Toxic Products special rapporteur 2003 report, UN Doc. E/CN.4/2004/46, ¶ 85 (Dec. 15, 2003) [hereinafter Toxic Products special rapporteur 2003 report].

⁵⁹⁴ Aarhus Convention, *supra* note 526, at art. 7.

“imposed a duty on governments.”⁵⁹⁵ This duty includes providing information “without a specific request, of any matter having a negative or potentially negative impact on the environment” and collecting and disseminating environmental information as well as providing “due notice of significant environmental hazards.”⁵⁹⁶

According to the UN toxic products special rapporteur, “Public access to information when requested and the obligation of public authorities to disclose and inform, irrespective of requests, are imperative for the prevention of environmental human rights problems and the protection of the environment.”⁵⁹⁷ The UN toxic products special rapporteur also made this point in a report on a visit to the Ukraine, noting that even though Ukraine had legislation providing access to information, some local authorities “were not sufficiently proactive in providing information to members of the public.”⁵⁹⁸ This included information about potentially hazardous materials, even if harms had not yet been proven. The special rapporteur concluded that in the Ukraine, “[a]ccess to information regarding environmental issues and their potential consequences for human rights thus appears to require some improvement.”⁵⁹⁹ In *SERAC v. Nigeria*, the African Commission asserted that compliance with the right to health and a healthy environment guaranteed in the African Charter⁶⁰⁰ meant that the government must publicize “environmental and social impact studies prior to any

⁵⁹⁵ H.R. and Environ. Final Report, *supra* note 518, at ¶ 204.

⁵⁹⁶ *Id.*

⁵⁹⁷ Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 33.

⁵⁹⁸ Mission to Ukraine, Toxic Products special rapporteur, UN Doc. A/HRC/7/21/Add.2, ¶ 53 (Mar. 4, 2008) [hereinafter UN Ukraine Report].

⁵⁹⁹ *Id.*

⁶⁰⁰ African Charter, *supra* note 53, at articles 16 and 24 respectively.

major industrial development.”⁶⁰¹ The government’s obligation included “undertaking appropriate monitoring and providing information to those communities exposed to hazardous material and activities.”⁶⁰²

The Aarhus Convention also required that governments proactively provide information about the environment. The convention contains a very detailed section on the collection and dissemination of information and requires governments to proactively provide information. According to the convention, governments must ensure that systems are “established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment.”⁶⁰³ The convention further details the types of information that must be provided, which include reports on the state of the environment;⁶⁰⁴ policies, plans, and programs relating to the environment;⁶⁰⁵ and information on proposed environmental policies.⁶⁰⁶ This obligation requires that governments not only provide information that is already available but also create documents specifically for the purpose of dissemination.⁶⁰⁷ The convention also provides that in the event of an environment emergency, regardless of the cause, “all information which could enable the public to take measures to prevent or mitigate harm

⁶⁰¹ SERAC v. Nigeria, at ¶ 53.

⁶⁰² *Id.*

⁶⁰³ Aarhus Convention, *supra* note 526, at art. 1(c).

⁶⁰⁴ *Id.* at art. 3(a).

⁶⁰⁵ *Id.* at art. 3(c).

⁶⁰⁶ *Id.* at art. 7.

⁶⁰⁷ *Id.* at art. 4.

arising from the threat and is held by a public authority” must be “disseminated immediately and without delay to members of the public who may be affected.”⁶⁰⁸

Private Sector Information

Within this conceptualization, a right of access to environmental information from private entities, not just governments, also has been discussed. Although a right to information from private entities has not been explicitly stated, it is clear that there is concern about the lack of information from corporations in particular.

In explaining how the right of access to environmental information can be violated, the UN environmental special rapporteur gave an example of development projects that involved both private and public entities. “Relevant information may be in many locations and with many entities, making access by the public difficult. International funding sources or transnational corporations may not allow private access to information under their control.”⁶⁰⁹

According to the UN toxic products special rapporteur:

[T]here are many cases . . . of disputes between citizens and Governments in developing countries and between developing countries and transnational corporations over the movement of toxic and dangerous products and wastes. Disputes often arise owing to a lack of information or the failure of the State or of corporations to ensure full disclosure of the potential dangers of activities carried out by those corporations to individuals, communities and the environment.⁶¹⁰

⁶⁰⁸ *Id.* at art. 1(c).

⁶⁰⁹ H.R. and Environ. Final Report, *supra* note 518, at ¶ 210. This point was reiterated by the Toxic Products special rapporteur in his 2008 report to the Human Rights Council, Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 31.

⁶¹⁰ Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 34.

Because of this, he argued, “often governments claim not to have access to the necessary information on the potential dangers to human beings and the environment.”⁶¹¹

In *SERC v. Nigeria*, the African Commission articulated obligations on the government to protect citizens from harm by corporations. The decision asserted:

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. . . . This calls for positive action on the part of governments in fulfilling their obligation under human right instruments.⁶¹²

Although the commission did not specifically link this obligation to a right to information from non-governmental entities, the decision is significant because it does articulate duties on African governments to monitor and control the activities of corporations.

The Right-to-a-Healthy-Environment Conceptualization – Limitations on the Right

Similar to the freedom-of-expression conceptualization, any limitation on the right of access to environmental information must be provided by law,⁶¹³ reasons for nondisclosure must be stated in writing,⁶¹⁴ and the government decision must be reviewable.⁶¹⁵ Limitations on the right to environmental information have not been detailed within the documents, with the exception of the Aarhus Convention.

⁶¹¹ *Id.* See also Toxic Products special rapporteur 2003 report, *supra* note 293, at ¶ 85 (arguing that some transnational corporations, often in collusion with governments, are violating human rights including the right to information) .

⁶¹² *SERC v. Nigeria*, at ¶ 57.

⁶¹³ Aarhus Convention, *supra* note 526, at art. 9; H.R. and Environ. Principles, *supra* note 518, at principle 26.

⁶¹⁴ Aarhus Convention, *supra* note 526, at art. 4.

⁶¹⁵ H.R. and Environ. Final Report, *supra* note 518, at ¶ 213 (stating that decisions to withhold information “must be reviewable to ensure that the public’s right to information is not unduly restricted”); Aarhus Convention, *supra* note 526, at art. 9.

Without elaboration, the Principles on Human Rights and the Environment stated that any limitations on access must be “necessary to protect public order, health and the fundamental rights and freedoms of others.”⁶¹⁶ The Aarhus Convention, on the other hand, articulates limitations in detail. According to the convention, information can be withheld if disclosure would adversely affect the confidentiality of proceedings; international relations, national defense, or public security; justice, fair trials, or inquiries; commercial confidentiality; intellectual property; personal information; voluntarily provided information from third parties; and environmentally sensitive information.⁶¹⁷ Aarhus Convention requires that limitations on information must be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested related to emissions into the environment.”⁶¹⁸ The UN toxic products special rapporteur also made this point. In a 2003 report on the United Kingdom, the special rapporteur noted with approval that “many of the exemptions [of the UK’s FOI law] involve a public interest test, an important safeguard which may require disclosure even where an exemption has technically been triggered.”⁶¹⁹

Both the UN environmental and toxic products special rapporteurs have expressed concern about restrictions on public access to environmental information based on national security and commercial secrecy grounds. The UN toxic products special rapporteur’s 2006 report focused on the human rights impact of the widespread exposure of individuals and

⁶¹⁶ H.R. and Environ. Principles, *supra* note 518, at principle 26.

⁶¹⁷ Aarhus Convention, *supra* note 526, at art. 4.

⁶¹⁸ *Id.*

⁶¹⁹ Mission to the United Kingdom of Great Britain and Northern Ireland, Report of the Special Rapporteur on adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, ECOSOC, UN Doc. E/CN.4/2004/46/Add.2, ¶ 86 (Dec. 19, 2003).

communities to toxic chemicals in everyday household goods and food. In a section on the rights to information and participation, the special rapporteur expressed concern that “information about the effects and exact nature of toxic chemicals is often labeled as being confidential commercial information, and access is impeded by laws and regulations exempting such information from public scrutiny.”⁶²⁰

In explaining how the right of access to environmental information can be violated, the UN environmental special rapporteur stated in a 2008 report that invoking national security to withhold information is of particular concern and must be in conformity with “limitations clauses in international human rights instruments.”⁶²¹ The special rapporteur further explained that even if a national security argument is legitimate, “there are circumstances where it is not acceptable.” For example, information must be disclosed “wherever there is a danger of large-scale industrial accidents like Chernobyl and Bhopal”,⁶²² when proposed development projects could “increase pollution, loss of land base, dislocation and other impacts”; or when the requested information involves “pollutants and wastes

⁶²⁰ Toxic Products special rapporteur 2006 report, *supra* note 523, at ¶ 41. The special rapporteur also made this point in the 2003 report, Toxic Products special rapporteur 2003 report, *supra* note 593, at ¶ 85.

⁶²¹ H.R. and Environ. Final Report, *supra* note 518, at ¶ 213. This point was reiterated by the Toxic Products special rapporteur in his 2008 report to the Human Rights Council, Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 36.

⁶²² In 1986 the Chernobyl nuclear power plant in the Ukraine accidentally released nuclear materials into the air killing 28 people within four months of the release. Dozens of others have since died from radioactive exposure. For more information. See BCC, Chernobyl In Depth, http://news.bbc.co.uk/2/hi/in_depth/europe/2006/chernobyl. In 1984, a lethal chemical leaked from a Union Carbide pesticide plant in Bhopal, India. Within days, more than 3,000 people were killed, and an estimated 2,000 more people died within the next several years. For more information, see New York Times, Bhopal, <http://topics.nytimes.com/top/news/international/countriesandterritories/india/bhopal/index.html>.

associated with industrial and agricultural processes.” In these circumstances, according to the special rapporteur, “there is a clear duty to disclose.”⁶²³

The UN toxic products special rapporteur also noted that “widespread political instability in many developing countries means that vital information that is necessary to the health, environment and well-being of the population is often withheld from the public, apparently on the grounds that it is necessary to uphold national security, and prevent civil unrest.”⁶²⁴ According to the special rapporteur, although the government can invoke national security or defense rationales for limiting information, “this responsibility should not be abused by States or used to derogate from their duty to protect and promote the rights of their citizens in relation to the adverse effects of toxic and dangerous products and wastes.”⁶²⁵

Conclusion

The right-to-a-healthy-environment conceptualization is not as well articulated as the freedom-of-expression conceptualization. Most of the discussion stems from the UN toxic products and environmental special rapporteurs and the Aarhus Convention. Although the European Court, the Inter-American Commission, and the African Commission address the right to environmental information sparingly, they do contribute to the articulation of the conceptualization. The NGOs, on the other hand, rarely address access to environmental information as separate from government information in general. Most likely this is because

⁶²³ H.R. and Environ. Final Report, *supra* note 518, at ¶ 214. This point was reiterated by the Toxic Products special rapporteur in his 2008 report to the Human Rights Council, Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 37.

⁶²⁴ Toxic Products special rapporteur 2008 report, *supra* note 527, at ¶ 39.

⁶²⁵ *Id.* at ¶ 67.

environmental information held by the government would be included within the broad scope of the freedom-of-expression conceptualization.

The right-to-a-healthy-environment conceptualization is based on the idea that human rights and environmental concerns are closely related. This has been envisaged in two distinct ways. The right to a healthy environment has been understood as substantive right and, more commonly, as a procedural right. As a substantive right, it exists as a right in and of itself. As a procedural right, it is seen as necessary to ensure the protection of other human rights.

Access to environmental information as a procedural right is articulated within the protecting-rights rationale, which confers a right of access to environmental information in order to ensure the protection of other human rights. Individuals and communities need information about the environment in order to be protected from ill-health or from loss of life or home, for example. The two European Court decisions based on the right to respect for private and family life are illustrative of this rationale. The Inter-American Commission report on Ecuador and the African Commission decision on Nigeria also reflect this position on the role of access to environmental information in protecting human rights.

Access to environmental information also is understood as facilitating effective public participation in environmental decision-making, the public-participation rationale. This rationale is based on the idea that public input into the decision-making process will produce better outcomes that reflect the needs of the people. The right to environmental information, participation, and judicial recourse are often intertwined, as reflected in the Aarhus Convention. Individuals have a right to participate in environmental decision-making, and, in order to effectively act on this right, they must have information. Access to judicial recourse

is then necessary to ensure the effective implementation of the rights of access to information and participation.

Often the public-participation rationale includes the protecting-rights rationale. In a sense, the public-participation rationale can be seen as taking the protecting-rights rationale one step further. Using environmental information to enhance decision-making and having opinions heard helps ensure that human rights will not be violated.

Similar to the freedom-of-expression conceptualization, the right-to-a-healthy-environment conceptualization confers the right to environmental information to all individuals regardless of citizenship or showing of interest. Governments also have an obligation to proactively provide information to the public even when the information is not requested. Because environmental issues often are not contained within countries' boundaries, governments also have a right of access to information held by the governments of other nations. This is especially true when large-scale environmental disasters occur.

The type of information included in this conceptualization generally is not defined. Although the Aarhus Convention is quite precise in most respects, it is vague about what specifically constitutes environmental information. Environmental information has been referred to as information about environmental harms as well as information on potential environmental harms. Sometimes there is a reference to information from the private sector. The activities of private entities such as corporations often affect or potentially affect the environment. Although a right to private information is not explicitly stated, concerns often were expressed about the lack of access to this type of information.

Regarding limitations of the right to environmental information, again, only the Aarhus Convention has been explicit in articulating limitations, but reference to the

importance of balancing the public interest against any limitations on information has been made by the toxic products special rapporteur as well. In discussions about limitations, information from private entities such as corporation again were noted, this time in reference to governments' overuse of limitations on government disclosure of commercial information. Concern also was expressed by both UN special rapporteurs about the overuse of national security arguments in denying access to information about the environment.

CHAPTER 5

THE RIGHT-TO-TRUTH CONCEPTUALIZATION

The right-to-truth conceptualization recognizes a right of access to government information about serious human rights violations. It is based on the right to truth found in human rights law. The right to truth creates obligations on governments to investigate serious human rights violations, bring the perpetrators to justice, and provide information to the victims, their families, and sometimes society as a whole about the circumstances surrounding the violations. It is this last obligation upon which the right-to-truth conceptualization of access to information is based. The right-to-truth conceptualization has been recognized by a range of human rights entities including the Inter-American and European UN Commission on Human Rights, Inter-American court and commission, and the European Court of Human Rights. Noticeably absent, with a few exceptions, are articulations from NGOs.

In order to understand this conceptualization, it is necessary to briefly examine the right to truth, which will be discussed in the following section. This discussion is not meant to encompass the myriad views regarding the right to truth but merely to provide a brief history of the right to truth and its place within international human rights law. Subsequent sections will explicate the right-to-truth conceptualization by discussing rationales for the right of access to information about human rights abuses, to whom this right is conferred, the type of information involved, and the limitations on the right.

Defining the Right to Truth

In human rights law, the right to truth, also referred to as the “right to the truth” and “the right to know the truth,” refers to the obligation on governments to investigate serious human rights violations, bring perpetrators to justice, and to provide information to the victims, their families, or society as a whole about the circumstances surrounding violations.⁶²⁶ According to a 2005 report of the Office of the United Nations High Commissioner for Human Rights (OHCHR):

The right to the truth is often invoked in the context of gross violations of human rights and grave breaches of humanitarian law. Victims of summary executions, enforced disappearance, missing persons, abducted children, torture, claim to know what happened to them or their relatives. The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.⁶²⁷

According to a UN Secretary-General report, the right to truth is “both an independent right and the means for the realization of other rights: information, to identity, to mourning and, especially, the right to justice.”⁶²⁸

⁶²⁶ See also UN Commission on Human Rights resolution 2005/66, Comm. H.R. Res. 2005/66, UN doc. E/CN.4/Res/2005/66, ¶ 1 (Apr. 20, 2005) (acknowledging that “that the right to the truth may be characterized differently in some legal systems as the right to know or the right to be informed or freedom of information”). This was reiterated in a Human Rights Council resolution, HRC Res. 9/11, UN Doc. A/HRC/Res/9/11, preamble (Sept. 24, 2008).

⁶²⁷ Report of the Office of the UN High Commissioner for Human Rights (OHCHR), Study on the Right to Truth, UN Doc. E/CN.4/2006/91, ¶ 3 (Feb. 8, 2006) [hereinafter 2005 UN OHCHR Study on the Right to Truth]. This study was conducted pursuant to the Commission on Human Rights resolution 2005/66, which “[r]ecognize[d] the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.” The resolution further requested the OHCHR “to prepare a study on the right to the truth, including information on the basis, scope, and content of the right under international law, as well as best practices and recommendations for effective implementation of this right, in particular, legislative, administrative or any other measures that may be adopted in this respect, taking into account the views of States and relevant intergovernmental and non-governmental organizations, for consideration at its sixty-second session.” *Id.* ¶ 6.

⁶²⁸ 2006 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/61/384, ¶16 (Sept. 12, 2006).

As a legal concept, the right to truth has emerged in various ways depending upon the jurisdiction.⁶²⁹ Historically, the right to truth was first articulated within the context of armed conflicts and international humanitarian law,⁶³⁰ which places obligations on parties of armed conflicts to search for missing persons and gives families the right to know the fates of their relatives involved in the conflict.⁶³¹ In the 1970s and early 1980s, the widespread practice of “enforced disappearances”⁶³² prompted several international and regional human rights bodies to further examine the right to truth.⁶³³ According to the UN special rapporteur on the independence of judges and lawyers, during this time “there emerged dictatorial regimes

⁶²⁹ See 2005 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 4-25. See also Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction*, 88 INT’L REV. RED CROSS 245, 248 (2006).

⁶³⁰ International humanitarian law (IHL), which is separate from human rights law, incorporates the rules of international law especially designed for the protection of the individual in time of war or armed conflict. IHL was codified in the four 1949 Geneva Conventions, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (Aug. 12, 1949); Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (Aug. 12, 1949); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 UNTS 135 (Aug. 12, 1949); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (Aug. 12, 1949), and the 1977 Additional Protocols to the Conventions: Additional Protocol (No. I) Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (June 8, 1977) [hereinafter Additional Protocol I of the Geneva Conventions]; Additional Protocol (No. II) Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (June 8, 1977). Each of these instruments contains a list of grave breaches of human rights that can be committed in both international and non-international armed conflicts. For a detailed description of the historical development of international humanitarian law, see MARCO SASSÒLI & ANTOINE BOUVIER, *HOW DOES LAW PROTECT IN WAR: CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW* (International Committee of the Red Cross, Geneva, Apr. 1999). See generally DIETER FLECK, *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (2000).

⁶³¹ *Id.* at article 32 of Additional Protocol I of the Geneva Conventions.

⁶³² According to the UN International Convention for the Protection of All Persons from Enforced Disappearance, an enforced disappearance “is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” GA Resolution 61/177, UN Doc. A/RES/61/177, Annex at article 2 (Jan. 12, 2007) [hereinafter Convention on Disappearances]. The UN General Assembly adopted the Convention on Disappearances in January 2007, *id.* at ¶ 2. The convention was opened for signatory on Feb. 6, 2007. As of December 2008, 80 states have signed it and seven have ratified it. The convention will come into force when it is ratified by 20 state parties, Convention on Disappearances, *id.* at article 39.

⁶³³ 2006 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 8.

which used this practice in an institutionalized, systematic and widespread manner, with the aim of eliminating all forms of opposition.”⁶³⁴ Latin America, according to the special rapporteur, “was among the main regions in which this sinister tool of repression was utilized. However, this practice has now been documented in 90 countries.”⁶³⁵

In 1980 the UN Commission on Human Rights created a working group on enforced or involuntary disappearances,⁶³⁶ which established in its first report that disappearances not only violated the rights of missing persons but also the rights of family members. Citing the Geneva Conventions,⁶³⁷ the report stated that international law recognizes the rights of families to be “informed of the whereabouts and the fate of” their relatives.⁶³⁸

In the 1980s the UN Human Rights Committee and the Inter-American Court of Human Rights both recognized that governments had an obligation to investigate allegations of enforced disappearances and that disappearances also violated the rights of relatives. In a case having to do with the fate of a political prisoner in Honduras, the Inter-American Court ruled that the government had an obligation to investigate the fate of prisoners, calling for an “effective search for the truth.”⁶³⁹ This obligation included using “the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of

⁶³⁴ 2006 Report of the Special Rapporteur on the independence of judges and lawyers, *supra* note 628, at ¶17. 2006).

⁶³⁵ 2006 Report of the Special Rapporteur on the independence of judges and lawyers, *supra* note 628, at ¶17. See also 1985-1986 Report of the Inter-American Commission, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, Chapter 5 (Sept. 26, 1986), <http://www.cidh.oas.org/annualrep/85.86eng/chap.5.htm> ; 1980 Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1435, ¶s 175-83 (Jan. 26, 1981) (referring also to problems of enforced disappearances in South Africa and Namibia).

⁶³⁶ UN Commission on Human Rights resolution 20 (XXXVI) (Feb. 29, 1980).

⁶³⁷ *Id.*

⁶³⁸ 1980 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 635, at ¶ 187.

⁶³⁹ Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) no. 4, ¶ 177 (July 29, 1988).

their remains,” an obligation that continues as long as there is uncertainty about the fate of the person who has disappeared.⁶⁴⁰

In 1988, the UN Human Rights Committee faced similar facts. An Uruguayan mother wanted to know the fate of her daughter who had been arrested years earlier. The committee found that a mother had endured substantial anguish and stress due to the disappearance of her daughter and the continuing uncertainty about her fate and whereabouts. In this context of her acute suffering, which itself was held to be a form of torture, the committee ruled that the mother had a basic “right to know” what had happened to her daughter.⁶⁴¹

The Inter-American Commission on Human Rights in its 1985 report also recognized that relatives had a right to know but went a step further and stated that this right also belonged to society. According to the commission: “Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives.”⁶⁴²

By 1992, the UN General Assembly adopted that Declaration on the Protection of All Persons from Enforced Disappearances,⁶⁴³ which also established a right to truth, requiring that all legitimate allegations of disappearances be investigated or, absent a formal complaint,

⁶⁴⁰ *Id.* at ¶ 181.

⁶⁴¹ *Quinteros v. Uruguay*, H.R.C. Comm. No. 107/1981, UN Doc. CCPR/C/19/D/107/1981, ¶ 14 (July 21, 1983). During this time period, the UN General Assembly also recognized that governments had an obligation to investigate disappearances and that victims’ relatives had a right to know what had happened. GA Res. 34/179, UN Doc. A/RES/34/179, ¶ 7 (1979); A/RES/35/188, ¶ 7 (Dec. 15, 1980); A/RES/ 40/45, ¶ 6(b) (1985).

⁶⁴² 1985-1986 Report of the Inter-American Commission, *supra* note 635.

⁶⁴³ GA Resolution 77/133, UN DOC. A/RES/47/133, preamble (Dec. 18, 1992) (proclaiming the Declaration “as a body of principles for all States”) [hereinafter Declaration on Enforced Disappearances].

when there were reasonable grounds to believe a disappearance had occurred.⁶⁴⁴ According to the declaration, all findings of investigations must be made available to all “persons concerned” unless doing so would jeopardize an ongoing criminal investigation.⁶⁴⁵

Following the declaration, after years of negotiation, the legally-binding International Convention for the Protection of All Persons from Enforced Disappearances opened for countries to sign in 2007.⁶⁴⁶ The convention similarly establishes a right to truth obligating governments to investigate disappearances and inform families. Broadly defining a victim as a “disappeared person and any individual who has suffered harm as a direct result of an enforced disappearance,”⁶⁴⁷ the convention states that each “victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”⁶⁴⁸

⁶⁴⁴ UN GA Res 47/133, UN Doc. A/RES/47/133, article 13 (Dec. 18, 1992).

⁶⁴⁵ *Id.*

⁶⁴⁶ Convention on Disappearances, *supra* note 632. The OAS had negotiated a similar treaty more than ten years earlier. Inter-American Convention on the Forced Disappearance of Persons art. III, June 9, 1994, 33 I.L.M. 1529, available at <http://www.oas.org/juridico/English/Treaties/a-60.html>.

⁶⁴⁷ *Id.* at article 24(1).

⁶⁴⁸ *Id.* at article 24(2). It is interesting to note that the United States, which has not signed the convention, publicly objected to the right-to-truth provisions stating that “the United States is committed to advancing the cause of families dealing with the problem of missing persons; however, we do not acknowledge any new international right or obligation in this regard. For the United States, which is not a party to the 1977 Additional Protocol I to the Geneva Conventions and has no obligations vis-à-vis any ‘right to truth’ under Article 32 of that instrument, families are informed of the fate of their missing family members based on the longstanding policy of the United States and not because of Article 32.” The statement further explained that regarding the convention, “Article 24 on the right to the truth and reparation contains text that is vague and at the same time overly specific, employs an overbroad definition of a ‘victim,’ and may not be consistent with a common law system for granting remedies and compensation.” U.S. Mission to the United State in Geneva, Press Release, U.S. Statement on the Draft Convention on Enforced Disappearances (June 27, 2006) available at <http://geneva.usmission.gov/Press2006/0627U.S.StatementonForcedDisappearances.html> (last visited Dec. 28, 2008). See also Digest of United States Practice, chapter 6, U.S. statement concerning draft International Convention for the Protection of All Persons from Enforced Disappearances, <http://www.state.gov/s/l/2005/87244.htm>.

Although initially established within the context of missing persons and enforced disappearances, the right to truth gradually has been extended to other areas of human rights law, such as combating impunity, which refers to the failure to bring perpetrators to justice,⁶⁴⁹ conferring remedies and reparations for serious human rights abuses,⁶⁵⁰ and creating obligations to investigate extrajudicial executions, and torture.⁶⁵¹ For example, in a case involving the 1989 assassination of Jesuit priests by Salvadorian military agents, the Inter-American Commission on Human Rights established that the lack of investigation and official information violated family members' and society's right to truth.⁶⁵²

According to the special rapporteur on the independence of judges and lawyers, the right to truth, which was first established in humanitarian law, has developed “more recently in the field of international human rights law, where this independent right appears in

⁶⁴⁹ See Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) [hereinafter Updated Set of Principles]. According to the Updated Set of Principles, impunity is “the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.” *Id.* at Definitions (A). The first draft of the Set of Principles can be found in Annex II of UN Special Rapporteur on Impunity Louis Joinet’s final report, UN Doc. E/CN.4/Sub.2/1997/20/Rev. 1, annex II (Oct. 2, 1997) [hereinafter Final Report on Updating the Set of Principles]. The updated principles were created “to reflect recent developments in international law and practice, including international jurisprudence and State practice” and are “not legal standards in the strict sense, but guiding principles.” Report of the independent expert to update the Set of Principles to combat impunity, UN Doc. E/CN.4/2005/102, ¶ 11 (Feb. 18, 2005).

⁶⁵⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, Annex (March 21, 2006) [hereinafter Basic Principles and Guidelines].

⁶⁵¹ 2006 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 8.

⁶⁵² Ignacio Ellacuría et al. v. El Salvador, case 10.488, Report no. 136/99, ¶ 221 (Dec. 22, 1999); 1999 Report of the Inter-American Commission, OEA, Ser.L/V/II.106, Doc. 6 rev. (Apr. 13, 1999).

association with other fundamental human rights, such as the right of access to information . . . and especially the right to justice.”⁶⁵³

As indicated in the statement above by the special rapporteur on the independence of judges and lawyers, the right to truth often is connected to the right of access to information. According to an OAS General Assembly resolution, the “right to truth may be characterized differently in some legal systems as the right to know or the right to be informed or as freedom of information.”⁶⁵⁴ A report of the UN High Commissioner for Human Rights noted, “One of the most decisive ways of ensuring the right to the truth is still the right to information.”⁶⁵⁵ This also was expressed by the Inter-American Commission, which stated that “access to state-held information is necessary in part to uphold the ‘right to know the truth.’”⁶⁵⁶

The Inter-American Commission, referring to the right of access to personal information held by the government discussed in chapter 3, noted:

[*H*]abeas data has become an essential tool for the investigation of human rights violations committed during past military dictatorships in the Americas. Relatives of the disappeared have brought actions of *habeas data* to obtain information about the government’s behavior, to ascertain the whereabouts of

⁶⁵³ 2005 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2006/2, ¶ 15 (Jan. 23, 2006). He further argued that the right to truth recognized in both humanitarian and human rights law “have been complementary and in no way opposed to each other.” *Id.* at ¶ 16.

⁶⁵⁴ OAS G.A. Res. Right to the Truth, AG/Res. 2267 (XXXVII-O/07), preamble (June 5, 2007). *See also* OAS G.A. Res. Right to the Truth, AG/Res. 2175 (XXXVI-O/06), preamble (June 6, 2006) (stating the same proposition). This language also was used in a UN Commission on Human Rights resolution, Comm. H.R. Res. On Right to the Truth, Comm. H.R. Res. 2005/66, UN doc. E/CN.4/Res/2005/66, preamble (Apr. 20, 2005) (stating that “the right to the truth may be characterized differently in some legal systems as the right to know or the right to be informed or freedom of information”).

⁶⁵⁵ Report of the Office of the UN High Commissioner for Human Rights, Right to Truth, UN Doc. A/HRC/5/7 (June 7, 2007), pursuant to H.R.C. Decision, A/HRC/Dec/ 2/105, ¶ 39 (Nov. 27, 2006) (requesting the High Commissioner for Human Rights to create a follow-up to the 2006 High Commission report on the right to truth) [hereinafter 2007 UN OHCHR Study on the Right to Truth].

⁶⁵⁶ Inter-America Comm. 2003 Report, OEA/Ser.L/V/II.118, Doc. 5 rev. 2, chap. 4, ¶ 14 (Dec. 29, 2003)

the disappeared, and to determine responsibilities. Such actions ultimately constitute an important means of ensuring the ‘right to truth.’⁶⁵⁷

The right to truth also has been linked more broadly to principles of government transparency. For example, a UN High Commission of Human Rights report stated that although the right to truth is “closely linked to the State’s duty to protect and guarantee human rights and to the State’s obligation to conduct effective investigations into gross human rights violations . . . and to guarantee effective remedies and reparation.”⁶⁵⁸ The obligation to investigate human rights abuses also “is closely linked to the rule of law and the principles of transparency, accountability and good governance in a democratic society.”⁶⁵⁹

The following sections will explicate the right-to-truth conceptualization by examining the rationales for the right of access to information about human rights abuses, to whom this right is conferred, the type of information involved, and the limitations on the right. As previously discussed, the right to truth includes the obligation on governments to investigate human rights violations and bring perpetrators to justice. The right to truth also includes the right to information about the circumstances surrounding the violation. This last obligation is the basis for the right-to-truth conceptualization. Although the obligation on government to investigate human rights abuses is part of the right to truth, the following sections will focus primarily on the right of access to information conferred within the right to truth. The obligation on governments to investigate human rights violations and bring perpetrators to justice will be addressed only in the context of subsequent obligations to disclose that information.

⁶⁵⁷ OAS Report on H.R. Defenders, *supra* note 399, at ¶ 89.

⁶⁵⁸ 2005 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 56.

⁶⁵⁹ *Id.* at ¶ 46.

The Right-to-Truth Conceptualization – Rationales of the Right

There are three main rationales for conferring a right of access to information about human rights violations within the context of the right to truth. These rationales are not mutually exclusive and often are found with the same court rulings or documents. The first rationale, the human-rights-violations-through-nondisclosure rationale, recognizes that nondisclosure of information about the fate of next of kin who may have been victims of human violations contributes to the violations of relatives' rights not to be treated inhumanely or tortured. In other words, by not providing information on human rights violations such as extrajudicial executions and enforced disappearance, governments can violate the rights of victims' family members, as well. The second rationale is the information-as-reparation-for-human-rights-violations rationale, which has both an individual and a societal dimension. The individual dimension recognizes access to information as a form of reparation for the family members of victims. Providing information is a way to compensate family members for harms they have suffered. The societal dimension of this rationale recognizes access to information as providing redress to society for the harms that were done. Often this redress involves ensuring that similar violations do not occur in the future. That is the third rationale for this conceptualization, the prevention-of-human-rights-violations rationale. This rationale is based on the idea that informing society of the details of its history of human rights abuse will act as a deterrent to future abuses.

Human-Rights-Violations-through-Nondisclosure Rationale

The nondisclosure rationale for a right of access to information recognizes that the anguish that individuals experience as a result of uncertainty about the fate of close relatives

who are direct victims of enforced disappearances or other serious violations of human rights in itself constitutes a violation of human rights. It has been recognized, particularly by the Human Rights Committee and the European Court, that a government's failure to provide information concerning victims of enforced disappearance can amount to a form of inhumane treatment or even torture. It follows that government authorities must investigate what happened to the victims and inform their relatives of their fate. This often includes a right to be kept apprised of official investigations.

Often the right of access to information about human rights is recognized within the context of enforced disappearances. As stated above, the UN Convention on Enforced Disappearances defines victims not only as those who "disappeared," but also their family members.⁶⁶⁰ The convention requires: "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."⁶⁶¹ Both the UN convention and the Inter-American convention on enforced disappearances define an enforced disappearance in part as an absence of information from the government about the missing person's fate.⁶⁶² This lack of information is seen as violating the rights of the victims and of their family members.

In several cases, the lack of information about relatives or loved ones has been determined to constitute a form inhumane treatment or torture. The UN Human Rights Committee has recognized on numerous occasions that the pain and suffering of relatives not

⁶⁶⁰ UN Convention on Enforced Disappearance, *supra* note 632, at art. 24(1).

⁶⁶¹ *Id.* at 24(2).

⁶⁶² UN Convention on Enforced Disappearance, *supra* note 632, at art. 2; Inter-American Convention on Enforced Disappearances, *supra* note 646, at art. 2.

knowing the fate of their loved ones constitutes a violation of article 7 of the Political Covenant,⁶⁶³ which prohibits torture. The committee first made this determination as far back as 1981. In *Quintero v. Uruguay*, discussed previously, the committee ruled that a mother's anguish and suffering caused by not knowing what happened to her daughter after being arrested was a form of torture.⁶⁶⁴ The authorities had arrested her daughter and provided no official information as to the daughter's whereabouts. According to the committee:

The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.⁶⁶⁵

In this case, the committee found that the mother had endured substantial anguish and stress due to the disappearance of her daughter and the continuing uncertainty of her fate and whereabouts. In this context of acute suffering, which itself was held to be a form of cruel and inhumane treatment, the committee ruled that the mother had a basic "right to know" what had happened to her daughter.⁶⁶⁶ Toward this end, the committee concluded that the government needed to take immediate and effective measures to establish the facts, secure the

⁶⁶³ Political Covenant, *supra* note 46, at art. 7 (stating: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.").

⁶⁶⁴ *Quinteros v. Uruguay*, H.R.C. Comm. No. 107/1981, UN Doc. CCPR/C/19/D/107/1981, ¶ 14 (July 21, 1983).

⁶⁶⁵ *Id.* See also *Amnesty International and Others v Sudan*, African Comm. H.R., Communication No. 48/90, AHG/222 (XXXVI) Add., Annex 5, ¶ 54 (2000) (stating that "holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned"), *available at* http://www.achpr.org/english/activity_reports/activity13_en.pdf.

⁶⁶⁶ *Id.*

daughter's release, bring to justice those found responsible, and ensure that similar violations did not occur in the future.⁶⁶⁷

The committee also has found a violation of article 7, the right against inhumane treatment or torture provision of the Political Covenant, when relatives of executed prisoners could not get information about why the execution occurred or the location of the grave site. According to the committee in *Lyashkevich v. Belarus*, “The secrecy surrounding the date of the execution, and the place of burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress.”⁶⁶⁸

On several occasions the European Court of Human Rights also has ruled that the lack of information about the whereabouts of missing relatives constitutes a violation of article 3 of the European Convention, which prohibits torture and inhumane or degrading treatment.⁶⁶⁹ In 1998, in *Kurt v. Turkey*, the court ruled that the Turkish government violated article 3 by not releasing information to the mother of a Kurdish man who had been taken into custody, where he subsequently disappeared. The mother's repeated requests for information were to no avail. The court ruled that the government breached article 3 because the mother had been left “with the anguish of knowing that her son had been detained” and because there was “a

⁶⁶⁷ *Id.* at ¶ 16. *See also* H.R.C. Concluding Observations on Algeria, UN Doc. CCPR/C/79/Add.95, ¶ 10 (Aug. 18, 1998) (stating that disappearances violated article 7 with regard to relatives of the disappeared). The Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment also has made this conclusion. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, ¶ 13 (July 3, 2001).

⁶⁶⁸ *Lyashkevich v. Belarus*, H.R.C. Comm. No. 887/1999, UN Doc. CCPR/C/77/D/887/1999, ¶ 9.2 (Apr. 24, 2003). *See also* *Khalilova v. Tajikistan*, H.R.C. Comm. No. 973/2001, UN Doc. CCPR/C/83/D/973/2001, ¶ 7.7 (Apr. 13, 2005); *Khalilova v. Aliboeva*, H.R.C. Comm. No. 985/2001, UN Doc. CCPR/C/85/D/985/2001, ¶ 6.7 (Nov. 16, 2005); Concluding Observations on Uzbekistan (2005); Concluding Observations on Tajikistan (2005).

⁶⁶⁹ *See* European Convention, *supra* note 55, at art. 3 (stating that “no one shall be subjected to torture or to inhumane or degrading treatment or punishment”).

complete absence of official information as to his subsequent fate” over a prolonged period of time.⁶⁷⁰

In a subsequent case, *Cakici v. Turkey*, involving the brother of a disappeared person, the court emphasized that the *Kurt* ruling did not “establish any general principle that a family member of a ‘disappeared person’ is thereby a victim of treatment contrary to Article 3.”⁶⁷¹

In order for there to be a violation of article 3, the court explained, several elements need to be considered. These included the “proximity of the family tie, with a particular weight to the parent-child bond;” the “involvement of the family member in the attempts to obtain information; and the “way in which the authorities responded to those inquiries.”⁶⁷² The court further explained:

The essence of such a violation does not so much lie in the fact of the “disappearance” of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct.⁶⁷³

In other words, the court put particular emphasis on how the government responded to requests for information. In the *Cakici* case, the court found that article 3 had not been violated because the Cakici was the brother of the disappeared person and not a parent, he did

⁶⁷⁰ *Kurt v. Turkey*, Eur. Ct. H.R., App. No. 24276/94, ¶ 133-34 (May 25, 1998). *See also* *Tas v. Turkey*, Eur. Ct. H.R., App No. 24396/94, ¶ 79 (Nov. 14, 2000) (ruling that the Turkish government violated article 3 when it neglected to provide information to the father of a son who had been detained by authorities and then went missing).

⁶⁷¹ *Cakici v. Turkey*, Eur. Ct. H.R., App. No. 23657/94, ¶ 98 (July 8, 1999).

⁶⁷² *Id.*

⁶⁷³ *Id.*

not “bear the brunt” of attempts to obtain information (the father had), and no proof was presented that the authorities’ response to inquiries was indifferent.⁶⁷⁴

In 2001, the European Court ruled in *Cyprus v. Turkey* that a violation of article 3 occurred even though relatives of disappeared persons did not witness the disappearance. The court emphasized the government’s responsibility to provide information. The case concerned the 1974 Turkish invasion of the island of Cyprus, which resulted in the disappearance of more than 1,000 persons. According to the court:

The fact that a very substantial number of Greek Cypriots had to seek refuge in the south [of Cyprus] coupled with the continuing division of Cyprus must be considered to constitute very serious obstacles to their quest for information. The provision of such information is the responsibility of the authorities of the respondent State. This responsibility has not been discharged. For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorized as inhumane treatment within the meaning of Article 3.⁶⁷⁵

The Inter-American Court also has ruled that suffering and anguish of family members of disappeared persons amounts to “cruel, inhumane and degrading treatment.”⁶⁷⁶ The case, *Bámaca Velásquez v. Guatemala*,⁶⁷⁷ dealt with the disappearance at the hands of the Guatemalan Army of Efraín Bámaca Velásquez, a leader of a guerrilla group in Guatemala. His disappearance became internationally known due to his wife, Jennifer Harbury, who also was a U.S. lawyer and writer. She led a prolonged campaign, which included hunger strikes,

⁶⁷⁴ *Id.* at ¶ 99.

⁶⁷⁵ *Cyprus v. Turkey*, Eur. Ct. H.R., App. No. 25781/94, ¶ 157 (May 10, 2001).

⁶⁷⁶ See American Convention, *supra* note 1, at art. 5 (stating: “1. Every person has the right to have his physical, mental, and moral integrity respected” and “2. No one should be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”).

⁶⁷⁷ *Bámaca Velásquez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) no. 70 (Nov. 25, 2000).

to discover his fate.⁶⁷⁸ The court ruled that the Guatemalan government's "official refusal to provide relevant information . . . clearly constitute[d] cruel, inhumane or degrading treatment."⁶⁷⁹

The Inter-American Court came to the same conclusion in *Pueblo Bello Massacre v. Colombia*, which dealt with a 1990 abduction and subsequent murder of 43 villagers by a Colombian paramilitary group. Family members' attempts to find out what had happened to their loved ones had been continually frustrated by government authorities. According to the court:

[T]he next of kin of the victims of human rights violations may also be victims. In this regard, the Court has considered that the right to mental and moral integrity of the next of kin of the victims has been violated owing to their suffering as a result of the specific circumstances of the violations perpetrated against their loved ones and the subsequent acts or omissions of the State authorities with regard to the events.⁶⁸⁰

The court further declared that:

[T]he next of kin have not been able to honor their deceased loved ones appropriately. In cases involving forced disappearance, the Court has stated that the violation of the right to mental and moral integrity of the next of kin of a victim is a direct consequence of this phenomenon; they suffer greatly as a result of the act itself, and their suffering is increased by not knowing the truth about the facts, which has the effect of ensuring partial impunity.⁶⁸¹

⁶⁷⁸ *Id.* at ¶ 18.

⁶⁷⁹ *Id.* at ¶ 165. The court also has ruled that "cruel, inhuman and degrading treatment" suffered by the next-of-kin of disappeared persons is due to the hardships resulting from the person being gone and the subsequent searches for the person. 19 Merchants v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 211 (July 5, 2004).

⁶⁸⁰ *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 154 (Jan. 31, 2006).

⁶⁸¹ *Id.* at 161.

According to the court, the suffering of the relatives amounted to a violation of article 5 of the American Convention, which guarantees the right to humane treatment.⁶⁸²

The UN special rapporteur on questions of torture and other cruel, inhumane, or degrading treatment or punishment also has stated that disappearances constitute a form of torture for the family members of the disappeared person. The government's "refusal to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of their liberty," according to the special rapporteur, "is an intentional act directly affecting close family members. Being fully aware they are hurling family members into a turmoil of uncertainty, fear and anguish regarding the fate of their loved one(s), public officials are said to maliciously lie to the family, with a view to punishing or intimidating them and others."⁶⁸³

Information-as-Reparation-for-Human-Rights-Violations Rationale

As noted above, the right to truth places obligations on governments to investigate human rights abuses, bring perpetrators to justice, and inform the families about the circumstances surrounding the abuse. Often this last obligation is understood as a form of reparation to the families for the suffering they endured. For example, according to the Inter-American Commission report on *Galdamez v. El Salvador*, reparations include knowing the "full, complete, and public truth as to the events that transpired, their specific circumstances,

⁶⁸² See American Convention, *supra* note 1, at art. 5. Specifically, the court ruled that article 5(1) was violated. Article 5(1) states, "Every person has the right to have his physical, mental, and moral integrity respected." *Id.*

⁶⁸³ Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, ¶ 12 (July 3, 2001).

and who participated in them.”⁶⁸⁴ It is not enough to investigate the abuses, bring perpetrators to justice, and provide monetary compensation to the families. Reparations also include providing the families with specific information about what occurred and why.

This was addressed in the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.⁶⁸⁵ Principle 34, which addresses reparations, stated, “[T]he family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person . . . regardless of whether the perpetrators have been identified or prosecuted.”⁶⁸⁶ The UN Basic Principles and Guidelines on the Right to Remedy and Reparations states that as part of reparations, victims of human rights violations “should be entitled to seek and obtain information on the causes leading to their victimization and conditions” pertaining to the violations in order “to learn the truth.”⁶⁸⁷

The UN independent expert on the Updated Set of Principles stated that the right of families to know the truth about the fate of their relatives has both a substantive and a remedial dimension. The substantive dimension, which was discussed previously, reflects jurisprudence that governments’ failure to inform victims’ families about what happened “may itself entail a breach of human rights.”⁶⁸⁸ The remedial dimension of the right to know “recognize[s] the reparative effect of knowledge of the circumstances” regarding serious

⁶⁸⁴ Monseñor Oscar Arnulfo Romero and Galdámez v. El Salvador, Case no. 11.481, Report No. 37/00, ¶ 147-8 (Apr. 13, 2000).

⁶⁸⁵ Updated Set of Principles, *supra* note 649.

⁶⁸⁶ *Id.* at principle 34.

⁶⁸⁷ Basic Principles and Guidelines, *supra* note 650, at art. 10.

⁶⁸⁸ Final Report on the Updated Set of Principles, *supra* note 649, at ¶ 63.

human rights abuses.⁶⁸⁹ According to the independent expert, one of the main goals of reparations is to “provide recognition to victims (not just in their status as victims, but also in their status as citizens and bearers of equal human rights).”⁶⁹⁰

Both the Inter-American Court and Inter-American Commission have understood access to information about human rights abuses as a form of reparation. Often this has both an individual and collective dimension. For example, in 1990 anthropologist Myrna Mack Chang, who was doing research in a Mayan village, was murdered by a member of the Guatemalan armed forces, which subsequently covered up the killing and obstructed the administration of justice.⁶⁹¹ According to the court:

[E]very person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations. This right to the truth has been developed by International Human Rights Law; recognized and exercised in a concrete situation, it constitutes an important means of reparation. Therefore, in this case it gives rise to an expectation that the State must satisfy for the next of kin of the victim and Guatemalan society as a whole.⁶⁹²

The court has used that same language in numerous cases.⁶⁹³ Often, as part of reparations, the court has ordered governments to publish in newspapers all or specific parts

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.* at ¶ (59)(e).

⁶⁹¹ *Myrna Mack Chang v. Guatemala* (ser. C) no. 1010 ¶ 4 (Nov. 23, 2003).

⁶⁹² *Id.* at ¶ 274.

⁶⁹³ *See, e.g.,* *Carpio-Nicolle*, Inter-Am. Ct. H.R. (ser. C), ¶ 128 (Nov. 22, 2004); *Oroza v. Bolivia* (Reparations), Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 114 (Feb. 27, 2002); *Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 122, ¶ 297 (Sept. 15, 2005); *Serrano-Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 62 (Mar. 1, 2005); *19 Merchants v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 259, 261 (July 5, 2004).

of the court's decision,⁶⁹⁴ publish the results of national criminal proceedings,⁶⁹⁵ and/or provide public apologies that detail the circumstances of the abuse.⁶⁹⁶

It is important to note, though, that the Inter-American Court has acknowledged a societal right to know only within the context of reparations for human rights abuses. Unlike the Inter-American Commission, the court has not recognized that there is a societal right to know based on the rights guaranteed by the American Convention. The right to know within the context of reparations, according to the court, is based on the idea that society benefits from the right to know, not that society has a right to know as guaranteed by the convention. For example, as part of reparations often the court will require that governments issue public statements in order to inform society about what happened. The societal right to know will be discussed further in the next section on who receives the right to information.

The Inter-American Commission also has stated in numerous reports that the right to know is a form of reparation for both individuals and society as a whole. For example, in

⁶⁹⁴ See, e.g., *Ituango Massacres v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 404(h) (July 1, 2006) (ordering the government to publish all of the Inter-American Court judgment); *Huilca-Tecse v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 107 (Mar. 3, 2005) (ordering Peru to publicize results of an extrajudicial execution trial so that “Peruvian society may know the truth”); *Tibi v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 258 (Sept. 7, 2004) (ordering that the “results of this process [the required investigation into the abuse] must be made know to the public, for Ecuadorian and French society to know the truth”).

⁶⁹⁵ See, e.g., *Luis Almonacid-Arellano v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶157 (Sept. 26, 2006) (ordering Chile to make public the results of the investigation “so that the Chilean society may know the truth” about the case); *Ituango Massacres v. Colombia* (ordering that the results of criminal proceedings be published by the state “so that Colombian society may know the truth”); *19 Merchants v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 236 (July 5, 2004) (ordering the results of the investigation be made public so “Columbian society may know the truth about what happen”); *Myrna Mack Chang v. Guatemala*, ¶ 275 (ordering that the outcome of the required investigation be made public in order “for Guatamalan society to know the truth”)

⁶⁹⁶ See, e.g., *Ituango Massacres v. Colombia*, ¶ 404(d) (requiring that the state acknowledge publicly in the presence of “senior authorities” its “international responsibilities” for the massacres); *Huilca-Tecse v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 111 (Mar. 3, 2005) (ordering Peru to provide a public apology); *19 Merchants v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 274 (July 5, 2004) (ordering Columbia to provide a public apology); *Tibi v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 261 (Sept. 07, 2004) (ordering a “written statement of acknowledgement of international responsibility” (for the facts addressed in the instant ruling) and an “apology to the victims”).

Chile v. Oracyle, which addressed enforced disappearances, the commission stated: “[T]he duty to repair the consequences of the violation is not satisfied merely by offering an amount of money. The first step toward offering reparation to the families of the victims consists of putting to an end the state of uncertainty and ignorance in which they are. That can only be achieved by completely and openly revealing the truth.”⁶⁹⁷ The commission further commented, “Apart from the families of the victims, which are directly affected by the violation of human rights, society as a whole is also entitled to be informed. . . . Every society has a right to know the truth about past events, as well as the motives and circumstance in which aberrant crimes came to be committed.”⁶⁹⁸ Often in these cases, the commission argued that not only is the right to know a form of reparation, it also is a way “to prevent repetition of such acts in the future.”⁶⁹⁹ The role of access to information in preventing future abuse is discussed in more detail in the next section.

Prevention-of-Human-Rights-Violations Rationale

Often the right of access to information about human rights abuses is understood as helping to ensure that human rights abuses do not happen again. The Inter-American Commission first articulated this idea in a 1985 report, stating, “Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in

⁶⁹⁷ *Chile v. Oracyle et al.*, Report No. 25/98, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 93 (Apr. 13, 1998).

⁶⁹⁸ *Id.* at 94. *See also* Lucio Parada Cea et al. v. El Salvador et al., Case no. 10.480, Report No. 1/99, ¶ 155 (Jan. 27, 1999); Monseñor Oscar Arnulfo Romero and Galdámez v. El Salvador, Case no. 11.481, Report No. 37/00, ¶ 144 (Apr. 13, 2000).

⁶⁹⁹ *Chile v. Oracyl* at ¶ 93.

the future.”⁷⁰⁰ This language has been quoted numerous times in commission decisions regarding the right to the truth.⁷⁰¹ According to the commission in *Ellacuría v. El Salvador*, “Society’s right to know the truth about its past must be seen not only as a means of ensuring compensation and clarification of the facts, but also as a means of preventing future violations.”⁷⁰²

In numerous decisions, the Inter-American Court also has referred to the benefit of information to prevent reoccurrences of abuse. Often this is within the context of issuing non-monetary reparations. For example, in *Bámaca Velásquez v. Guatemala*, the court stated that not only must governments investigate human rights abuses and inform the victims’ families of the outcome, governments also must “publicly divulge” the result of the investigation because “[s]ociety has the right to know the truth regarding such crimes, so as to be capable of preventing them in the future.”⁷⁰³ The OAS General Assembly also has articulated the connection between the right of access to information and the prevention of human rights

⁷⁰⁰ 1985-1986 Report of the Inter-American Commission, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, Chapter 5, 193 (Sept. 26, 1986), available at <http://www.cidh.oas.org/annualrep/85.86eng/chap.5.htm>.

⁷⁰¹ See, e.g., *Ellacuría et al. v. El Salvador*, report no. 136/99; *Chile v. Oracyle et al.*, Report No. 25/98, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 92 (Apr. 13, 1998); *Lucio Parada Cea et al. v. El Salvador et al.*, Case no. 10.480, Report No. 1/99, ¶ 153 (Jan. 27, 1999); *Monseñor Oscar Arnulfo Romero and Galdámez v. El Salvador*, case no. 11.481, report No. 37/00, ¶ 146 (Apr. 13, 2000).

⁷⁰² *Ignacio Ellacuría et al. v. El Salvador*, Case 10.488, report no. 136/99 (Dec. 22, 1999); Annual Report of the IACHR 1999, OEA, Ser.L/V/II.106, Doc. 6 rev., ¶ 228 (Apr. 13, 1999). See also *Galdamez v. El Salvador*, Report No. 37/00, ¶ 148 (Apr. 13, 2000), available at <http://www.cidh.org/annualrep/99eng/Merits/ElSalvador11.481.htm>. (stating that the “right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, . . . but is also aimed at preventing future violations”); *Lucio Parada Cea et al. v. El Salvador et al.*, Case no. 10.480, Report No. 1/99, ¶ 155 (Jan. 27, 1999).

⁷⁰³ *Bámaca Velásquez v. Guatemala* (Reparations and Costs), Inter-Am. Ct. H.R. (ser. C) no. 91, ¶ 77-8 (Feb. 22, 2002). See also *19 Merchants v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶259 (July 5, 2004) (stating that “knowing the truth about such crimes . . . can prevent them in the future”); *Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 259 (Nov. 25, 2003); *Vargas-Areco v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 81 (Sept. 26, 2006) (stating that “the imperious need to avoid repetition can only be satisfied by fighting impunity and by respecting the right of victims and society as a whole to know the truth”).

violations. A 2006 resolution on the right to the truth encouraged governments to take “appropriate measures to establish mechanisms or institutions for disclosing information on human rights violations, and to ensure that citizens have appropriate access to said information, in order to further the exercise of the right to the truth, prevent future human rights violations, and establish accountability in this area.”⁷⁰⁴

The idea that information about past human rights abuses will prevent recidivism also has been propagated in the context of governments trying to achieve peace, democracy, and national reconciliation in the aftermath of an abusive regime. In a 2006 case, *Pueblo Bello Massacre v. Colombia*, the Inter-American Court acknowledged that the government had been struggling “to achieve peace,” but the court still held the government responsible for investigating human rights abuses of previous governments. According to the court, not investigating and not releasing investigative findings to the public “reproduces the conditions of impunity for this type of acts to be repeated.”⁷⁰⁵

The Inter-American Commission also emphasized the role of information is preventing future abuse in *Galdámez et al. v. El Salvador*. Quoting former Inter-American Court Judge Pedro Nikken, the commission stated:

First, it is useful for society to learn, objectively, what happened in its midst, which translates into a sort of collective catharsis. And second, it contributes to creating a collective conscience as to the need to impede the repetition of similar acts and shows those who are capable of doing so that even if they may escape the action of justice, they are not immune from being publicly recognized as the persons responsible for very grave attacks against other human rights. In this regard, even though these do not constitute punitive

⁷⁰⁴ OAS G.A. Res. Right to the Truth, AG/Res. 2175 (XXXVI-O/06), ¶ 7 (June 6, 2006).

⁷⁰⁵ *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 146 (Jan. 31, 2006).

mechanisms, they may perform a preventive function that is highly useful in a process of building peace and the transition to democracy.⁷⁰⁶

The Lima Principles also emphasize the importance of a right of access to information during times of transition from one government to another. According to the principles, “transparency of information reduces the possibility of abuse of power. Freedom of information in the context of democratic transition can contribute to guaranteeing truth, justice and reconciliation. Lack of information adds to the difficulty of transition and reduces its credibility.”⁷⁰⁷ This also was emphasized in the 2007 report of the UN High Commissioner of Human Rights, which stated, “The right to the truth is viewed as an indispensable element in any process of restoring democracy, since it plays an essential role in the historical reconstruction of the causes and consequences of human rights violations.”⁷⁰⁸

The UN original and updated Set of Principles on Impunity, which have been very influential particularly within the Inter-American human rights regime,⁷⁰⁹ stressed the importance of the right to know the truth for ensuring that gross human rights violations do not occur in the future. According to principle 1:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and

⁷⁰⁶ Galdámez et al. v. El Salvador, Case no. 11.481, Report No. 37/00, ¶ 149 (Apr. 13, 2000), citing former Inter-American Court judge Pedro Nikken, *El manejo del pasado y la cuestión de la impunidad en la solución de los conflictos armados de El Salvador y Guatemala*, in Liber Amicorum - Héctor Fix-Zamudio, Vol. I, Secretariat of the Inter-American Court of Human Rights, San José, Costa Rica, 149 (1998).

⁷⁰⁷ Lima Principle, *supra* note 309, at preamble.

⁷⁰⁸ 2007 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 16.

⁷⁰⁹ Updated Set of Principles, *supra* note 649. Both versions of the principles have been influential, particularly within the Inter-American human rights regime, having been cited in several court decisions and commission reports. *See, e.g.*, Chile v. Oracyle et al., Report No. 25/98, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 93 (Apr. 13, 1998); Myrna Mack Chang v. Guatemala (Ser. C) No. 101, ¶ 274 (Nov. 25, 2003); Tibi v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 65 (Sept. 7 2004); Lucio Parada Cea et al. v. El Salvador et al., Case no. 10.480, Report No. 1/99, ¶ 154 (Jan. 27, 1999); Monseñor Oscar Arnulfo Romero and Galdámez v. El Salvador, Case no. 11.481, Report No. 37/0, ¶ 147 (Apr. 13, 2000).

reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations⁷¹⁰

The Updated Set of Principles also refers to the importance of ensuring that information about past human rights abuses is not lost because remembering the events of the past helps guarantee that abuses do not occur in the future. This places an obligation on government to preserve information. According to the principles:

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfillment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.⁷¹¹

Similarly, the final report on the first Set of Principles referred to the right to know about past human rights abuses as a “corollary to a ‘duty to remember,’”⁷¹²

The Right-to-Truth Conceptualization – To Whom the Right is Conferred

Generally, the right to information about human rights abuses is conferred on the relatives of those whom are victims of enforced disappearances, extrajudicial executions, and torture, as well as the victims. Society as a whole also has been understood as having a right to information about past human rights abuses. The following sections will discuss the individual dimension and the societal dimension of the right to information about human rights abuses.

⁷¹⁰ Updated Set of Principles, *id.* at principle 2.

⁷¹¹ *Id.* at principle 2.

⁷¹² Final Report on Updating the Set of Principle, *supra* note 649, at ¶ 17.

The Individual Dimension

The individual dimension of the right to information includes both the victims of human rights violations and their relatives. For example, according to the Inter-American Court, “The victim of the human rights violation and their next of kin, when applicable, have the right to know the truth.”⁷¹³ The UN Convention on Enforced Disappearances defines victim in broad terms, stating that victims include “any individual who suffered harm as the direct result of an enforced disappearance,” although this is an exception and generally the status of victim is confined to the victim of abuse and close relatives of victim.

The relatives’ right to truth is based on the idea that relatives of victims of serious human rights violations also are victims. As stated above, the UN Convention on Enforced Disappearances and the Updated Set of Principle define victims not only as those who were victims of enforced disappearances but also their family members.⁷¹⁴ As was discussed previously, authorities’ refusal to provide information to relatives of victims contributes to the victimization of the relatives.⁷¹⁵ It is not always clear who is a relative with the right to the

⁷¹³ *Tibi v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 257 (Sept. 07, 2004) .

⁷¹⁴ UN Convention on Enforced Disappearance, *supra* note 632, at art. 24(1); Updated Set of Principles, *supra* note 632, at art. 4.

⁷¹⁵ *See infra* pp. 171-78.

information about human rights abuses. Often the terms “family,”⁷¹⁶ “relatives,”⁷¹⁷ and “next-of-kin”⁷¹⁸ are used interchangeably to describe who has a right to the truth.

Only the European Court of Human Rights has articulated parameters for relatives’ rights to information. In *Cakciki v. Turkey*, discussed earlier, the European Court established that in order to find a violation relatives’ rights, the court must consider the “proximity of the family tie” to the victim, with particular weight placed on the parent-child bond.⁷¹⁹ In *Cakciki*, the court ruled that the brother of a man who disappeared was not a victim in part because his family tie to the victim was not close enough. It is important to note that the closeness of the family tie is only one of several elements the court considers and, as discussed above, in one case the court found that a large group of relatives with varying ties to the victims also were victims of human rights abuse.⁷²⁰

The Societal Dimension

Often it has been asserted that society in general has a right to information about human rights abuses. The societal dimension of the right to know the truth has been

⁷¹⁶ See e.g. *Lyashkevich v. Belarus*, H.R.C. Comm. No. 887/1999, UN Doc. CCPR/C/77/D/887/1999, ¶ 9.2 (Apr. 24, 2003). See also *Khalilova v. Tajikistan*, H.R.C. Comm. No. 973/2001, UN Doc. CCPR/C/83/D/973/2001, ¶ 7.7; *Chile v. Oracyle et al.*, Report No. 25/98, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 93 (Apr. 13, 1998); *Galdamez*, ¶ 147-48; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, ¶ 12 (July 3, 2001).

⁷¹⁷ See, e.g., *Ellacuría et al. v. El Salvador* at ¶ 224.

⁷¹⁸ See, e.g., *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 154 (Jan. 31, 2006); *19 Merchants v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 261 (July 5, 2004); *Tibi v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 257 (Sept. 07, 2004); *Bámaca Velásquez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) no. 70, ¶ 160 (Nov. 25, 2000).

⁷¹⁹ *Cakciki v. Turkey* at ¶ 99.

⁷²⁰ *Cyprus v. Turkey* at ¶ 157.

articulated as a right of “every people,”⁷²¹ “society as a whole,”⁷²² and, more specifically, “Chilean society,”⁷²³ or “Peruvian society,”⁷²⁴ for example. The societal right also has been referred to as a “collective”⁷²⁵ right.

Often the societal dimension of the right to truth is recognized in connection with the prevention of future abuse. For example, the 2006 UN High Commissioner study on the right to truth stated, “The right to the truth also has a societal dimension: society has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future.”⁷²⁶

The Updated Set of Principles stated, “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and the circumstances and reasons that led” to them.⁷²⁷ The principles also referred to the importance of preserving a “people’s knowledge of history of its oppression” and the “collective memory.”⁷²⁸ This idea of collective memory has been referred to as a “duty to remember,”

⁷²¹ See, e.g., Updated Set of Principles, *id.* at principle 2.

⁷²² See, e.g., *Myrna Mack Chang v. Guatemala* at ¶ 274.

⁷²³ See, e.g., *Luis Almonacid-Arellano v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶157 (Sept. 26, 2006).

⁷²⁴ See, e.g., *Huilca-Tecse v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 107 (Mar. 3, 2005).

⁷²⁵ *Galdámez et al. v. El Salvador*, Case no. 11.481, Report No. 37/00, ¶ 149 (Apr. 13, 2000).

⁷²⁶ 2005 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 58.

⁷²⁷ Updated Set of Principle, *supra* note 649, at principle 2

⁷²⁸ *Id.* at principle 3

which places obligations on governments to collect and disseminate information about human rights abuses “in order to guard against the perversions of history.”⁷²⁹

The Inter-American Commission has repeatedly argued that the American Convention guarantees a right to information about human rights violations for society as a whole as well as individuals. According to the commission, “Pursuant to the American Convention, the State has the duty to ensure the right of the victims’ families and of society as a whole, to know the truth of the facts connected with the serious violations to human rights which occurred in Chile, as well as the identity of those who committed them.”⁷³⁰ The commission’s report concerned a group of cases involving complaints about Chile’s 1978 amnesty law,⁷³¹ which was promulgated under the regime of General Augusto Pinochet. The amnesty law, according to the complaints, obstructed justice for the victims and prevented victims’ next of kin from knowing what had happened to the victims. Without providing legal reasoning, the commission stated:

The right to truth constitutes both a right of a collective nature which allows society as a whole to have access to essential information on the development of the democratic system, and an individual right which allows the families of the victims to have access to some kind of reparation in those cases in which amnesty laws are in force. The American Convention protects the rights to access and receive information in the case of disappearances.⁷³²

In *Ellacuría* the Inter-American Commission was more specific, stating that the right to truth is based on article 13, the freedom of expression provision within the American

⁷²⁹ Final Report on Updating the Set of Principles, *supra* note 649, at ¶ 17.

⁷³⁰ Chile v. Oracyle et al., Report No. 25/98, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 85 (Apr. 13, 1998).

⁷³¹ Amnesty laws retroactively exempt a select group of people, often military leaders or government leaders, from criminal liability for crimes usually involving human rights abuses and crimes against humanity.

⁷³² Chile v. Oracyle et al., Report No. 25/98, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 88 (Apr. 13, 1998).

Convention.⁷³³ According to the commission, “The right to know the truth is a collective right that ensures society access to information that is essential for the workings of democratic systems. . . . Article 13 of the American Convention protects the right of access to information.”⁷³⁴

The Inter-American Court has been reluctant to find a societal right to information about human rights abuses with the American Convention. In several cases, the court has emphasized that the right to information about human rights abuses is conferred on the victims and their next of kin. According to the court, this right is based on article 8 of the American Convention, which guarantees the right to a fair trial, and article 25, which guarantees the right to judicial protection.⁷³⁵ Although the Inter-American Court has not specifically denied a societal right of access to information based on article 13, the freedom-of-expression provision, it thus far has not agreed with the commission on this point.

Although the Inter-American Court does not recognize a societal right to know about human rights violations based in the American Convention, it does seem clear that the court views access to information about human rights abuses as a substantial benefit to society. The court often has referred to a societal right to know within the context of reparations and non-recidivism, as discussed previously. For example, the court has stated that the obligation on governments to investigate human rights abuses and inform the families of the results also “benefits . . . society as a whole, because, by knowing the truth about such crimes, it can

⁷³³ American Convention, *supra* note 1, at art. 13.

⁷³⁴ Ignacio Ellacuría et al. v. El Salvador, Case 10.488, report no. 136/99, ¶ 24 (Dec. 22, 1999); Annual Report of the IACHR 1999, OEA, Ser.L/V/II.106, Doc. 6 rev. (Apr. 13, 1999).

⁷³⁵ American Convention, *supra* note 1, at art. 8 and 25.

prevent them in the future.”⁷³⁶ In another ruling, the court differentiated between rights guaranteed by the convention that were violated and a societal right to know. The court stated that the Suriname government’s failure to investigate an extrajudicial execution, punish the perpetrators, and inform the victim’s family, breached “its duty to ensure the rights recognized in the Convention *and* [emphasis added] prevents the society as a whole from learning the truth regarding the facts.”⁷³⁷ In the court’s ruling on the reparations owed to the victims, the court’s language was less cautious:

[A]ll persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims.⁷³⁸

The court went on to order the government to effectively and swiftly investigate the killing, punish those responsible, provide compensation, and “publicly disseminate” the findings “so that Surinamese society may know the truth regarding the facts.”⁷³⁹

The Right-to-Truth Conceptualization – The Type of Information Guaranteed

The type of information included within the right-to-truth conceptualization of the right of access to information has been articulated in a variety of ways. The type of information has been described as information about “serious” or “grave” human rights

⁷³⁶ 19 Merchants v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 259 (July 5, 2004)

⁷³⁷ *Moiwana Community v. Suriname*, In-Am Ct H.R. (ser. C) No. 124, ¶ 153 (July 15, 2005).

⁷³⁸ *Id.* at 204.

⁷³⁹ *Id.* at 205.

violations,⁷⁴⁰ “aberrant crimes,”⁷⁴¹ and “gross violations” of human rights.⁷⁴² Most often governments must provide all information about such crimes, including who participated in the crimes and the specific circumstances in which the crimes took place.

Most often the type of information about the human rights violations includes the circumstances surrounding enforced disappearances and extrajudicial executions. This includes obligations on governments to provide all information about the violations that occurred, their specific circumstances, who participated in the violations, and the circumstances in which the violations took place.

According to the 2006 UN High Commissioner report on the right to the truth:

Given that historically the right to the truth was initially linked to the missing and disappeared, the content was focused on knowing the fate and whereabouts of disappeared persons. However, as international law on the right to the truth has evolved to apply in all situations of serious violations of human rights, the material scope of the right to the truth has also expanded to include other elements. These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person’s victimization; the causes and

⁷⁴⁰ Ignacio Ellacuría et al. v. El Salvador, Case 10.488, Report N° 136/99, ¶ 221 (Dec. 22, 1999). The term “serious” has not been defined within the context of the right to truth and human rights violations, but within international humanitarian law, the term has referred to violations of the Geneva Conventions. According to the Updated Set of Principles, “serious violations of international law . . . encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery” Updated Set of Principle, *supra* note 649, at definition B.

⁷⁴¹ 1985-1986 Report of the Inter-American Commission, *supra* note 635, at 205; Chile v. Oracyle et al., Report No. 25/98, OEA/Ser.L/V/II.98, doc. 6 rev., ¶ 92 (Apr. 13, 1998); Ignacio Ellacuría et al. v. El Salvador, Case 10.488, Report N° 136/99, ¶ 226 (Dec. 22, 1999); Lucio Parada Cea et al. v. El Salvador et al., Case no. 10.480, Report No. 1/99, ¶ 153 (Jan. 27, 1999); Galdámez v. El Salvador, Case no. 11.481, Report No. 37/00, ¶ 146 (Apr. 13, 2000).

⁷⁴² The use of the term “gross” when referring to human rights violations has not been defined within these documents, but according to the Restatement of Foreign Relations Law, gross violations of human rights law include at least the following: genocide; slavery, and slavery-like practices; summary or arbitrary execution; torture and cruel, inhumane, or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender. Restatement (Third) of the Foreign Relations Law of the United States, sec. 702 (American Law Institute 1987).

conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.⁷⁴³

As stated above, the right to the truth obligates governments to investigate human rights abuses, bring the perpetrators to justice, provide information to the victims' next of kin, and, in some articulations, provide information to society as a whole about the investigations' outcomes. This means that governments not only have to provide information that is in their possession, governments also must investigate the circumstances surrounding the human rights violations in order to create new information. According to Toby Mendel of the NGO Article 19: "It is not enough for individuals simply to have access to whatever information the State already holds. The State must also ensure that information about past human rights violations is readily available, including by collecting, collating, preserving and disseminating it, where necessary."⁷⁴⁴

According to the UN Convention on Enforced Disappearances, governments must provide the name of the person who ordered the "deprivation of liberty" and that person's supervisor; the date, time, and place of the deprivation and the release of the person; the health of the deprived person; and, in the event of death, the circumstances and cause of the death and the location of the remains.⁷⁴⁵

⁷⁴³ 2005 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 38.

⁷⁴⁴ See Mendel, *supra* note 95, at 16.

⁷⁴⁵ UN Convention on Enforced Disappearances, *supra* note 632, at art. 18(1). See, e.g., Lyashkevich v. Belarus, H.R.C. Comm. No. 887/1999, UN Doc. CCPR/C/77/D/887/1999, ¶ 9.2 (Apr. 24, 2003); Khalilova v. Tajikistan, UN Doc. CCPR/C/83/D/973/2001, ¶ 11 (Mar. 30, 2005); Valichon Aliboev v. Tajikistan, UN Doc. CCPR/C/85/D/985/2001 (Nov. 16, 2005).

The right of access to information about human rights abuses also can include a right of access to the government's investigatory procedures. In several cases, the European Court of Human Rights has ruled that the government has an obligation to conduct "a thorough and effective investigation capable of leading to the identification and punishment of those responsible," as well as providing "effective access for the relatives to the investigatory procedure."⁷⁴⁶ As stated previously, often this requires that the final outcomes of investigations into human rights violations be publicly disseminated, requiring governments to publish the outcomes of judicial proceedings and to issue detailed public apologies.

The right of access to information about human rights violations also often includes an obligation on governments to create and maintain archives. According to the 2007 UN OHCHR Study on the right to truth:

Archives have an intrinsic value directly related to the exercise of victims' rights, the work of the courts and non-judicial mechanisms for establishing the facts, the preservation of memory and history. The question of archives is closely bound up with the right to information, the fundamental right of each individual to have access to information on the public record relating to himself or herself.⁷⁴⁷

A Human Rights Council resolution on the right to truth stated, "States should preserve archives and other evidence concerning gross violations of human rights and serious violations of international law to facilitate knowledge of such violations, to investigate allegations and to provide victims with access to an effective remedy."⁷⁴⁸

⁷⁴⁶ Kurt v. Turkey, Eur. Ct. H.R., App. no. 24276/94, ¶ 140 (May 25, 1998). *See also* Kaya v. Turkey, Eur. Ct. H.R. App. No. 22535/93, ¶ 106-7 (Mar. 28, 2000); Tas v. Turkey, Eur. Ct. H.R., App. No. 24396/94, ¶ 91 (Nov. 14, 2000).

⁷⁴⁷ 2007 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 58.

⁷⁴⁸ Human Rights Council resolution 9/11, *supra* note 626, at preamble.

The UN Updated Set of Principles provides a section on the preservation of and access to archives. According to principle 14, “The right to know implies that archives must be preserved. Technical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purposes of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law.”⁷⁴⁹ According to the final report on updating the Set of Principle, these obligations require that specific measures be taken, including “preserving paper, video, audio and other documents and the use of microfilm. Such measures must be taken on an urgent basis in some situations, as when an outgoing regime attempts to destroy records of its human rights violations. When possible and appropriate, copies of archives should be made and stored in diverse locations.”⁷⁵⁰

The Updated Set of Principles also addresses individuals’ rights to information about themselves that is stored in archives. Similar to the information-privacy conceptualization of the right of access to information, the principles provide that “all persons” are entitled to information about them in government archives and can challenge that information if it is inaccurate.⁷⁵¹

The Right-to-Truth Conceptualization – Limitations on the Right

The discussion of limitations on the right of access to information about human rights violations is limited and is often difficult to separate from discussions of the right to truth –

⁷⁴⁹ Updated Set of Principles, *supra* note 649, at principle 14.

⁷⁵⁰ Final Report on the Updated Set of Principles, *supra* note 649, at ¶ 32.

⁷⁵¹ Updated Set of Principles, *supra* note 649, at principle 17(b).

obligations on government to investigate, punish perpetrators, and provide information. Often these discussions have more to do with what governments cannot do to impede access to information than what restrictions on access they legitimately can employ. Nonetheless, limitations on the right of access to private information, information that could jeopardize personal safety, and information that could threaten national security have been addressed. In some quarters, the right to truth is understood as having no limitations, but whether or not the right to information also would be understood as having no limitations remains unclear. It also has been argued that implementation of amnesty laws violates the right to know about human right violations. This section discusses the limitations on the right of access to information, the idea that there may not be limitations, and amnesty laws.

The UN Convention on Enforced Disappearances provides that information be accessible unless it is “personal information.” According to the convention, “The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.”⁷⁵²

The UN Basic Principles and Guidelines on the Right to Remedy and Reparations states that all information must be disclosed unless it will cause further harm. According to the principles, governments must ensure “full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.”⁷⁵³

⁷⁵² UN Convention on Enforced Disappearances, *supra* note 632, at art. 19(b).

⁷⁵³ Basic Principles and Guidelines, *supra* note 650, at ¶ 22(b).

Regarding national security, principle 16 of the UN Updated Set of Principles states, “Access may not be denied on grounds of national security unless, in exceptional circumstances, the restriction has been prescribed by law; the Government has demonstrated that the restriction is necessary in a democratic society to protect a legitimate national security interest; and the denial is subject to independent judicial review.”⁷⁵⁴ According to the final report on the Updated Set of Principles, the term “legitimate national security interest” was added to the principles in light of “recent developments in international law and State practice.” The report then cited the Johannesburg Principles.⁷⁵⁵ According to the report, a “‘legitimate national security’ interest should be understood to exclude restrictions whose actual purpose or effect is to protect a government from embarrassment or to prevent exposure of wrongdoing.”⁷⁵⁶

A 1998 Inter-American Commission report states that obstacles created by restrictions based on national security must be removed in order to ensure a right to know about human rights violations. This includes declassifying information. According to the commission:

The administration of swift and effective justice, especially in exposing, sanctioning, and providing remedy for atrocities or grave violations of human rights by agents of the state, often requires reference to documents that have been classified as secret or inaccessible for reasons of national security. Maintaining State secrecy in such cases perpetuates impunity and erodes State authority, inwardly and outwardly. Such legal and administrative obstacles must be removed, and the way cleared for the Commission to establish state and individual responsibility for such reprehensible conduct, with all of the

⁷⁵⁴ Updated Set of Principles, *supra* note 649, at principle 16.

⁷⁵⁵ Final Report on the Updated Set of Principles, *supra* note 649, at ¶ 34. The report cited principle 2(b) of the Johannesburg Principles, which stated: “In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.” Johannesburg Principles, *supra* note 279, at principle 2(b).

⁷⁵⁶ Final Report on the Updated Set of Principles. *Id.*

legal and moral consequences it entails, by opening the archives and declassifying documents requested by appropriate national as well as international authorities.⁷⁵⁷

It also has been argued that the very nature of the right to truth means that there can be no limitations on the right. This is because the right is understood as so fundamental to human dignity that there can be no legitimate restrictions on it.⁷⁵⁸ For example, prohibitions against torture often are understood in this light. It is not clear, though, whether the right to information would also be understood as having no limitations, as is discussed below.

According to the 2005 UN Office of the High Commissioner of Human Rights report on the right to truth:

The right to the truth as a stand-alone right is a fundamental right of the individual and therefore should not be subject to limitations. Given its inalienable nature and its close relationship with other non-derogable rights, such as the right not to be subjected to torture and ill-treatment, the right to the truth should be treated as a non-derogable right.⁷⁵⁹

This sentiment is echoed by the UN special rapporteur on the independence of judges and lawyers:

A particular feature of the right to the truth, which is based on treaty and customary law, is that it is both an independent right and the means for the realization of other rights: to information, to identity, to mourning and, especially, the right to justice. Because of the significance of the matters in question and the fundamental nature of the rights affected — to life, to

⁷⁵⁷ 1998 Inter-American Comm. Annual Report, OEA/Ser.L/V/II.102, Doc. 6 rev., chap. 7, ¶ 20(2) (Apr. 16, 1999).

⁷⁵⁸ The arguments are based on the concept of *jus cogens* in international law. According to the Vienna Convention, *jus cogens* is a norm of general international law “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention, *supra* note 58, at art. 53.

⁷⁵⁹ 2005 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 60.

physical or moral integrity, to a fair trial, etc. — the right to the truth is inalienable, non-derogable and imprescriptible.⁷⁶⁰

Nonetheless, concern has been expressed about whether the right-to-know component of the right to truth can be limited. According to the 2005 UN OHCHR report on the right to truth, “During the expert workshop on the right to the truth . . . participants concluded that the right to seek information may be an instrumental right to realize the right to the truth, but both constitute different and separate rights. As the right to freedom of information can be restricted for certain reasons under international law, there is the question of whether the right to the truth could be restricted under any circumstances.”⁷⁶¹

The UN special rapporteur on the independence of judges and lawyers also expressed concern that although “the right to the truth is often referred to as the ‘right to know’ or the right ‘to be informed,’ . . . there is still a need to spell out its different components.”⁷⁶² The right to truth is often “ensured through freedom of opinion, expression and information laws, which can be subjected to certain restrictions, even in ordinary situations.”⁷⁶³ He maintained that this is problematic and that there needs to be a distinction between the right to truth and the right to know. He stated:

It would be illogical to accept that for public order reasons a State may suspend rights and guarantees – including the right to the truth – thereby jeopardizing untouchable rights such as the right to life or to the physical and moral integrity of persons. The differences between these two undoubtedly widen as we enter situations in which the nature of the crimes and the rights affected renders the right to the truth untouchable and confers on the obligation the character of *jus cogens*.⁷⁶⁴

⁷⁶⁰ 2006 Report of the Special Rapporteur on the independence of judges and lawyers, *supra* note 628, at ¶16.

⁷⁶¹ 2005 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 43.

⁷⁶² 2005 Report of the Special Rapporteur on the independence of judges and lawyers, *supra* note 627, at ¶ 23.

⁷⁶³ *Id.*

⁷⁶⁴ *Id.*

Amnesty laws, which protect human rights violators from prosecution, often are understood as violating the right to truth and the right of access to information about human rights violations. According to the 2005 UN OHCHR report on the right to truth, “Amnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth. The right to the truth is intimately linked with the States’ obligation to fight and eradicate impunity.”⁷⁶⁵

The Inter-American Commission also has maintained that amnesty laws violate the right of access to information about human rights violations. For example, in *Ellacuría v. El Salvador*, the commission ruled that an El Salvadorian amnesty law violated article 13, the freedom of expression provision of the American Convention. The commission stated: “The right to know the truth is a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted. Article 13 of the American Convention protects the right of access to information.”⁷⁶⁶

⁷⁶⁵ 2005 UN OHCHR Study on the Right to Truth, *supra* note 627, at ¶ 60.

⁷⁶⁶ Ignacio Ellacuría et al. v. El Salvador, Case 10.488, Report No. 136/99, ¶ 224 (Dec. 22, 1999). *See also* Chile v. Oracyle, ¶ 89; Cea v. El Salvador, ¶ 151-2. The Inter-American Court also has ruled that amnesty laws violate the American Convention, but the court has not specifically linked those violations to a right to information. *See* 19 Merchants v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 262; Myrna Mack Chang v. Guatemala (ser. C) no. 1010 ¶ 276.

The commission also argued that amnesty laws violated article 25 of the American Convention, which protects the “right to simple and prompt recourse for the protection of the rights enshrined therein.”⁷⁶⁷ According to the commission:

The existence of obstacles, *de facto* or *de jure* (such as the amnesty law) to access to information relating to the facts and circumstances surrounding the violation of a fundamental right constitutes an open violation of the right established in that article [25] and negates remedies available under domestic jurisdiction for the judicial protection of the fundamental rights established in the Convention, the Constitution and domestic laws.⁷⁶⁸

This right to information, according to the commission, “applies not only to the relatives of the victims directly affected by a human rights violation, but also to society in general.”⁷⁶⁹

Conclusion

The right-to-truth conceptualization of access to information is based on the right to truth that is found in international human rights law. The right to truth obligates governments to investigate human rights violations; bring perpetrators to justice; and inform victims, next of kin, and society of the circumstances surrounding the violations. The obligation within the right to truth to provide information about human rights abuses is the basis of the right-to-truth conceptualization.

The right-to-truth conceptualization includes three rationales, which often overlap. The human-rights-violations-through-nondisclosure rationale recognizes that the failure to provide relatives information about the fate of next of kin can contribute to the violation of the relative human rights. Often this is within the context of enforced disappearances or

⁷⁶⁷ Ignacio Ellacuría et al. v. El Salvador, Case 10.488, Report No. 136/99, ¶ 225 (Dec. 22, 1999). *See* American Convention, *supra* note 1, at art. 25.

⁷⁶⁸ Ignacio Ellacuría et al. v. El Salvador, Case 10.488, Report No. 136/99, ¶ 225 (Dec. 22, 1999).

⁷⁶⁹ *Id.* at ¶ 226.

extrajudicial executions. The European Court and Inter-American Court both have found that denial of information to family members about what happened to their loved ones constitutes inhumane treatment or torture. When determining if denial of information constitute human right abuse, the European Court considers the relationship of the individual requesting the information to the victim, and places a particular emphasis on the parent-child bond. The court also considers the officials' response to the information request. Particularly unhelpful or callous responses contribute to the court's finding of a violation.

The information-as-reparations-for-human-rights-violations rationale recognizes that information can serve as a form of compensation and redress for family members who are victims of not knowing what happened to their loved ones. Information is understood as a form of reparation to help provide closure for the victims' families. The public dissemination of information also serves to publicly acknowledge the suffering of both the family members and their next of kin. Often public dissemination includes requiring governments to publish the results of official investigations into human rights violations, publish human rights court rulings, and to issue detailed public apologies. The public dissemination of information is recognized as benefiting society as well as the victims of human rights abuses.

The third rationale for the right to information recognizes that information can help prevent future human rights abuses. The prevention rationale recognizes that access to information can act as a preventative measure against future abuses. This recognition of preventative role of information is particularly apparent within the Inter-American human rights system. Articulations of how access to information will prevent future human rights abuses are limited, but discussions suggest that information will publicly shame those responsible for the abuses and provide an accurate history.

The right of access to information about human rights abuses within the right-to-truth conceptualization has been recognized as having both an individual and a societal dimension. The individual dimension of the right to information is granted to the victims of human rights abuses and their relatives. Usually this is within the context of enforced disappearances, extrajudicial executions, and torture. The relatives' rights to information are based on the idea that the suffering endured by not knowing what happened to their next of kin constitutes a form of abuse. The societal dimension of the right to information usually is recognized within the context of preventing future abuse. By informing society about what happened, future human rights abuse will be less likely to occur. For example, the Inter-American Court often requires that governments publicly disseminate information about the past human rights abuses.

The type of information included within the right-to-truth conceptualization includes information about serious human rights abuses, although what constitutes serious human rights violations is not always made clear. Often the information includes facts about the circumstances of the abuses, the perpetrators of the abuse, and the progress and results of government investigations into the abuse. The location of victims' remains also often is included. The right-to-truth conceptualization also recognizes that the right to information creates positive obligations on governments to create and maintain archives.

Articulations on limitations on the right of access to information within the right-to-truth conceptualization are limited. Some restrictions are noted such as restrictions on access to personal information and information that may harm individuals' safety, but they are not discussed in any detail. Some sources suggest that the right to truth is so essential to human

dignity, that it cannot be limited, but whether the right to information would be considered to be unlimited is unclear.

CHAPTER 6

EVALUATING AND COMPARING THE CONCEPTUALIZATIONS

The purpose of this dissertation is to identify and analyze the various conceptualizations being used to promote access to government-held information as a human right. This was accomplished in the preceding chapters, which identified and analyzed four separate conceptualizations. This dissertation also set out to assess the relative strengths and weaknesses of each conceptualization and determine which conceptualization or set of conceptualizations holds the greatest promise for ensuring the broadest right of access to information. The last two objectives will be realized in subsequent sections of this chapter. First, it is important to review the findings thus far. The next section will review the findings of the four identified conceptualizations. Following these summaries will be an assessment of the strengths and weaknesses of each conceptualization and an evaluation of which conceptualization holds the greatest promise for ensuring the broadest right of access to information. The final section will provide suggestions for further research related to this topic.

Four Conceptualizations of Access to Information as a Human Right

Four conceptualizations were identified through legal analysis of human rights treaties, documents, and reports from international and regional human rights entities; decisions of regional human rights courts; and materials from nongovernmental organizations that promote access to information as a human right (see Appendix I). The documents were

evaluated for explicit and implicit references to access to government-held information as a human right. From this analysis four conceptualizations were identified: the freedom-of-expression, information-privacy, right-to-a-healthy-environment, and right-to-truth conceptualizations. This research explicated each conceptualization by asking the following subset of questions: What is the rationale behind the right of access? Who has the right to information? To what type of information does the right apply? and What are the limitations of the right? The following sections will review the explications of each conceptualization.

The Freedom-of-Expression Conceptualization

The freedom-of-expression conceptualization is by far the most pervasive and well articulated conceptualization of the four. This conceptualization has been articulated by nearly all of the human rights law sources examined for this project including the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, the African Commission on Human and Peoples Rights, the UN Human Rights Committee, the UN Commission on Human Rights, the UN Human Rights Council, and NGOs. Only the European Court of Human Rights has not recognized a right to information based on the right to freedom of expression. Of all of the conceptualizations, the freedom-of-expression conceptualization clearly is the most recognized by NGOs. The other conceptualizations, although sometimes hinted at, rarely are discussed in detail in NGO documents and declarations. Most likely this is because of the expansive nature of this conceptualization, which recognizes the right to information as belonging to all citizens and including almost all government information; thus, information to which access is guaranteed within the other

conceptualizations – personal, environmental, or human rights information – would be included within the freedom-of-expression conceptualization.

The freedom-of-expression conceptualization is based on the idea that the right to freedom of expression also includes the right to government information. According to this conceptualization, citizens and media need information in order to fully exercise their rights of freedom of expression. Without access to information, the ability to express and receive information is limited.

There exist three main rationales for providing a right to information based on the right to freedom of expression: the seek-and-receive, self-governance, and good-governance rationales. The latter two rationales are based on the importance placed on healthy governance practices such as public participation and government transparency. The seek-and-receive rationale, on the other hand, stems from efforts to link a right of access to information to a right to freedom of expression. This is achieved by arguing that the right to seek and receive information that is guaranteed in freedom of expression provisions of several human rights instruments includes a right of access to government information. Thus, the seek-and-receive rationale is not mutually exclusive of the other two; instead it operates as the foundation on which to base a right to information within the right to freedom of expression.

The difference between the right to seek information and the right to receive information was not clearly articulated, but evidence suggests that a right of access to information is more likely linked to the right to seek information. This is evidenced by the Inter-American Court decision, *Reyes v. Chile*. In explaining why the right to seek and receive information, which is guaranteed by the American Convention,⁷⁷⁰ guarantees a right

⁷⁷⁰ American Convention, *supra* note 1, at art. 13(2).

of access to government information, the court stated that the right of access to information is based on the right of individuals to receive information and the positive obligation on the government to provide it.⁷⁷¹ This suggests the court understands the right to seek information as conferring a positive obligation on governments to supply it.

It also is worth noting that the African Commission passed a resolution to ensure a right to seek information, which is not in the African Charter on Human and Peoples Rights, specifically to guarantee a right of access to government information. Also, the European Court has yet to find a right of access to government information based on article 10 of the European Convention, the freedom of expression provision, which provides a right to receive information but not a right to seek it. In fact, Giorgio Malinverni, a European Court judge, suggested that the drafters of article 10 of the European Convention specifically left out the term “to seek” due to concern that it would place a positive obligation on governments to provide information.⁷⁷²

The self-governance and good-governance rationales both are based on the need to ensure healthy governments. The self-governance rationale recognizes government information as essential to public participation. Without access to information, citizens potentially are deprived of information that is vital to making informed decisions about their government. The good-governance rationale is linked to the self-governance rationale in that information is recognized as being vital for a healthy government, but the good-governance rationale recognizes access to information as a means to hold governments accountable for their actions and to prevent government abuse and corruption. The two rationales are not mutually exclusive and are often discussed together in human rights documents.

⁷⁷¹ Reyes v. Chile, at ¶ 77.

⁷⁷² See Malinverni, *supra* note 112, at 233.

Within the freedom-of-expression conceptualization, all citizens, and sometimes all individuals regardless of citizenship, have a right to government information. This is because the freedom-of-expression conceptualization recognizes that government information is a public good that belongs to the people. The government's role as representatives of the people is to hold information on behalf of all citizens; therefore, government is the caretaker, not the owner, of information. Because citizens are the owners of information, they do not have to show a direct interest in the information when requesting access to it. At a minimum, information belongs to all citizens of a given country, but often it is expressed that the right to information belongs to all people regardless of citizenship.

Within this conceptualization, each citizen (or each individual) has the same right to information as the next citizen; nonetheless, there is recognition that information fulfills important societal needs for marginalized groups and the media. For the disenfranchised, information is recognized as empowering citizens to gain equality within society. For the media, information is recognized as helping media to fulfill their role of informing citizens.

Within the freedom-of-expression conceptualization, there is a presumption that the government will disclose information. Because information is recognized as being owned by the people, the freedom-of-expression conceptualization requires that all information be disclosed unless there are legitimate justifications to withhold it. Often this is referred to as the principle of maximum disclosure. Governments also are required to proactively provide information that is of a public interest even when the information is not requested, although what constitutes information that is of a public interest is unclear. This requirement to proactively provide information is to help facilitate the democratic process. NGOs, in particular, have recognized that private entities such as corporations also have an obligation to

release information if important public interests are at stake. However, why private entities have this obligation and the parameters of the obligation have not been articulated as a matter of law. The idea that private entities have an obligation to disclose information has at least some level of recognition within all of the conceptualizations, as will be discussed in more detail below.

The freedom-of-expression conceptualization does recognize that there are legitimate reasons for withholding information, but governments are required to meet strict standards in order to justify nondisclosure. Any limitation must be explicitly established in national law, and, when a limitation is applied, the government must provide a written justification. Procedures to appeal nondisclosure decisions also must be in place. Restrictions on information must be narrowly tailored and interpreted, and based on a significant public interest. The balancing of the public interest in receiving the information against the government interest in nondisclosure must be weighted in favor of public's interest in obtaining the information. Government bears the burden of proof in showing that the legitimate government interest outweighs the public interest. Within this conceptualization, it is acknowledged that the protection of national security is a legitimate justification for withholding information; nonetheless, any limitation on access to information based on national security must meet the same requirements as other limitations on access. Restrictions on national security must be justified and not used indiscriminately. It also is recognized that individuals receiving unauthorized confidential or classified materials should not be punished.

The Information-Privacy Conceptualization

The information-privacy conceptualization of access to information recognizes that individuals have a right to access government documents that contain information directly pertaining to them. Individuals have the right to know what information the government has gathered and stored about them, to know whether the information is accurate, and, if it is not accurate, to have the information corrected. Articulations of the information-privacy conceptualization, unlike the freedom-of-expression conceptualization, are not detailed and comprehensive. Unlike the freedom-of-expression conceptualization, which is based solely on the right to freedom of expression, the information-privacy conceptualization is based on several different rights: the right to privacy, the right to freedom of expression, and, in one articulation, the right to fair treatment while in detention. Basing the right to personal information on separate rights largely has not affected the way the right to personal information has been conceptualized, but it is an interesting finding. Both the OAS and UN special rapporteurs on freedom of expression have stated that the right of access to information is based on the right of freedom of expression. In making this assessment, they referred to information held by the government as “public information” and differentiated between public uses and private uses of the information. The right to personal information in this context is subsumed within the right of citizens to have access to all government information, as articulated in the freedom-of-expression conceptualization. The Human Rights Committee in its reports on countries’ compliance with the Political Covenant has expressed at different times that a right to personal information is part of the right to privacy and the right to freedom of expression. The committee had the opportunity to clarify its views

on personal information in *Zheludkov v. Ukraine*,⁷⁷³ but instead based a right to personal information on the right to humane treatment while in prison.

Much of the material comprising the elements of the conceptualization comes from the European Court. Interestingly, of all the sources of human rights law, the European Court was the only source not to recognize a right of access to information based on the right to freedom of expression, and, in some of its rulings granting a right of access to personal information, the court emphasized that the access right is not based on the right to freedom of expression.

The information-privacy conceptualization includes two rationales: the knowledge-about-self rationale and the government-accountability rationale. One rationale recognizes access to personal information purely as a personal right, and the other recognizes it as a political right. The knowledge-about-self rationale recognizes that personal information is vital to understanding aspects about one's own history. In this context, the right to personal information is recognized as a personal right. This rationale largely is based on three European Court decisions that involve access to information about one's childhood or birth. In all three cases, the court recognized that access to personal information fell under the right to privacy provision of the European Convention.

The government-accountability rationale does not recognize a right to personal information as a purely personal right. This rationale understands access to personal information as a means of ensuring government accountability. In order to hold governments accountable for responsibly holding personal information, citizens must be able to check to see if the information is accurate, legally obtained and used, and only available to authorized

⁷⁷³ UN HRC Communication no. 726/1996, *Zheludkov v. Ukraine*, CCPR/C/76/D/726/1996, ¶ 8.4 (Dec. 6, 2002).

individuals. This rationale is similar to the good-governance rationale of the freedom-of-expression conceptualization in that both recognize access to personal information as a political right that helps hold governments accountable.

The information-privacy conceptualization recognizes that all individuals have a right to their personal information held by the government, regardless of citizenship, and they do not need to provide reasons for their requests or allege that the information is inaccurate. The type of information to which access is guaranteed within this conceptualization is limited to one's personal information. The European Court has stated that personal information does not include information of a professional or business nature. This conceptualization also recognizes a right of access to personal information held by private entities, although the parameters of this right are not articulated.

Only the European Court, which recognizes the right of access to personal information as based on the right to privacy, has addressed in detail limitations on the right. Sources that discuss a right to personal information based on the right to freedom of expression have not articulated limitations; therefore, it is unclear if limitations based on the right to freedom of expression would be conceptualized differently than limitations based on the right to privacy.

According to the European Court, in order for limitations on the right of access to personal information to be legitimate, they must be clearly stated in legislation. This legislation must be accessible, meaning that individuals have access to it, and it must be foreseeable, meaning that individuals are able to clearly understand the circumstances when limitations are legitimate. Legitimate limitations can include withholding information to protect the privacy of third parties and national security. When limitations based on national security are evoked, proper safeguards against abuse of power must exist. The court has made

clear, though, that governments are given deference in deciding how best to balance the competing interests of privacy and national security.

Right-to-a-Healthy-Environment Conceptualization

Similar to the information-privacy conceptualization, the right-to-a-healthy-environment conceptualization is not as well articulated as the freedom-of expression conceptualization. Much of the discussion of the elements of the conceptualization comes from two UN special rapporteurs who deal with the environment and toxic products and from the Aarhus Convention. The European Court, the Inter-American Commission, and the African Commission do address the right to environmental information, but their discussions are limited. NGOs contribute little to the understanding of a right of access to environmental information, which was also the case with the information-privacy conceptualization. As stated above in discussing the information-privacy conceptualization, this most likely is because all information held by the government including environmental information would be included within the freedom-of-expression conceptualization, which the NGOs strongly support.

The right-to-a-healthy-environment conceptualization is premised on the concept that human rights and environmental concerns are linked, which has been recognized in two different ways. The relationship between human rights and the environment has been recognized as a substantive right, meaning the right to a healthy environment is a stand-alone right. More commonly, it has been recognized as a procedural right, which understands that a healthy environment is needed in order to protect other human rights such as the right to life. Both frameworks – the right to a healthy environment as a substantive right and as a

procedural right – recognize the right of access to environmental information as essential for protecting the environment and ensuring that human rights are not violated by environmental harms.

There are two rationales for recognizing a right of access to environmental information within the healthy-environment conceptualization. The protecting-rights rationale recognizes that a right of access to environmental information is necessary in order to ensure the protection of other human rights. Individuals and communities need information about the environment in order to be protected from human rights violations such as ill-health or loss of life or home. This rationale is evident in two European Court decisions, which are based on the right to respect for private and family life guaranteed in the European Convention. The second rationale, the public-participation rationale, also recognizes the importance of information in protecting the environment and preventing environmental harms, but the public-participation rationale emphasizes the role of information in contributing to effective public participation in environmental decision-making.

The public-participation rationale is based on the idea that access to environmental information, public input into the environmental decision-making process, and access to judicial recourse when information is withheld will produce outcomes that address the needs of the people. Similar to the self-governance rationale of the freedom-of-expression conceptualization, the public-participation rationale recognizes that citizens need access to information in order to effectively participate in decision-making. Access to judicial recourse is then necessary to ensure the effective implementation of the rights of access to information and participation. This rationale is reflected in the three pillars of the Aarhus Convention – the right to information, the right to participation, and the right to judicial recourse.

There is not much elaboration on who receives the right to environmental information. The right to environmental information has been understood as belonging to individuals and communities. Because environmental problems often are not contained within countries' boundaries, the right also has been recognized as belonging to governments of other nations. This is especially true when large-scale environmental disasters occur.

At the very least, the right belongs to those whom may be affected by specific environmental harms, but this articulation is usually very vague. For example, in the African Commission report, *SERAC v. Nigeria*, the right to environmental information was recognized as belonging to “communities likely to be affected.”⁷⁷⁴ The Aarhus Convention is more expansive in its understanding of who has a right of access to environmental information and recognizes that the right belongs to all individuals regardless of citizenship or whether the individual has a direct interest in the information. The European Court, on the other hand, requires that individuals have a direct interest in the information – that they are victims or potential victims of environmental harms.

As with the freedom-of-expression conceptualization, there has been recognition that efforts should be made to ensure that vulnerable populations have access to information. Also similar to the freedom-of-expression conceptualization, the healthy-environment conceptualization recognizes that governments have an obligation to proactively provide information to the public even when the information is not requested.

The type of information included within the right-to-a-healthy-environment conceptualization is not well defined. Sometimes environmental information is referred to as information about environmental harms and sometimes as information on potential environmental harms. There is a reference to information from the private sector. Although a

⁷⁷⁴ SERC v. Nigeria, ¶ 71.

right of access to private information is not explicitly stated, concerns often were expressed about the lack of access to this type of information.

Only the Aarhus Convention has explicitly articulated limitations on the right of access to environmental information. The limitations include restrictions based on national security, privacy, and corporate confidentiality. Several sources have expressed concern about the overuse of limitations based on the confidentiality of commercial information. Both UN special rapporteurs also expressed concern about the overuse of national security arguments to deny access to information about the environment. Similar to the freedom-of-expression conceptualization, limitations on access to environmental information require that the restrictions are clearly stated in law, that reasons for nondisclosure are stated in writing, and that nondisclosure decisions are reviewable.

Right-to-Truth Conceptualization

The right-to-truth conceptualization of access to information is based on the right to truth that is found in international human rights law. The right to truth usually is guaranteed within the context of serious human rights violations such as enforced disappearances, extrajudicial executions, and torture. The right to truth obligates governments to investigate human rights abuses; bring perpetrators to justice; and inform victims, next of kin, and society of the circumstances surrounding the abuses. The right-to-truth conceptualization stems from the obligation on governments to provide information to victims, their next of kin, and society about the abuses that occurred. The right to truth has been articulated in a variety of ways by the various human rights entities; therefore the specific parameters of the right of access to information within the right to truth are not always clear. Nonetheless, components of a right-

to-truth conceptualization of access to information were identified from the range of ideas within the documents.

The right-to-truth conceptualization comprises three rationales, which often overlap. All three right-to-truth rationales are predicated on the fact that serious human rights violations have occurred either at the hands of government officials or with their explicit or tacit approval. The human-rights-violations-through- nondisclosure rationale recognizes that nondisclosure by the government of information about the fate of next of kin can contribute to the violation of human rights, often within the context of enforced disappearances. Both the European Court and Inter-American Court have found that denying information to family members about what happened to their loved ones constitutes inhumane treatment or torture. The European Court has been very explicit about when the nondisclosure of information amounts to inhumane treatment. The court considers the relationship of the individual requesting the information to the next of kin, with particular emphasis on the parent-child bond and the authority's response to the information request.

The information-as-reparations-for-human-rights-violations rationale recognizes that information can serve as a form of compensation and redress for family members who are victims of not knowing what happened to their loved ones. The obligation to disclose information to families and society about what happened is a form of reparation to help provide closure for the victims. The public dissemination of information also serves to publicly acknowledge the plights of both the family members and their loved ones. Often this acknowledgment is achieved by requiring governments to publish the outcomes of official investigations and human rights court rulings, and to issue detailed public apologies. This dissemination of information is recognized as benefiting society as well as the victims of

human rights abuses. It has been suggested that public dissemination can act as a “collective catharsis” for society.

The third rationale for the right to of access information about human rights abuses recognizes that information can help prevent future human rights abuses. Within the prevention rationale, access to information is recognized as a preventative measure against future abuses. This understanding of preventative role of information is particularly evident within the Inter-American human rights system. As noted above, often it is understood as a form of reparation for individuals and society in general. Nonetheless, the articulation of this benefit of access to information is pronounced enough to warrant a separate rationale. Articulations of how access to information will prevent future human rights abuses are limited. The discussions suggest that information will publicly shame those responsible for the abuses and ensure an accurate history, which can demonstrate how to prevent such abuses in the future.

The right of access to information about human rights abuses within the right-to-truth conceptualization has been recognized as belonging to individuals and society as a whole. The individual aspect of the right to information is conferred on the victims of human rights abuses and their relatives. Often this is within the context of enforced disappearances, extrajudicial executions, and torture. Relatives’ rights to information are based on the idea that not knowing what happened to their next of kin constitutes a form of abuse. The societal aspect of the right of access to information often is recognized with the context of preventing abuse. By informing society about what happened, future human rights abuse will be less likely to occur. Toward this end, the Inter-American Court, for example, often requires that governments publicly disseminate information about the abuses.

The type of information included within the right-to-truth conceptualization includes information about serious human rights abuses. This includes information surrounding the circumstances of the abuses, who participated in the abuses, the progress and results of government investigations into the abuse, and, when applicable, the location of the victims or their remains. The right of access to information about human rights abuses creates a positive obligation on government to investigate the abuses, thereby creating new information. The right to information also can include an obligation on government to create and maintain archives.

Discussions of the limitations on the right of access to information within the right-to-truth conceptualization are limited. Restrictions on access to personal information and information that may harm individuals' safety are discussed, but not in detail. What is interesting about the discussions on limitations on the right of access to information is that much of it is focused on what cannot be limited. This is because of the nature of the information that is at stake – information about serious human rights violations. It is understood that limitations on information about the violation of human rights by government officials are dangerous to the very notion of civilized society.

As with the other conceptualizations, national security is discussed; but within this conceptualization, a national security exemption is only justified in “exceptional circumstances.”⁷⁷⁵ Some sources even suggested that information may need to be declassified to satisfy the obligation on government to disclose information. There also have been suggestions that the right to truth cannot be limited, although it is unclear whether that means the right of access to information also would be unlimited.

⁷⁷⁵ Updated Set of Principles, *supra* note 649, at principle 16.

Strengths and Weaknesses of the Four Conceptualizations

Two criteria are used to assess the strengths and weaknesses of each conceptualization. First, each conceptualization is evaluated to assess the level of support within the human rights community for recognizing access to information as a human right. In other words, how limited or widespread is the support for the conceptualization? Second, each conceptualization is evaluated to determine the strength of the right to information. This is achieved by assessing the identified elements of each conceptualization – the rationales, to whom the information granted, the type of information granted, and the limitations on the right – to evaluate the breadth of access to information guaranteed and the clarity of the right. The broader the right of access to information and the clearer the articulations of the right, the stronger the conceptualization.

Freedom-of-Expression Conceptualization: Strengths and Weaknesses

Evaluation of the freedom-of-expression conceptualization indicates that the conceptualization is quite strong. The level of support of the conceptualization in the human rights community is very broad and the right to information guaranteed is extensive and clearly articulated.

The freedom-of-expression conceptualization of access to information is the most widely recognized by all the sources that were examined with the exception of the European Court of Human Rights. As stated previously, much of this recognition is based on the interpretation of the right to seek and receive information that is part of the right to freedom of expression guaranteed by several human rights instruments.⁷⁷⁶

⁷⁷⁶ See, e.g., Political Covenant, *supra* note 46, at art. 19; UN Declaration, *supra* note 46, at art. 19; American Convention, *supra* note 1, at art. 13.

It is important to note as well that many government reports to the Human Rights Committee about compliance with article 19, the freedom of expression provision of the International Civil and Political Covenant,⁷⁷⁷ list freedom-of-information legislation as evidence of compliance. This indicates that many governments also recognize that the right to seek and receive information includes a right of access to information.

A weakness of the freedom-of-expression conceptualization is that the European Court has not recognized a right of access to information based on the right to freedom of expression provision of the European Convention, which only provides a right to receive information and not a right to seek it.⁷⁷⁸ Nonetheless, the European Court's rulings denying a right of access to information have been limited by the phrase "in circumstances such as those of the present case," suggesting that a right to information could exist in some circumstances.⁷⁷⁹ In a 2006 decision determining the admissibility of a complaint, the European Court ruled that article 10,⁷⁸⁰ the freedom of expression provision of the European Convention, was applicable in a case involving government documents about the design and construction of a nuclear reactor.⁷⁸¹ The decision was based on the fact that the complainants were a party to an administrative hearing reviewing the impact of the reactor. Ultimately, the court ruled that the government had properly justified its nondisclosure. Nonetheless, what is

⁷⁷⁷ Article 19 states in part: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice." *See* Political Covenant, *supra* note 46, at art. 19(2).

⁷⁷⁸ Article 10 of the European Convention states in part: "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." European Convention, *supra* note 55, at art. 10.

⁷⁷⁹ *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A), ¶ 74 (Mar. 26, 1987).

⁷⁸⁰ European Convention, *supra* note 55, at art. 10.

⁷⁸¹ *Sdružení Jihočeské Matky v. Czech Republic*, Eur. Ct. H.R., App. no. 19101/03 (July 10, 2006).

significant here is that this case suggests that the European Court could change course in its interpretation of article 10 of the European Convention to include a right of access to information.

The widespread support of this conceptualization by the major NGOs that promote a right of access to information also is significant. Although NGOs do not make human rights law, they can be very influential on governments and human rights entities. Numerous NGO reports, declarations, and principles support the proposition that the right to freedom of expression includes a right to information. Several of these principles and declarations have been very influential. For example, the Johannesburg Principles on National Security, Freedom of Expression, and Access to Information have been cited by the Human Rights Committee, the Inter-American Commission, and both the UN and OAS special rapporteurs on freedom of expression.

This widespread support for a right to information based on the right to freedom of expression adds strength to the freedom-of-expression conceptualization. It shows that there is a growing consensus among the human rights community that the right to freedom of expression also includes a right to information.

The strengths and weakness of the freedom-of-expression conceptualization also were evaluated by assessing the elements of the conceptualization – the rationales, to whom the right is granted, the type of information, and the limitations on the right. The seek-and-receive rationale provides a strong foundation for the right to information based on the right to freedom of expression. The recognition of information as a public good and the presumption of openness that are based in the self-governance and good-governance rationales provide a broad right of access to information.

The rationales of the freedom-of-expression conceptualization add to the conceptualization's strength. As previously discussed, the right to information often is based on the rights to seek and receive information, which have been identified as a rationale for the freedom-of-expression conceptualization. The seek-and-receive rationale acts as a foundation upon which to base a right of information. The widespread recognition of a right to information based on the rights to seek and receive information, as noted above, adds to the strength of this foundation. The other two rationales – self-governance and good-governance – also add to the strength of the conceptualization. Both address the role of information in society. The former recognizes the importance of information in ensuring an informed and politically-active citizenry. The latter understands information as essential for holding government accountable for its actions and preventing government abuse.

Both rationales recognize that governments exist to represent the people and address their needs; therefore, citizens have the right to information in order to participate in their own governance and to ensure that government acts for the benefit of the people. Based on these assumptions, government information is recognized as a public good that belongs to the people. These core assumptions about democratic governance within the self-governance and good-governance rationales directly contribute to the broad right to information guaranteed within the freedom-of-expression conceptualization. The recognition of information as a public good is a key strength of the conceptualization. Information as a public good means that all citizens have a right to access all government information.

Because information is owned by the public, citizens do not have to show a direct interest in obtaining it. The understanding that information is a public good also means that there is a presumption that all information should be disclosed, except for limited, legitimate

exemptions. This has been referred to as the principle of maximum disclosure. The understanding that information is a public good includes an obligation on governments to proactively provide information of public concern even if the information is not requested.

A weakness of the conceptualization is that it is unclear whether the right to information extends to all individuals regardless of citizenship. Within the freedom-of-information conceptualization, it often is understood that all individuals have a right of access to information; however, the justification that information is a public good implies that the right to information belongs only to citizens.

The freedom-of-expression conceptualization is the only conceptualization that acknowledges the media's right to information, which is a strength. Although it does not confer any greater rights for the media to access to information than for individuals, it does recognize that the media play a vital role in ensuring that the public receives government information.

Of course, this broad right to information is not absolute and can be limited. The conceptualization does not articulate how specific limitations on information would be understood, which is a weakness of the conceptualization. The right to information within the freedom-of-expression conceptualization is based on the right to freedom of expression guaranteed in several human rights instruments, most of which contain limitations on the right. The American and European Conventions, and the Political Covenant all are designed to protect the reputations of others, public safety, public morals, and national security.⁷⁸² Although there were some discussions of national security limitations, in general, there was very little to no articulation of how the other limitations would apply to access to information.

⁷⁸² See American Convention, *supra* note 1, at art. 13(2); European Convention, *supra* note 55, at art. 10(2); Political Covenant, *supra* note 46, at art. 19(3).

For example, would limitations on the right to information based on the right to freedom of expression be different than limitations on the right to freedom of expression?

Although the freedom-of-information conceptualization is weak in articulating specific limitations on the right to information, a strength of the conceptualization is that it recognizes that specific procedures must be in place in order to limit information.

Restrictions must be designated in law, satisfy a significant public interest, be narrowly-drawn, and balanced with the public's interest in the information. To this end, the governments carry the burden of proof. Simply claiming that the information will harm national security is not sufficient to prove a significant public interest.

Information-Privacy Conceptualization: Strengths and Weaknesses

The information-privacy conceptualization is relatively weak. Although there is broad support for the conceptualization, few of the entities that recognize the conceptualization have articulated its parameters in depth. There also are several inconsistencies regarding the source of the right to personal information. The conceptualization also has narrow definitions regarding who has the right to information and to what type of information.

The information-privacy conceptualization has broad support. It is recognized by the European Court, the Human Rights Committee, and the Inter-American, UN Commission on Human Rights, and the African Commission; nonetheless, there are several weaknesses regarding the strength of the support. This is because, of those entities that recognize the right to personal information, very few have articulated the parameters of the right. For example, much of the understanding of the information-privacy conceptualization stems from the decisions of the European Court.

Another weakness regarding the strength of the support is that when the right to personal information is recognized, often there are inconsistencies regarding the source of that right. The right to personal information has been recognized as part of the right to privacy and also as part of the right freedom of expression, sometimes by the same entity. For example, the Human Rights Committee in its reports on governments' compliance with the Political Covenant has recognized the right to personal information as part of the right to privacy⁷⁸³ and as part of the right to freedom of expression;⁷⁸⁴ yet, in its only ruling on a complaint regarding access to personal information, the Human Rights Committee recognized a right to personal information based on the right to humane treatment while in detention.⁷⁸⁵ The fact that the right to personal information is based in several different rights makes it difficult to identify the parameters of the right. For example, would the parameters of a right to personal information based on the right to freedom of expression be different than a right to personal information based on the right to privacy?

This inconsistency is due in part to the two different rationales for guaranteeing the right to personal information. The knowledge-about-self rationale recognizes the right to personal information as purely a personal right; the government-accountability rationale recognizes that the right of access to personal information has benefits to society because the right helps citizens hold their government accountable. The latter rationale is similar to good-governance rationale of the freedom-of-expression conceptualization. Both recognize

⁷⁸³ See, e.g., UN H.R. C. The Former Yugoslav Republic of Macedonia Second Periodic Report, UN Doc. CCPR/C/MKD/2, ¶ 329 (Feb. 2, 2007).

⁷⁸⁴ See, e.g., UN H.R. C. Argentina Third Periodic Report, UN Doc. CCPR/C/ARG/98/3, ¶ 149 (May 7, 1999); UN H.R. C. Australia Third Periodic Report, UN Doc. CCPR/C/AUS/98/3, ¶ 869 (July 2, 1999); UN H.R. C. Belgium Third Periodic Report, UN Doc. CCPR/C/94/Add.3, ¶ 187 (Oct. 15, 1997).

⁷⁸⁵ UN HRC Communication no. 726/1996, *Zheludkov v. Ukraine*, UN. Doc. CCPR/C/76/D/726/1996, ¶ 8.4 (Dec. 6, 2002).

information as helping to hold governments accountable, which benefits all citizens. The knowledge-about-self rationale is much narrower and thus much weaker. The right to information is understood as benefiting only the individual. Although having the information necessary to understand oneself clearly is important, as a basis for a right of access to information, it is extremely narrow.

Another weakness of the conceptualization is the narrow definitions of who has a right to information and the type of information to which the right of access applies. Because of these narrow definitions, the information-privacy conceptualization is the narrowest of all the conceptualizations. Although the right to personal information may benefit society by holding governments accountable, the right is conferred only to an individual with a direct interest in the information, and the information that is available is limited to information pertaining to that individual. That said, a strength of this conceptualization is the recognition from some sources that the right to personal information includes a right to information from private databases. This understanding is broader than that of the freedom-of-expression conceptualization, which only expresses concerns about the lack of access to private information and does not articulate an explicit right.

As with the freedom-of-expression conceptualization, articulation of the restrictions on access to personal information is limited, and this is a weakness of this conceptualization. Only the European Court has addressed restrictions on the right and then mostly within the context of procedural obligations. For example, similar to the freedom-of-expression conceptualization, the restrictions must be based in law. The European Court briefly

referenced restrictions based on national security, stating that governments should receive deference when national security interests are concerned.⁷⁸⁶

As stated above, there are inconsistencies regarding the source in human rights law of a right to personal information. This inconsistency could affect how restrictions on the right to personal information are conceptualized. For example, the right to privacy and the right to freedom of expression have different restrictions. Would restrictions on the right to personal information based on the right to freedom of expression be different from restrictions on the right to personal information based on the right to privacy?

Right-to-a-Healthy-Environment Conceptualization: Strengths and Weaknesses

The right-to-a-healthy-environment conceptualization has a broad level of support. It has been recognized by the Aarhus Convention on the Environment, the European Court on Human Rights, the Inter-American Commission, and the African Commission, as well as the UN Commission on Human Rights and the UN Sub-Commission on the Promotion and Protection of Human Rights. Nonetheless, support, while broad, is weak because there are inconsistencies as to where the source of the right to information is found in human rights law. This weakness was also found with the strength of the support of the information-privacy conceptualization.

The European Court has recognized the right to environmental information as part of the right to respect for private and family life that is guaranteed in the European Convention. The Inter-American Commission and the Inter-American Court based the right to environmental information in part on the right to freedom of expression. The African Commission based the right to environmental information on a right to a healthy environment

⁷⁸⁶ See *Leander v. Sweden*, at ¶ 49; *Segerstedt-Wiberg v. Sweden*, at ¶ 87.

found in the African Charter, and the Aarhus Convention created a stand-alone right to environmental information. These inconsistencies are a weakness of the conceptualization because the parameters of a right to environmental information could change based on the sources of law in which that the right is based. For example, the Aarhus Convention clearly creates a strong right of access to environmental information. Its obligations on governments to provide information to all individuals are unambiguous and detailed. Yet, the right to environmental information based on the European Convention's right to respect for private and family life is quite limited. In the two cases dealing with a right to environmental information, the European Court made clear the right to environmental information pertained only to those with a direct interest.⁷⁸⁷

A strength of the conceptualization is the public-participation rationale. Similar to the self-governance rationale of the freedom-of-expression conceptualization, the public-participation rationale recognizes the importance of information to the democratic process. Both the public-participation and the self-governance rationales recognize that citizens have a right to participate in government decision making. In order to effectively exercise this right, citizens must have access to information. The protecting-rights rationale of the right-to-a-healthy environment conceptualization, on the other hand, is much weaker because it recognizes the right to environmental information only in the context of ensuring that rights are not violated due to environmental harms. The protecting-rights rationale only recognizes information as helping individuals who are likely to be affected by an environmental harm.

There has not been much elaboration on who is guaranteed the right of access to environmental information. The Aarhus Convention recognizes that the right belongs to all individuals regardless of citizenship, which is very strong. The European Court only

⁷⁸⁷ Guerra and Others v. Italy, at ¶ 57; McGinley v. United Kingdom, at ¶ 101.

recognizes a right to information for those with a direct interest in the information, which is much weaker. Other sources are not as clear regarding who has the right to environmental information. At a minimum, the right belongs to those who may be affected by environmental harms, but how this is determined remains unclear.

What constitutes environmental information also is not always clear, and this is a weakness of this conceptualization. Often references to environmental information are vague references to information about the environment or information about potential environmental harms. The Aarhus Convention is the only source that explicitly defines environmental information. The Aarhus Convention's definition is all-encompassing in that it includes general information about the health of the environment as well as information about potential harms that could result from environmental problems. Nonetheless, the narrow nature of the information involved makes this conceptualization much weaker than the freedom-of-expression conceptualization.

Two strengths of the conceptualization are its obligation on government to proactively provide information and its potential obligation on the private sector to provide information. Similar to the freedom-of-expression conceptualization, the right-to-a-healthy environment conceptualization includes an obligation on government to proactively provide important information even if the information is not requested. The right-to-a-healthy environment conceptualization also takes into account the importance of private sector information. Although a right to information from the private sector is not explicitly recognized, it is clear that there is concern about the lack of environmental information from corporations in particular.

Only the Aarhus Convention has articulated limitations in detail, which are far more extensive than the limitations recognized by the freedom-of-expression conceptualization. A strength regarding the limitations of the right-to-a-healthy-environment conceptualization lies in the understanding that the use of the national security exemption must be limited. Governments are not to be given deference automatically when national security exemptions are evoked. Even when the national security exemption is legitimately applied, in some circumstances such as wide-scale environmental disasters, information still must be disclosed. Another strength is that the right-to-a-healthy environment conceptualization requires that limitations on the right to information must be provided by law.

Right-to-Truth Conceptualization: Strengths and Weaknesses

The right-to-truth conceptualization of access to information has a strong level of support in that it has been widely recognized by the human rights community. This includes recognition by the Inter-American Court, the European Court, the Human Right Committee, the African and the Inter-American commissions, the UN Commission on Human Rights, the UN Sub-Commission on the Promotion and Protection of Human Rights, and the UN General Assembly.

Although, the conceptualization has been widely recognized, similar to the information-privacy and right-to-a-healthy environment conceptualizations, the right-to-truth conceptualization stems from different sources in human rights law, which is a weakness of the conceptualization. Both the European Court and Human Rights Committee have recognized a right of access to information about human rights abuses in the right to be treated humanely and not be tortured. The Inter-American Court has recognized a right of

access to information based on the rights to a fair trial and judicial recourse, and the Inter-American Commission has recognized a right to information on human rights abuses based in part on the right to freedom of expression. A right to information on human rights abuses also is recognized as part of the UN and Inter-American conventions on enforced disappearances. As stated above, inconsistencies regarding the source of the right can weaken the conceptualization because how the right is exercised can change depending on the source. This unpredictability weakens the conceptualization because the parameters of the right to information are unclear.

Of the three rationales for the conceptualization, the human-rights-violations-through-nondisclosure is the narrowest in that it recognizes that the failure to disclose information about what happened to one's next of kin constitutes abuse. This rationale only recognizes the right to information for relatives of disappeared persons or victims of extra-judicial executions. The information-as-reparations-for-human-rights-violations rationale and the prevention-of-human-right-violations rationale are much stronger in that both recognize to some degree that society as a whole benefits from the information. The reparations rationale recognizes information as a form of healing whereas the prevention-of-human-right-violations rationale recognizes information as tool to prevent future abuse. In this sense, the latter rationale is similar to the freedom-of-expression conceptualization rationale. Both are based on the societal benefits of information in holding government accountable to its citizens.

All of the sources recognized that relatives of victims of human rights abuses have a right of access to information about the abuse of their next of kin, although it is not always clear who constitutes a relative. This is a very narrow understanding of the right to information and a weakness of the conceptualization. Several of the sources also recognize

that the right belongs to society as well, which is a strength because a societal right to know would ensure a right to information on a broader scale. It is unclear, though, how this right would be exercised. Does a societal right to know mean that any individual within society can demand information from the government? It seems unlikely that is the case. More likely, a societal right to know requires that governments proactively provide information to the public about human rights abuses.

The Inter-American Commission has argued that this societal right to know is based on the freedom of expression provision within the American Convention. The Inter-American Court, on the other hand, has not acknowledged that the American Convention provides a society a right of access to information about human rights abuses; instead, the court has referred to a societal right to know only within the context of providing reparations. It is interesting to note that in *Reyes v. Chile*, the Inter-American Court did refer to a societal right to know. The *Reyes* decision conferred a right to government information based on the right to freedom of expression. In the body of the decision, the court stated that the right of the individual to government information also allows the information to be circulated within society. The court stated, “In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.”⁷⁸⁸ The court did not elaborate on the contours of a societal right to know based on freedom of expression.

All of the sources also recognize that information regarding enforced disappearances and extrajudicial executions is included in the right to information. Some sources refer to the

⁷⁸⁸ *Reyes v. Chile*, at ¶ 77.

right of access to information about other serious human rights violations, but it is uncertain to which type of human rights they refer. It is clear that the right-to-truth conceptualization only involves the most egregious human rights violations, and thus the conceptualization is quite limited. For example, information about other human rights abuses such as violations of the right to freedom of expression or the right to privacy would not be included.

Another weakness of the conceptualization is that limitations on the right of access to information about human rights abuses also are not well delineated. Some sources stated that the right to the truth cannot be limited at all, but did not differentiate between the right to truth and the right to information. In fact, the UN special rapporteur on the independence of judges and lawyers acknowledged that this is an unresolved issue regarding the right to truth – unresolved because of the multiple sources of the right to truth.⁷⁸⁹ Some sources find a right to truth and subsequent right of access to information in the right to freedom of expression. The special rapporteur argued that restrictions on the right of freedom of expression and information found in human rights law should not be applied to the right to truth, which should have few or no limitations.

Which Conceptualization Has the Broadest Reach?

The final research question of this study asks, “Which conceptualization (or set of conceptualizations) holds the greatest promise for ensuring the broadest right of access to information?” It is evident that the freedom-of-expression conceptualization, of all the conceptualizations, provides the broadest right of access to government information. This is because it is the most broadly recognized by the human right community, it is the most clearly articulated, and it encompasses many of the strengths of the other conceptualizations.

⁷⁸⁹ 2006 Report of the Special Rapporteur on the independence of judges and lawyers, *supra* note 628, at ¶16.

The freedom-of-expression conceptualization is the most broadly recognized conceptualization of the human rights community. Although other conceptualizations also were broadly recognized, they were not acknowledged with the same level of breadth. Not only is the freedom-of-expression conceptualization recognized by numerous human rights entities, generally, it was articulated in detail, compared to the other conceptualizations. It also is the most consistently articulated in that there are few ambiguities regarding the source of the right to information. Unlike the information-privacy, right-to-a-healthy-environment, and right-to-truth conceptualizations, which recognize the right to information as stemming from several different rights, the freedom-of-expression conceptualization understands that the right to information is based solely on the right to freedom of expression. Most often the right to information is recognized as stemming from the rights to seek and receive information that are part of the right to freedom of expression in many human rights instruments. This is important because it offers clarity and consistency upon which a right to information can build.

Because the right to freedom of expression is so pervasive and well-accepted, basing a right to information on the right to freedom of expression gives the right to information a very broad reach. It is present in most human rights instruments as well as several federal constitutions. Recognizing a right to information based on the right to freedom of expression or the right to seek and receive information therefore influences numerous jurisdictions and protects large numbers of people. It also is important to note that both the information-privacy and right-to-truth conceptualizations have included the right to freedom of expression as a source of the right to personal information and information about human rights abuses,

respectively. This attests to the versatility of a right to information based on the right to freedom of expression.

The elements of the right to information within the freedom-of-expression conceptualization – the rationales, to whom the right is conferred, the type of information, and the limitations – also allow for a broad right of access to information compared to the other conceptualizations. And as will be discussed, often the strengths of the other conceptualizations are included within the freedom-of-expression conceptualization.

The three rationales of the freedom-of-expression conceptualization combine to give the conceptualization a solid foundation and a broad reach. The seek-and-receive rationale anchors the right to information within the right to freedom of expression, and the self-governance and good-governance rationales provide a strong association between democratic governance and access to information. It is important to recognize that all of the other three conceptualizations include rationales that are similar to the self-governance and good-governance rationales. The information-privacy and right-to-truth conceptualizations include rationales that emphasize the importance of holding governments accountable to their citizens and preventing government corruption and abuse. The right-to-a-healthy-environment conceptualization includes the public-participation rationale, which is similar to the self-governance rationale. Both recognize that government information is essential to public participation in decision-making. A right of access to information allows citizens to more effectively participate in governmental decision-making. The inclusion of these similar rationales within all the conceptualizations attests to the broad recognition of the essential role of information for healthy governance. The fact that the freedom-of-expression conceptualization incorporates rationales similar to rationales found in the other three

conceptualizations indicates the conceptualization's broad reach. In other words, the freedom-of-expression conceptualization encompasses the strong rationales of the other conceptualizations.

The freedom-of-expression conceptualization's emphasis on democratic governance is reflected in its understanding of information as a public good. Because information is recognized as a public good, the right belongs to all citizens and includes all government information; however, it is not always clear whether citizenship is required to obtain information. This is unlike the right-to-a-healthy environment conceptualization, which confers the right to information on all individuals. In some articulations the right-to-truth conceptualization also might grant a right to information to all individuals, but the parameters of a societal right to information remain unclear. The information-privacy conceptualization, on the other hand, has a much narrower understanding of who receives a right to information and requires that individuals have a direct interest in the information being sought.

Within the freedom-of expression conceptualization, because information is a public good, citizens have the right to all information. The type of information granted within this conceptualization is far more extensive than within the other conceptualizations. The type of information granted with the information-privacy conceptualization is the narrowest of all the conceptualizations and only includes individuals' personal information. The other two conceptualizations, although broader, only include specific categories of information – information relating to the environment and information about human rights abuses. The type of information granted within the freedom-of-expression conceptualization, on the other hand, is broad enough to encompass all the types of information granted within the other conceptualizations and much more.

None of the conceptualizations provided detailed and consistent explanations of limitations on the right to information; nonetheless, the freedom-of-expression conceptualization did provide detailed obligations on governments regarding how they could implement limitations. Restrictions must be provided for in law, written justifications must be provided when information is withheld, and there must be an independent process for appealing nondisclosure decisions. Other conceptualizations articulated some of these obligations, but did not include all of them. Because the freedom-of-expression conceptualization includes a presumption of disclosure, all information must be released unless there are legitimate reasons for nondisclosure. The freedom-of-expression conceptualization requires the public's right to know be weighed against the substantial harm that could come from disclosure. Some articulations of the right-to-truth conceptualization recognize that there are no limitations on access, but this understanding is unclear.

The freedom-of-expression conceptualization holds the greatest promise for ensuring the broadest right of access to information. Basing the right to information on the right to freedom of expression gives the right to information a broad reach. Of all of the conceptualizations, it is the most clearly defined; the specific parameters of the right to information are clearer than with the other conceptualizations. Because the freedom-of-expression conceptualization is grounded in rationales that place importance on the role of information in democracies, the conceptualization offers a broad right of access to all types of information. In fact, all of the different types of information guaranteed within the other conceptualizations are included with the freedom-of-expression conceptualization. Although limitations on the right to information need to be better articulated, the freedom-of-expression

conceptualization does recognized detailed procedures that must be in place in order to withhold information. This is an area that needs to be better defined.

Directions for Further Research

The claim that access to government information is a human right is relatively new. This research identified and analyzed four conceptualizations of access to information as a human right. These findings suggest several avenues for future research.

As stated above, it is unclear how the limitations on the right to freedom of expression in human rights law might limit the right of access to information. One way to help clarify this would be to examine how the limitations have been interpreted by the European Court, the Inter-American Court, and the Human Rights Committee.

Research on national constitutions could help illuminate the ways that rights of access to information have been conceptualized. Many countries have added access-to-information provisions to their federal constitutions.⁷⁹⁰ Others have added the right to “seek and receive” information.⁷⁹¹ Research on how these provisions have been interpreted by national courts could add to the understanding of the conceptualizations identified in this study. Also, several national supreme courts have interpreted constitutional provisions guaranteeing the right to freedom of expression as including a right of access to government information.⁷⁹² Analysis of these ruling also would be illuminating.

⁷⁹⁰ See, e.g., the Czech Constitution, art 17(5) (stating, “State bodies and territorial self-governing bodies are obliged, in an appropriate manner, to provide information with respect to their activities.”).

⁷⁹¹ See, e.g., the Slovakian constitution, art 26 (stating that everyone has the right to “freely seek out, receive, and spread ideas and information”).

⁷⁹² See, e.g., *S.P. Gupta v. President of India*, AIR SC 149 (1982) (stating that “disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirements of public interest so demands”).

Another area that needs to be explored is access to information from private entities such as corporations. The idea that corporations may have legal obligations to provide information to the public was a consistent theme within this research, particularly within the right-to-a-healthy-environment conceptualization. This line of research is especially important as corporations grow larger and more powerful and as more government functions are privatized.

Finally, this research did not address compliance with human right obligations. Research is needed to examine whether there is a difference among conceptualizations regarding compliance with the right of access to information. Such research could reveal governments' views of access to information as a human right.

APPENDIX I

Sources

Documents of the UN Charter-based Bodies:

- Documents of the UN General Assembly, which include:
 - Verbatim records of GA plenary meetings
 - GA resolutions
 - Summary records of the Third Committee of the General Assembly⁷⁹³
- Documents of the Human Rights Council (replaced Commission on Human Rights in 2006), a subsidiary organ of the GA.
 - Reports of the HRC to the General Assembly
 - Documents relating the new Universal Periodic Review process in which States are reviewed for compliance of human right laws
- Documents of the Economic and Social Council, which include:
 - Reports of the relevant Functional Commissions⁷⁹⁴ including the Commission on Human Rights, which was a subsidiary organ of the Economic and Social Council until it was replaced by the Human Rights Council in 2006
 - Resolutions
 - Reports of sessions, which include reports from special rapporteurs⁷⁹⁵
 - Summary records of sessions

⁷⁹³ The Third Committee of the General Assembly is allocated items relating to social, humanitarian, and cultural matters. Only summary records are available for this committee.

⁷⁹⁴ The relevant functional commissions are Commissions on Science and Technology for Development, Sustainable Development, Population and Development, Status of Women, and Commission for Social Development. The other Commissions are Narcotic Drugs and Crime Prevention and Criminal Justice.

⁷⁹⁵ Special Rapporteurs include the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression; on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and on violence against women, its causes, and consequences; on torture and other cruel, inhuman, or degrading treatment or punishment; on the independence of judges and lawyers; on human rights and the environment; and on adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.

- Documents of the Sub-commission on the Promotion and Protection of Human Rights (Its last report was issued in Aug. 2006. Its duties have since been taken over by the Human Rights Council.).
- United Nations Environment Programme
 - Text of the Rio Declaration on Environment and Development
 - Text of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

United Nations International Human Rights Treaties and their monitoring bodies

UN Treaties

- International Covenant on Civil and Political Rights
- The Convention on the Rights of the Child
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Elimination of All Forms of Discrimination against Women
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

General list of documents from the monitoring bodies of treaties (committees):

- General Comments (General statements from the committees on its interpretations of specific articles in the treaty)
- Sessional/Annual Report of the committees to the UN General Assembly
- Concluding Observations (Reports from the committees to the states regarding states' compliance with the treaty).
- State Reports to the committees required by the treaty (Reports from states to the committees regarding the State's implementation of the treaty)
- List of Issues (Report from committees regarding State reports)
- Reply to List of Issues (Reports from states regarding committees' List of Issues)
- Summary Records of committee meetings about states' compliance.

- Jurisprudence of committees regarding individual complaints of human rights violations (Only the Political Covenant and the Convention on the Elimination of All Forms of Racial Discrimination have provisions that empower the monitoring committees to hear and rule on complaints.).

Regional Human Rights treaties and their monitoring bodies and courts

- The European Convention on Human Rights
 - Rulings of the European Court of Human Rights
- The American Convention on Human Rights
 - Judgments of the Inter-American Court of Human Rights
 - Inter-American Commission on Human Rights⁷⁹⁶
 - Annual reports, reports on session, and special reports
 - Individual petitions to the Commission
 - Advisory opinions of the Inter-American Court of Human Rights
- The African Charter on Human and Peoples' Rights
 - Documents of the African Commission on Human and Peoples' Rights, which include:
 - Resolutions
 - Mission reports
 - Activities reports
 - Communiqués of commission sessions
 - States' Periodic Reports to the commission (very limited access)
 - Intersession Activity Reports and resolutions from the special rapporteurs⁷⁹⁷

International Nongovernmental Organizations:

- Access Info Europe
- Article 19, Global Campaign for Freedom of Expression
- Open Society Institute Justice Initiative

⁷⁹⁶ Documents of the commission and the court are limited to those documents that are available in English.

⁷⁹⁷ There are 10 Special Rapporteurs including one for freedom of expression and access to information.

- Transparency International
- Global Transparency Initiative
- Commonwealth Human Rights Initiative
- Privacy International

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