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INTERNATIONAL STANDARDS ON TRANSPARENCY AND ACCOUNTABILITY[1]

EXECUTIVE SUMMARY

It seems intuitive that both accountability and transparency are key underpinnings and essential elements of democracy. This is borne out by numerous authoritative statements about democracy adopted by different international actors.

The core of transparency is the idea that State actors should operate in an open manner. A key means of delivering transparency is through the right to access information held by public bodies, or the right to information, and laws giving effect to this right now exist in some 100 countries globally. Transparency also incorporates a number of other elements, such as ensuring that meetings of public decision-making bodies are accessible to the public and the recent open data movement.

Accountability, for its part, is founded on the notion that State actors should bear responsibility for their decisions and actions. There are two dimensions to accountability. The first is *answerability*, or the obligation of State actors to provide information and an explanation to the public about their activities. However, this needs to be accompanied by *enforcement*, or mechanisms by which the information obtained via answerability can be made effective in extracting or obtaining accountability. Accountability can be either vertical – i.e. owed directly to the public – or horizontal – i.e. delivered through mechanisms which operate between public institutions.

Transparency and accountability are mutually reinforcing and interdependent inasmuch as a serious failure to deliver either one makes it almost impossible to deliver the other. There is also significant overlap between these concepts. This is particularly evident in the answerability dimension of accountability. However, there are important differences. Systems of enforcement for accountability go beyond transparency, while transparency requires openness that reaches into spheres well beyond those required for answerability.

International statements about accountability are, for the most part, rather general in nature, probably due to the fact that different countries have very different systems in place for ensuring accountability. At the same time, it is clear that there is a strong international law foundation for accountability, most particularly based on the right to participate in public affairs and to elect government. These rights also serve as a basis for transparency, although international courts and other bodies have more often based the right to information on the right to freedom of expression which, under international law, includes the right to seek and receive, as well as to impart, information and ideas.

While, as noted, international standards have not defined in any detail the various elements of accountability, it is different for transparency, and specifically the right to information (RTI), where the following ten standards have been identified:

- Clear legal guarantees of the right
- Broad application of the right
- Proactive disclosure of important information
- Open meetings of public decision-making bodies
- Clear procedures for processing requests for information
- A clear and narrow regime of exceptions
- A system of appeals
- A system of sanctions and protections
- Measures to promote implementation
- Beyond RTI to open data

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1. INTRODUCTION

In 2004, the UN General Assembly adopted Resolution 59/201, citing a number of "essential elements of democracy," among them "transparency and accountability in public administration."[2] Today, transparency – and more specifically the right to information – has gained widespread recognition as a fundamental right at both the national and international levels. Accountability has not received such explicit endorsement as a human right, but it is frequently invoked alongside transparency as a foundation of democracy. What are these concepts and why are they so essential to democracy?

This Briefing Paper provides detailed definitions of accountability and transparency, and explores the relationship between them and their role in supporting democracy. It also explores the international law foundations of these concepts and provides some key standards flowing from those guarantees, with particular reference to the right to information.

2. DEFINING TRANSPARENCY AND ACCOUNTABILITY

2.1. TRANSPARENCY

The core idea behind transparency, as that term is used in this paper, is that State actors – including actors which are funded or controlled by the State, even if they formally operate at arms length to the three branches of government – should act in an open manner. This includes being transparent about how they operate, about the rules that govern them, about their activities and expenditures, about their operations and about the decisions they take, among other things.

This idea is founded, among other things, on the right of everyone to 'seek' and 'receive' information and ideas, guaranteed under international law as part of the wider right to freedom of expression.[3] It is also grounded in the foundational democratic idea that the "will of the people shall be the basis of the authority of government" for, without transparency, this goal cannot be achieved.[4]

There are a number of ways in which transparency in this sense is achieved in practice. A central element is what has come to be known as the 'right to information' or 'freedom of information', which is the right of everyone to access information held by public bodies. This right is constitutionally protected in some 60 countries globally.[5] A good example of constitutional protection for the right to information is found at Article 51 of the 1997 Constitution of Montenegro, which states: "Everyone shall have the right to access information held by the state authorities and organizations exercising public authority."[6] Another example is found at Article 32 of the 1996 Constitution of the Republic of South Africa, which states:

> (1) Everyone has the right of access to-
> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.[7]

As Article 32(2) of the South African Constitution makes clear, legislation is required to give effect to this right, and dedicated right to information laws have been adopted in some 100 countries around the world.[8] Typically, these laws establish systems for the processing of requests for information and also place a positive obligation on public bodies to publish information on a proactive basis. Beyond the right to information, many countries have laws and/or systems to ensure that meetings of certain key public bodies – most importantly the legislature and the courts but ideally a much wider range of decision-making bodies – are open to the public. A more recent development is the open data movement, whereby public bodies are increasingly making publicly available structured sets of information (datasets) not only for free, but licensed for free reuse and provided in formats which can be processed electronically.

2.2. ACCOUNTABILITY

The core idea behind accountability is that State actors need to be able to be held responsible for their decisions and actions.[9] Accountability is central to democratic governance and is implicit in the right to political participation, which rests, among other things, on the idea that the government is answerable to the people. Public power thus needs to be organised in a way which ensures that the people can demand answers from and, if needed, indicate displeasure with or even sanction the government.

As a concept, accountability can be found in comparative constitutional practice in varying degrees. For example, the Republic of South Africa's 1996 Constitution establishes: "All spheres of government and all organs of state within each sphere must... provide effective, transparent, accountable and coherent government for the Republic as a whole" (Article 41(1c)). Finland's 1999 Constitution has an entire section devoted to "Official Accountability." In Finland, a civil servant is "responsible for the lawfulness of his or her official actions"

[2] United Nations, General Assembly, *Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy*, A/RES/59/201, 20 December 2004.
[3] See, for example, Article 19 of the *Universal Declaration on Human Rights* (UDHR), UN General Assembly Resolution 217A(III), 10 December 1948.
[4] See Article 21 of the UDHR.
[5] See http://www.right2info.org/constitutional-protections.
[6] Available at: http://www.unhcr.org/refworld/docid/47e11b0c2.html.
[7] Available at: http://www.info.gov.za/documents/constitution/.
[8] See the Right to Information Rating, available at: http://www.rti-rating.org/index.html.
[9] This responsibility extends primarily to citizens, but States are also responsible to others for any actions they take that violate those third parties' human rights, for example as established under international law.

and the decisions "made by an official multi-member body that he or she has supported as one of its members." Section 118 of the Constitution provides for individual responsibility and punishment of officials who act unlawfully in a way which violates the rights of others or results in a loss to them. Thus, civil servants are responsible (accountable) for their actions and must answer for them.

2.2.1. ANSWERABILITY AND ENFORCEMENT

Accountability has two dimensions: *answerability* and *enforcement*. State bodies and representatives have an obligation to inform citizens about their actions and explain the rationale for their decisions (answerability). At the same time, citizens should have opportunities to hold these bodies and officials accountable for their actions (enforcement).

Answerability is the obligation of public bodies to provide information about and an explanation for their decisions and actions, and the right of the public, or other State institutions, to ask questions and to receive relevant answers. When public authorities inform citizens about their actions and explain the rationale for their decisions or, better yet, when they actively engage with citizens, they enter into a form of dialogue with the public that has the potential to foster trust in the government and ongoing deliberations between citizens and government.[10] Answerability is an important foundation for enforcement, since without relevant information, it is difficult or even impossible to actually deliver or enforce accountability.

In some cases, answerability is enshrined in law and formal procedures, such as requirements for public bodies to report regularly to parliament and the public or financial disclosure laws. In other cases, answerability takes place in less formal ways, for example through the media. The media represents an important mechanism by which officials communicate with the wider public, and hence represent a key means by which answerability is delivered. The media, along with civil society and opposition parties, also often plays a role in eliciting responses from government, for example reporting on government actions and exposing problems or concerns, thereby forcing government to respond.

Enforcement gives teeth to accountability, by providing for remedial action. In some cases, this takes place via formal mechanisms. Voters can 'force' governments to change their behaviour by threatening to vote or actually voting them out of office. Courts adopt binding decisions related to other State bodies that must be implemented; for example, an administrative court may oblige a city authority to stop a building project. A variety of institutions, such as information and judicial commissions, have the power to make binding orders, or sometimes just authoritative recommendations, on public bodies. In other cases, the mechanism is less formal but often just as effective. The media, civil society and opposition parties represent important vehicles for channelling citizens' concerns and pressuring public bodies and government officials to change their behaviour. For example, if government fails to provide answers to citizens' concerns, a free press can 'sanction' them with bad publicity.

2.2.2. VERTICAL AND HORIZONTAL ACCOUNTABILITY

Cross cutting these two dimensions of accountability are two different ways of extracting or enforcing accountability, namely vertical and horizontal accountability.

VERTICAL ACCOUNTABILITY

In a democracy, elections are a key instrument used by citizens to enforce their preferences on the State. As such, they are perhaps the clearest expression of direct accountability of government towards citizens, also known as vertical accountability. While elections are an important way for citizens to exercise accountability, vertical accountability involves many more aspects. Citizens can use judicial remedies against State bodies and petition parliament or the executive. More indirectly, they can exert public pressure through the media or through civil society networks that monitor and criticise government. Vertical accountability is thus an ongoing feature of a democracy, not just something that takes place during elections. It flows in part from the human right to political participation, as guaranteed in Article 25 of the International Covenant on Civil and Political Rights (ICCPR)[11]. The UN Human Rights Committee, the body tasked with promoting the implementation of the rights set out in the ICCPR, has drawn the link between voting and accountability in its 1996 General Comment No. 25, on Article 25 (see below for more detail on this).

HORIZONTAL ACCOUNTABILITY

Horizontal accountability, in contrast to vertical accountability, refers to accountability mechanisms which operate between public institutions. In democracies, a web of institutional relationships enforce accountability, which are often referred to as checks and balances.

An important form of horizontal accountability is that the executive is accountable to the legislature. Parliamentary oversight of the executive can take many forms, the most common of which is the parliament's right to ask questions of the government ('question time') or to form committees to investigate government behaviour. In parliamentary systems, the government is directly accountable to parliament because it usually requires the support of a parliamentary majority; parliament can force a government out through a no-confidence vote.

All State institutions are bound by the rule of law, which also means that all State institutions are accountable to the judiciary. Often, this form of accountability is triggered when citizens lodge legal cases against State bodies, but it can also

[10] Borowiak, Craig. *Accountability and Democracy: The Pitfalls and Promise of Popular Control*. New York, NY: Oxford University Press, 2011. p. 71.

[11] Adopted by General Assembly resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.

be engaged when one State body brings a legal appeal against another one. For example, the German government can appeal to the Constitutional Court if it believes that a parliamentary law is unconstitutional. Constitutional review along these lines, albeit taking different specific forms, is a common feature in democracies.

Horizontal accountability is not only exercised between the executive, legislature and judiciary, but also through independent institutions which are often set up with the specific objective of promoting accountability. Examples of such independent bodies include anti-corruption commissions, human rights commissions, ombudsmen, information commissions and judicial commissions.

Horizontal accountability also requires clear constitutional allocations of roles and responsibilities. The UN Human Rights Committee has repeatedly pointed out that unclear delimitation of roles between the executive and the legislative pose a human rights concern.

It may be noted that answerability and enforcement are each delivered via both vertical and horizontal accountability mechanisms. For example, when civil society and media exert pressure on authorities to divulge information on issues of concern, answerability is extracted using a vertical accountability tool. But answerability is provided via horizontal accountability mechanisms, for example in the right of parliamentarians to request information from government ministers.

3. THE RELATIONSHIP BETWEEN ACCOUNTABILITY AND TRANSPARENCY

Transparency and accountability are mutually reinforcing and interdependent. Accountability can only be achieved if citizens have access to information. In turn, transparency is also dependent on accountability mechanisms, such as the rule of law, without which key transparency mechanisms such as the right to information will be seriously weakened.

The relationship, however, goes beyond reinforcement or interdependence, to encompass an important degree of overlap. In its 'answerability' element, accountability directly incorporates key elements of transparency. The Inter-Parliamentary Union's Universal Declaration on Democracy highlights this aspect of the relationship, focusing on the idea that accountability embraces key aspects of transparency: "Accountability entails a public right of access to information about the activities of government, the right to petition government and to seek redress through impartial administrative and judicial mechanisms."[12]

A recent report by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression looks at the issue from a slightly different optic, noting that effective delivery of accountability is dependent on the right to information:

> Core requirements for democratic governance, such as transparency, the accountability of public authorities or the promotion of participatory decision-making processes, are practically unattainable without adequate access to information. Combating and responding to corruption, for example, require the adoption of procedures and regulations that allow members of the public to obtain information on the organization, functioning and decision-making processes of its public administration (para. 3).[13]

The UN Special Rapporteur on the situation of human rights defenders emphasises yet another aspect of this, specifically in the context of international development projects, namely the need for transparency about accountability mechanisms:

> The principle of transparency relates to the availability and accessibility of relevant information. Access to information is a right enshrined in article 19 (2) of the International Covenant on Civil and Political Rights. It is essential for the ability of rights holders to understand how their rights will be affected, how to claim rights that could be undermined by a large-scale development project and how to ensure the accountability of stakeholders and duty bearers.[14]

In essence, these three viewpoints all represent the same idea, namely of an umbilical relationship between accountability and transparency whereby they are not only interdependent but also, at least to some extent, part and parcel of one another.

At the same time, neither is fully bounded by the other. Although the right to information is critical to holding government accountable it is not, by itself, enough to deliver accountability. For this, one must go beyond answerability and provide for enforcement. For example, in order to combat and respond to corruption, mechanisms – a code of conduct, an oversight body and/or a legal framework, for example – must also exist so that members of the public, or their representatives, have effective means to enforce accountability.

[12] Universal Declaration on Democracy, Point 14. Adopted in Cairo, 16 September 1997, Inter-Parliamentary Council, Session 161.

[13] *UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,* UN Doc A/68/362 (4 September 2013). See also the preamble to the 2004 Joint Declaration by the special mandates on freedom of expression at the UN, OSCE and OAS, which states: "Recognising the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency;" See citation below.

[14] United Nations, General Assembly, *Situation of human rights defenders: report of the Special Rapporteur on the situation of human rights defenders*, A/68/262 (26 August 2008).

Similarly, transparency is not only about answerability, but embraces openness much more broadly, even where accountability interests are not engaged. Thus, the open data movement is more about getting access to open format datasets that can be used for interesting business and social uses than about holding governments to account.

4. INTERNATIONAL LAW FOUNDATIONS FOR ACCOUNTABILITY AND TRANSPARENCY

As mentioned above, the UN General Assembly considers transparency and accountability to be essential elements of democracy. Similarly, the UN Human Rights Council has emphasised "the importance of effective, transparent and accountable legislative bodies, and [...] their fundamental role in the promotion and protection of human rights, democracy and the rule of law."[15] And in the Universal Declaration on Democracy, the Inter-Parliamentary Union declares:

> Democracy thus goes hand in hand with an effective, honest and transparent government, freely chosen and accountable for its management of public affairs.[16]

Based on the idea that transparency and accountability are central to democratic governance, a number of international treaties and other documents refer to transparency and accountability as core tools for regulating the exercise of public power. International treaties on anti-corruption also incorporate important transparency and accountability rules. Of particular note over the last ten to fifteen years has been the widespread recognition of the right to information as a human right.

4.1. ACCOUNTABILITY

At the international level, accountability is an oft-mentioned concept, but its contours are generally not defined in any detail. This may be because of the wide variety of different systems for actually delivering accountability in practice. Despite this, accountability has found general legal recognition in numerous charters and treaties. The Charter of the Commonwealth, for example, has as its core principles "mutual respect, inclusiveness, transparency, accountability, legitimacy, and responsiveness."[17] Similarly, "accountability, economic and social justice and popular participation in development"[18] are part of the fundamental principles in the Revised Treaty of the Economic Community of West African States (ECOWAS).

Anti-corruption treaties at the international and regional levels have explicitly recognised that corruption is antithetical to accountability, and have linked anti-corruption efforts to promoting accountability. Article 1(c) of the United Nations Convention Against Corruption[19] outlines the purpose of anti-corruption efforts: "To promote integrity, accountability and proper management of public affairs and public property." States Parties to the Convention, in accordance with their legal systems, are obligated to develop anti-corruption policies that "reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability" (Article 5(1)). Similarly, the African Union Convention on Preventing and Combating Corruption commits States Parties to "transparency and accountability in the management of public affairs."[20]

While government accountability is not explicitly recognised in the International Covenant on Civil and Political Rights (ICCPR), it is implicit in its Article 25, which recognises the right of citizens to take part in the conduct of public affairs, the right to vote, and equal access to the public service. In its 1996 General Comment No. 25, on Article 25, the UN Human Rights Committee, which issues authoritative interpretations of the rights included in the ICCPR,[21] clarified how accountability is mandated in Article 25:

> Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions (...)
>
> Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them.

Closely linked to this is a notion of accountability flowing from both the right to participate in elections and the related rights to equality and dignity, which are found in the first sentence of the preamble to the Universal Declaration of Human Rights (UDHR),[22] as well as its first article. If we cannot hold officials to account, we do not, in fact, enjoy equality in dignity and rights. The right to an effective remedy for violations of rights, found at Article 2(3) of the ICCPR, also serves as a human rights foundation for accountability. Such remedies represent

[15] United Nations, Human Rights Council, *Human rights, democracy and the rule of law*, A/HRC/RES/19/36 (19 April 2012)
[16] Universal Declaration on Democracy, Point 14. Adopted in Cairo, 16 September 1997, Inter-Parliamentary Council, Session 161.
[17] Charter of the Commonwealth (para. 8). Adopted in London, 19 December 2012, in force 11 March 2013.
[18] Article 4(h) of the Revised Treaty of the Economic Community of West African States (ECOWAS), Cotonou, 24 July 1993.

[19] General Assembly resolution 58/4, 31 October 2003, in force 14 December 2005.
[20] Article 3(3) of the African Union Convention on Preventing and Combating Corruption. Adopted in Maputo, Mozambique, 11 July 2003, in force 5 August 2006. For a list of states that have ratified the Convention, visit http://www.africa-union.org/root/AU/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf
[21] Although General Comments are not legally binding, they represent authoritative elaborations of the rights in the ICCPR, which are themselves legally binding on State parties.
[22] UN General Assembly Resolution 217A(III), 10 December 1948.

accountability mechanisms while, conversely, elected officials cannot be said to be accountable if there is no remedy against them when they abuse human rights.

There are also a number of soft law sources for the idea of accountability as a foundational democratic and hence human rights value. The 2001 General Assembly Resolution 55/96 urges States to promote "the development of effective public institutions, including an independent judiciary, accountable legislature and public service" while improving "the transparency of public institutions and policy-making procedures and enhancing the accountability of public officials".[23]

The UN Human Rights Council calls on States to guarantee that:

> All Government agents, irrespective of their positions, are promptly held fully accountable, consistent with applicable domestic law and international obligations, for any violation of the law that they commit.[24]

In the context of international development projects, the UN Special Rapporteur on the situation of human rights defenders recommends that States:

> Ensure that various types of accountability mechanisms are available to those who feel that their rights have been infringed upon in the context of large-scale development projects, including judicial and administrative mechanisms that are well resourced, impartial, effective, protected against corruption and free from political and other types of influence;[25]

In addition, many of the international hard and soft law sources recognising the right to information, set out in some detail below, also refer to the centrality of accountability as a democratic corollary to transparency. These include the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention),[26] the 2008 Council of Europe Convention on Access to Official Documents,[27] the 2004 Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression,[28] the 2000 Inter-American Declaration of Principles on Freedom of Expression,[29] and the 2002 Declaration of Principles on Freedom of Expression in Africa.[30]

4.2. TRANSPARENCY

Recognition of the right to information under international law was relatively late in coming, but it is now well established. As noted above, the key basis for this right has been the wider right to freedom of expression which, under international law, aims to protect the free flow of information and ideas in society rather than the narrower concept of free speech. The right can also be founded on the right to participate and the rights to privacy and to family life.

4.2.1. THE RIGHT TO FREEDOM OF EXPRESSION

Article 19 of the Universal Declaration of Human Rights (UDHR), guaranteeing freedom of expression, protects not only the speaker, but also the rights to 'seek' and 'receive' information and ideas:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

Although the UDHR, as a UN General Assembly resolution, is not formally binding, parts of it, including Article 19, are widely understood as having matured into customary international law, binding on all States. The right to freedom of expression is guaranteed in very similar terms in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), a formally binding international treaty. It is also protected in all three general regional human rights treaties, at Article 9 of the African Charter on Human and Peoples' Rights (ACHPR),[31] at Article 13(1) of the American Convention on Human Rights (ACHR),[32] and at Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[33]

[23] United Nations, General Assembly, *Promoting and consolidating democracy*, A/RES/55/96 (28 February 2001).
[24] United Nations, Human Rights Council, *Human rights, democracy and the rule of law*, A/HRC/RES/19/36 (19 April 2012), para. 16(j)(iii).
[25] United Nations, General Assembly, *Situation of human rights defenders: report of the Special Rapporteur on the situation of human rights defenders*, A/68/262 (26 August 2008).
[26] In the Preamble, the parties to this Convention aim "to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment."
[27] CETS No. 205, not yet in force. In the Preamble, the Convention links the right to access to official documents with accountability: "Considering that exercise of a right to access to official documents: [...]
iii fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy".
[28] In the Preamble of the Joint Declaration, the right to information is linked to accountability: "Recognizing the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency".
[29] 108th Regular Session, 19 October 2000. Available at: http://www.iachr.org/declaration.htm. The preamble again links the right to access to information to accountability: "Convinced 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;"
[30] 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html. The wording in this Preamble is similar: "Convinced that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy;"
[31] Adopted at Nairobi, Kenya, 26 June 1981, 21 I.L.M. 58 (1982), in force 21 October 1986.
[32] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, in force 18 July 1978.
[33] E.T.S. No. 5, adopted 4 November 1950, in force 3 September 1953.

4.2.2. FORMAL LEGAL RECOGNITION

The right to freedom of expression was not originally understood as encompassing a right to access information held by public bodies. However, legally binding decisions by international and regional courts over the last ten years have read in this element. Such interpretation has been based on two main jurisprudential foundations. First, as noted above, the right to freedom of expression protects the wider free flow of information and ideas in society ("seek, receive and impart information and ideas"), which cannot properly be realised in a context of excessive governmental secrecy. Second, like a number of international rights, the right to freedom of expression is not exclusively negative in nature (protecting individuals against State interference) but it also places a positive obligation on the State to take steps to foster and protect the free flow of information and ideas in society.

The first international court to recognise the right to information was the Inter-American Court of Human Rights, in the 2006 case of *Claude Reyes and Others v. Chile*.[34] In that case, the Court clearly and explicitly held that the right to freedom of expression embraced the right to information. In spelling out the scope and nature of the right, the Court stated:

> [T]he Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. 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.[35]

It took a few years but, in April 2009, the European Court of Human Rights followed suit, recognising a right to information based on Article 10 of the ECHR.[36] Interestingly, the respondent State in the case, Hungary, did not even contest the claim that Article 10 protects the right to information, and instead limited itself to arguing that the information in question fell within the scope of the exceptions to this right (i.e. that the refusal to provide the information was a legitimate restriction on freedom of expression).

The UN Human Rights Committee was relatively late to recognise clearly the right to information. However, a 2011 General Comment on Article 19 of the ICCPR does just this, stating:

> Article 19, paragraph 2 embraces a right of access to information held by public bodies.[37]

A number of international treaties directly guarantee the right to information. In 1998, as a follow-up to the 1992 Rio Declaration, Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union signed the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention),[38] which recognises a right to access information about the environment. The *Convention Against Corruption* was adopted by the United Nations General Assembly in 2003.[39] Although this Convention is not specifically about the right to information, Articles 10 and 13, respectively, require States to enhance transparency in the public sector and to ensure that the public has access to information for purposes of participation, and together these are widely understood as a basis for the right to information.

In November 2008, the Council of Europe *Convention on Access to Official Documents* was adopted as the first general treaty specifically devoted to the right to information.[40] Although formally a European document, the Convention is open to ratification by all States.

4.2.3. SOFT LAW RECOGNITION

Formal legal recognition of the right to information was preceded by, and to an important degree founded on, recognition of the right in a number of soft law sources. The earliest official statements suggesting that the right to freedom of expression included the right to information came from the specialised international mandates on freedom of expression. In his 1998 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression stated clearly that the right to freedom of expression includes the right to access information held by the State: "[T]he 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 in all types of storage and retrieval systems."[41]

In 1999, all three (at the time) special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of

[34] 19 September 2006, Series C, No. 151. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.
[35] *Claude Reyes and Others v. Chile,* note 34, para. 77.
[36] Társaság A Szabadságjogokért v. Hungary, 14 April 2009, Application No. 37374/05.
[37] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.
[38] UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001. The text of the Convention in various languages is available at: http://www.unece.org/env/pp/treatytext.htm.
[39] General Assembly resolution 58/4, 31 October 2003, in force 14 December 2005.
[40] CETS No. 205, not yet in force.
[41] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

Expression – adopted their first Joint Declaration, a practice which they have continued annually since that time. The 1999 Joint Declaration included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[42]

Although this is arguably a somewhat equivocal (or poetic) formulation, this was unequivocally remedied in the 2004 Joint Declaration, which included a significant focus on the right to information and stated, among other things:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[43]

The statement went on to elaborate in some detail on the specific content of the right.

In parallel to these statements by the special mandates was the adoption of regional declarations asserting a right to information. In October 2000, the Inter-American Commission on Human Rights approved the Inter-American Declaration of Principles on Freedom of Expression,[44] the most comprehensive official and authoritative elaboration of the principles relating to the human right to freedom of expression to date in the Inter-American system. Importantly, the Principles unequivocally recognise as human rights both the right to access one's own personal data (*habeas data*) and the wider right to information:

> 4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Almost exactly two years later, in October 2002, the African Commission on Human and Peoples' Rights adopted its own Declaration of Principles on Freedom of Expression in Africa[45] which, like its American predecessor, is an authoritative elaboration of the implications of the guarantee of freedom of expression. The Declaration endorses the right to information as follows:

> *Principle IV: Freedom of Information*
> Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

The rest of Principle IV goes on to elaborate a number of key features of the right to information.

Within Europe, the Committee of Ministers of the Council of Europe had adopted Recommendation No. R(81)19 on Access to Information Held by Public Authorities as far back as 1981. While this stressed the importance of access to information, it did not go so far as to say that this had a human rights foundation. In 1994, the 4th European Ministerial Conference on Mass Media Policy adopted a Declaration on Media in a Democratic Society, recommending that the Committee of Ministers consider "preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities."[46] In the end, the Committee of Ministers opted for a Recommendation, which was finally adopted in 2002 in the form of Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe on access to official documents.[47] Principle III of this Recommendation states:

> *General principle on access to official documents*
> Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.

The rest of the Recommendation elaborates in some detail on the content of the right.

4.2.4. OTHER BASES

In addition to the right to freedom of expression, the right to information has variously been founded on the right to participate and the rights to private and family life. The earliest soft law statement noted above, the 1999 Joint Declaration of the special mandates on freedom of expression, highlights the idea of the right to information as a basis for participation.

More formally, the European Court of Human Rights has often grounded a right to access specific information in the right to private and family life. For example, in *Gaskin v. United Kingdom*,[48] the Court held that the applicant, who had been in foster care, had a privacy interest in accessing his case records and that the failure of the United Kingdom to

[42] 26 November 1999. All of the Joint Declarations are available at: hthttp://www.osce.org/fom/66176.
[43] Adopted on 6 December 2004. See note 42.
[44] 108th Regular Session, 19 October 2000. Available at: http://www.iachr.org/declaration.htm.
[45] 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.
[46] Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16. Available at: http://www.coe.int/t/dghl/standardsetting/media/doc/DH-MM(2006)004_en.pdf, p. 44.
[47] Adopted 21 February 2002.
[48] 7 July 1989, Application No. 10454/83.

establish an independent authority with the power to decide upon such requests was a breach of his right to private and family life.

5. KEY STANDARDS

The right to information embraces a number of key standards. Some, such as the need for any exceptions to the right to be clear, narrow and proportionate, are based on clear international law principles. Others, such as the idea of open meetings, are more good practice than international law rules as such. Ten key standards relating to the right to information are outlined below.

STANDARD 1: CLEAR GUARANTEE OF THE RIGHT

The right to information should find clear expression in national law. Ideally, this would include a constitutional guarantee recognising this right as a human right, along the lines of the guarantees noted above. This places it in its proper lexical position vis-à-vis other rights and laws, and reflects its status under international law.

A constitutional guarantee is, however, not sufficient because it cannot spell out in detail the specific regime governing the right, such as how requests for information may be made and what interests are deemed to be sufficiently important to justify refusals to provide information (exceptions). It is thus essential to have a law guaranteeing and giving practical effect to this right. Better practice is for such a law to include a rule on interpretation, stating that its provisions should be interpreted in the manner which best gives effect to the right, as well as the wider benefits it brings (such as facilitating participation and accountability and combating corruption). For example, section 2(1) of the South African Promotion of Access To Information Act, 2000 states: "When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects."[49]

STANDARD 2: BROAD SCOPE

Human rights bind the State as a whole, including all of its constituent parts. As a result, the scope of the right to information in terms of bodies covered should be broad. Better practice in this respect is to cover all three branches of government – the executive, legislature and judiciary – all levels of government, subsidiary bodies and agents of the State – including bodies which are established by law or which are funded or controlled by other public bodies – and even private bodies which undertake public functions. For example, pursuant to Article 1, the 2011 Brazilian right to information law covers all three branches of government, as well as public companies, independent public bodies, and bodies which are owned or controlled by any of these other bodies.[50]

For the same reason, the scope in terms of information and people covered should be broad. Better practice is to define the information covered by the right as being all information which is held by a public body. In terms of who is covered, some laws limit this to citizens, but better practice laws cover everyone and this is also required for consistency with international standards, which apply to 'everyone'.

STANDARD 3: PROACTIVE DISCLOSURE

There are two main practical means of realising the right to information: granting individuals a right to make requests for information (and imposing a corresponding obligation on public bodies to meet those requests) and imposing a positive obligation on public bodies to publish information on a proactive basis, even in the absence of a request. In practice, the vast majority of individuals will never make a request for information, so proactive disclosure obligations ensure that they can at least access a minimum platform of information.

This obligation should cover key categories of information of significant public interest, such as information about the structure and functions of the public body, about its rules and policies, about its programmes and budgets, and about opportunities for public engagement with it. A strong global trend in this area, partly driven by technological changes, is to increase the amount of information subject to proactive publication over time. A very practical reason to increase the proactive disclosure of information is that as more information becomes available on a routine basis, the need to make requests for information will diminish.

Many countries include a long list of categories of information which are subject to proactive disclosure. Section 4(1) of the Indian Right to Information Act, 2005,[51] for example, contains a list of 19 different categories of information which must be published on a proactive basis. A different approach is taken in the United Kingdom Freedom of Information Act 2000, which requires all public authorities to adopt publication schemes setting out what they propose to publish on a proactive basis. These must be approved by the oversight body, the Information Commissioner, who may impose a time limit on his or her approval of the scheme, with the idea that the public authority would need to produce a more ambitious scheme after the expiry of the approval. This provides for a system for levering up proactive disclosure obligations over time.[52]

STANDARD 4: OPEN MEETINGS

Open meetings are the logical corollary of providing access to recorded or documentary information. Despite this, only a few countries have put in place clear legal guarantees for a right to attend meetings of public bodies beyond the legislature

[49] Act No. 2, 2000.

[50] Law n. 12.527, of 18 November 2011.
[51] Act, No. 22 of 2005.
[52] See sections 19-20.

and the courts. Better practice is to require meetings of governing bodies to be open, albeit subject to closure where this is justified. To achieve this, it is important to define the scope of both governing bodies – normally public decision-making bodies such as elected bodies, judicial bodies, planning and zoning boards, educational boards and so on – and meetings – which refers to formal or official meetings convened to conduct public business. For this to be effective, certain supporting information needs to be disclosed on a proactive basis, such as advance notice of meetings, agendas and documents being relied upon as background for key decisions. The rules should also set out clear standards and procedures for closing meetings, which should normally include a requirement that such decisions (i.e. to close the meeting) be made in public. A good example of this is United States Government in the Sunshine Act,[53] passed in 1976, which obliges federal bodies to hold open meetings, subject to certain conditions.

STANDARD 5: PROCEDURES

Unless the right to lodge requests for information is anchored in clear procedural rules, it is unlikely to be effective. These rules need to be simple, so that ordinary people can easily understand them (and hence be able to make requests), but they also need to be reasonably comprehensive, so as not to provide reluctant officials with loopholes to avoid responding to requests.

These rules can be divided into two groups: those relating to the making or lodging of requests and those relating to the processing of requests. For the former, the main goals are to ensure that making requests is easy and free. Better practice is to require only a minimum of information to be included in a request – ideally simply a description of the information sought and an address for delivery of that information – not to require requesters to provide reasons for their requests and to accept requests submitted via a range of means of communication, including online and via email. Public bodies should provide assistance to requesters that are having difficulty making requests – whether because of illiteracy, disability or challenges in defining the information they are seeking – and receipts should be provided to requesters for purposes of tracking requests.

On the processing side, perhaps the two most important requirements are clear and preferably short time limits for responding to requests and a regime of fees that prevents costs from becoming a barrier to making requests. Better practice in this regard is to allow for charges only for the reasonable cost of making copies and sending them to requesters (so that electronic provision of information is free). In addition, better practice is to put in place rules for transfer of requests to another public body, where warranted, to require information to be provided in the form preferred by the requester, whenever possible, and to require public bodies to provide adequate notice where a request is refused, in whole or in part.

[53] 5 U.S.C. § 552b.

A number of right to information laws have very good sections on procedures, which are normally quite long and complicated due to the detail involved. Some examples include El Salvador,[54] Jamaica,[55] Kyrgyzstan[56] and Tunisia.[57]

STANDARD 6: EXCEPTIONS

It is universally accepted that the right to information is not absolute and that certain information needs to be kept confidential. The regime of exceptions lies at the very heart of a right to information system, since it effectively defines the dividing line between transparency and secrecy. It is very important that the regime cover all legitimate secrecy interests – both because they should be protected and because otherwise the whole right to information system will start to lose credibility – and equally important that it not be overbroad – because otherwise the system will fail to promote the transparency it has been designed for.

International law only allows for restrictions on freedom of expression where these are provided by law, where they seek to protect a legitimate interest[58] and where they are 'necessary' to protect that interest. The necessity test, in turn, involves a number of different considerations, including that the restriction not be overbroad and that it be proportionate. These international standards have been distilled into a similar three-part test for restrictions on the right to information:

1. A full and narrow list of protected interests which may justify secrecy should be set out in law.
2. Access to information should only be refused where disclosure of the information would or would be likely to cause harm to the protected interest (the harm test).
3. Even where harm is likely to ensue, the information should still be released if the benefits of this outweigh that harm (the public interest override).

Better practice right to information laws thus include a narrow list of protected interests – such as national security, privacy, law enforcement and legitimate commercial interests – all of which are subject to a harm test and a public interest override. To give one example, section 8(1) of the Indian Right to Information Act[59] provides, in part:

> Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
>
> (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of

[54] Ley de Acceso a la Información Pública.
[55] Access to Information Act, 2002.
[56] Law on Access to Information held by State Bodies and Local Self-Government Bodies of the Kyrgyz Republic.
[57] Décret-loi 2011-41 relatif à l'accès aux documents administratifs des organismes publics.
[58] For a full list of legitimate interests, see Article 19(3) of the ICCPR.
[59] Right to Information Act, No. 22 of 2005. Available at: http://persmin.nic.in/RTI/WelcomeRTI.htm.

the State, relation with foreign State or lead to incitement of an offence;

Better practice laws also include a few further protective rules, such as overall time limits – for example of 20 years – for exceptions protecting public interests such as national security, a requirement to provide the rest of a document where only part of it is exempt (severability) and rules on consulting with third parties where requests are made for potentially sensitive information provided by them.

STANDARD 7: APPEALS

If the response to a request for information were left to the discretion of the public body to which the request was directed, it would not be proper to speak of a 'right' to information. It is, therefore, necessary for there to be some independent oversight over requests for information. In most countries, appeals against refusals to provide information or other failures to respect the rules on processing requests ultimately go to the courts. However, the expense and time consuming nature of this remedy renders it beyond the reach of most requesters.

Better practice is to provide for three levels of appeal: an internal appeal to a higher authority within the same public body; an external appeal to an independent administrative oversight body; and an appeal to the courts. It is essential that the independence of the oversight body be protected, and there are many ways of ensuring this. These include the manner in which the governing officer(s) or board is appointed, protection of the tenure of this/these individual(s) and an independent process for setting and allocating the budget. It is also important that the body possess adequate powers. These include a range of investigatory powers – such as the power to compel witnesses to testify and public bodies to produce information and documents – and the power to issue binding orders regarding remedies, most obviously to disclose information but also for public bodies to put in place necessary structural measures, such as appointing dedicated officers to deal with requests for information and/or providing training for its officials.

Better practice in this area is also to establish broad grounds for appeals – not just for refusals to provide information but for any other breach of the rules, for example relating to fees or time limits – to establish clear procedures for processing appeals and to place the burden on public bodies to justify their actions. The latter is based on the idea that appeals represent claims about breaches of human rights, so it is appropriate to require the relevant public bodies to establish that they have respected the rules.

In many countries – such as Canada,[60] Ireland[61] and Yemen[62] – the law appoints a single person as the information commissioner while in other countries – such as Mexico[63] and Indonesia[64] – these are multi-person bodies (in those cases, respectively, of five and nine persons).

STANDARD 8: SANCTIONS AND PROTECTIONS

Experience with implementation of the right to information has shown that for the system to be effective in overcoming the culture of secrecy that prevails in most public bodies, a number of sanctions and protections need to be put in place. Better practice laws provide for sanctions – of a criminal and/or administrative nature – to be imposed on officials who wilfully breach the rules, as well as on public bodies which systematically fail to meet their transparency obligations. This is in essence an accountability mechanism.

It is also important to provide protection for officials who disclose information pursuant to the law in good faith. Otherwise, a history of refusing to provide information, coupled with often very harsh sanctions for the wrongful disclosure of information, will be likely to prompt officials to err on the side of caution by refusing to disclose even non-sensitive information. Protection for individuals who provide information on wrongdoing, again in good faith, is also an important information safety valve, helping to ensure that information of overriding public interest is not kept secret. Sections 44 and 45 of the Ugandan Access to Information Act 2005 provide, respectively, protection for good faith disclosures under the law and for disclosures which reveal wrongdoing.

STANDARD 9: PROMOTIONAL MEASURES

Right to information laws are not self-implementing; they require a range of measures to be put in place to support good implementation practices. These include the appointment of dedicated officers with responsibility for ensuring that the public body meets its transparency obligations, including by responding to requests, placing responsibility on a central body – perhaps the oversight body – to undertake public awareness raising measures, and requiring public bodies to maintain their records in an orderly fashion and to provide training on the right to information to their employees. A proper system of reporting on implementation is also important, to identify problems and also to ensure a good base of information on how things are going. Better practice is to require all public bodies to publish an annual report on their implementation activities and then to require a central body – again perhaps the oversight body – to publish a central, amalgamated report on overall implementation.

Some right to information laws which have particularly strong promotional measures include those of Bangladesh,[65] Liberia,[66] Nicaragua[67] and Serbia.[68]

[60] Access to Information Act, R.S.C., 1985, c. A-1.
[61] Freedom of Information Act, 1997.
[62] Law on the Right of Access to Information, No. 13 of 2012.
[63] Federal Transparency and Access to Public Government Information Law.
[64] Law 14/2008 on Public Information Openness.
[65] Right to Information Ordinance, No. 50 of 2008.
[66] Freedom of Information Act, 2010.
[67] Law No. 621 on Access to Public Information.
[68] Law on Free Access to Information of Public Importance, 2004.

STANDARD 10: BEYOND RTI: OPEN DATA

In recent years, a new movement has emerged in the area of transparency popularly known as the open data movement. This movement was originally focused on getting governments to release more sets of structured information, or datasets, not only publicly but also for free and able to be reused freely, as well as in formats that can readily be processed by electronic devices, for example in excel as opposed to .pdf format. The social and business benefits of releasing these datasets are enormous, and a strong community of geeks and hackers has emerged in many countries which makes effective use of these datasets, often by merging or hashing them with other datasets to create beneficial tools or apps.

The movement has now grown in a number of different directions. One has been to call on governments to attach open licences to public information which allow for it to be reused freely, with only minimal constraints, such as to acknowledge the source of the information. Another, closely related development, is to go beyond structured information, and to call for the release of an increasingly wide range of types of information of public interest. In this respect, the open data movement is closely related to the idea of proactive publication, noted above.

6. CONCLUSION

There is a close relationship between transparency, defined as the obligation on State actors to operate in an open manner, and accountability, defined as the ability to hold State actors responsible for their actions. They are mutually reinforcing, and even interdependent inasmuch as a serious failure to deliver either one makes it almost impossible to deliver the other (i.e. neither can exist where the other one is absent). There is also significant direct overlap between these two concepts, particularly in the answerability dimension of accountability, which is largely a notion of transparency. Nevertheless, both concepts exist in separate spheres as represented, for example, by systems of enforcement for accountability and openness beyond answerability for transparency.

Both transparency and accountability are fundamental underpinnings of democracy. Indeed, without them, even an essential aspect of democracy – elections – cannot function or deliver its intended results, and the myriad other mechanisms that exist in democracies for ensuring that public decision-making reflects the will of the people will also founder. This explains the nearly ubiquitous coupling of both accountability and transparency in international statements about democracy.

Both of these notions are, at least in a general sense, protected under international law, and particularly international human rights law. Over the last 15 years there has been clear and unequivocal recognition of the right to access information held by public bodies, or the right to information, as a human right, mainly based on the right to freedom of expression. International recognition of accountability has been more general, although no less robust. This is due to the fact that different systems of government have different ways of ensuring accountability, whereas systems for protecting the right to information are far more standardised globally. This variance in the means of delivering accountability does not in any sense detract from its importance or status under international law.

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