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The Right to Information in International Human Rights Law

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1. Introduction

The existence of a right of access to government information is increasingly accepted around the world, both at domestic and international levels. At domestic level, a right to information is to be found in a growing number of constitutions and since the early 1990s there has been a huge upsurge in the number of states adopting Freedom of Information laws.[1] Internationally the existence of a right of access to information is frequently articulated in international human rights documents; the first ever international Convention on access to information[2] has been adopted; and human rights enforcement bodies, both regional and global, have interpreted existing human rights treaties as protecting a right to information in a range of contexts.

The focus of this article will be on the recognition of a right to information at international level. The right to information has been most commonly recognized by international human rights treaty bodies as coming within the scope of the right to freedom of expression though such bodies have, on occasion, based their recognition of a

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1 Vluegels, 'Overview of all FOI Laws' *Fringe Special*, 9 October 2011, available at: http://www.right2info.org/resources/publications/laws-1/ati-laws_fringe-special_roger-vleugels_2011-oct [last accessed 10 December 2012]; Ackerman and Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 *Administrative Law Review* 85.

2 Council of Europe Convention on Access to Official Documents 2009, ETS 205. The Convention on Access to Official Documents will enter into force when ratified by ten states; to date it has been ratified by six and signed by a further eight.

right to information on the enjoyment of other rights such as: the right to respect for private life; the right to a fair trial; the right to life; social and economic rights; and the right to take part in public affairs. One of the themes explored in this article is that of the implications of the adoption by the treaty monitoring bodies of an instrumentalist approach to the recognition of the right to information. The development of a right to information in the context of the realization of other rights will be considered and the article will argue that basing the recognition of a right to information on the furtherance of other rights may operate to limit the development of the right to information and may even have negative connotations in terms of the enjoyment of such other rights.

The article will commence with a brief discussion of instrumentalism in the context of rights recognition. It will proceed in Part 2 by tracing the development of a right to information in international human rights law. Part 3 of the article will evaluate the scope of the right to information as it has evolved in international human rights law. Part 4 of the article will advocate the recognition of the right to information as an intrinsic right.

1. Instrumental and intrinsic rights

Nagel describes the instrumental account of rights as postulating that rights are morally deriative from other more fundamental values: the good of happiness, self-realization, knowledge and freedom and the evils of misery, ignorance, repression and cruelty.[3] On this account, rights are of vital importance as a means of fostering those goods or preventing those evils but they are not themselves fundamental. Instrumentalism is associated with a utilitarian approach to rights which focuses on maximizing overall happiness[4] and which has been criticised as not paying sufficient attention to individuals. Rawls, for example, was of the view that 'utilitarianism does not take seriously the distinction between persons'.[5] Opponents of the instrumental view of rights similarly argue that it cannot plausibly account for the strength of individual rights. Nagel, for example, contrasts the instrumental account of rights with the intrinsic one where rights are a 'non deriative and fundamental element of morality'[6] that embody a form of recognition of the value of each individual that 'supplements and differs in kind from the form that leads us to value the overall increase of human happiness and the eradication of misery'.[7] The intrinsic view of rights is therefore associated with individualism.[8] Kamm suggests that intrinsically valuable rights are status-based while utilitarian rights are interest-based.[9] The significance of the two approaches is described by Wenar as follows:

3 Nagel, 'Personal Rights and Public Space' (1995) 24 *Philosophy & Public Affairs* 83 at 86.
4 Bentham, *Introduction to the Principles of Morality and Legislation* (London, 1789); and Stuart Mill, *Utliitarianism* (London, 1863).
5 Rawls, *A Theory of Justice* (Boston: Harvard University Press, 1971) at 27.
6 Nagel, supra n 3 at 87.
7 Ibid.
8 Ibid.
9 Kamm,'Rights', in Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 508 at 508-9.

> The two views thus approach rights from opposite directions. A status-based justification begins with the nature of the rightholder and arrives immediately at the right, with only a brief nod to the negative effect that respecting the right may have on others' interests. The instrumental approach starts with the desired consequences (like maximum utility) and works backwards to see which right-ascriptions will produce those consequences. [10]

Various theorists have analysed the right to freedom of expression in terms of the instrumental versus intrinsic approach to the recognition of rights.[11] The intrinsic approach to rights views freedom of expression as content-neutral. Thus Wenar describes Nagel's account of speech rights as flowing immediately from 'the nature of persons as reasoners, and not from the interests that people may have in speaking on particular topics or in lisening to others speak on particular topics' [12] An instrumental account of speech rights, on the other hand, will be unlikely to be content neutral 'as people have very different interests in speaking and in hearing speech on different topics'.[13]

While Wenar acknowledges the shortcomings of the instrumental approach in coming to terms with individual rights, he leans more towards an instrumental account of the right to freeedom of expression. To Wenar, the status approach, 'though resonant with our deep intuitions about human dignity, often appears unable to match the subtlety of our reasoning about rights'.[14] Wenar proffers as an example of such subtlety of reasoning the drawing of distinctions between public and private figures in the context of freedom of expression, a distinction which cannot, he argues, be accommodated within an intrinsic status-based account of rights. Nagel, on the other hand, favours the intrinsic account of the right to free speech on the basis that freedom of expression confers a form of inviolability on everyone, 'not as an effect but in itself-in virtue of its normative essence, so to speak'.[15] This approach, he suggests 'becomes important if we wish to extend the justification of free expression substantially beyond the domain of political advocacy, where its instrumental value is clearest.'[16]

2. The right to information in international human rights law

Until the Council of Europe adopted the Convention on Access to Official Documents[17] in 2009, international human rights instruments did not afford explicit protection to the right to information. While the recognition of a right to information in international human rights law was also slow to evolve, international human rights bodies such as the UN Human Rights Committee, the European Court of Human Rights, the Inter-American

10 Wenar, 'The Value of Rights', in O'Rourke (ed.), *Law and Social Justice* (Boston: MIT, 2005) 179 at 181.
11 See Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 24.
12 Wenar, supra n 10 at 183.
13 Ibid. at 184.
14 Ibid. at 187.
15 Nagel, supra n 3 at 96.
16 Ibid.
17 Council of Europe Convention on Access to Official Documents, supra n 2.

Court of Human Rights and the European Committee on Social Rights have today accepted the existence of a right to information in certain circumstances. This has invariably occurred in the context of the securing of other rights, including both civil and political and economic and social. Each of these foundations for the right to information will be considered below with a view to building an overview of the current status of the right to information in international human rights law.

A. The right to freedom of expression

Perhaps the most broadly based of the rights that have been relied upon as the foundation for a right to information is the right to freedom of expression. Every international human rights treaty protects this right.[18] Traditionally, the focus of the right to freedom of expression had been on the provider of information. As Weeramantry explains, 'Libertarian or liberalist theories … concentrate on the rights of the speaker'.[19] The right to information, on the other hand, has at its core the potential recipient of that information. The foundation of the argument for including a right to information under the umbrella of freedom of expression is that access to information is a pre-condition of the full exercise of the right to freedom of expression.[20] Crucially such information includes not only that which the provider wishes to furnish to the recipient, but also information that others, such as the government, do not wish to make available to them. The right to information can therefore be said to be instrumental to the enjoyment of the right to freedom of expression or, as expressed more colourfully by Judge Bell of the Victorian Civil and Administrative Tribunal in *XYZ v Victoria Police*: 'Freedom of information is in the blood which runs in the veins of freedom of expression'.[21]

Freedom of expression and freedom of information have long been linked in international human rights activities and documentation. The reports of the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression have supported the recognition of a right to freedom of information within the framework of the right to freedom of expression in the ICCPR. The 1998 report referred to the right to seek, receive and impart information in Article 19 as imposing 'a positive obligation on states to ensure access to information, particularly with regard to information held by governments'. Subsequent reports of the Special Rapporteur have endorsed the view that Article 19 of the ICCPR encompasses a right of access to information. For example, the 2005 Report of the Special Rapporteur stated:

> 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 …

18 Article 19 International Covenant on Civil and Political Rights 1966 (ICCPR); Article 13 American Convention on Human Rights; Article 10 European Convention on Human Rights and Fundamental Freedoms 1950, ETS 5; and Article 9 African Charter on Human and Peoples' Rights.

19 Weeramantry, 'Access to Information: A New Human Right. The Right to Information' (1994) 4 *Asian Yearbook of International Law* 99 at 103.

20 Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford: Oxford University Press, 2000).

21 [2010] VCAT 255 (16 March 2010).

information' as contained in articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[22]

In 2004, the Special Rapporteur along with the Special Rapporteur on Freedom of Expression of the Organisation of American States and the Organisation for Security and Cooperation in Europe (OSCE) issued a joint declaration recognising the access right as a fundamental human right based on the principle of maximum disclosure[23] and in 2010, UNESCO[24] marked World Press Freedom Day 2010 by issuing the Brisbane Declaration which called on national governments who had not already adopted access to information laws to do so 'based on international standards and the principle of maximum disclosure'.[25]

In 2011, in a highly significant development, the UN Human Rights Committee published a new General Comment on Article 19 of the ICCPR,[26] which, in contrast to its predecessor,[27] expressly acknowledged that Article 19 embraces a general right of access to information held by public bodies. The General Comment noted, in arriving at this position, that Article 19 taken together with Article 25 of the ICCPR, the right to take part in public affairs had previously been interpreted by the Committee as including a right of the media to access to information on public affairs[28] and the right of the general public to receive media output.[29] The Committee further noted that elements of the right of access to information were addressed elsewhere in the ICCPR. It was pointed out, for example, that General Comment No 16 regarding article 17 of the Covenant, the right to privacy, addresses the issue of access to and amendment of personal data relating to individuals,[30] while General Comment No 32 regarding Article 14 of the ICCPR, the right to a fair trial, sets out the various entitlements to information that are held by those accused of a criminal offence.[31] The Committee also referred to the fact that Article 10, the right to liberty, had been interpreted by the Committee as preserving the right of prisoners to access their medical records.[32] Finally, the Committee noted that General Comment No 31 on the nature of the general legal obligation imposed on the parties to

22 Report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, E/CN.4/20.05/64, 2005, at para 39. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/11/4, 2009, at para 60.
23 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004.
24 The United Nations Educational, Scientific and Cultural Organisation.
25 UNESCO, *Brisbane Declaration: Freedom of Information, The Right to Know*, 3 May 2010.
26 Human Rights Committee, General Comment No 34: Freedom of expression (art 19),12 September 2011, CCPR/C/GC/34 .
27 UN Human Rights Committee, General Comment No 10: Freedom of expression (art. 19), 29 June 1983, HRI/GEN/1/Rev.1.
28 *Gauthier v Canada* (633/1995), CCPR/C/65/D633/1995, 5 May 1999.
29 *Mavlonov and Sa'di v Uzbekistan* (1334/2004), CCPR/C/95/D/1334/2004, 29 April 2009.
30 UN Human Rights Committee, General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art. 17), 8 April 1988, HRI/GEN/1/Rev.1.
31 UN Human Rights Committee, General Comment No 32: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32.
32 *Zheludkov v Ukraine* (726/1996), CCPR/C/76/D/726/1996 (2002).

the Covenant states that persons should, pursuant to Article 2 of the Covenant, be in receipt of information regarding their Covenant rights in general.[33]

General Comment No 34 fleshes out the requirements necessary to give effect to the right of access to information protected under Article 19 of the ICCPR. Parties to the Covenant should both proactively publish government information of public interest and "enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation". Interestingly the General Comment goes into a degree of detail in terms of the contents of such legislation, referring in particular to the need to make provision for the timely processing of requests for information, for the giving of reasons for refusals of access to information and for the putting in place of an appeals system. It also states that fees for requests for information should not be such as to constitute an unreasonable impediment to access to information.

Notwithstanding these developments embracing the right to information, international human rights courts and monitoring bodies had, for many years, been slow to interpret the right to freedom of expression as encompassing a right to information. More recent developments indicate a willingness to move towards the recognition of this right however, at least in specific contexts. In 1999, the UN Human Rights Committee expressed the view in *Gauthier v Canada*[34] that Article 19, read together with Article 25 (the right to take part in the conduct of public affairs), 'implies that citizens, in particular through the media, shall have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members'. This case revolved around the issue of access by the applicant journalist to press facilities in the Canadian parliament, rather than the issue of access to information *per se*.

The 2009 admissability decision of the Human Rights Committee in *S.B. v Kyrgyzstan*,[35] was less encouraging in terms of the recognition of a right to information. The applicant was a human rights activist who had requested information concerning the pronouncing of death sentences in Kyrgyzstan. The Human Rights Committee noted that the applicant had not explained 'why exactly he, personally, needed the information in question' and that he had merely contended that it was a matter 'of public interest'. The Committee went on to hold that, in light of these circumstances, and 'in the absence of any other pertinent information', the complaint constituted an *actio popularis* and was therefore inadmissible.

In 2011, the pendulum swung back again in favour of the right to information with the decision of the Human Rights Committee in another case emanating from Kyrgyzstan, *Toktakunov v Kyrgyzstan*,[36] the facts of which mirror those of *S.B. v Kyrgyzstan*. The Committee found that the applicant's Article 19 rights had been violated

33 UN Human Rights Committee, General Comment No 31: Nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004 CCPR/C/21/Rev.1.
34 (633/1995), CCPR/C/65/D633/1995 (1999), at para 13.4.
35 (1877/2009), CCPR/C/96/D/1877/2009 (2009), at para 4.2.
36 (1470/2006), CCPR/C/101/D/1470/2006 (2011).

by the refusal of the Kyrgyzstan authorities to provide him with access to statistics on the imposition of death sentences in that jurisdiction. On the issue of admissibility, the Committee noted that the information sought had been deemed to be information of public interest in a number of UN documents, each of which was either signed or accepted by Kyrgyzstan. The Committee went on to say that the reference to the right to 'seek' and 'receive' information contained in Article 19(2) included the right of individuals to receive State-held information, subject to the exceptions provided for in the Covenant. In a clear departure from its approach in *S.B.* the Committee observed that 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'. The Committee sought to distinguish the position in *Toktakunov* from that in *S.B.* on the basis that the complainant in *Toktakunov* was a legal consultant of a human rights public association, and 'as such, he can be seen as having a special "watchdog" functions [sic] on issues of public interest'.[37] In light of the fact that S.B. was a human rights activist who, like Toktakunov, sought access to information regarding death sentences, this distinction is difficult to sustain. The Committee concluded that the complainant was, as an individual member of the public, directly affected by the refusal of the authorities to make the information available to him and that the application was therefore admissible.[38]

In terms of the merits of the case, the Committee, having noted that the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output, held that public associations or private individuals who are engaged in the exercise of 'watchdog' functions on matters of legitimate public concern warrant similar protection to that afforded to the press in terms of access to State-held information. The Committee observed that delivery of information to an individual can permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it and continued: 'In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information…' The Committee concluded that the State party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under Article 19(3) of the Covenant. The Committee found that none of the restrictions permitted under Article 19(3) applied and so Kyrgyzstan was found to be in breach of its obligations under that Article.[39]

At the regional level, an influential milestone in the international development of the right of access to information occurred in 2006 when the Inter-American Court of Human

37 Ibid. at para 6.3 .

38 Ibid. at para 6.5.

39 Interestingly this decision was not referred to by the Human Rights Committee in explaining the basis of its finding in General Comment No 34 that Article 19 includes a right to information. This may have been down to a question of timing. While the General Comment was formally adopted in September 2011, a number of months after the Human Rights Committee had handed down its decision in *Toktakunov*, it is likely that much of the contents of the General Comment had been agreed well in advance of that date.

Rights handed down its decision in *Claude Reyes v Chile*.[40] The case originated in a request for access to information relating to a deforestation project submitted to the Chilean Committee on Foreign Investment by an environmental group. The Committee provided the applicant with some of the requested information but did not adopt any written decision justifying its refusal to disclose the remainder. The failure of the Committee to disclose all of the requested information and the lack of written response from the Committee were unsuccessfully challenged by the applicant before the domestic courts, which deemed his complaints inadmissible. The applicant made a complaint under the American Convention on Human Rights arguing *inter alia* that the failure of the Committee on Foreign Investment to disclose all the information he had requested amounted to a violation of Article 13 of the American Convention on Human Rights which protects freedom of expression. The Inter-American Court of Human Rights found that

> 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, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it[41]

A later decision of the Court, *Gomes Lund v Brazil*,[42] extended the scope of the right to freedom of expression to contribute to the recognition of a 'right to truth' about gross human rights violations. The case concerned a challenge to amnesty laws prohibiting prosecutions for torture and killings committed during the military dictatorship in Brazil in the 1970s. The Court held that law was 'incompatible with the American Convention and void of any legal effects.' The right to the truth about gross human rights violations was held by the Court to be 'connected to the right to seek and receive information enshrined in Article 13' of the Convention.[43] By denying and delaying access by the victims' relatives to relevant army archives and other information, Brazil was held to have violated their Article 13 right to information when read together with Articles 8 (duty to investigate grave violations) and 25 (judicial protection of rights).

The path to recognition by the European Court of Human Rights of a right to information as part of the right to freedom of expression has been long and tortuous. Some of the earlier decisions of the supervisory bodies of the ECHR had been quite expansive in their approach to interpreting the scope of the right to freedom of expression. In 1979 in *X v Federal Republic of Germany*,[44] for example, the European Commission on Human Rights said:

> [I]t follows from the context in which the right to receive information is mentioned ... that it envisages first of all access to general sources of information

40 Sep-19/2006, IACtHR, Series C 151 (2006). The Court also found a violation of Article 8 ACHR: see the text at n 88 infra.
41 Ibid. at para 77.
42 Nov-24/2010 IACtHR, Series C 219 (2010).
43 See para 201 of the Spanish version of the judgment.
44 DR 17 (1979) at 227.

> ... the right to receive information may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance.[45]

In the same year, in *Sunday Times v United Kingdom (No 1),*[46] a case which concerned a challenge to the granting of an injunction by the British courts against the publication of an article about the thalidomide scandal, the European Court of Human Rights held that Article 10 guarantees not only freedom of the press to inform the public but also 'the right of the public to be properly informed'.[47] Later decisions tended however to narrowly interpret the scope of the right to freedom of expression as it applies to those who seek information. In *Leander v Sweden*[48] the applicant complained that his rights had been infringed in circumstances where information about him that was recorded in a register maintained by the Swedish Security Department was disclosed to a potential employer. Believing that he had been denied a position on the basis of that information, Leander sought access to the information in order that he might challenge the decision not to hire him. In considering his complaint that his Article 10 rights had been violated, the court treated the right to receive information as being merely negative in effect saying: '[T]he 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.'[49] The Court went on to hold that 'Article 10 does not, in circumstances such as those of the present case, confer on an 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.'[50] The inclusion by the Court of the phrase 'in circumstances such as those of the present case' did however leave open the possibility that the Court might in the future find in favour of an applicant who sought access to government information.

Subsequent decisions of the Court in the 1980s and 1990s did not pursue that option however. In *Gaskin v United Kingdom*[51] the Court held that Article 10 did not embody an obligation on the State concerned to impart to the applicant, information contained in records held by a public authority relating to a time when he had been in public foster care. In *Guerra v Italy,*[52] the Court reiterated its view that the right to freedom to receive information in Article 10 basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. The Court held that the freedom to receive information referred to in paragraph 2 of Article 10 of the Convention 'cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and

45 Ibid. at 228–229.
46 A 30 (1979); 2 EHRR 245.
47 Ibid. at 281.
48 A 116 (1987); 9 EHRR 433.
49 Ibid. at 456.
50 Ibid.
51 A 160 (1990); 12 EHRR 36.
52 1998–I; 26 EHRR 357.

disseminate information of its own motion'.[53] The decision in *Guerra* not only confirmed the court's reluctance to allow Article 10 to ground the establishment of a right of access to official information, but also restated its opposition to the use of Article 10 to impose positive information dissemination obligations on the State, at least in the particular circumstances of that case.[54]

A pivotal issue in the establishment of a right to freedom of information under the umbrella of the right to freedom of expression guaranteed by the ECHR, is the extent to which Article 10 can be said to impose positive obligations. While the existence of positive obligations under Article 8 had long been recognised,[55] such obligations had not been generally viewed as arising under Article 10, although the decisions in *Leander* and *Guerra* implicitly acknowledged that this could occur in certain circumstances. A later decision of the European Court of Human Rights clearly established that positive obligations can derive from the right to freedom of expression as set out in Article 10: in *Özgür Gündem v Turkey*,[56] the Court held that genuine effective exercise of the right to freedom of expression 'does not depend merely on the State's duty not to interfere, but may require positive measures of protection'. This left open the possibility that Article 10 could be interpreted as including a positive right of public access to information.

Following the 2006 decision of the Inter-American Court of Human Rights in *Claude Reyes v Chile*,[57] there was a discernible shift in the approach of the European Court of Human Rights to the issue of access to information. The first decision indicating a change in attitude was an admissability decision of the European Court of Human Rights in *Sdruženi Jihočeské Matky v Czech Republic*.[58] The applicant, an environmental NGO, had requested access to documents relating to the design and construction of a nuclear reactor. The Court found that the application was inadmissible on the basis of being 'manifestly ill-founded' as the authorities had adduced sufficient justification for refusing access to the requested documents. The Court did however acknowledge that the rejection of the applicant's request for information amounted to an interference with its right to receive information under Article 10. This decision was significant in terms of establishing that a refusal of a request for access to information can amount to an interference with Article 10.

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53 Ibid at para 53.

54 See also *Roche v United Kingdom* 2005-X; 42 EHRR 599, where the Court held that there was no reason not to apply the 'established jurisprudence' in *Leander*, *Gaskin* and *Guerra*. See also *Sirbu v Moldova* Applications Nos 73562/01, Admissibility, 15 June 2004, where the Court referred to *Leander* in deeming an application inadmissible under Article 10.

55 See, for example, *Marckx v Belgium* A 31 (1979); 2 EHRR 330; and *Airey v Ireland* A 32 (1979); 2 EHRR 305.

56 (2001) 31 EHRR 1082. The Turkish Government was found to be under a positive obligation to take investigative and protective measures where the 'pro-PKK' newspaper and its journalists and staff had been victim to a campaign of violence and intimidation.

57 Supra n 40.

58 Application No 19101/03, Admissibility, 10 July 2006.

This decision was followed in 2009 by the landmark decision in *Társaság a Szabadság v Hungary*,[59] where the European Court of Human Rights held, for the first time, that a refusal of access to information constituted a violation of Article 10 of the ECHR. The applicant, a civil liberties non-governmental organisation (NGO), employed domestic freedom of information (FOI) legislation in a bid to obtain access to the text of an application for constitutional review of laws relating to drug offences submitted to the Constitutional Court by a member of parliament. The decision of the Constitutional Court to refuse to grant access to the requested material had been upheld by the domestic courts on the basis that the application for review contained personal data of the member of parliament which could not be accessed without the author's approval. The European Court of Human Rights decided that the refusal of access amounted to a violation of the applicant's rights under Article 10. The Court commenced its assessment of the merits of the case by asserting that it had 'consistently recognised that the public has a right to receive information of general interest' and that 'the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information'. It went on to say that the NGO, operating as it did as a social watchdog, deserved the same protection of its Article 10 rights as the press. The Court concluded, on the basis that the applicant's intention was to contribute to a public debate, that the refusal of access amounted to an interference with the applicant's rights under Article 10. This interference was found to be unjustified in that it did not meet the requirement of being 'necessary in a democratic society'. In arriving at this conclusion, the Court, referring to its decision in *Matky*, noted that it had 'recently advanced towards a broader interpretation of the notion of "freedom to receive information"[citation omitted] and thereby towards the recognition of a right of access to information.'60

Another 2009 decision of the European Court of Human Rights, *Kenedi v Hungary*,[61] again saw the Court hold that a denial of access to information by the State amounted to an interference with the right to freedom of expression. The applicant was a historian undertaking research into state security service in 1960s. The domestic courts had found in favour fo the granting of access to the requested information but the State had failed to enforce a court judgment to that effect. The Government conceeded that there had been an interference with the applicant's freedom of expression and the Court agreed saying 'access to original documentary sources for legitimate historical research was an essential element of the applicant's right to freedom of expression'.62 The Court found that as the Ministry had acted in in defiance of domestic law, the interference was not 'prescribed by law'. This finding obviated the need to examine whether the interference had a 'legitimate aim' or was 'necessary in a democratic society' and the Court concluded that the interference was unjustified.[63]

59 Application No 37374/05, Merits, 14 April 2009.
60 Ibid. at para 35.
61 Application No.31475/05, Merits. 26 May 2009.
62 Ibid. at para 43.
63 A pending case, *Bubon v Russia* Application No 3898/09, concerns an attempt by a researcher to obtain access to crime statistics.

In 2012, the Grand Chamber of the European Court of Human Rights confirmed the recognition by the Court of a right to information arising under Article 10 when it referred in *Gillberg v Sweden*,[64] to persons who had requested access to research files held by a university, as having rights 'under Article 10 … to receive information in the form of access to the public documents concerned*'*.65 The facts of this case diverged from those of a straightforward access to information scenario, in so far as they related to a rejection by the ECtHR of a claim by the head of the department of the university in which the requested records were held, that his conviction of a criminal offence for refusing to comply with a court order to give access to his research files amounted to a violation of his rights under Articles 8 and 10 of the ECHR. The decision nonetheless amounts to an acknowledgement by the Grand Chamber that a right to information can arise under Article 10.

B. The right to take part in public affairs

International human rights instruments contain several provisions designed to promote participation in government, for example, the right to take part in public affairs, the right to vote and the right to free elections. Article 25 of the ICCPR supports both participatory and representative models of democracy in so far as it protects the right to take part in the conduct of public affairs, directly or through freely chosen representatives. Article 25 also protects the right to vote and to be elected, and the right of access to the public service. Article 23 of the American Convention on Human Rights (the right to participate in government) protects the right to vote and to take part in public affairs in identical terms to Article 25 of the ICCPR. Article 13 of the African Charter on Human and Peoples' Rights confers on every citizen a right to 'participate freely in the government of his country, either directly or through freely chosen representatives'. Notwithstanding the fact that the original text of the ECHR contained a number of references to democracy,[66] no rights akin to those found in Article 25 ICCPR were included in it. The right to free elections was however added by Article 3 of the Protocol No 1 to the Convention but there is no right to take part in public affairs in the ECHR. As a result, O'Connell describes the provisions of the ECHR on specifically democratic rights as being very tentative.[67]

The rationale for recognising a right to information based on the right to take part in public affairs is that a well-functioning democracy requires an informed electorate. Models of participative democracy, in particular, require that citizens be sufficiently well-informed to enable them to effectively participate in government. Stiglitz, for example, argues that 'meaningful participation in democratic processes requires informed

64 Application No 41723/06, Merits, 3 April 2012..

65 Ibid. at paras 93 and 94.

66 For example, the preamble recognises the joint contribution that effective political democracy and human rights make to the attainment of 'those fundamental freedoms, which are the foundation of justice and peace in the world'. Also many of the rights contained in the ECHR to which restrictions may be applied cannot be restricted more than is 'necessary in a democratic society'.

67 O'Connell, 'The Right to Democracy', in Bechter and De Angelis (eds), *Problems of Democracy: Probing the Boundaries* (Oxford: Inter-Disciplinary Press, 2010) 48.

participants'.[68] Florini argues for a right to information deriving from the recognition of democratic rights in instrumentalist terms when she says that 'a broad right of access to information is fundamental to the functioning of a democratic society. The essence of representative democracy is informed consent, which requires that information about political practices and policies be disclosed'.[69] Roberts appears to favour this rationale for the recognition of a right to information over one based solely on the right to freedom of expression: 'the logic suggests that the access right is better understood as a corollary of basic political participation rights, rather than the right to freedom of expression alone'.[70] He recognises an instrumentalist basis for a right to information in this context when he suggests that political participation rights 'have little meaning if government's information monopoly is not regulated'. [71]

The link between access to information and participation in public affairs has also been recognised in international human rights jurisprudence. In *Gauthier v Canada* the UN Human Rights Committee relied on Article 25 of the ICCPR, along with the right to freedom of expression, in upholding a complaint of a journalist who had been denied access to press facilities in parliament.[72] The basis of the Committee's decision was that '[c]itizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and activities about the activities of elected bodies and their members.'[73]

On the other hand, the Inter-American Commission on Human Rights, in *Claude v Chile*,[74] deemed inadmissible the applicant's claim under Article 23 (the right to participate in government) that the approval by the Chilean Committee on Foreign Investment of a deforestation project to be carried out by a private corporation, related to activities of such fundamental public interest as to require access to information in order to facilitate direct citizen participation in their oversight. The basis of the Commission's decision was that since Article 23 refers to the right to participate in government either directly, or through freely elected representatives, in order to conclude that there had been a violation of Article 23 the Commission would have to find, not only that citizens were, as a result of the lack of information, unable to participate directly in government but also that they were unable to elect their representatives freely. While the Commission acknowledged that access to public information about the conduct of individuals who run for public office may impede the ability of citizens to elect representatives in a manner that can truly be considered 'free', it found that the applicants had not made a *prima facie* showing that they have been impeded from freely electing their representatives. Despite the restrictive approach to the scope of Article 23 that had been adopted by the Inter-

68 Stiglitz 'The Role of Transparency in Public Life', in World Bank, *The Right to Tell: The Role of the Mass Media in Economic Development* (Washington, D.C.: World Bank, 2002) 30.
69 Florini, 'Introduction; the battle over Transparency', in Florini (ed.), *The Right to Know: Transparency for an Open World* (New York: Columbia University Press, 2007) 3.
70 Roberts, 'Structural Pluralism and the Right to Know' (2001) 51 *University of Toronto Law Journal* 243 at 262.
71 Ibid.
72 (633/1995), CCPR/C/65/D633/1995 (1999) at para 13.4.
73 Ibid. at para 13.4.
74 Supra n 40. This decision is discussed further in the text to n 40 supra.

American Commission in finding this element of the applicant's claim to be inadmissible, the Inter-American Court of Human Rights took account of arguments concerning the role played by access to information in promoting participation in arriving at its decision in *Claude v Chile* that the withholding of information amounted to a violation of the right to freedom of expression in the American Convention. In particular, the Court took into account the fact that the information at issue could 'permit participation in public administration'.75

C. The right to respect for private life

Privacy rights are widely protected in international human rights instruments. For example, Article 17 of the ICCPR provides: '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.' The right to privacy is also protected by most regional human rights instruments.[76] Most of the case law pertaining to the right to privacy in international human rights treaties has been generated by the European Court of Human Rights. The Court has long held that Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, home, family and correspondence, can give rise to both positive and negative obligations on States.[77]

The European Court of Human Rights has adopted a broad approach to the scope of Article 8 in the context of access to information. Article 8 accommodates variations in the circumstances in which information is withheld by the State, encompassing both information, access to which has been refused, and information that the authorities have failed to make available on its own initiative. It also accommodates different categories of information, including information that is personal information of the requester, and information that the applicant has an interest in accessing, even though it is not personal to him or her. Examples of information the refusal of access to which has been found to come within the scope of Article 8 include: information relating to a period the applicant spent in care as a child;[78] records held by the security police about the applicant;[79] and medical records.[80] While the refusal of access to each of these categories of information has been found to amount to an interference with Article 8, the Court has held in some instances that such refusal was justified in terms of paragraph 2 of Article 8 which allows for restrictions on the right to respect for private life that are: in accordance with law; for a legitimate aim expressly provided for; and necessary in a democratic society. Thus while in *Gaskin v United Kingdom*,[81] a refusal on the part of the authorities to allow the applicant to access information relating to a period he had spent in care was held to amount to a violation of Article 8, the Court held in *Leander v Sweden*[82] that the

75 Ibid. at para 86.
76 Article 11 ACHR; Article 6 ECHR; Article 7 European Charter of Fundamental Rights and Freedoms. There is no right to privacy in the African Charter on Human and Peoples' Rights.
77 *Golder v United Kingdom* A 18 (1978); 1 EHRR 524; and *Airey v Ireland* A 32 (1979); 2 EHRR 305.
78 See *Gaskin v United Kingdom* supra n 51; and *M.G. v United Kingdom* 36 EHRR 3.
79 *Leander v Sweden*, supra n 48; see also: *Segerstedt-Wiberg v Sweden* 2006-VII; 44 EHRR 2.
80 *K.H. v Slovakia* Application No 32881/04, Merits, 28 April 2009.
81 Supra n 51.
82 Supra n 48..

applicant's right to access records held by the security police about him was outweighed by the State's interest in protecting its national security.[83]

The decision in *Guerra v Italy*[84] provides an example of a situation in which a failure, as opposed to a refusal, on the part of the State to provide information gave rise to a violation of Article 8. The Court held that Article 8 had been violated as a result of the State's failure to provide them with access to information that would have allowed them to assess the risk they might run from living in a town exposed to a severe environmental hazard.[85] Similarly, in *McGinley and Egan v United Kingdom*,[86] where the applicants were seeking to link their health problems to alleged exposure to radiation during their military service, the Court found that the alleged failure of the authorities to allow the applicants access to portions of their military medical records and to recordings of environmental radiation levels came within the scope of Article 8. The basis of this decision was that the documents in question contained information which might have assisted the applicants in assessing radiation levels in the areas in which they were stationed during the tests, and might have served to reassure them. [87]

Most of the information the withholding of which has been held to give rise to a violation of Article 8 consists of personal information *viz* child care records, social services records and medical records but the Court has also accepted that a violation of the right to respect for private life may arise in the case of the withholding of or failure to supply information which is not personal to the applicant, but in which he or she has a personal interest in obtaining access. For example, in *Guerra v Italy*[88] the information in question was not personal information of the requester but consisted instead of information that would have allowed the applicants to assess the risk they might run from living in a town exposed to a severe environmental hazard[89] while part of the disputed information in *McGinley and Egan v United Kingdom*[90] consisted of recordings of environmental radiation levels.

D. The right to a fair trial

The right to a fair trial is a classic civil and political right protected in all the major human rights treaties.[91] Weeramantry had presaged the use of the right to a fair trial to form the basis for a right to information in the early 1990s when he described the

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83 See also *Segerstedt-Wiberg v Sweden*,supra n 79, where the Court held that there was no violation of Article 8 on the basis that that a refusal of access 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.

84 *Guerra v Italy*, supra n 52, where this intereference with the applicants' Article 8 rights was found to be unjustified.

85 The Court went on to hold that this interference was not justified under the terms of Article 8(2) and thus gave rise to a violation of Article 8.

86 *McGinley & Egan v United Kingdom* 2000-I; 27 EHRR 1

87 The Court found however that there was no violation of Article 8 as the State had met its positive obligations arising under Article 8 by providing a procedure for applying for the records in question which the applicants had not used.

88 Supra n 52.

89 See also *Roche v United Kingdom* 2005-X; 42 EHRR 599.

90 Supra n 86.

91 ICCPR: Article 14; ECHR: Article 6; ACHR: Article 8; African Charter on Human and Peoples' Rights, Article 7.

enjoyment of that right as being 'dependent on information relating to the charges against the accused and the evidence on which they are based'.[92] The dependent relationship between the right to a fair trial and the right to information was acknowledged by the European Court of Human Rights in a civil law context in *McGinley & Egan v UK*.[93] The applicants had complained that as a result of the non-disclosure of portions of their military medical records and the records of radiation levels they had been denied effective access to a court in violation of the right to a fair trial contained in Article 6 of the Convention. The Court accepted that an interference with the right to a fair trial could arise out of a restriction on access to information in the following terms:

> if it were the case that the respondent State had, without good cause, prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would have assisted them in establishing … that they had been exposed to dangerous levels of radiation, this would have been to deny them a fair hearing in violation of Article 6 § 1.[94]

A similar approach was adopted by the Inter-American Court of Human Rights in *Claude Reyes v Chile*[95] where the Court held that the right to a fair trial in the American Convention on Human Rights was violated *inter alia* by the failure of an administrative body to justify the withholding of information. As noted, the case originated in a request for access to information relating to a deforestation project in respect of which the body to which the request was submitted, the Committee on Foreign Investment, did not adopt any written decision justifying its refusal to disclose all of the requested information. The applicant made a complaint under the American Convention on Human Rights arguing *inter alia* that there had been a violation of Article 8 of the Convention which protects the right to a fair trial. The Court found that the Committee's failure to adopt a 'duly justified' written decision which would have provided information regarding the reasons for the decision not to disclose part of the information and would, in addition, have established whether this restriction was compatible with the Convention, resulted in a violation of Article 8.[96]

E. The right to life

The right to life is the most fundamental right of all and it is strongly protected in international human rights treaties.[97] The evolving jurisprudence of the European Court of Human Rights concerning the positive obligations emanating from Article 2 supports a duty on the part of States to safeguard the lives of those within its jurisdiction.[98] In the leading decision of *Osman v United Kingdom*,[99] the Court said that an interference with Article 2 will occur where the authorities know of the existence of a real and immediate

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92 Weeramantry, supra n 19 at 102.
93 2000-I; 27 EHRR 1.
94 In the event, the Court found no violation of Article 6 as the applicants had failed to use a procedure available to them for the disclosure of the documents.
95 Supra n 40.
96 Ibid. at para 122.
97 Article 6 ICCPR; Article 2 ECHR; Article 4 ACHR; and Article 4 African Charter on Human and Peoples' Rights.
98 *Osman v United Kingdom* 1998-VIII; 29 EHRR 245; and *Kilic v Turkey* 2000-III; 33 EHRR 1357.
99 Ibid..

risk to the life of an identified individual or individuals from the criminal acts of a third party and they fail to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Measures aimed at safeguarding life could include the provision of information to those whose lives are known to be at risk. As demonstrated by the decision of the European Court of Human Rights in *Oneryildiz v Turkey*,[100] the right to life can also support a right to information in broader circumstances than those provided for in *Osman*. This case concerned a shanty town that had been established on a hilltop below a refuse tip. The resposible local authority had received an expert report informing them of a very real risk of a build-up of methane at the refuse tip and the possibility of a landslide, but had taken no action. Thirty-nine people died as a result of a methane explosion which caused a landslide. One of the grounds on which the Government was found to have violated the right to life was that it was unable to show that any measures were taken to provide the inhabitants with information 'enabling them to assess the risks they might run as a result of the choices they had made'.[101] Again the violation in question arose out of a failure to supply information rather than a refusal to supply it.

D. Economic and social rights

Economic and Social Rights are protected at UN by the International Covenant on Economic, Social and Cultural Rights and also at regional level.[102] The link between access to information and the realisation of economic and social rights is the subject of increasing recognition. A report published by the NGO, Article 19, and entitled 'Access to Information: An Instrumental Right for Empowerment' asserts that 'The right to access public information about one's economic, social and cultural rights is not only related to these rights – it is a precondition for their realisation'.[103] A number of General Comments issued by the UN Committee on Economic, Social and Cultural Rights on the interpretation of the rights protected by the International Covenant on Economic, Social and Cultural Rights have emphasised the importance of access to information in realising those rights. For example, the General Comment issued in respect of the right to social security requires that social security systems should 'ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner'.[104]

The right to information was accepted by the European Committee of Social Rights in *Maragopoulous Foundation for Human Rights v Greece*,[105] as a necessary condition of the enjoyment of specific social and economic rights. The Committee found

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100 2004-XII; 41 EHRR 325.

101 Ibid. at para 108.

102 Europe: European Social Charter; Americas: Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights: and Africa: African Charter on Human and Peoples' Rights.

103 Article 19, *Access to Information: An Instrumental Right for Empowerment* (London: Article 19, 2007), at para 8.1.

104 European Committee on Economic and Social Rights, General Comment No 19: The right to social security (art. 9), 4 February 2008, E/C.12/GC/19.

105 Case No 30/05, 2 February 2007.

that the Greek government, in failing to meet its obligations regarding the provision of information concerning pollution caused by lignite mining had violated rights protected under the European Social Charter. In particular, the Committee found breaches of *inter alia* the right to health (Article 11) and the right to safe and healthy working conditions (Article 3). The right to health was said to impose on the Greek government a duty to inform and educate the public about environmental problems. By not applying satisfactorily the legislation mandating the provision of information to the public about the application of environmental criteria in the approval of projects, the government was held to have failed to meet its obligations under the right to health (Article 11). The Committee also found that the government did not provide sufficiently precise information to meet its obligation under Article 11 to develop a valid educational policy aimed at persons living in lignite mining areas. With respect to the right to safe and healthy working conditions, the Committee found that the state had a duty under Article 3 to provide precise and plausible explanations and information on occupational accidents and on measures taken to monitor the application of the relevant health and safety regulations. The government had failed in this obligation *inter alia* by not supplying precise data on the number of accidents in the mining sector.

3. Scope of the right to information in international human rights law

While advocates of the right to information have enthusiastically welcomed recent developments in the case law of the Human Rights Committee, the Inter American Court of Human Rights, the European Court of Human Rights and the European Committee on Social Rights, the question arises whether these developments, by virtue of their primarily instrumental focus, limit the scope of the right to information. In order to be as comprehensive as possible a right to information should be unlimited in scope in terms of:

1. The context in which the right may be invoked
2. The class of requester who may invoke the right
3. The nature of the information that may be sought
4. The purpose for which access may be sought

This list of requirements should not be understood as suggesting that the right to information should be absolute. In common with almost all other rights protected by international human rights treaties, the right to information may, in certain circumstances, be restricted. What is at issue here is the shape of the right to information in advance of the imposition of any legitimate restrictions on its operation. A comparison under these headings of the right to information, as it has evolved to date from the decisions of the international human rights Courts and treaty monitoring bodies, with the right to information provided for under the only international human rights instrument to expressly guarantee a right of access to information, the Council of Europe Convention on Access to Official Documents, clearly demonstrates the shortcomings in the scope of the right to information as it has emerged from the jurisprudence of the human rights courts and treaty monitoring bodies.

A. The context in which the right may be invoked

While the access right provided for in the Convention on Access to Official Documents applies in all contexts where information is held by public authorities, the upholding by the international human rights bodies of a right to information based on the right to respect for private life, the right to a fair trial, the right to life, and economic and social rights is clearly context dependent in so far as such rights can deliver a right to information in certain circumstances only; for example where the information at issue relates to the requester or where the requester has a particular interest in accessing it (right to respect for private life); where the information is needed in connection with legal proceedings (right to a fair trial); where the information is needed to protect life (right to life) or where the information is needed to further economic or social rights, such as the right to health. Given the narrow contexts in which these rights can form the basis of a right to information, they will not be discussed further in terms of their potential to form the basis of a general right to information.The right to take part in public affairs and the right to freedom of expression clearly offer a much broader basis for engagement with the right to information. These rights will be further compared with the access right provided for in the Convention on Access to Official Documents in terms of the other criteria for a comprehensive right to information: the class of requester who may invoke the right; the nature of the information that may be sought; and the purpose for which access may be sought.

B. The class of requester who may invoke the right

The right of access provided for in the Convention on Access to Official Documents is unlimited in terms of the class of requester who can invoke that right in so far as it guarantees 'the right of everyone, without discrimination on any ground, to have access'[106] to information and requires that 'requests for access to official documents shall be dealt with on an equal basis'.[107] The scope of the right to take part in public affairs provided for in Article 25 of the ICCPR is, apart from the fact that it is confined to 'every citizen' as opposed to 'everyone', is inclusive. While applicants who have initiated proceedings before the Human Rights Committee under Article 25 have invariably had some degree of political involvement, for example as political activists, candidates for political office or for membership of political parties,[108] or, in the case of *Gauthier*, as a parliamentary reporter, it is clear that the protection afforded by Article 25 is not confined to such groups and the Human Rights Committee has not expressly confined the enjoyment of the rights conferred by Article 25 to those involved in political activities. The right to freedom of expression in all the major human rights treaties similarly applies to 'everyone' but the decisions of the treaty bodies have emphasised the watchdog role of requesters who invoke the right to freedom of expression in order to gain access to information. In *Toktakunov v Kyrgyzstan*[109] the basis of the UN Human Rights Committee's decision that the authorities had violated Article 19 was the performance by the applicant of '''watchdog" functions on matters of legitimate public concern'. This decision clearly echoed the decision of the European Court of Human Rights in *Tarsasag*

106 Article 2(1).
107 Article 5(3).
108 A perusal of the cases arising under Article 25 shows that they consist largely of political activists, candidates for political office or for membership of political parties.
109 Supra n 36..

v Hungary[110] which turned on the fact that the applicant, the Hungarian Civil Liberties Union, was acting as a 'social watchdog' though *Toktakunov* goes further by contemplating the performance of such functions by individuals as well as organisations. These decisions suggest that while both the right to take part in public affairs and the right of freedom of expression appear to apply to all, the right to information that has evolved from the right to freedom of expression, in particular, has been associated with the fulfilment of a 'watchdog' role by the seeker of information.

C. The nature of the information that may be sought

The right of access provided for in the Convention on Access to Official Documents is unlimited in terms of the nature of the information to which it applies in that it covers 'information recorded in any form, drawn up or received and held by public authorities'.[111] The strong emphasis placed by General Comment No 25 on the role of public affairs in the conduct of formal political processes suggests that the focus of information rights arising under Article 25 of the ICCPR is on the provision of access to information that concerns the conduct of political processes.[112] This is reflected in the approach of the UN Human Rights Committee. In *Gauthier*, for example, the Human Rights Committee couched its decision in favour of access in terms of the information at issue being information 'about the activities of elected bodies and their members'. It appears therefore that the right to information that has emerged from the right to take part in public affairs is limited to information of a political nature.

The scope of the right to information that has developed under the umbrella of the right to freedom of expression would also appear to be limited to particular categories of information. In the landmark case of *Claude Reyes v Chile*,[113] for example, the Inter-American Court of Human Rights emphasised the public interest aspects of the requested information. In particular, the Court noted that the information the State had failed to provide was 'State-held information of public interest'. The European Court of Human Rights has also paid attention to the nature of the information to which access has been sought. In *Tarsasag v Hungary*[114] for example, the Court referred to the fact that the information in question was 'information on a matter of public importance', while in *Kenedi v Hungary*,[115] the Court noted that the information at issue consisted of 'original documentary sources' required for legitimate historical research. It appears therefore that information to which the right to information arising under both the right to take part in public affairs and the right to freedom of expression might apply, would have to meet some sort of public interest qualitative test.

D. The purpose for which access may be sought

110 Supra n 59.
111 Article 1(2)(b).
112 UN Human Rights Committee, General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (art.25), 12 July 1996, CCPR/C/21/Rev.1/Add.7.
113 Supra n 40.
114 Supra n 59.
115 Supra n 61.

The access right provided for under the Convention on Access to Official Documents is unlimited in terms of the purpose for which access may be sought in so far as no requirements as to the reasons why access is sought are imposed by the Convention. The irrelevance to the exercise of the right of access of the purpose for which access is sought is supported by the inclusion in the Convention of an express prohibition on the imposition on requesters of obligations to give reasons for accessing requested information.[116] The decisions of the UN Human Rights Committee regarding Article 25 of the ICCPR that pertain to access to information have all related to attempts on the part of the individuals concerned to participate in political processes of one kind or another, for example, to stand for office or to vote[117] or, in Gauthier's case, to obtain access to parliamentary press facilites. This suggests that the right to information that arises under Article 25 is limited to sitations where access to information is sought in connection with participation in political activities, or the dissemination of information concerning such activities. This is in keeping with General Comment No 25 issued by the UN Human Rights Committee in respect of Article 25 of the ICCPR which refers to the conduct of public affairs in the following terms:

> The conduct of public affairs … is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.[118]

The scope of Article 25 in forming the basis of a general right to information was also undermined by the interpretation of the equivalent provision of the Inter-American Commission on Human Rights (Article 23) as requiring evidence of the imposition of an impediment on both an individual's right to participate directly in government and their right to freely elect their representatives. While the Commission acknowledged in *Claude v Chile* that '[lack of] access to public information about the conduct of individuals who run for public office may impede the ability of citizens to elect representatives in a manner that can truly be considered "free"',[119] establishing a link between a lack of access to information and interference with the 'free' election of representatives could prove difficult.

With regard to the right to freedom of expression, the international human rights tribunals have taken account in arriving at their decisions of the purposes of access and they have, in particular, highlighted the public nature of such purposes. In *Claude v Chile*, for example, the Inter-American Court of Human Rights linked the right of access to information that derived from the right to freedom of expression with the requesters' objective of using the requested information to 'assess the commercial, economic and social elements of the … project, measure its impact on the environment … and set in

116 Article 4(1).
117 See, for example, *Massera v Uruguay* (5/1977, R.1/5), CCPR A/34/40/1977 (1979) at paras 2 and 10; and *Npaka-Nsusu v Zaire* (157/1983), CCPR/A/41/40/1983 (1986) at paras 8.2 and 10.
118 UN Human Rights Committee, General Comment No 25, supra n 112 at para 5.
119 Case 12.108, *Claude Reyes and others v Chile* Report No 60/03 (2003) at para 61.

motion social control of the conduct of the State bodies that intervene or intervened in the development of the project'[120] as well as that of monitoring the 'possible indiscriminate felling of indigenous forests in the extreme south of Chile'.[121] The European Court of Human Rights in *Tarsasag v Hungary*[122] emphasised the role of the right of access to information in facilitating 'participation in public debate on matters of legitimate public concern'[123] while in *Kenedi v Hungary*,[124] the Court took note of the fact that the purpose for which the information was sought was the conduct of 'legitimate historical research'[125] to enable the requester to publish an 'objective study' on the functioning of the Hungarian State Security Service.[126] These decisions suggest that the purpose for which access is sought is a factor that is viewed by the international human rights tribunals as relevant to the determination as to whether or not there is a right of access to the information in question. Such purpose, it would also appear, must be political in character or be concerned with monitoring and/or controlling government activities.

E. Consequences of the placing of limitations on the right to information

It would appear from the foregoing that recognition of a right to information arising from both the right to take part in public affairs and the right to freedom of expression is limited, both in terms of the nature of the information sought and in terms of the purpose for which it is sought. Those who seek access to information to participate in political activities or to participate in informed public debate on matters of legitimate public concern should be a good position to invoke their right to such information under the right to take part in public affairs or the right to freedom of expression, but only if the information they seek is information concerning political processes or is of public interest and it is sought for purposes that are political in nature or are at least concerned with monitoring or exerting other forms of control over government activities.

Limiting the right to information to the realm of political/public interest contexts gives rise to both conceptual and practical difficulties. At a conceptual level, such a limitation does not sit well with one of the basic principles of information access laws: that access rights accrue to everyone, regardless of their capacity to establish any particular interest in accessing the requested information,[127] and that the motive of a requester in seeking access to information should therefore be disregarded. This principle is expressly protected in domestic FOI legislation in a number of jurisdictions,[128] while, in others, it is supported by decisions of the courts or other enforcement bodies.[129] A

120 Supra n 40 at para 99.
121 Ibid. at para 99.
122 Supra n 59.
123 Ibid. at para 26.
124 Supra n 61 at para 43.
125 Ibid.
126 Ibid. at para 40.
127 Ackerman and Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 *Administrative Law Review* 85 at 93.
128 See, for example, Australia: section 11(2) Freedom of Information Act (Cth); and Ireland: section 8(4) Freedom of Information Act 1997.
129 For example, in Canada: the decision of the Canadian Supreme Court in *Canada (Information Commissioner) v Canada (Royal Canadian Mounted Police Commissioner)* [2003] 1 S.C.R. 66, 2003 SCC

requirement that requests for access to information have a political or public interest dimension focuses undue attention on the motives of the requester thus undermining this principle. While the use of government information for the purposes of monitoring government activities, or, more broadly, for political purposes, constitute important justifications for the recognition of a right to information, there are other justifications for access. As Weeramantry has pointed out: '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 realms of social, economic, cultural and technological information.'[130] In particular, requesters may wish to use the right to information to secure access to information in circumstances where the gaining of access to the requested information might not immediately be seen as serving a broad public interest, but it is nonetheless of huge significance to the requesters personally and is potentially of equal importance to others who may find themselves in a similar position. Such circumstances could include requests aimed at assisting requesters to secure their entitlements, to obtain access to information that might shed light on grievances they harbour, to help to clear their names in the event of allegations having been made against them, and to obtain access to information relating to others, such as family members.[131] While the use of information rights in this context may be primarily motivated by personal concerns, that is not to say that the granting of access to information in such circumstances cannot bring benefits to the wider community, for example, through enabling individuals to use the information in a way that sets a precedent for the treatment of others who find themselves in a similar position. Locating the right to information within the orbit of the right to freedom of expression or the right to take part in public affairs or any of the other rights that have on occasion yielded a right to information in particular circumstances means that many of those who seek information for these purposes may fail to meet the threshold for protection of their right to information.

Restricting the right to information to the political realm is also at odds with the reality of information access practice in terms of the class of requester who may invoke the right, the nature of the information that may be sought, and the purpose of access requests. Experience with access laws at domestic level shows that requesters are a heteregeneous group. While statistics on the categories of requesters are not widely available, those that exist reveal that comparatively few FOI users qualify as 'social watchdogs'. A US study showed, for example, that only six per cent of FOI requests came from the media while two per cent came from non-profit organisations.[132] The Annual Report of the Scottish Information Commissioner for 2010/2011 revealed that just thirteen per cent of requesters fell into a category that might be described as that of a

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8 (S.C.C.) at para 32; and in the United Kingdom the decision of the Information Tribunal in *S v Information Commissioner and the General Register Office* EA 2006/0030, 9 May 2007, at para 19.

130 Weeramantry, supra n 19 at 1001.

131 McDonagh and Paterson, 'Freedom of Information: Taking account of the circumstances of individual applicants' (2010) 3 *Public Law* 505.

132 Coalition of Journalists for Open Government, *Frequent Filers: Businesses Make FOIA Their Business*, 3 July 2006, available at: http://www.cjog.net/documents/who_uses_foia_cx.pdf [last accessed 19 December 2012]. More than sixty per cent of requests came from commercial interests while a third of requesters were categorised as 'other' and consisted mostly of private citizens.

social watchdog[133] while the corresponding figure for Ireland was eleven per cent.[134] While a survey undertaken by Hazell, Worthy and Glover suggests that the proportion of UK FOI requesters who could be described as social watchdogs would appear to be quite high by international standards in so far as thirty-seven per cent of requests were found to have emanated from a combination of campaign workers, the media, political parties and charities,[135] more than sixty per cent of UK requesters do not fall into the category of 'social watchdog'.

While data on the nature of the information sought and the purpose of access requests is similarly scarce, it appears from the few studies that have been undertaken that domestic FOI laws are used at least as much for personal or business purposes as for political/public interest purposes. Empirical work done by Hazell, Worthy and Glover on the use to which FOI laws are put in the UK, for example, showed that the UK FOI Act is put to a variety of uses and that it is used 'as much a tool for "non-political" activity or personal activity as it is for political activity'.[136] A study of the use of the Irish FOI Act in the context of local government revealed that many requests concern matters of individual concern to requesters.[137]

A further problem arising from the adoption of an instrumental approach to the right to information is that the linking of the right to information with other rights may stretch the scope of that right beyond its appropriate limits. Sedley has commented on the incongruity of the recognition of a right to information under the umbrella of the right to respect for private life (Article 8) of the ECHR in following terms: 'There is something odd about discovering a right to information in the entrails of Article 8, which says nothing about information…'.[138] In extreme cases, the shoehorning of the right to information into other rights may have negative consequences for the right used as the basis of the recognition of the right to information. Professor Neuman, in his individual concurring opinion in the UN Human Rights Committee decision in *Toktakunov v Kyrgyzstan,* warned that establishing a right of access to government held information under the right to freedom of expression could 'undermine more central aspects of freedom of expression'.[139] The right of access to government information can, in

133 Those of voluntary/campaign organisation, media or elected representative: Scottish Information Commissioner, *Freedom of Information Annual Report 2010/2011* at 12.

134 This figure is made up of journalists and elected representatives: Office of the Information Commissioner, ibid. at 56. Note that in the case of the Irish statistics the figures include requests made for access to personal information (which amounted to approximately seventy-five per cent of total requests). As most requests made by media and elected representatives are likely to be non-personal the proportion of requests for non-personal information emanating from the media and elected representatives is likely to surpass the percentages given here.

135 Hazell, Worthy and Glover, *Does FOI work? The Impact of the Freedom of Information Act 2000 upon British Central Government* (London: Palgrave Macmillan, 2010), Appendix II.

136 This conclusion was based on the results of a survey of requesters, Hazell, Worthy and Glover, Ibid. at 237.

137 McDonagh, 'The Impact of Freedom of Information on Irish Local Government', in Chapman and Hunt (eds), *Freedom of Information: Local Government and Accountability*, (United Kingdom: Ashgate, 2010) at 812.

138 Sedley, 'Information as a Human Right', in Beatson and Cripps (eds), supra n 20 at 245.

139 Supra n 36 at 12.

Neuman's opinion, tolerate restrictions on its exercise in circumstances where the suppression of the right to freedom of expression would not be justified. For example access to information might, according to Neuman, be justified on the basis of cost or the impairment of government functions. Placing the two rights together, in Neuman's opinion, runs the risk that restrictions that might be appropriate in the context of the exercise of the right to information could unjustifiably be imposed in respect of the enjoyment of the right to receive information. His core argument is that 'The traditional right to receive information and ideas from a willing speaker should not be diluted by subsuming it in the newer right of access to information held by government'.

4. Is there an intrinsic right to information?

In light of the difficulties associated with pursuing the right to information from an instrumental perspective, the question arises whether it is appropriate to view the right to information as an intrinsic right rather than an instrumental right. Stiglitz supported the existence of an intrinsic right to information when, having acknowledged that greater openness could be justified on instrumental grounds as a means to an end, he continued '[b]ut I also believe that greater openness has an intrinsic value. Citizens have a basic right to know'. Florini, too, argued that access to information is not only 'a necessary concomitant of the realization of all other rights' but is also 'a fundamental human right'.[140]

According to Sen, the recognition of claims as human rights depends on their capacity to 'survive open public scrutiny'. On the basis of this test, it can be argued that the right to information meets the requirements for recognition as an intrinsic right. In particular, one can point to the recognition of a stand-alone right to information at international level in the Council of Europe Convention on Access to Official Documents and (in so far as documents of the EU institutions are concerned) at the right of access to information in the EU Charter of Fundamental Rights and, at domestic level, to the constitutions of a growing number of jurisdictions which contain a stand-alone right to information not dependent on other rights.[141]

One can also point as evidence of the acceptability of the right to information, to the role played by access to information in furthering principles that have wide acceptance as pre-requisites of democratic societies, namely those of transparency and accountability in government. Access to information has been widely linked to the achievement of both transparency and accountability. Transparency can be understood as 'a means to achieve the end of a more responsive state that more effectively achieves democratically agreed-upon ends'.[142] While its scope extends beyond access to information,[143] it is clear nonetheless that access to information plays a pivotal role in the

140 Florini, 'Introduction; the battle over Transparency' in Florini (ed.) *The Right to Know: Transparency for an Open World* (New York: Columbia University Press, 2007) 3.
141 See www.right2info.org.
142 Fenster, 'Seeing the State: Transparency as Metaphor' (2010) 62 *Administrative Law Review* 617 at 623.
143 Stirton and Lodge, 'Transparency Mechanisms: Building Publicness into Public Services' (2001) 28 *Journal of Law and Society* 471.

achievement of transparency.[144] In terms of its capacity to enhance accountability, Franschett points out that FOI laws 'can be used for "exposing" wrongdoing or highlighting areas of conflict within government, thereby serving the value of accountability' while Bishop suggests that 'access to information is necessary in order to hold governments accountable and to discover and prevent government corruption'.[145] Some FOI laws refer expressly to accountability as being amongst their aims. The New Zealand Official Information Act, for example, includes as one of its purposes 'to promote the accountability of Ministers of the Crown and officials'.[146] The concept of control which is at the core of accountability was highlighted by Curtin who referred to a 'general right of access for citizens to public documents as facilitating the citizens' control of the actions and inactions of public bodies'.[147] While Bovens also acknowledges the role of information rights in enhancing social control and the democratic accountability of government, he links access to information to a broader conception of citizenship which 'concern[s] first and foremost the social functioning of citizens, not only in relation to the public authorities, but also in their mutual relations and their relations with private legal entities'.[148] The role of access in facilitating control has also been recognised in access to information jurisprudence. In *Claude v Chile*,[149] for example, the Inter American Court of Human Rights found that lack of access to the requested information meant that the applicants were restricted in their abilities to carry out 'social control of public administration'.

While Wenar points out that arguments supporting the existence of an intrinsic right cannot, by virtue of the status based nature of such rights, be based on the good effects of the recognition of such a right since '[i]n a sense the argument is supposed to show that the morality that includes rights is already true',[150] it is nonetheless worth noting the potential beneficial effects of the recognition of an intrinsic right to information. The suggested move away from an instrumental justification for the recognition of the right to information towards classifying it as an intrinsic right would have a number of advantages. In the first place, it would remove the requirement to link the right to information with other existing rights, which, as we have seen can have the effect of limiting the scope of the right to information. In particular, the recognition of the right to information as an intrinsic right would, as Nagel has suggested in the context of his discussion of the right to free speech, address the limitations identified in the instrumental approach to the recognition of this right by extending the justification for the right to information 'beyond the domain of political advocacy, where its instrumental value is clearest.'[151] The content-neutral character of an intrinsic right would also render

144 Hale, 'Transparency, Accountability and Global Governance' (2008) 14 *Global Governance* 73.
145 Bishop, *Internationalizing the Right to Know: Conceptualizations of Access to Information in Human Rights Law* (unpublished Ph.D. dissertation, University of North Caroline, Chapel Hill (2009)) at 69.
146 Section 4(a)(ii).
147 Curtin, 'Citizens' fundamental Right of Access to EU Information: An Evolving Digital Passepartout?' (2000) 37 *Common Market Law Review* 7 at 8.
148 'Information rights: Citizenship in the Information Society' (2002) 10(3) *The Journal of Political Philosophy* 317 at 327.
149 Supra n 40.
150 Wenar, supra n 10 at 181.
151 Nagel, supra n 3 at 96.

it a good fit for the right to information, one of the underlying principles of which is that access to information should be unlimited in terms of the nature of the information to which it applies. Focusing on the right to information as an intrinsic right would also address the problem of the failure of instrumentalist approaches to pay sufficient attention to individuals who, as we have seen, are frequent invokers of the right to information for personal purposes and whose concerns, in any case, often mirror those of other individuals. Another advantage of approaching the right to information as an intrinsic right is that it would remove the possibility of unforeseen negative consequences for the rights to which the right to information might be linked. Realisation of a stand-alone right to information would of course depend on the existence of the political will to include such a right in the major human rights treaties. The growing recognition of the right to information at both domestic and international levels, it is suggested, should render the establishment of such a stand-alone right to information difficult to resist.