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# The Human Right to Information and Transparency

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## 1. Introduction

One way to explore the place of the right to information in international law is to start by noting its understanding in a globally significant national jurisdiction, that of South Africa. Indeed, the inauguration of the right of access to information in the South African legal system itself took place at the intersection of international and national law. In its *Certification* case, the Constitutional Court of South Africa examined the position of the right of access to information and noted that ‘freedom of information [was] not a “universally accepted fundamental human right”, but is directed at promoting good government’. This was significant for this judicial decision on the validity of South Africa’s new constitution, because the right was suspended for three years and ‘[h]ad freedom of information indeed been a fundamental human right or one of the basic structural requirements for the new dispensation, its suspension would have been inconsistent with the character of the state envisaged by the drafters’.<sup>1</sup>

More than ten years later, in *Brümmer v. Minister for Social Development and Others*,<sup>2</sup> the Constitutional Court of South Africa

<sup>1</sup> Constitutional Court of South Africa, *Certification of the Constitutional of the Republic of South Africa, 1996*, Judgment of 6 September 1996, Case CCT 23/96, para. 85; Constitutional Court of South Africa, *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, Judgment of 4 December 1996, Case CCT 37/96.

<sup>2</sup> Constitutional Court of South Africa, *Brümmer v. Minister for Social Development and Others*, Judgment of 13 August 2009, Case CCT 25/09, [2009] ZACC 21, paras. 62–63; see also Constitutional Court of South Africa, *President of the Republic of South Africa v. M & G Media Limited*, Judgment of 29 November 2011, Case CCT 03/11, [2011] ZACC 32.

further explicated its understanding of the importance of the right of access to information:

The importance of this right (. . .) in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information.'

Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. (. . .) Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.

As is clear from this passage, the judges of the Constitutional Court view and analyze the right to information within a framework of values that includes the value of transparency and places the principle of transparency at the core of this national constitution.

The argument for the recognition of the right to information in international law has continued to strengthen since the Constitutional Court's *Certification* decision. This chapter examines the human right to information in international law and makes the argument that this human right is a significant vehicle for promoting transparency. In section 2, it makes some observations concerning the conceptual foundations of the right to information and the right's relationship to the broader concept of transparency. Section 3 will note the current state of the human right to information in international law doing so from an African perspective. The final section presents a set of questions for further consideration (noting some linkages with South African post-apartheid jurisprudence) as well as some concluding observations, organized in conceptual terms based on the right of information.

Both of these cases deal directly with the interpretation of South Africa's freedom of information law, the Promotion of Access to Information Act (PAIA). Iain Currie/Jonathan Klaaren, *The Promotion of Access to Information Act Commentary* (Westlake: SiberInk, 2002). For an excellent examination of the PAIA's successes, failures, and challenges, see Kate Allan (ed.), *Papers Wars: Access to Information in South Africa* (Wits University Press, 2009).

## 2. The Relationship between the Human Right to Information and Transparency

One way of understanding the relationship between the human right to information and transparency is to see the human right to information as a vehicle for increasing a certain amount of transparency or (stated somewhat differently) as a vehicle for furthering the ends or some of the ends contained within the concept of transparency. Another way of understanding the relationship between the two concepts would be to explore the logical relationship: is the right to information necessary for transparency and is it sufficient for transparency? For purposes of this chapter, the right to information is assumed to be neither necessary for nor sufficient for transparency.<sup>3</sup>

Despite the explosion of transparency literature, there appears to be no dominant conceptual definition of transparency. For instance, in the chapters of the current volume, there are a variety of definitions, an intended consequence of the welcome approach of the editors. In my view, we should not take from this variety of definitions and concepts the lesson that there is nothing to transparency worth talking about. However, we must recognize that transparency's definition is dispersed.

Further, given the disparity of definitions of the concept of transparency, I would argue to discern and hold open at least three aspects of our enquiry into the right to information and transparency. First, we should recognize that transparency itself can be instrumentally rational towards other values. Transparency can promote, for instance, the values of accountability and participation. This potential relationship of transparency with respect to other values seems worth recognizing, especially in light of the relative paucity and relative lack of clarity on the definition of transparency. Holding onto the possibility of broad definitions of transparency allows for transparency in narrow definitions to play an intermediating role in promoting values or concepts that might be seen to reside in more fulsome definitions of transparency (yet outside a narrow definition). It is of course also the case that the relationship between transparency and other values may not always be a positive one. To take one oft-stated example, there may be a negative relationship between transparency and privacy. Indeed, this is undoubtedly true in some contexts. For instance, greater public access to information about

<sup>3</sup> Benedict Kingsbury/Megan Donaldson, 'Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance Institutions', chapter 19 in this volume.

an individual – greater transparency of that individual’s personal information – may allow for and facilitate an invasion of that individual’s privacy. While the relationship of privacy and transparency is better seen as complex rather than a zero-sum relationship, the example of privacy should serve to remind us that transparency is not an unalloyed universal public good.

Second, we should recognize the critical importance of the normative angle in any investigation of the right to information and transparency. In a recent article, Roy Peled and Yoram Rabin surveyed the right to information’s normative justifications.<sup>4</sup> They see the right to information as ‘a multidimensional right. It serves a range of individual and group interests and rests on various theoretical justifications. The four major justifications are: (a) the political democratic justification; (b) the instrumental justification; (c) the proprietary justification; and (d) the oversight justification’.<sup>5</sup> Their discussion of the fourth is of particular interest, since it is explicitly a governance, rather than a rights based, justification. Without sketching a full-scale normative theory or even mounting a defence of the proposition, this chapter will assume that an adequate (albeit not necessary complete) theoretical defence for both transparency and the right to information may be founded on justification as a concept of justice.<sup>6</sup> Broadly speaking, this normative

<sup>4</sup> Roy Peled/Yoram Rabin, ‘The Constitutional Right to Information’, *Columbia Human Rights Law Review* 42 (2011), 357–401; at 358 Peled and Rabin argue ‘the right to information should be seen as a constitutional right, due to its political nature and its unique role in protecting democracy’. See also Patrick Birkinshaw, *Freedom of Information: The Law, the Practice, and the Ideal* (Cambridge University Press, 2010).

<sup>5</sup> Peled/Rabin, ‘Constitutional Right to Information’ 2011 (n 4), 360.

<sup>6</sup> The specific relationship of transparency, openness, accountability and responsiveness in the South African constitution was perceptively yet incompletely analyzed by Etienne Mureinik. Before his death in 1995, Mureinik was an administrative law scholar at the cusp of the constitutionalization of South Africa’s open democracy. See e.g. David Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’, *South African Journal on Human Rights* 14 (1998), 11–37; and Karl E. Klare ‘Legal Culture and Transformative Constitutionalism’, *South African Journal on Human Rights* 14 (1998), 146–188. In his enduring conceptualization, the new constitutional democracy replacing apartheid was to be based on a culture of justification. Etienne Mureinik, ‘A Bridge To Where? Introducing the Interim Bill of Rights’, *South African Journal on Human Rights* 10 (1994), 31–48. The Constitutional Principles (which Mureinik helped to draft) upon which the South African interim and final constitutions were based held as follows: ‘[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness’ (principle VI) and ‘[p]rovision shall be made for freedom of information so that there can be open and accountable administration at all levels of

assumption fits within the tradition of Jürgen Habermas and the Frankfurt School. Indeed, there is some new work on justification as a new theory of justice that has been recently published.<sup>7</sup>

Third, we should in my view embrace and even further the diversity of concepts embodied within the right to information. In earlier work elaborating upon the conceptual foundations of the right to information as entrenched in the South African constitution, I have argued that there are four components to this right: a democracy-supplementing right, an individual-autonomy right, a market-supplementing right and a socio-economic right:

The *first* concept underlying the right of access to information is the notion that access to information supplements democracy. This understanding of the right of access to information is its most prevalent and common understanding. (...) Either in the form of representative democracy where access to information serves as a check on governmental power or in the form of participatory democracy where access to information allows citizens to partake in genuine public debate, the right finds its traditional backing in democratic rationales. Likewise, the constitutional value of transparency, the value most closely linked to the right of access to information, is itself a means to democratic accountability and participation.

The *second* concept underlying the right of access to information is that access to information is an important supplementation of the market. Here, the disclosure of information is seen as going beyond a public role, playing instead a role in allowing the market in goods and services to self-regulate. More information leads to more informed consumer choices. Transparency and the disclosure of information can be an effective and significant facilitator of economic efficiency. In its most radical form, the concept argues that the provision of information can restructure the very rules of the market itself.

The *third* concept underlying the right of access to information is the idea that access to information reinforces or is indeed constitutive of individual autonomy. Often the right to privacy is considered to be in two parts: one protecting personal autonomy and the other protecting

government' (principle IX). Mureinik argued that what he acknowledged to be the ambiguous concept of responsiveness was itself a means for advancing two separate and distinct values: participation and accountability. Etienne Mureinik, 'Reconsidering Review: Participation and Accountability', *Acta Juridica* 35 (1993), 35–46. This chapter assumes an analogous argument could be made regarding transparency. This should be contrasted with definitions of transparency that specifically exclude element of accountability and participation such as Julie Maupin, 'Transparency in International Investment Law: The Good, the Bad and the Murky', chapter 6 in this volume.

<sup>7</sup> Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2011).

information about a particular person. In the negative sense, where the right to privacy protects the individual from having information about themselves published without consent, it is perhaps the right to privacy more than the right of access to information that is implicated. (...) But with respect to the positive sense, to the extent that an individual has a right to information in order to pursue self-development and actualisation, the access to information right has a dimension that comes into its own and is separate from privacy.

The *fourth* concept underlying the right of access to information is the character of information as a socio-economic resource. (...) [H]ere, the matters of form and substance become almost inextricably intertwined. (...) [O]ne can [most] easily understand access to information as access to a mechanism for access to information rather than as direct access to information. For instance, access to an adequate telephone service may be more easily understood as the exercise of the right of access to information than access to the content of a telephone conversation. Adequate public access to the internet (itself a mechanism of accessing information) is a manifestation of the right of access to information more than the mass provision of all the information available on the internet. Thus, the socio-economic dimension of the right of access to information is a right to access a mechanism to access information.<sup>8</sup>

### 3. The Human Right to Information in International Law: An African Perspective

This section briefly surveys two perspectives on the human right of access to information and transparency globally.<sup>9</sup> The first perspective is that of public international law. As recently summarized by Roy Peled and Yoram Rabin:

European law and inter-American law suggest an accelerating trend with respect to recognizing freedom of information as a right that flows from

<sup>8</sup> Jonathan Klaaren, 'A Right to a Cellphone? The Rightness of Access to Information', in Richard Calland/Alison Tilley (eds.), *The Right to Know, The Right to Live: Access to Information and Socio-economic Justice* (Cape Town: Open Democracy Advice Centre, 2002), 17–26 (citations omitted). The leading access to information-NGO in Africa, Open Democracy Advice Centre (ODAC) has largely followed and implemented the strategy suggested by an instrumentalist conception of the right to information. For an articulation of such a conception, see e.g. Saras Jagwanth, 'The Right to Information as a Leverage Right', in Richard Calland/Alison Tilley (eds.), *The Right to Know, The Right to Live: Access to Information and Socio-economic Justice* (Cape Town: Open Democracy Advice Centre, 2002), 2–16.

<sup>9</sup> Its inspiration for combining a public international law and an African perspective lies with John Dugard, *International Law: A South African Perspective* (Cape Town: Juta, 4th edn, 2012).

the right to freedom of expression. In addition, there are indications that the international legal community is beginning to recognize freedom of [information] as an autonomous right. (...) The burgeoning perception in legal circles is that the right to freedom of information has been established as a recognized right in international law, and that we can expect further institutionalization in states' laws in the coming years.<sup>10</sup>

This bullish statement is supported by developments in recent case law and treaty interpretation.<sup>11</sup>

In a highly significant move in 2011, the Human Rights Committee interpreting the International Covenant on Civil and Political Rights has now recognized a separate identity to the right to information from that of freedom of expression. In its view, a right to information is founded in article 19(2) of the Universal Declaration of Human Rights.<sup>12</sup> Titled 'Right of Access to Information', paragraphs 18 and 19 of General Comment No. 34 of the Human Rights Committee begin by clearly stating: '[a]rticle 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production'.<sup>13</sup> As the preeminent enforceable universal human rights treaty text, this interpretation of article 19(2) to

<sup>10</sup> Peled/Rabin, 'Constitutional Right to Information' 2011 (n 4), 381.

<sup>11</sup> For a recent overview, see Marcos A. Orellana, 'The Right of Access to Information and Investment Arbitration', *ICSID Review: Foreign Investment Law Journal* 26 (2011), 59–106, 62–76.

<sup>12</sup> UNGA, Universal Declaration of Human Rights, A/RES/217(III)A, 10 December 1948.

<sup>13</sup> UN, International Covenant on Civil and Political Rights, Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, 12 September 2011, para. 18 continues: '[p]ublic bodies are as indicated in paragraph 7 of this General Comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output. Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified. Pursuant to article 10 of the Covenant, a prisoner does not lose the entitlement to access to his medical records. The Committee, in general comment No. 32 on article 14, set out the various entitlements to information that are held by those accused of a criminal



found a right of access to information in international law is highly significant as well as welcome.

One of the judicial sources upon which this authoritative statement is able to draw and build upon is that of a 2006 decision of the Inter-American Court of Human Rights. In the first such ruling from an international tribunal, on 11 October 2006 that Court decided in *Claude Reyes and Others v. Chile* that there is a general right of access to information held by government.<sup>14</sup> That Court held:

[t]he 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 delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.<sup>15</sup>

A further significant regional judicial source developing the right of access to information in international law is the European Court of Human Rights (ECtHR) case of *Társaság a Szabadságjogokért v. Hungary*.<sup>16</sup> This case dealt with a denial of access to the details of a Hungarian parliamentarian's complaint pending before that country's

offence. Pursuant to the provisions of article 2, persons should be in receipt of information regarding their Covenant rights in general. Under article 27, a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities'; para. 19: '[t]o give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failures to respond to requests'.

<sup>14</sup> IACrtHR, *Claude-Reyes and Others v. Chile*, Judgment of 19 September 2006 (Merits, Reparations and Costs), Series C No. 151.

<sup>15</sup> *Ibid.*, para. 77.

<sup>16</sup> ECtHR, *Társaság a Szabadságjogokért v. Hungary*, Judgment of 14 April 2009, Application No. 37374/05.



Constitutional Court. The complaint concerned provisions of drug-related legislation and the request for access came from a Hungarian civil society non-governmental organization, a 'social watchdog' in the parlance of the ECtHR. The Court's reasoning was based in part on the circumstances of the case – concerning a matter of public interest (the constitutionality of drug-related legislation) and the potential for arbitrary denial (and indirect censorship) through refusal of access to the details of the constitutional complaint against such legislation. As the Court put it: 'the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents'.<sup>17</sup> Nonetheless, the case represents a significant development in the ECtHR's jurisprudence elaborating and recognizing a right of access to information.

One of the routes to legal status in international law is of course through article 38 ICJ Statute and general principles, bolstering an argument regarding the status of the right of access to information at customary international law.<sup>18</sup> This would be an alternative in some contexts to the interpretation of the International Covenant on Civil and Political Rights noted above. Indeed, over sixty countries now have a constitutional right to access to official information and about ninety developed freedom of information laws.<sup>19</sup> The significant and increasing African place in this explosive trend is worth noting. The South African access to information regime is often cited, at least in terms of doctrine if not implementation, as a global gold standard and at least eight African countries are commonly cited as having working freedom of information regimes.

Another Human Rights Council report of 2011 – in its exploration of the second dimension of universal access and access to the internet – seems to bolster the socio-economic understanding of the right to information. The report states 'the Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to

<sup>17</sup> *Ibid.*, para. 36.

<sup>18</sup> See e.g. the discussion in Antonios Tzanakopoulos, 'Transparency in the Security Council', chapter 14 in this volume.

<sup>19</sup> See Right2Info, 'Constitutional Protections of the Right to Information', available at: <http://right2info.org>, overview; Toby McIntosh, 'FOI Laws: Counts Vary Depending on Definitions', 28 October 2011, available at: [www.freedominfo.org](http://www.freedominfo.org); and Roger Vleugels, 'Fringe Special: Overview of all FOI Laws', 9 October 2011, available at: [www.right2info.org](http://www.right2info.org).

information, and for facilitating active citizen participation in building democratic societies'.<sup>20</sup>

A second and particularly African perspective starts with the African Charter on Human and People's Rights, adopted by the Organization of African Unity in 1981.<sup>21</sup> Article 9(1) provides '[e]very individual shall have the right to receive information' and article 9(2) provides '[e]very individual shall have the right to express and disseminate his opinions within the law'. These formulations are relatively cautious. Indeed, they do not use or include the term 'seek' which has been a key textual term in the elaboration of a freestanding right of information. Nonetheless, these provisions have been aggressively and substantively interpreted by the African Commission and by the Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa into an understanding (at least at the level of the Commission) of a freestanding right of access to information separate from the right of freedom of expression.<sup>22</sup> Moreover, the African human rights machinery has moved quickly to implement this understanding. For instance, the Special Rapporteur has recently conducted and concluded a process of drafting a model law for African Union member States on access to information, with provisions in many instances more far-reaching and progressive than that of South Africa's Promotion of Access to Information Act.<sup>23</sup>

In the specific area of access to environmental information, there is a significant African instrument, the 2003 African Convention on the Conservation of Nature and Natural Resources, beyond the African Charter.<sup>24</sup> This Convention is not yet in force.

The African perspective is further informed by a cultural analysis of the right to information, an analysis that should inform any discussion of the right and its status in international law. Such a socio-legal perspective

<sup>20</sup> UNGA, Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/HRC/17/27, 16 May 2011, para. 2.

<sup>21</sup> African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

<sup>22</sup> African Commission on Human and Peoples' Rights, 'Resolution 122: Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa', 28 November 2007, available at: [www.achpr.org](http://www.achpr.org).

<sup>23</sup> Available at: [www.africafoicentre.org/](http://www.africafoicentre.org/).

<sup>24</sup> African Convention on the Conservation of Nature and Natural Resources (Revised Version), 1 July 2003, available at: [www.au.int](http://www.au.int). The 1968 version of the African Convention on the Conservation of Nature and Natural Resources, 15 September 1968, 1001 UNTS 3, is in force.

is consistent with a variant of international law scholars aiming to take on established views of the efficacy of public international law and human rights.<sup>25</sup> In this socio-legal vein, Bronwen Morgan has examined the social and global construction of the right to water, an examination that might provide a template for an examination of the right to information.<sup>26</sup>

In their work, *Freedom of Information and the Developing World: The Citizen, the State, and Models of Openness*, Colin Darch and Peter Underwood begin with South Africa but expand to the Global South. Darch and Underwood draw on the critical human rights theory of the African human rights scholar Makau W. Mutua to present an appreciative yet critical view of freedom of information, beginning with an enquiry into how access to information regimes actually work (or do not work) in regimes of the Global South.<sup>27</sup> Darch and Underwood reject a universalized model for freedom of information, contending that such an understanding is too legalistic, adversarial and frankly colonial. Instead, they argue that local conditions such as adequacy of recording keeping practices and the capacity of national bureaucracies determine the relative success or failure of regimes of access to information.<sup>28</sup> Specifically examining the relationship between the right to information and government transparency, they concluded that

<sup>25</sup> See e.g. the work by Ryan Goodman and Derek Jinks arguing that acculturation is a social process distinct from persuasion or coercion and one by which international law influences States and further that human rights law might harness this mechanism in designing effective global regimes. Ryan Goodman/Derek Jinks, 'How to Influence States: Socialisation and International Human Rights Law', *Duke Law Journal* 54 (2004–2005), 621–703.

<sup>26</sup> Bronwen Morgan, 'Turning off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law', *European Journal of International Law* 17 (2006), 215–246, 215 in her view, 'the process of socially constructing global administrative law is centred in iterative interaction between formal legal and informal political modes of participation, especially social protest and political negotiations. It is a process with two modes, political and technical, and the political salience of global administrative law is shaped first by differential capacities to deploy both modes, and secondly by the capacity to switch between national and international levels of governance'; Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (Cambridge University Press, 2011).

<sup>27</sup> Colin Darch/Peter G. Underwood, *Freedom of Information and the Developing World: The Citizen, the State, and Models of Openness* (Oxford: Chandos Publishing, 2010) (drawing on Makau W. Mutua, 'The Ideology of Human Rights', *Virginia Journal of International Law* 36 (1996), 589–657).

<sup>28</sup> Darch/Underwood, *Freedom of Information* 2010 (n 27), 205–244 and ch. 7 ('Struggles for Freedom of Information in Africa').

[W]hile many of the outcomes [claimed as a result of the social impact, historical rootedness, political effectiveness, and human rights character of freedom of information legislation] are probably impossible without some kind of state transparency towards the citizenry, the outcomes themselves do not logically or necessarily result from the existence of legislation guaranteeing access to information, or indeed from any other kind of information access practice. The relationship between cause and effect, in other words, is both complex and dialectical.<sup>29</sup>

#### 4. Conclusions and Questions for Further Consideration

This chapter has argued that attention to the conceptual understandings of the right to information and of transparency is helpful towards understanding how the human right to information can be and is a vehicle for transparency in international law. This concluding section poses a number of questions about the conceptual underpinnings of the right of access to information in international law for further consideration and uses several post-apartheid South African cases to illustrate those questions.

One question to explore further from the viewpoint of international law is the degree to which the right of access to information may be seen as overlapping with the right of access to court. The potential conceptual overlap may be seen in the South African case of *Mphahlele v. First National Bank of South Africa Ltd*, which deals with the transparency of judicial reasoning.<sup>30</sup> The applicant in *Mphahlele* challenged the Supreme Court of Appeal's long-standing practice not to provide reasons when dismissing an application for leave to appeal.<sup>31</sup> The applicant argued that there was a direct link between the right to information and the constitutional value of openness.<sup>32</sup> The Constitutional Court agreed that reasoned decisions ensured openness and transparency but held that the court of first instance had provided reasons for the dismissal of the application and that the practice of no reasoning for the court of final instance was not inconsistent with an open and democratic society.<sup>33</sup> Interestingly and perhaps revealing some doctrinal potential in

<sup>29</sup> *Ibid.*, 248 (summarizing ch. 2 ('Developing Countries and Freedom of Information')).

<sup>30</sup> Constitutional Court of South Africa, *Mphahlele v. First National Bank of South Africa Ltd*, Judgment of 1 March 1999, Case CCT 23/98.

<sup>31</sup> *Ibid.* <sup>32</sup> *Ibid.*, para. 9.

<sup>33</sup> A two-judge court of final instance, as required, had considered the lower court's reasons and found that there was no prospect of a successful appeal. *Ibid.*, para. 18.

international law, the question in *Mphahlele* was turned from a rights question into a duty question. Judge Goldstone found a duty on the judicial officers of the State to give reasoning for their judicial decisions. This *duty* was said to come from the constitutional access to court right, not from the access to information right.

Another South African case, *Independent Newspapers (Pty) Ltd v. Minister for Intelligence Services*, may be similarly directly relevant to the potential for the right of access to information to be recognized in international law as part of a justiciable principle of open justice.<sup>34</sup> The facts of the case concerned the constitutionality of the President's dismissal of the chief of the intelligence service. Referring to freedom of expression, access to information, access to courts, and the right to a public trial as well as the constitutional founding value of openness, Deputy Chief Justice Moseneke clustered the concepts together and stated that this collective concept formed the basis of the media's right to gain access to, observe and report on the administration of justice.<sup>35</sup> Here, the Constitutional Court created and then applied not a specific textual constitutional right, but a constitutional concept, which the Court termed open justice.<sup>36</sup>

Even more fundamental, perhaps, than the potential overlap in international law of the right of access to information with the right of access to court is the overlap between the right of access to information with the identification and development of accountability, participation, and good governance as well as transparency as general principles of international law. In his volume, Antonios Tzanakopoulos argues that

<sup>34</sup> Constitutional Court of South Africa, *Independent Newspapers (Pty) Ltd v. Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) in re: Masetlha v. President of the Republic of South Africa and Another*, Judgment of 22 May 2008, Case CCT 38/07, [2008] ZACC 6.

<sup>35</sup> *Ibid.*, para. 39; the judgment also refers to Constitutional Court of South Africa, *South African Broadcasting Corporation Ltd v. National Director of Public Prosecutions and Others*, Judgment of 21 September 2006, Case CCT 58/06, paras. 31–32 where Chief Justice Langa states that the foundational values of accountability, responsiveness and openness also applies to the functioning of the judiciary; and Judge Yacoob in Constitutional Court of South Africa, *Shinga v. the State and the Society of Advocates (Pietermaritzburg Bar) as Amicus Curiae; O'Connell and Others v. The State*, Judgment of 8 March 2007, Case CCT56/06; CCT80/06, [2007] ZACC 3, para. 26: 'the principle of open justice is an important principle in a democracy'.

<sup>36</sup> *Ibid.*, para. 1; see also Jonathan Klaaren, 'Open Justice and Beyond: Independent Newspapers v. Minister for Intelligence Services (in re: Masetlha)', *South African Law Journal* 126 (2009), 24–38.

‘[T]ransparency’ is not a free-standing primary norm, which prescribes or proscribes or permits certain action, but rather it is a norm without any independent normative charge. It is a contingent obligation (of the [Security] Council) and right (of the Member States) which mediates between the powers of the Council to act, and the residual powers of Member States to exercise diffuse control over the exercise of those Council powers.<sup>37</sup>

The South African post-apartheid case of *Matatiele Municipality and Others v. President of the Republic of South Africa and Others*<sup>38</sup> would be relevant to an argument for a greater role for the norm of transparency. In this case, the issue of openness first arose due to a provincial legislature’s failure to be open to public participation, particularly by a local community slated to be relocated from one province to another. The Constitutional Court held that the South African Constitution calls for open and transparent governance, that the democracy contemplated in the Constitution includes elements of participatory democracy and specifically that a purposive interpretation of the relevant Constitutional section demanded that the provincial legislature should have afforded the members of the community a reasonable opportunity to participate in a decision that would directly and profoundly impact on their community.<sup>39</sup> Here, the norm of transparency is understood by the Court to be directly assisting in the achievement of participation.

Another conceptual question relating to the location of the right of access to information in international law can be related to the private/public distinction. While the dominant view is that the right to information is adversely related to privacy and secrecy, the conceptual relationship may well be more complex and multidimensional. Even if the norm of privacy does not benefit States, the norm of secrecy (at least as understood as a matter of communication among States) does. The Constitutional Court’s jurisprudence and reasoning in the informational privacy cases thus far brought before it have left open the interpretation that the right of information includes as a right a component of

<sup>37</sup> Antonios Tzanakopoulos, ‘Transparency in the Security Council’, chapter 14 in this volume.

<sup>38</sup> Constitutional Court of South Africa, *Matatiele Municipality and Others v. President of the Republic of South Africa and Others*, Judgment of 18 August 2006, Case CCT 73/05.

<sup>39</sup> *Ibid.*, para. 97: ‘[I]aw-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies’.

informational privacy.<sup>40</sup> Paradoxically, informational privacy thus may comprise an important part of transparency.<sup>41</sup> One thinks that concern with confidentiality and privacy is antithetical to the development of transparency. Thus, the development of a norm of informational privacy, where an individual may enforce certain rights and norms concerning information about that individual, can be seen as taking away from transparency. While this view may have some validity at a general level, attention to specific cases where the limits of transparency are contested and where judicial determinations must be made demonstrates that transparency and information privacy may also be seen as two sides of the same coin.

A final conceptual question engages with what this chapter's section 2 identified as a market-supplementing component of the right to information. The relationship of this component to transparency may be of particular interest for international law. An assertion of the right to information may push along a regulatory regime based on transparency. For example, the South African case of *Clutchco* demonstrates the potential for the right of access to information to effect significant albeit limited regulatory change. In *Clutchco (Pty) Ltd v. Davis*, the Supreme Court of Appeal subjected the South African regime of corporate regulation to the right of access to information.<sup>42</sup>

Indeed, it would be valuable to engage in further research on how this market-supplementing component of the right to information overlaps with the view of information as a socio-economic right. The relationship between regimes of access to information and market dynamics is fundamental and complex.<sup>43</sup> For instance, one can argue that another

<sup>40</sup> Constitutional Court of South Africa, *Mistry v. Interim National Medical and Dental Council of South Africa*, Judgment of 29 May 1998, Case CCT 13/97.

<sup>41</sup> Some thinking in the analysis of privacy looks at privacy as giving differential access to information. This is analogous to some analyses of secrecy, such as David Pozen, 'Deep Secrecy', *Stanford Law Review* 62 (2010), 257–339. Differential access of information as applied to the privacy right can be one of the ways of analysing the coherence of the concept of privacy. This differential access line of thinking may allow us to make direct connections between informational privacy, secrecy, openness, and transparency. This line of thinking would also hold that openness is not just a virtue of public institutions.

<sup>42</sup> Supreme Court of Appeal of South Africa, *Clutchco (Pty) Ltd v. Davis*, Judgment of 24 March 2005, Case No. 35/04.

<sup>43</sup> Thomas Cottier has explored in general terms the relationship between markets and human rights, arguing that there are deep economic and juridical linkages as well as mutual interdependence. Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover', *Journal of International Economic Law* 5 (2002), 111–132. Cottier and Sangeeta Khoran have specifically explored the relationship of the freedom of expression



example of the assertion of the right of access to information assisting a transparency regime has recently taken place in the realm of international economic law. In the WTO decision *China – Audiovisuals*, the order did not directly impact on the pre-existing and Chinese system of censorship but the application of WTO laws did increase the degree of transparency and the degree of implementation of the pre-existing Chinese freedom of information regime.<sup>44</sup> In this case, adjudication over the competitive function of the international trading system indirectly led to a result that was protective of both freedom of expression and the right of access to information. The impact of the case can be seen as both setting market rules and influencing the shape of State institutions.

(understanding this to include the right to information) and the competition rules of the multilateral WTO trading system, noting of course that the WTO does not include competition rules nor does it protect the freedom of expression. Thomas Cottier/Sangeeta Khorana, 'Linkages between Freedom of Expression and Unfair Competition Rules in International Trade: The Hertel Case and Beyond', in Thomas Cottier/Joost Pauwelyn/Elisabeth Burgi (eds.), *Human Rights and International Trade* (Oxford: Hart, 2005), 245–272. Their case study of the *Hertel* case drew attention to 'the close inter-relationship between information and the functioning of markets'. Indeed, in their view, the significance of access to information extends nearly to the point of providing a justification for the existence of the WTO: '[n]o trading system, whether domestic, regional or international can ignore that symmetry of information is vital for the functioning of markets and the legal instruments and rules need to be designed on all levels to remedy asymmetries which markets produce without an appropriate legal framework. Information economics shows that the theory of the "invisible hand" has been rendered ineffective. It calls for appropriate government intervention. It is increasingly perceived that a supranational, multilateral and public body is required to regulate commercial trade by the rule of law on the basis of mutual and freely entered agreements', at 271.

<sup>44</sup> WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009; see also Panagiotis Delimatsis, 'Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings in US-Gambling and China-publications and Audiovisual Products', *Journal of International Economic Law* 14 (2011), 257–293; Joost Pauwelyn, 'Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China-audiovisuals', *Melbourne Journal of International Law* 11 (2010), 119–140.