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International Covenant on Economic, Social and Cultural Rights: accessibility and the right to information

YVONNE DONDERS

1 Introduction

According to international human rights law, notably Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of opinion and expression includes the freedom to seek, receive and impart information and ideas through any media and regardless of frontiers. In his report of 2000, the UN Special Rapporteur on Freedom of Opinion and Expression stated that the *freedom* of information was in fact a *right* to information and that this right was not just a component of freedom of expression, but a right in itself.¹ This status of the right to information was then reaffirmed by the United Nations Commission on Human Rights² – thus accepted by States – and is now widely accepted and recognized. The Human Rights Committee (HRC) included the right of access to information as a specific item in its General Comment No. 34 on freedom of opinion and expression.³

The rights to seek and to have access to information, as well as the right to receive information, have traditionally been developed in the context of civil and political rights. Information plays a central role in good governance and the democratic process. It advances participation and it is needed to properly monitor the government and to combat corruption. However, the right to information is also a significant

¹ *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, paras. 42, 15.

² United Nations Commission on Human Rights, Resolution 2000/38: The Right to Freedom of Opinion and Expression, 20 April 2000, para. 10(a).

³ Human Rights Committee, General Comment No. 34, Article 19 (Freedoms of opinion and expression), UN Doc. CCPR/C/GC/34, 12 September 2011, paras. 18–19. See Chapters 1 and 2 in this book.

element in good governance regarding the implementation of economic, social and cultural rights, such as the right to education, the right to health, the right to food and the right to an adequate standard of living. Information plays a crucial role in securing access to facilities, goods and services in the field of, for instance, health and education and in allowing people to make informed choices in these areas. The right to information thereby contributes importantly to the enjoyment of these rights.

This chapter explores the interconnectedness between the right to information and economic, social and cultural rights as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on Economic, Social and Cultural Rights, which monitors the compliance with and implementation of the ICESCR, has maintained that access to information about relevant services and facilities is part of the normative content of several provisions, for instance the right to health and the right to work. This right to information accordingly brings several types of State obligations, including the negative obligation to allow access to information concerning economic and social facilities and services, but also in some instances positive obligations to promote, facilitate and provide access to, as well as actively distribute, information. This chapter will outline the normative content and corresponding State obligations of the right to information in relation to several economic, social and cultural rights, in particular the right to health. This chapter focuses on the interpretative and supervisory work of the CESCR, in particular its Concluding Observations as part of the State reporting procedure and its General Comments, but will also examine the work of other UN bodies and secondary sources. First, though, a brief introduction to the right to information and its development within international human rights law will be provided.⁴ Since the work of several regional human rights bodies has been crucial in the elaboration of the right to information, these will also be analysed briefly.

2 The right to information: a brief introduction

2.1 *Rationale and normative framework*

Freedom of information was recognized by the UN General Assembly (GA) as early as 1946. In its Resolution 59(1), the GA stated that 'freedom of information is a fundamental human right and ... the

⁴ See Chapter 9 in this book.

touchstone of all the freedoms to which the UN is consecrated.⁵ Before, in another Resolution, the GA had pointed at the importance of the wide spreading of information about the UN and its functioning.⁶ Both were meant to emphasize the importance of the free flow of information, mainly disseminated via the media, but it could not yet be seen as a recognition of the right to access information held by public authorities.⁷

The right to information is included in the Universal Declaration of Human Rights (UDHR), the ICCPR and also in regional human rights instruments, which are dealt with below. Article 19 UDHR states that the right to freedom of opinion and expression ‘includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’. Article 19 ICCPR affirms that the right to freedom of expression ‘shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’.

The right to freedom of expression, including the right to information can be limited by States in accordance with the limitation clause of Article 19(3) ICCPR. There it is indicated that:

the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a. For respect of the rights or reputations of others; b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

These provisions, and similar provisions in regional human rights instruments, have been interpreted and elaborated by the respective treaty bodies. Via different tools, including State reports and individual communications, these bodies have elaborated the contours of the right to information, including the entitlements of individuals, the obligations of States and the possible limitations of this right.

⁵ GA, Resolution 59(1): Calling of an International Conference on Freedom of Information, 14 December 1946.

⁶ GA, Resolution 13(1): Organization of the Secretariat, Annex I, Recommendations of the Technical Advisory Committee on Information concerning the Policies, Functions and Organization of the Department of Public Information, 13 February 1946.

⁷ T. Mendel, *Freedom of Information: A Comparative Legal Study*, 2nd edn (Paris: UNESCO, 2008), 8.

Being part of the right to freedom of expression and with reference to the text of Article 19 ICCPR, 'through any media' implied that the right to information was originally considered mainly in relation to the free media and press freedom. Later on, the dimension of information held by public authorities was added, including the (alleged) obligations of these authorities to make such information available and/or distribute it actively, via media or other means. The right to have access to public information, or in other words the right to know, became a central part of the right to information.⁸ In its General Comment No. 34, the HRC affirmed that Article 19(2) ICCPR 'embraces a right of access to information held by public bodies.'⁹ Below, the focus is on this dimension of the right to information, since it is most relevant to economic, social and cultural rights.

The right to information is important for the public as well as the private domain. The right to information is one of the rights upon which free and democratic societies depend and a right that gives meaning to the right to participate. The recognition of the right to information confirms its importance for democracy and for the rule of law.¹⁰ Information is crucial for participation in democratic decision-making processes, as well as for the assessment of public authorities' performance, to hold them accountable and prevent corruption. Therefore, public bodies should not keep information to themselves or distribute it as a discretionary gift, but 'as custodians of the public good', they should make it available and accessible to the people.¹¹

Apart from being important for democratic and participation purposes, access to information is crucial for personal development and for individual decision-making. This is directly relevant also for economic, social and cultural rights. A good example of an area where access to information is crucial is health. The health of a society depends on

⁸ ARTICLE 19, 'Access to Information: An Instrumental Right for Empowerment' (London, 2007), 5.

⁹ HRC, General Comment No. 34 (2011), para. 18.

¹⁰ *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, paras. 42, 15; S. Sedley, 'Information as a Human Right', in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information, Essays in Honour of Sir David Williams* (Oxford University Press, 2000), 241.

¹¹ T. Mendel, *Freedom of Information* (2008), 4; H. H. Perritt and C. J. Lhulier, 'Information Access Rights Based on International Human Rights Law', *Buff. Law Review* 45 (1997), 899.

information on clean water, sanitation, vaccines, statistics, etc., but also on information campaigns to prevent illnesses. But access to medical information also helps individuals to make informed decisions on medical treatment and the use of medication.¹²

2.2 Normative content and State obligations

The right to information has developed from a *freedom* to seek, receive and impart information, as it was described in the UDHR and the ICCPR, into a *right* to seek, receive and impart information. Consequently, the content of the right to information developed from a mere right of access to information to a right to actively *seek* and *receive* information.¹³ The enlarged scope and content of the right to information as included in international human rights instruments have been elaborated by various international and regional supervisory bodies. They indicate the possible claim aspect of this right towards the State and thereby more broadly the obligations of States towards the beneficiaries of these rights.

2.2.1 United Nations

In its General Comment No. 34, the HRC connects the right of access to information to other rights in the Covenant, thereby underlining the interdependence and interrelatedness of all human rights. For instance, the right of access to information in connection with Article 2 ICCPR on non-discrimination in the enjoyment of the rights in the Covenant implies a general right of information for all regarding their Covenant rights. Furthermore, the link between the right of access to information and Article 25 on political participation implies that the media should have access to public information and that the general public has the right to receive media output. The relation with Article 17 on respect for private life and privacy implies that individuals have the right to know which personal data is stored and which authorities have access to such data. The right of access to information in connection with Article 10 on

¹² Mendel, *Freedom of Information*, 4–5; ARTICLE 19, *Access to Information*, 10 and 17. See, also, ARTICLE 19, *The Free Flow Principles: Freedom of Expression and the Rights to Water and Sanitation* (London, 20 March 2014) available at: www.article19.org/data/files/medialibrary/37492/Right-to-Water-WEB.pdf (last accessed 25 March 2014).

¹³ *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2000), paras. 42, 15; Mendel, *Freedom of Information*, 3.

rights of persons deprived of their liberty and Article 14 on rights of the accused implies, for instance, access rights for these persons in relation to information relevant to them.¹⁴

According to the HRC, the right to information gives rise to several negative and positive obligations of States. In General Comment No. 34, they are formulated as follows:

To 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 failure to respond to requests.¹⁵

These obligations to a large extent reflect the ideas that have been developed by various international bodies and institutions. For instance, in their Joint Declaration of 2004, the Special Rapporteurs on Freedom of Expression of the United Nations (UN), the Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE) stated that the right to access information held by public authorities is a fundamental human right and its implementation should be guided by the principles of maximum disclosure and the presumption that all information is accessible, subject only to a narrow system of exceptions. The Special Rapporteurs reaffirmed that public authorities have an obligation to proactively publish information of public interest, even in the absence of a specific request.¹⁶

These principles were taken from the work of, *inter alia*, the NGO ARTICLE 19 on the right to information. ARTICLE 19 drafted a list of principles for national legislation on access to information. Among these principles were the principle of maximum disclosure; the obligation of public authorities to disclose key information, or information of public

¹⁴ HRC, General Comment No. 34, para. 18. ¹⁵ *Ibid.*, para. 19.

¹⁶ 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 in Freedom of Expression (adopted 6 December 2004), 2.

interest; the principle of narrow exceptions which are clearly outlined, including the legitimate aims which may justify non-disclosure and tested by the criteria of harm and public interest; and the obligation to have procedural guarantees for the request for information, including strict time limits for the processing of requests and the cost of gaining access to information should not be so high as to deter potential applicants.¹⁷

Information in relation to economic, social and cultural rights, for instance the rights to health, education, social security or food, often concerns information of public interest. The question is, however, what the scope of 'public interest' is and to what extent more individual interests could also oblige public bodies to disclose information. And should the obligation of maximum disclosure be limited to information upon request, or does the right to information also imply that public bodies proactively publish and widely disseminate information on their own initiative? How does maximum disclosure work out in relation to the possible limitations of the right to information, in other words exceptions to disclosure, in relation to economic, social rights and cultural rights, for instance for the protection of privacy or public safety?

2.2.2 Council of Europe

The right to information and corresponding State obligations and possible limitations have also been dealt with by regional supervisory bodies. Some of these cases concern economic, social or cultural issues, notably health.

The European Court of Human Rights (ECtHR, or 'the Court') has consistently recognized that the public has a right to receive information of general or public interest. Most of the cases relate to press freedom serving to impart information and ideas, emphasizing the role of the media as a public watchdog.¹⁸ The Court has however also recognized the role of NGOs in this respect.¹⁹ The Court has been more cautious in its approach towards positive obligations of States Parties to provide or

¹⁷ ARTICLE 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (London, 1999). See also, Mendel, *Freedom of Information*, 31–40.

¹⁸ ECtHR, *Sunday Times v. the United Kingdom* (Appl. No. 6538/74), Judgment of 26 April 1979, para. 65: 'Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them' and para. 66: 'Article 10 (Art. 10) guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed.'

¹⁹ ECtHR, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land-und forstwirtschaftlichen Grundbesitzes v. Austria* (Appl. No. 39534/07), Judgment of 28 November 2013, para. 34.

disclose information. As regards access to information held by public authorities, the Court has consistently argued that the government does not have a general obligation to disclose information. At the same time, the government may not restrict a person from receiving information that others are willing to share.²⁰ The Court has argued that 'it is difficult to derive from the Convention a general right of access to administrative data and documents', but that the importance of the disclosure of such data and documents for the applicant's personal situation should be taken into account.²¹ If a person has a special interest, the information may have to be disclosed. This line of reasoning was also confirmed in cases concerning, for instance, information on abortion, which is important for a woman's health, which implied that the State was to refrain from interference when a woman herself obtained such information.²² The State may also not prevent in a disproportionate way the distribution of such information by third parties.²³

More recently, the ECtHR seems to be willing to expand the scope of obligations in relation to the right to information. One example concerned the refusal by the Czech authorities to allow an environmental NGO access to administrative documents concerning a nuclear power station. The Court found this refusal an interference with the right to receive information as guaranteed by Article 10. However, it argued that this right may be limited and concluded that the refusal met the conditions of the limitations clause in Article 10(2).²⁴ The

²⁰ ECtHR, *Leander v. Sweden* (Appl. No. 9248/81), Judgment of 26 March 1987, para. 74: 'The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 (Art. 10) does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.'

²¹ ECtHR, *Loiseau v. France* (Appl. No. 46809/99), Judgment of 18 November 2003, para. 7.

²² ECtHR, *Open Door and Dublin Well Woman v. Ireland* (Appl. No. 14234/88; 14235/88), Judgment of 29 October 1992, para. 72: 'the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.'

²³ ECtHR, *Women on Waves and Others v. Portugal* (Appl. No. 31276/05), Judgment of 3 February 2009, paras. 38–43.

²⁴ ECtHR, *Sdružení Jihočeské Matky v. Czech Republic* (Appl. No. 19101/03), Admissibility Decision of 10 July 2006.

information in this case concerned a matter of public interest. While the Court was willing to accept that in principle States have a positive obligation to provide such information under Article 10, it also recognized possible limitations to this right. In the case of *OVESSG v. Austria* the Court concluded that the limitation criteria were not met and that Austria had violated Article 10 by completely refusing access to information on agricultural and forest land transactions, which was considered disproportionate to the legitimate aim.²⁵

The (former) European Commission of Human Rights²⁶ and Court have also dealt with the right to information under Article 8 concerning the right to respect for private life. Interestingly, it seems that the Court is more willing to accept positive obligations for States to disclose information under Article 8. Relevant cases concerned the disclosure of information concerning health and environment. For instance, in the *Guerra v. Italy* case, the European Commission of Human Rights held that Italy had violated its obligations under Article 10 by withholding information on the risks of living close to a chemical plant. It argued that in cases of information concerning the protection of public well-being and health or danger to the environment, Article 10 placed a positive obligation on States to make information not only available, but to actively publish it.²⁷ The Court did not follow this interpretation of Article 10 and stayed in line with its previous jurisprudence, arguing that freedom of information 'cannot be construed as imposing on a State, in circumstances such as those of present case, positive obligations to collect and disseminate information of its own motion'.²⁸ It did, however, find a violation of Article 8. It reasoned that the right to respect for private life implied a right to information, if such information is relevant to the enjoyment of the right. In this case, the lack of information prevented people from

²⁵ ECtHR, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land-und forstwirtschaftlichen Grundbesitzes (OVESSG) v. Austria* (Appl. No. 39534/07), Judgment of 28 November 2013, para. 47.

²⁶ The European Commission of Human Rights was a body of independent experts charged with determining whether cases should be admitted for consideration on merits by the European Court of Human Rights. It was disbanded on 1 November 1998 upon entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No. 155, 11 May 1994.

²⁷ ECommHR, *Guerra and Others v. Italy* (Appl. No. 14967/89), Report adopted 29 June 1996.

²⁸ ECtHR, *Guerra and Others v. Italy* (Appl. No. 116/1996/735/932), Judgment of 19 February 1998, para. 53.

making a proper risk assessment, which prevented them from enjoying their rights related to private lives and home.²⁹ The Court came to a similar conclusion in a case concerning a methane explosion on a slum site in Istanbul in which thirty-nine people died. The Court concluded that Turkey had violated several provisions of the ECHR, among which Article 2 on the right to life. The Court applied its *Guerra* ruling concerning the right to information to Article 2 and concluded that insufficient measures had been taken to provide the inhabitants of the slums with information enabling them to assess the risks they might run as a result of the choices they had made.³⁰

In another comparable case on risk assessment, the case of *McGinley and Egan v. United Kingdom*, the Court held that Article 8 implied an obligation on the State to establish a proper procedure for providing information on hazardous activities to exposed individuals. This case concerned nuclear testing, causing possible adverse consequences on the health of persons.³¹ In the judgment of *Vilnes and Others v. Norway*, the Court went a step further by holding that under certain circumstances the State's obligation to provide access to information essential to assess health risks includes not only non-refusal to provide such information, but a duty to actively provide it, even if there is scientific uncertainty about the precise nature and extent of the risks.³² In other words, the Court is ready to accept far-reaching positive obligations concerning the dissemination of information under Article 8 (and 2), in particular when it concerns potential health risks, whereas it has not (yet) been ready to accept such obligations under Article 10.

This changed somewhat with the judgment in the case of *Társaság v. Hungary*. In this case, the Court recognized a right to information under Article 10 in a more explicit way, but it did not accept a general positive obligation on State authorities to publish or disseminate information. The Court unanimously agreed that in cases of information of public interest, public authorities have an obligation not to impede such information so that others, in this case an NGO, could disseminate it. It argued that 'obstacles created in order to hinder access to information

²⁹ *Ibid.*, para. 60.

³⁰ ECtHR, *Öneryildiz v. Turkey* (Appl. No. 48939/99), Judgment of 30 November 2004, paras. 90 and 108.

³¹ ECtHR, *McGinley and Egan v. United Kingdom* (Appl. Nos. 21825/93 and 23414/94), Judgment of 8 June 1998.

³² ECtHR, *Vilnes and Others v. Norway* (Appl. No. 52806/09), Judgment of 5 December 2013, para. 244.

of public interest may discourage those working in the media...from pursuing such matters. As a result, they may no longer be able to play their vital role as public watchdogs and their ability to provide accurate and reliable information.³³ The Court confirmed this standpoint in relation to NGOs in the case of *OVESSG v. Austria*.³⁴

The political bodies of the Council of Europe have also recognized the right to information. In a recommendation on information held by public authorities, the Committee of Ministers agreed that ‘everyone within the jurisdiction of a member states shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities’.³⁵ In another recommendation, the Committee of Ministers held that ‘member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities’.³⁶ These recommendations formed the basis for the adoption in 2008 of the European Convention on Access to Official Documents, the first binding international instrument recognizing a general right of access to official documents held by public authorities.³⁷ It should be noted, however, that the Convention also includes a long list of potentially legitimate aims for which this right may be limited, provided that the measures are provided by law, necessary in a democratic society and proportionate to the aim pursued.³⁸ The Convention has not yet entered into force, as it has only six of the ten necessary ratifications.³⁹

2.2.3 The Organization of American States

The right to information, including positive obligations for States, is most explicitly recognized in the human rights system of the

³³ ECtHR, *Társaság a Szabadságjogokért v. Hungary* (Appl. No. 37374/05), Judgment of 14 April 2009, para. 38. See also, ECtHR, *Kenedi v. Hungary* (Appl. No. 31475/05), Judgment of 26 May 2009, paras. 42–5.

³⁴ ECtHR, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land-und forstwirtschaftlichen Grundbesitzes (OVESSG) v. Austria* (Appl. No. 39534/07), Judgment of 28 November 2013, para. 41.

³⁵ Council of Europe, Committee of Ministers, Recommendation No. R(81)19 on Access to Information Held by Public Authorities, 25 November 1981.

³⁶ Council of Europe, Committee of Ministers, Recommendation No. 2 of the Committee of Ministers to Member States on Access to Official Documents, 21 February 2002.

³⁷ Council of Europe, Convention on Access to Official Documents, Tromsø, 18 June 2009, CETS No. 205, Art. 2.

³⁸ Convention on Access to Official Documents, 2009, Art. 3.

³⁹ On 1 February 2014, eight more States had signed but not ratified the Convention.

Organization of American States (OAS). Article 13 of the American Convention on Human Rights (ACHR)⁴⁰ includes the right to freedom of thought and expression including the freedom to seek, receive and impart information, similar to the European Convention on Human Rights. The Inter-American Court of Human Rights (IACtHR) expressed in an Advisory Opinion on Article 13 of the ACHR that the right to freedom of expression ‘implies a collective right to receive any information whatsoever’.⁴¹ This notion led to the full recognition of the right to access information held by public authorities in the case of *Claude Reyes and Others v. Chile*. The case concerned the authorities’ refusal to provide information on a deforestation project authorized by the Chilean government, which could have prejudicial effect on the environment and sustainable development of Chile. The Court decided 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. . . 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 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.⁴²

With this judgment, the Court defined a positive obligation for the State to disseminate information of general interest, whereby no direct interest of the receiver had to be proven. It also recognized that such information may be of interest not only to an individual, but to a larger community or society as a whole.

⁴⁰ American Convention on Human Rights, ‘Pact of San José’, Costa Rica, adopted 22 November 1969, entry into force 18 July 1978.

⁴¹ IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 30.

⁴² IACtHR, *Claude Reyes and Others v. Chile*, Series C No. 151, 19 September 2006, para. 77.

2.2.4 African Union

Within the African human rights system, the right to information is recognized in Article 9 of the African Charter on Human and Peoples' Rights.⁴³ It is interesting to note that the formulation of this provision is different from the similar provisions in the European and American Conventions on Human Rights. Article 9 starts with the phrase that every individual has the right to receive information, after which the second paragraph includes the freedom to express and disseminate opinions. The African Commission on Human and Peoples' Rights adopted in 2002 a Declaration of Principles on Freedom of Expression.⁴⁴ In this Declaration it is clearly stated that everyone has the right to access information held by public bodies. The Declaration further confirms that States not only have negative obligations, but also positive ones, for instance, even in the absence of a request, to actively to publish important information of significant public interest.⁴⁵ There have been no individual cases concerning the right to information before the African Commission on Human and Peoples' Rights, nor before the African Court on Human and Peoples' Rights.

2.2.5 Conclusion

In short, the core of the right to information is the right to have access to information, in particular, but not limited to, information of public interest. The State should ensure maximum disclosure, which implies first the negative obligation not to interfere with the free flow of information shared or disseminated by others. This is also linked to the fact that the right to information is part of the right to freedom of opinion and expression. The right to information may, however, also place positive obligations upon States to disseminate information, upon request as well as proactively, and to do so on a non-discriminatory basis. The scope of these positive obligations depends on the situation and the individual and community interests at stake. One may also wonder to what extent States are obliged to take special measures in relation to the (form of) information distributed, such as translating it

⁴³ African Charter on Human and Peoples' Rights, Banjul, Gambia, adopted 27 June 1981, entry into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

⁴⁴ ACHPR, Res.62(XXXII)02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002), 23 October 2002.

⁴⁵ *Ibid.*, Art. IV.

into different languages, or making it accessible for disadvantaged groups such as persons with visual or cognitive disabilities.⁴⁶

As indicated above, the right to information may be lawfully limited by States with the aim to protect the rights of others, national security, public order, or public health or morals. For instance, the right to information has to be balanced with the right to respect for privacy.⁴⁷ Respect for privacy relates not only to how State authorities obtain information, but also to how they safeguard, store and process it.⁴⁸ The ECtHR has defined several factors relevant to the collection, storage and use of information in relation to respect for privacy. These include the nature of the material disclosed (the more private or sensitive, the more care should be taken), the gravity of the threat or the social importance of the purpose for disclosure; and the gravity of the impact of disclosure for the persons involved. Moreover, a proper procedure should be in place for persons affected.⁴⁹ Respect for and protection of privacy are closely linked to the issue of confidentiality. Sometimes the public interest actually prevents public authorities from disclosing information. Examples could be information about security and intelligence operations. A balance has to be struck between the public interest in favour of not disclosing information and the countervailing interest of the public in receiving information about public authorities and their activities.⁵⁰ The current debates on the disclosure of classified information (WikiLeaks, Cablegate) show the complexity and delicacy of striking such a balance.

Limitations to the right to information in relation to economic, social and cultural rights could, for instance, be justified in order to respect and protect the right to privacy, for instance, the right to have personal health data treated with confidentiality or the right of health workers to have their privacy respected.

3 The right to information and economic, social and cultural rights

Although the right to information is incorporated in treaties containing civil and political rights – the ICCPR, the ECHR and the ACHR – it has a

⁴⁶ See Chapter 6 in this book.

⁴⁷ This right is incorporated in Article 17 ICCPR, in Article 8 ECHR and in Article 11 ACHR.

⁴⁸ D. Feldman, 'Information and Privacy', in Beatson and Y. Cripps (eds.), *Freedom of Expression*, 301 and 308.

⁴⁹ *Ibid.*, 313–16.

⁵⁰ R. Scott, 'Confidentiality', in Beatson and Cripps (eds.), *Freedom of Expression*, 267 and 274. See Chapter 9 in this book.

clear relevance for economic, social and cultural rights and this has been acknowledged by States, international supervisory bodies and scholars. The right to information is a good example of a right that is not only valuable in itself, but also as a right that unlocks and promotes the enjoyment of other human rights. It is not only a component of one right (to freedom of opinion and expression) and a right in itself, it also gives effect to other rights, assists in their realization and, in the case of economic, social and cultural rights, may be a precondition for their realization.⁵¹ The right to information is also crucial for the realization and litigation of economic, social and cultural rights.⁵² The right to information thereby embodies the principles of the indivisibility, inter-relatedness and interdependence of all human rights.

The Committee on Economic, Social and Cultural Rights has explicitly recognized that the right to information is a component of the rights to health, water, work and cultural participation. The Committee monitors the implementation of the Covenant by the States Parties via a periodic State reporting procedure and, since 2013, an individual communication procedure.⁵³ For the reporting procedure, the Committee has adopted reporting guidelines, outlining which information States Parties should include in their reports. The right to information can be found in the guidelines as one of the topics to be addressed. The practice and experience of the Committee is laid down in so-called General Comments, in which it comments on specific treaty provisions or elaborates on the relationship between the treaty and specific themes or issues.⁵⁴ These General Comments are not legally binding upon States Parties, but they provide them with an authoritative interpretation of the provisions of the

⁵¹ S. Jagwanth, 'The Right to Information as a Leverage Right', in R. Calland and A. Tilley (eds.), *The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice* (Cape Town: Open Democracy Advice Centre, 2002), 13; Sedley, 'Information as a Human Right', 248.

⁵² International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability* (Geneva, 2008); Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva, 2003); M. Daruwala and V. Nayak (eds.), *Our Rights, Our Information: Empowering Peoples to Demand Rights through Knowledge*, Commonwealth Human Rights Initiative (Paris: UNESCO, 2007).

⁵³ The individual communications procedure is laid down in GA, Resolution A/RES/63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, entry into force 5 May 2013. On 1 February 2014, no individual communications had been submitted.

⁵⁴ *Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process*, UN Doc. HRI/MC/2005/4, 25 May 2005, 28, para. 105.

Covenant. The Committee has included the right to information in several of its General Comments on specific economic, social and cultural rights.

3.1 *The right to information in General Comments on economic, social and cultural rights*

The Committee on Economic, Social and Cultural Rights has since several years firmly integrated the right to information in its elaboration and interpretation of the normative content and State obligations of various provisions of the Covenant. Interestingly, the right to information was not included in the General Comments on the right to food and the right to education, both adopted in 1999. All General Comments since include a reference to the right to information. The fact that the right to information was not explicitly mentioned in the General Comments on the rights to food and education does not mean that it is not important in relation to these rights. This is confirmed by the reporting guidelines. In these guidelines, States Parties are requested to include in their reports information on the implementation of the right to food, for instance, 'the measures taken to disseminate knowledge of the principles of nutrition, including of healthy diets'.⁵⁵ Dissemination of knowledge is closely related to the right to information.

The right to information was first included in the General Comment on the right to the highest attainable standard of health (right to health), adopted in 2000. It was indicated that the right to health is closely related to and dependent upon other rights, among which the right to access information.⁵⁶ The Committee further included access to information as a dimension of one of the elements of the normative content of the right to health, namely the accessibility of health facilities and services. Accessibility was described as having four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility and *information accessibility*. The Committee noted that 'accessibility includes the right to seek, receive and impart information and ideas concerning health

⁵⁵ Committee on Economic, Social and Cultural Rights, *Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2008/2, 24 March 2009, para. 45.

⁵⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR), UN Doc. E/C.12/2000/4, 11 August 2000, para. 3.

issues' and refers in that connection to Article 19(2) ICCPR.⁵⁷ The Committee, however, also warned that 'accessibility of information should not impair the right to have personal health data treated with confidentiality'.⁵⁸

In all subsequent General Comments the Committee included access to information as part of the accessibility of the right, whereby it adjusted the specific elements to the provision concerned. In the General Comment on the right to water the Committee maintained that accessibility includes the right to seek, receive and impart information concerning water issues, without however referring to Article 19 ICCPR.⁵⁹ The Committee further stated under the heading of the implementation at national level that 'individuals and groups should be given full and equal access to information concerning water, water services and the environment held by public authorities or third parties'.⁶⁰ Moreover, States should give timely and full disclosure of information on the proposed measures that interfere with the right to water.⁶¹

In the General Comment on the right to work, the Committee maintained that 'accessibility includes the right to seek, obtain and impart information on the means of gaining access to employment through the establishment of data networks on the employment market at the local, regional, national and international levels'.⁶² Again, no reference to Article 19 ICCPR was made.⁶³ The Committee further referred to the dissemination of information as one of the possible measures to implement strategies and programmes to eliminate employment-related discrimination 'with minimum resource implications'.⁶⁴ It further indicated

⁵⁷ *Ibid.*, para. 12(b)iv. ⁵⁸ *Ibid.*

⁵⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water (Articles 11 and 12 ICESCR), UN Doc. E/C.12/2002/11, 20 January 2003, para. 12(c)iv.

⁶⁰ *Ibid.*, para. 48.

⁶¹ *Ibid.*, para. 56. See, also, ARTICLE 19, *Free Flow Principles*. The principles include the right to know, because 'information empowers people to pursue their rights to water and sanitation. This aspect of the right obliges governments and other duty bearers to proactively inform the population about issues relating to water and sanitation, water-related resources and management. It is the basis for transparency, accountability and good governance in all water and sanitation-related matters.'

⁶² Committee on Economic, Social and Cultural Rights, General Comment No. 18, The Right to Work (Article 6 ICESCR), UN Doc. E/C.12/GC/18, 6 February 2006, para. 12(b)iii.

⁶³ It seems that the Committee on Economic, Social and Cultural Rights no longer wanted to explicitly refer to Article 19 ICCPR, but chose to include the right to (access) information more generally.

⁶⁴ *Ibid.*, para. 12(b)i.

that States have a positive obligation to undertake educational and informational programmes to increase public awareness on the right to work.⁶⁵

In the General Comment on the right to social security the Committee noted that the social security system should ensure the right to seek, receive and impart information on social security entitlements. Interestingly, it is explicitly stated that this right is not only to be ensured to individuals, but also to organizations.⁶⁶ At various points in the General Comment, the importance of the right of access to information and disclosure of information were emphasized, for instance in relation to social security services⁶⁷ and to prevent the denial of social security to certain groups.⁶⁸

Another example of the adjustment of the right to information to the specific requirements of the right in question is the General Comment on the right to take part in cultural life. In this General Comment, the Committee noted under accessibility, the right of everyone to seek, receive and share information on all manifestations of culture, but it added that this information should be in the language of the person's choice.⁶⁹ The right to information was mentioned at several other points in the General Comment, for instance by emphasizing the link between the right to take part in cultural life and other human rights, such as the right to freedom of expression and the right to information.⁷⁰ Respect for freedom of expression includes expression in the languages of one's choice and the right to seek, receive and impart information and ideas of all kinds and forms: "This implies the right of all persons to have access to, and to participate in, varied information exchanges."⁷¹

From the reporting guidelines and the General Comments, it appears that the Committee on Economic, Social and Cultural Rights clearly recognizes the importance of the right (of access) to information for the implementation and enjoyment of several economic,

⁶⁵ *Ibid.*, para. 28.

⁶⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 19, The Right to Social Security (Article 9 ICESCR), UN Doc. E/C.12/GC/19, 4 February 2008, para. 26.

⁶⁷ *Ibid.*, para. 27. ⁶⁸ *Ibid.*, para. 35.

⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 21, The Right of Everyone to Take Part in Cultural Life (Article 15(1)a ICESCR), UN Doc. E/C.12/GC/21, 21 December 2009, para. 16(b).

⁷⁰ *Ibid.*, para. 43. ⁷¹ *Ibid.*, para. 46.

social and cultural rights. The Committee includes access to information as one of the essential elements of the implementation and enjoyment of these rights. It further appears that the States Parties not only have negative obligations not to interfere with the right to seek information, but that they also should actively provide access to information and/or disseminate information. It is interesting to see that in relation to the right to take part in cultural life, information is even to be accessed in a language of one's choice. This language issue is not included in relation to information concerning other rights. It is, however, imaginable that information on health issues or on social security systems should also be made available in different languages. The Committee has indeed confirmed this in its General Comment on non-discrimination, in which it stated that 'information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities'.⁷² Apart from minority languages, one can also think of special language facilities for persons with visual impairment or low levels of literacy. Interestingly, these issues are not addressed in the General Comment on persons with disabilities. This General Comment recognizes that States Parties have positive obligations to ensure that persons with disabilities can fully enjoy the rights in the Covenant, including 'special tailored measures', but no specific obligations in relation to (access to) information were included.⁷³

The reporting guidelines and the General Comments are directly linked to the State reporting procedure and the dialogue between the Committee and States Parties on their implementation of the Covenant. It is therefore also interesting to look at this procedure in the elaboration of the right to information in relation to economic, social and cultural rights and the State obligations in this regard.

⁷² Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Article 2(2) ICESCR), UN Doc. E/C.12/GC/20, 2 July 2009, para. 21.

⁷³ As included in paragraph 9: 'The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.' Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with Disabilities, UN Doc. E/1995/22, 9 December 1994. See Chapter 6 in this book.

3.2 *The right to information in Concluding Observations by the Committee on Economic, Social and Cultural Rights*

The importance attached to the right to information in relation to the implementation of economic, social and cultural rights is confirmed in the State reporting procedure. In this procedure, States Parties have to report periodically on how they have implemented the provisions of the Covenant. The Committee then critically assesses the report and enters into a dialogue with the State Party. NGOs are allowed to submit so-called shadow reports in which they can provide additional, often critical, information on the performance of the State Party. After the dialogue, the Committee adopts Concluding Observations, in which it highlights the good practices of the State Party as well as the remaining challenges for the implementation of the Covenant. The Concluding Observations are a selection of the many issues that have arisen in the reporting procedure. For this chapter, the Concluding Observations (COs) adopted between 2005 and 2012 were studied to see to what extent and how the Committee referred to the right to information.⁷⁴ It appears that it did so most often in relation to the right to health, in particular reproductive health.

For example, in the CO on Mauritania, the Committee encouraged the State in its combat against HIV and AIDS 'to disseminate information as to how HIV/AIDS can be effectively prevented, including by using condoms'.⁷⁵ The State Party seems to have a positive obligation in this regard. In the CO on Tanzania, the Committee recommends the State to take measures to address the high rate of teenage pregnancies, *inter alia*, 'through family planning information and services'.⁷⁶ Here the obligation is formulated less strongly but it is part of a wide range of measures to be taken.

Both early pregnancy and sexually transmitted diseases were also addressed in the CO on Slovakia. The Committee noted with concern that sexual and reproductive health education was not included in school curricula, which meant that youth was left uninformed about these issues.⁷⁷ Similar observations were made in respect of the Russian Federation, which

⁷⁴ A full study of the State reports as well as the summaries of the dialogues falls outside the scope of this chapter. The COs offered sufficient insight into the way the Committee refers to the right to information in relation to economic, social and cultural rights.

⁷⁵ Committee on Economic, Social and Cultural Rights, Concluding Observations on Mauritania, UN Doc. E/C.12/MRT/CO/1, 30 November 2012, para. 27.

⁷⁶ Committee on Economic, Social and Cultural Rights, Concluding Observations on Tanzania, UN Doc. E/C.12/TZA/CO/1-3, 30 November 2012, para. 24.

⁷⁷ Committee on Economic, Social and Cultural Rights, Concluding Observations on Slovakia, UN Doc. E/C.12/SVK/CO/2, 08 June 2012, para. 25.

was called upon to increase knowledge of and access to affordable contraceptive methods and to ensure that family planning information and services would be available to everyone, including in rural areas.⁷⁸ The CO on Cameroon also included that measures were to be taken, including information on birth control and family planning, to reduce infant and maternal mortality and to facilitate the access of women and girls to sexual and reproductive health services.⁷⁹ The Committee used similar language in its CO on the Philippines, where it explicitly found such information to be inadequate.⁸⁰ The CO on Sri Lanka also spoke of better inclusion of educational programmes and appropriate information on sexual and reproductive health in the curricula of the Sri Lankan education system.⁸¹ The availability and accessibility of reproductive and sexual health information and services for everyone were also mentioned in the COs on Serbia⁸² and India.⁸³

Although the obligations were formulated cautiously and not always in explicitly positive terms, it is clear that the Committee considers education and information on sexual and reproductive health as falling under the various provisions of the Covenant, notably Articles 12 (right to health) and 13 (right to education) and that the States Parties have positive obligations in this regard.

The right to information in relation to the right to health has further raised several other points. In the CO on Kenya, the Committee recommended that the State Party take immediate measures to ensure that pregnant women with HIV/AIDS are not discriminated against and are informed about and have free access to antiretroviral medication during pregnancy, labour and after birth, including for their children.⁸⁴ In the

⁷⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Russian Federation, UN Doc. E/C.12/RUS/CO/5, 1 June 2011, para. 30.

⁷⁹ Committee on Economic, Social and Cultural Rights, Concluding Observations on Cameroon, UN Doc. E/C.12/CMR/CO/2–3, 23 January 2012, para. 27.

⁸⁰ Committee on Economic, Social and Cultural Rights, Concluding Observations on The Philippines, UN Doc. E/C.12/PHL/CO/4, 2 December 2008, para. 31.

⁸¹ Committee on Economic, Social and Cultural Rights, Concluding Observations on Sri Lanka, UN Doc. E/C.12/LKA/CO/2–4, 09/12/2010, para. 34. Sri Lanka was also encouraged to speed up the adoption of a right to information act, para. 10.

⁸² Committee on Economic, Social and Cultural Rights, Concluding Observations on Serbia, UN Doc. E/C.12/UNK/CO/1, 1 December 2008, para. 30.

⁸³ Committee on Economic, Social and Cultural Rights, Concluding Observations on India, UN Doc. E/C.12/IND/CO/5, 8 August 2008, para. 77.

⁸⁴ Committee on Economic, Social and Cultural Rights, Concluding Observations on Kenya, UN Doc. E/C.12/KEN/CO/1, 1 December 2008, para. 32.

CO on Brazil, the Committee expressed its concern about child sex abuse and recommended that the State Party, *inter alia*, organize information campaigns for parents, communities and children.⁸⁵

States Parties are also obliged to provide information in situations of health risks. The Committee in its CO on Serbia emphasized that minority and Roma families should be adequately informed about the health risks involved in living in an internally displaced persons camp and should be offered adequate alternative housing solutions that are culturally acceptable.⁸⁶ The rights to information, health and housing were connected here. The Committee recommended that the Republic of Korea ensure that adequate information on health risks relating to bottled drinking water was made available to the public.⁸⁷ The Committee called on the authorities in Kazakhstan to provide for more general public information campaigns on healthy lifestyles.⁸⁸

The COs on Libyan Arab Jamahiriya⁸⁹ and China included a more general urge to respect and protect freedom of information and expression in these States Parties. In these COs, freedom of information and expression is linked to the right to take part in cultural life and the right to enjoy the benefits of scientific progress (Article 15). For instance, in the CO on China, the Committee noted with deep concern the restrictions placed on access to information with regard to academic research, foreign and domestic publications and the Internet.⁹⁰

The Committee sometimes makes an explicit link between the rights to information and education, in particular information and education on human rights. For instance, it urged Libyan Arab Jamahiriya to ensure that information on human rights was disseminated effectively among the population.⁹¹ Sometimes such education and information were

⁸⁵ Committee on Economic, Social and Cultural Rights, Concluding Observations on Brazil, UN Doc. E/C.12/BRA/CO/2, 12 June 2009, para. 22.

⁸⁶ Committee on Economic, Social and Cultural Rights, Concluding Observations on Serbia, UN Doc. E/C.12/UNK/CO/1, 1 December 2008, para. 29.

⁸⁷ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Republic of Korea, UN Doc. E/C.12/KOR/CO/3, 17 December 2009, para. 32.

⁸⁸ Committee on Economic, Social and Cultural Rights, Concluding Observations on Kazakhstan, UN Doc. E/C.12/KAZ/CO/1, 01 July 2010, para. 36.

⁸⁹ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Libyan Arab Jamahiriya, UN Doc. E/C.12/LYB/CO/2, 25 January 2006, para. 38.

⁹⁰ Committee on Economic, Social and Cultural Rights, Concluding Observations on China, UN Doc. E/C.12/1/Add.107, 13 May 2005, paras. 39 and 68.

⁹¹ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Libyan Arab Jamahiriya, UN Doc. E/C.12/LYB/CO/2, 25 January 2006, para. 38.

linked to specific communities. It recommended that the Libyan Arab Jamahiriya take measures in the field of education and information to 'encourage knowledge of the history, traditions, language and culture of the various groups, including the Amazigh community, existing within its territory'.⁹² In the CO on Ecuador, the Committee expressed its concern that insufficient informational material has been translated into the various indigenous languages.⁹³

The right to information is also linked to the right to an adequate standard of living as included in Article 11 ICESCR. In the CO on Ecuador, the Committee urged the State Party to establish channels for providing the public with information on the coverage of a voucher programme intended for persons living in extreme poverty, thereby increasing the protection of the right to an adequate standard of living.⁹⁴

The fact that the right to information is not included in all Concluding Observations adopted by the Committee does not diminish the importance of this right for the implementation and enjoyment of economic, social and cultural rights. As stated above, COs are a selection of the topics discussed with the State Party and do not fully cover all issues at stake. The overview here does, however, confirm the link between the right to information and economic, social and cultural rights and it also broadly confirms that States have negative as well as positive obligations in this regard. The COs, issued for individual States Parties, confirm the picture arising from the General Comments and the reporting guidelines, which have a more general application for all States Parties.

4 In focus: the right to information and the right to health

The work of the Committee on Economic, Social and Cultural Rights shows that one of the economic, social and cultural rights where the right to information is of crucial importance is the right to health. It can indeed be argued that without the right to information, 'the ICESCR's guarantee of a right to health becomes devoid of meaning'.⁹⁵ Various UN bodies, including the Committee, have recognized the right to (access to)

⁹² *Ibid.*, para. 43.

⁹³ Committee on Economic, Social and Cultural Rights, Concluding Observations on Ecuador, UN Doc. E/C.12/EQU/CO/3, 13 December 2012, para. 33.

⁹⁴ *Ibid.*, para. 23.

⁹⁵ G. A. Hoffman, 'In Search of an International Human Rights to Receive Information', *International and Comparative Law Review* 25(165) (2002–3), 174.

information as one of the critical underlying determinants of the right to health and a proper information system, with for instance appropriately disaggregated data, as a building block for a good health system.⁹⁶

The strong link between the right to information and the right to health follows from the earlier conclusion that the right to information is particularly relevant if it concerns information of public interest. Public interest is often at stake in the case of (public) health. This is why the State has not only negative but also positive obligations to provide (access to) information which is relevant to the health of individuals or communities. The State should share information, not only upon request, but also without such a request, and should make information publicly available at its own initiative. Such information could concern many different health (related) issues: general health policies, health risks, specific ways of treatment, drugs, medication, sexual and reproductive health, etc. It also means that the State has a positive obligation to prevent and end all forms of discrimination in relation to (access to) information and to ensure that health information is made available to vulnerable groups, including women, children, minorities, indigenous peoples, persons with disabilities, elderly, etc.⁹⁷

Such information concerning health is crucial at different levels: to broadly monitor State policies in a democratic process and to have knowledge about the general health situation in a country, but also more individually to be able to make informed choices in relation to health, to give informed consent to medical interventions and to promote one's own health.⁹⁸

⁹⁶ *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Report of the Special Rapporteur, Paul Hunt, UN Doc. E/CN.4/2004/49, 16 February 2004, paras. 28 and 68; *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Paul Hunt, UN Doc. A/HRC/7/11, 31 January 2008, paras. 45, 68(c) and 71. Other underlying determinants of health are access to safe water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and freedom from discrimination.

⁹⁷ Jagwanth, 'Right to Information', 7; see also: S. Coliver, 'The Right to Information Necessary for Reproductive Health and Choice under International Law', *American University Law Review* 44 (1994–5), 1283–6; *Report of the Special Rapporteur*, Paul Hunt, 16 February 2004, para. 39.

⁹⁸ Coliver, 'Right to Information Necessary', 1280 and 1288; *Report of the Special Rapporteur*, Paul Hunt, 31 January 2008, para. 40; M. Hartlev, 'Patient Rights', in B. Toebes, M. Hartlev, A. Hendriks and J. Rothmar Herrmann (eds.), *Health and Human Rights in Europe* (Antwerp: Intersentia, 2012), 130; T. Lemmens and C. Telfer, 'Access to Information and the Right to Health: the Human Rights Case for Clinical Trials Transparency', *American Journal of Law and Medicine* 38 (2012), 104–6.

Interesting in relation to the individual level is that the right to information also implies its opposite: the right not to be informed, or the right not to know. This right implies a negative obligation to respect the wish of a person not to receive information, such as genetic information, or not to be informed of the outcome of genetic testing.⁹⁹

A particular area of health where information is crucial (and often lacking) is sexual and reproductive health. This was not only recognized by the Committee on Economic, Social and Cultural Rights, but also by the Special Rapporteur on the Right to Health and by scholars. Ensuring access to information on sexual and reproductive health is recognized as an obligation of immediate effect and a core obligation of States.¹⁰⁰ These two connotations show the importance attached to this right. While the ICESCR in Article 2 prescribes that the rights in the Covenant may be achieved progressively, States have several immediate obligations, such as ensuring non-discrimination.¹⁰¹ It is interesting to see that access to information, even beyond non-discrimination, is considered an immediate obligation. The Committee has further elaborated the concept of 'core obligations' in relation to economic, social and cultural rights, which is the minimum essential level of protection that States should provide, irrespective of their economic and social development.¹⁰² Apparently, access to information is considered to be such a core obligation.

It has further been established that ensuring access to information on sexual and reproductive health implies that States have negative and positive obligations. Negative obligations imply that States do not interfere with the dissemination of information by others, for instance on abortion services or birth control. Positive obligations include providing women with sufficient and reliable information and educating them on matters of sexuality and reproduction.¹⁰³ Another positive obligation in relation to health, which is also grounded in the rights to liberty and security and the prohibition of inhumane and degrading treatment, is the obligation not to perform or permit medical interventions, in particular

⁹⁹ Hartlev, 'Patient Rights', 132.

¹⁰⁰ *Report of the Special Rapporteur*, Paul Hunt, 16 February 2004, paras. 14, 18, 29 and 42; *Report of the Special Rapporteur*, Paul Hunt, 31 January 2008, para. 52.

¹⁰¹ Committee on Economic, Social and Cultural Rights, General Comment No. 3 on the Nature of States Parties' Obligations (Article 2, para. 1 of the Covenant), UN Doc., E/1993/21, 1991, para. 9.

¹⁰² *Ibid.*, para. 10.

¹⁰³ Coliver, 'Right to Information Necessary', 1299–300; J. Rothmar Herrmann, 'Reproductive Health', in Toebe et al. (eds.), *Health and Human Rights in Europe*, 145–76.

far-reaching interventions such as abortion or sterilization, without prior and informed consent.¹⁰⁴

The right to information in relation to the right to health and health care is also a so-called 'patient right'.¹⁰⁵ Patient rights include the right to information and to confidentiality before and during treatment, including about health condition, treatment opportunities and possible negative effects of treatment, but also after treatment, including access to one's own files and to have information destroyed.¹⁰⁶

As argued above, the right to information could be limited by the State, for instance to protect the rights of others. Limitations of access to information in relation to health can be envisaged to protect privacy. Health information may be sensitive and may have to be concealed to protect the privacy of a person, or the confidential relationship between the patient and health care providers.¹⁰⁷

5 Concluding remarks

The right to information is formally part of the right to freedom of expression and as such included in the ICCPR and other instruments on civil and political rights. It has however gained broader meaning as being a right of its own. The right to information allows people to critically follow their authorities, as part of democracy, transparency, accountability and participation, but it also allows individuals and communities to make informed choices or to express informed consent on various matters.

The right to information is clearly linked to economic, social and cultural rights. It is more than part of the normative content of these

¹⁰⁴ Coliver, 'Right to Information Necessary', 1301–2. Article 7 ICCPR includes that 'no one shall be subjected without his free consent to medical or scientific experimentation'.

¹⁰⁵ Patient rights to information are internationally recognized in the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, adopted 4 April 1997, Articles 5 and 10; the WHO Declaration of the Promotions of Rights of Patients in Europe, Copenhagen, 1994, Article 2; UNESCO Universal Declaration on Bioethics and Human Rights, adopted 19 October 2005, Articles 6, 22 and 23.

¹⁰⁶ Hartlev, 'Patient Rights', 111, 113 and 116. Information on treatment and medicines is often not in the hands of public authorities, but in the hands of private (pharmaceutical) companies. The question to what extent they have obligations to make such information available and accessible falls outside the scope of this chapter. See, on this issue: Lemmens and Telfer, 'Access to Information', 63–112.

¹⁰⁷ Hartlev, 'Patient Rights', 139.

rights; it is a determining factor in the enjoyment of these rights and one of the crucial elements for States in the implementation of these rights. The right to information thereby echoes the interrelatedness and interdependence of all human rights.

The right to information concerns the right to seek, receive and impart information, which is broadly grouped as the right of access to information. Such access not only concerns the media or other information providers, but it may also concern State authorities directly. In particular, in relation to information of public interest, individuals and communities have the right to receive such information and State authorities have the obligation to make such information available and accessible or to disseminate it actively.

The fact that the State should play an active role in providing (access to) information of public interest also follows from the specific character of these rights, as compared to civil and political rights. Most economic, social and cultural rights are drafted in a programmatic way. This means that they are not formulated as substantive rights for individuals (everyone has the right to...), but as assignments to States Parties (States Parties recognize the right to..., or undertake to respect and ensure the right to...). This formulation as well as the character of these rights imply that the obligations of States are not merely negative ones of State abstention but also positive ones of State action.

Moreover, most economic, social and cultural rights concern (public) goods and services, such as education, food, water, housing, health care, etc. It is clear that information about the way a State has taken measures and has implemented policies in relation to these goods and services, as well as information about their availability is crucial for the beneficiaries of the rights. They can only truly enjoy these rights if they are sufficiently informed of their existence and their normative content and of the different laws, policies, measures, services and facilities available. It is only when individuals and communities are adequately and transparently informed that they can make choices about the way and extent to which they wish to enjoy their rights, for instance as to which education or health care they prefer, which possibilities there are for social security and which employment opportunities exist. Information also implies that the beneficiaries can critically assess these measures and policies and can hold their State accountable in case of non-respect or violation of these rights.

The fact that the right to information is an important part of the implementation of economic, social and cultural rights is confirmed by

the work of the Committee on Economic, Social and Cultural Rights. The Committee has included the right to information in its reporting guidelines and in all its General Comments since the year 2000. It has also regularly included the right to information in its COs on various States Parties. The link between the right to information and economic, social and cultural rights is also confirmed in the work of other UN bodies, such as the Special Rapporteur on the right to health.

The fact that the right to information is a determinant factor of economic, social and cultural rights, in particular the right to health, implies that States have positive as well as negative obligations. They should not only make information available and accessible upon request, but they also have a positive obligation to disseminate information of public interest (pro) actively. This is confirmed in the HRC's General Comment No. 34, which lays down that States Parties should proactively put in the public domain government information of public interest. At the same time, the right to information may be limited, for instance to protect the rights of others, in particular their privacy, or national security.

A human rights approach to information implies that special measures may have to be taken to make information also accessible for vulnerable groups, such as persons with low levels of literacy or visual disabilities. One could also think of information in different languages, in particular those of minorities and indigenous peoples. And although the ways and modes of information sharing have also drastically changed with the developments in the information and communication technologies, the State should not forget those people who are not familiar or experienced with the internet or online tools. A holistic approach to the right to information is needed to make this right effective in practice for different groups in society.

It should be noted that the elaboration of the State obligations in relation to the ICESCR has so far taken place via the reporting procedure, including (reporting) guidelines, COs and General Comments. This procedure is focused on monitoring general policies and measures and does not concern individual or specific situations. The individual complaint procedure of the ICESCR has only recently come into force. As soon as individual complaints are examined by the Committee on Economic, Social and Cultural Rights, more concrete situations could be tested, as is already the case at the regional human rights courts. This will further clarify and strengthen the bond between the right to information and economic, social and cultural rights.

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