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Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, Giulio Bartolini

The Right to Know

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Alice Riccardi
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Introduction: some preliminary reflections on the nature of the right to know

In general terms, the right to know may be defined as the right according to which States must be held accountable for their actions and make information available, accessible and accurate according to the principles of transparency and openness. 1 The nature of the right at hand is currently highly debated and two different positions are maintained.

On the one hand, it is said to be an autonomous, self-standing right, emerging from the States’ general duty to protect and guarantee human rights. 2 At the United Nations (UN) level especially, it is affirmed that the right to know, although rooted in the right to freedom of expression provided for in Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), became a ‘right in and of itself’. 3 This interpretation portrays the right to know as a value in itself – as the ‘desire to know’ is a ‘basic human need’ 4 – and consider it a right upon which free and democratic societies depend. 5 Particularly, according to the UN Human Rights Committee (HRComm), the autonomous right encompasses two aspects. Firstly, States should ‘make every effort to ensure easy, prompt, effective and practical access’ 6 to information of public interest, by enacting the necessary procedures; 7 such activity should be guided by the principle of maximum disclosure, whereby the States should provide those seeking information with all the documentation at their disposal, in whatever form expressed, upon request. 8 This stems from the idea that the right to know goes ‘beyond simply being passive recipients of information’. 9 Secondly, States should ‘proactively put in the public domain Government information of public interest’, irrespective of an individual request. 10 On the other hand, the right to know is continued as a procedural duty upon States in order to prevent the violations or secure the enjoyment of other rights, such as the right to life and the right to private and family life. 11 This perspective is grounded on the fact that the right to know does not originate from the right to freedom of expression. In this opinion, freedom of expression would not be capable of imposing upon States positive obligations, but only negative ones; hence, it would merely entail that States are prevented ‘from restricting a person from receiving information that others wish or may be willing to impart to him, but would not confer on the individual a right of access’. 12 Of course, an obligation on the Government to impart such
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information to the individual. Consequently, States would be bound to provide information only when another right is at stake. This understanding of the right to know, which has been labelled as instrumental, carries several disadvantages inter alia by requiring a connection with the infringement of other rights, it narrows the array of right holders entitled to invoke it and the circumstances in which the information can be sought.

Although the interpretation of the right to know in terms of autonomy is at present gaining momentum, a general right to know information held by governments is yet to be fully recognised in international human rights law. The described interpretative discrepancy is particularly evident at the regional level. This may have been caused by the dissimilar formulation of the right to freedom of expression embraced by the American Convention on Human Rights (ACHR), on the one hand, and the European Convention of Human Rights (ECHR) together with the African Charter on Human and Peoples’ Rights (ACHPR), on the other. Whereas Article 13 ACHR explicitly provides that freedom of expression includes the freedom to seek, receive, and impart information, Article 10 ECHR and 9 ACHPR are drafted in a more restrictive manner providing that this right includes the freedom to receive and impart information – with no mention of a right to seek. As it will be shown in the forthcoming pages, the European Court of Human Rights (ECtHR) is particularly resistant in abandoning an instrumentalist approach to the right to know, although a slow evolution in the opposite direction can be traced in its most recent case law.

This resistance is particularly relevant in the context of International Disaster Law (IDL). In this realm, it is common sense that the recognition of a self-standing right to know would be fundamental, allowing participation of the affected populations in all phases of the disaster cycle, fostering a good and transparent conduct of prevention and mitigation activities and enabling civil society to scrutinise the public authorities’ actions. Indeed, if the right to know is construed in terms of autonomy, States would have broad positive information obligations towards the public, encompassing not only the duty to give individuals access to information concerning them, but also a set of proactive dissemination obligations concerning information of public interest. In other words, as such a scenario, States would be required to: firstly, establish administrative procedures for allowing the public to ask for disclosures of information held by public authorities, irrespective of whether affected or concerned by risks threatening other rights (in order to facilitate the right to know); and secondly, actively disseminate among the public key information, in particular those needed for the exercise of other rights, irrespective of an imminent threat or serious risk to such rights (in order to provide the right to know). Arguably, this would entail an expansion of States’ traditional prevention duties, as to include also an obligation to disseminate information in the preparedness phase of the disaster cycle.

Should instead an instrumentalist interpretation of the right to know prevail, then the scope of States’ obligations would be narrower, for the right to know would be a positive obligation aimed at protecting other human rights. This implies that, firstly, only those having a legal interest in the disclosure of information held by public authorities would be entitled to trigger such a right. Indeed, States would be required to establish administrative procedures for allowing individuals to ask for the release of information, only those affected for the risk would be entitled to activate it. Secondly, following a classical understanding of the notion of due diligence in the human rights context, States would be bound to proactively disseminate information only when they are or should be aware of an imminent and real risk impairing other human rights – thereby excluding a duty to disseminate information meant to mitigate or prepare for disasters. Against this debate, the aim of this chapter is to unravel the emerging approach to the right to know in IDL, in order to understand whether one of the two described tendencies is currently prevailing. The investigation will be confined to forward-looking information obligations, i.e. information duties incumbent upon States prior to the strike of a disaster. The thesis has two
main reasons: firstly, because forward-looking obligations are particularly capable of revealing whether knowledge in IDL is envisaged as a value in itself or as a means through which the individual is protected and seeks protection from the State in the enforcement of other rights and, secondly, because human rights bodies and courts have mainly devoted their attention to the right to know prior to the occurrence of a calamitous event. Consequently, the research question that will be studied is the following: in IDL, what is the (developing) nature of the right to know prior to the strike of a disaster? Particularly, is it professed as a self-standing right or rather as an obligation instrumental to the prevention of other human rights violations?

In order to answer the above question, this chapter proceeds in two steps, following the approach of the HRComm envisaging the right to know as encompassing (i) the right to access to State-held information and (ii) the right to be proactively informed by States’ authorities. Accordingly, the analysis is divided into two sections, each dealing with one of the above components; each section is sub-divided in three paragraphs, specifically looking at (i) hard and (ii) soft law instruments and at (iii) the practice of human rights treaty bodies, special procedures and regional human rights courts to uncover the paths followed so far.

### The right to access to information in IDL

#### The right to access to information in hard law instruments

Positing that all disasters are, at some point, an information crisis, the vast majority of hard law instruments specifically dealing with disasters include provisions aimed at unveiling the flow of information. However, the majority of these mostly provide for horizontal rights and obligations, rather than vertical ones. To other words, these instruments envisage the duty to inform as a mere inter-State cooperation obligation and do not identify individual beneficiaries. As to bilateral agreements, the virtual totality of them establish inter-State information obligations, including them under a general cooperation umbrella. 21 The research conducted for this chapter found no case of bilateral agreements establishing upon the parties an obligation to give access to the information gathered through cooperation.

At the regional level, with the adoption of the Union Civil Protection Mechanism, the European Union (EU) started promoting the dissemination of information related to disasters among the public. 22 However, it has been noted that the obligations stemming therefrom are mostly directed to Member States and do not identify individual beneficiaries. 23 Moreover, relevant EU instruments provide clauses guaranteeing the non-dissemination among the public of sensitive information, leaving States with a wide margin of discretion. 24 The Association of South East Asian Nations Agreement on Disaster Management and Emergency Response 25 and the Agreement Establishing the Caribbean Disaster Emergency Response Agency 26 are construed in similar terms, whereas both the South Asia Association for Regional Cooperation Agreement on Rapid Response to Natural Disasters 27 and the Association of Caribbean States for Regional Cooperation Agreement on Natural Disasters 28 shape the obligation to exchange information only as an inter-State obligation of cooperation.

Enlarging the investigation to regional instruments not specifically dealing with disasters, two documents are particularly relevant.

The first one is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). 29 This Treaty crystallises the idea – which traces back to the 1972 Stockholm and 1992 Rio Declarations – that States have a duty to give access to, collect and disseminate environmental information. Notably, the Aarhus Convention provides a wide variety of obligations connected
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The right to access to and dissemination of information. Learning aside, the latter aspect which will be dealt with in the second section of this chapter. Article 4(3) Aarhus Convention establishes a general right to access for the public "without an interest to be stated", unless the request is manifestly unreasonable or formulated in too general a manner, or concerns material not yet completed or internal communications of public authorities (Article 4(3)).

The second document, namely the Council of Europe Convention on Access to Official Documents (CoE Convention), adopted in 2009 but not yet entered into force, echoes the Aarhus Convention's approach. This Treaty, which is the first one recognising a general right to access to documents held by States, establishes at Article 4(1) "An applicant . . . shall not be obliged to give reasons for having access to the official documents", unless the request is too vague or manifestly unreasonable. However, Article 4(3)(b) lists, among other useful and justifiable limitations to the right at hand, purposes that may be relevant in disaster-related requests, such as "the environment." Yet, limitations are possible only if precisely set down in law, necessary in a democratic society and proportionate to the aim sought. Both the Aarhus and the CoE Conventions hence embrace an interpretation of the right to access to State-held information as an autonomous one.

At the global level, it seems that the above-mentioned "horizontal" scheme is still prevailing. For instance, Article 6 of the UN Framework Convention on Climate Change establishes that the States parties to its implementing and co-operation in education and public awareness and encouraging the widest participation as established in Article 4(1)(i), shall merely promote public access to information. Yet, some exceptions exist. For instance, the 1992 Convention on the Transboundary Effects of Industrial Accidents establishes that State parties shall provide "natural or legal persons who are being or are capable of being adversely affected by the transboundary effects of an industrial accident . . . with access to . . . administrative and judicial proceedings" with the aim of obtaining relevant information. In conclusion, on a conventional level, a trend towards the establishment of a State's duty to grant individuals access to Government-held information, irrespective of any legal interest in it of the person claiming disclosure, shall be recognised. This trend is not specific to IDL; rather, it developed in the realms of international environmental law and of the regulation of dangerous activities to eventually go further and reach all State-held information of public interest.

The right to access to information in soft law instruments

The right to access to disaster-related information is confirmed by recent soft law instruments dealing with IDL. Above all, the UN World Conference agreed in 2015 on seven global targets meant to support the achievement of the goals enunciated in the Sendai Framework for Disaster Risk Reduction 2015–2030 (Sendai Framework). One of such targets is to "substantially increase the access to . . . disaster risk information and assessment to people by 2030." Moreover, with the purpose of helping States to effectively implement the Sendai Framework, the International Federation of the Red Cross and Red Crescent Societies (IFRC) published in 2015 a Checklist on Law and Disaster Risk Reduction. This document affirms that States should establish adequate mechanisms for ensuring accountability, particularly guaranteeing the "right to access to information on disaster risk . . . and to challenging the decision[s] . . . of those responsible for disaster risk management." These instruments do not specifically elicit the notion of the right of the individual to learn about his legal interest in it of the person claiming disclosure, but they can nevertheless inform an understanding of the right to know as a self-standing right, stemming from these instruments' general tenor and reference to "people" as the subject entitled to disclosure.
reduce the risk of disasters, the ‘collection . . . of risk and past loss information’. 38 Although this formulation appears broad enough to embrace the right to access information, 39 the ILC seems to validate an instrumentalist view of it, whereby this right would be triggered only when other rights are at stake. Indeed, the Commission hastily shot on the case law of the ECtHR adopting such an approach, 40 further described in the following paragraph. Moreover, it specifies that the duty being envisaged is one of conduct and not of result. . . . Accordingly, the reference to ‘taking appropriate measures’ is meant to indicate the relative nature of this obligation. The fundamental requirement of due diligence is inherent in the concept of appropriate. 41

Portraying the right to access to information – among other disaster risk reduction (DRR) activities – in terms of due diligence entails a fortiori an understanding of it as an ancillary to other rights.

The right to access to information in the practice of human rights treaty bodies and procedures regionally and national human rights courts

As anticipated in the introduction, UN human rights treaty bodies and procedures have consistently upheld an understanding of the right to access to information as a self-standing right, at least from 2011 onwards. That year, the HRCComm adopted General Comment No. 34 establishing that Article 19(2) ICCPR ‘embraces a right of access to information held by public bodies’ 42 and affirmed in Toktakunov v. Kyrgyzstan that ‘the information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied’. 43 The same approach is shared by the African Commission on Human and Peoples’ Rights (ACommHPR), as it may be inferred from its 2002 interpretation of Article 9 ACHPR: therein, the ACommHPR affirmed the right of everyone to access to information held by public bodies only when ‘necessary for the exercise of other rights’, whereas no similar qualification is mentioned in the case of access to information held by private bodies. 44 This interpretation is confirmed by the words of the ACommHPR Special Rapporteur on Freedom of Expression and Access to Information, who has been maintaining that ‘freedom of information derives its origins from and is intertwined with freedom of expression, it occupies a special place in the human rights family’. 45 As to the Inter-American Court of Human Rights (IACtHR), it enshrined the same viewpoint in its 2006 ruling, citing the right to access to environmental information Cland-Keys v. Costa Rica. This ruling arose from the request of a Chilean NGO for the disclosure of information held by public authorities concerning a deforestation project to be implemented by a foreign company. Contrary to the opinion of Chilean courts which denied the NGO access to information for lack of standing, the IACtHR held that Article 13 ACHR includes a right to access to information under the States’ control, irrespective of any demonstration on the part of the claimant of a direct interest in receiving the information. 47 According to the Court, Article 13 ACHR ‘embraces an individual right’ that ‘is not restricted to persons whose personal involvement is indispensable in order to obtain information’. 48 This understanding has been confirmed by other writings on the subject. In turn, the right to access to information has been closely linked by the IACtHR
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The right to know, to the principle of transparency, which requires a service-oriented approach to public administration. The IACtHR recognised this right to be of "fundamental importance and good faith." In conclusion, the Court recognised that knowledge is a value per se, thus justifying the right to know as a self-standing right.

Contrary to the case law of the IACtHR, the ECtHR was for a long time reluctant to interpret Article 10 ECHR (freedom of expression) as encompassing the right to access to information. This state of affairs changed in 2006, in the context of a case concerning the disclosure of State-owned documents and plans regarding a nuclear power station. Therein, the Court affirmed for the first time that the freedom to receive information mentioned in Article 10 ECHR also refers to the right to access to State-held information. This provision, for the Court, is meant "essentially to prevent a State from using its right to keep secret information that is not in any case to be disclosed by the element(s). In any case, the Court found that the applicant, an NGO whose activities were "essential to informed public debate," could be characterized as a "social watchdog," and hence had an interest in the disclosure. This interpretation was confirmed in the 2009 case "Youth Initiative for Human Rights v. Serbia," where the Court established that the applicant could not be refused access since it was an NGO involved in the legitimate gathering of information of general interest with the intent of imparting it to the public. In conclusion, the Court recognized that Article 10 ECHR enables the right to access to information, depart from the interpretations provided by other human rights bodies and public procedures. In 2010, the ECtHR confirmed in the judgment "Youth Initiative for Human Rights v. Serbia," that the right to receive information was not a general right to access. However, in 2013, the Court recognized that the right to access to information was essential to informed public debate, thus affirming the right to access to information of general interest. Hence, the Court found that the applicant, an NGO involved in the legitimate gathering of information of general interest with the intent of imparting it to the public, had an interest in the disclosure. In conclusion, these pronouncements, although eventually recognizing that Article 10 ECHR enshrines the right to access to information, depart from the interpretation provided by other human rights bodies and public procedures. In fact, for the ECtHR, the entitlement to invoke this right cannot be granted to those who do not show a legal interest in disclosure. As to environmental information specifically, the approach, confirmed in recent cases, is not in line with Article 4(1) Aarhus Convention establishing a general right to access to information without an interest to be stated. The Court has been consistently granting this right in the judgment pronounced after the entry into force of the Aarhus Convention itself.

Nevertheless, it shall be positively evaluated that the Court has recognized that partially in the environmental context, there is a strong public interest in enabling individuals to contribute to the public debate by disseminating information on matters of general interest. Hence, the development occurring regarding the right to access to information cannot be overlooked since it legitimizes the necessity of some social control on States' actions addressing matters of public interest. However, the Court has yet to embrace the trend of recognizing transparency as a driving value in re-conceiving the subjective scope of the right to know. The Court has, in several cases, failed to address the implications deriving from the judgment, notably, the idea that "[t]here can be no robust democracy without transparency, which should be served and used by all citizens." It can thus be expected that, in future and pending questions of transparency, the ECtHR will confirm the supremacy of this principle on State's information obligations.

Interim conclusions

The right to access to disaster-related information held by public authorities is at present undisputed. This principle is entrenched in all analyzed sources. However, no general consensus exists on the scope of the legal entitlement to activate such a right, although a clear trend is emerging in granting access to everyone, irrespectively of any interest to be stated. Also the ECtHR, although still
requiring claimants to demonstrate a legal interest in accessing a piece of information, is enlarging the array of right holders, e.g., including among them NGOs and other public watchdogs. This trend stands on at least two grounds. The first is the fact that disaster-related information held by States is inherently of public interest, especially because disasters may affect numerous human rights, and the second is the fact that the right to access to information is progressively recognized as a right per se (although the ILC still propounds the opposite view, when it states that the obligation to provide access to information is collective one). It is held that, in light of the considerable evolution of the law on access to information in the past decades, the time is now ripe for recognizing the public right to the right to access to information will eventually prevail. Such a process of consolidation may be further promoted by developments triggered by the principle of transparency. This principle indeed supports a collective dimension of the right to access to information, thereby subsuming the status of potential right holders. Moreover, it may facilitate the expansion of the scope of States’ duties regarding the collection of information, e.g., by requiring States to undertake disaster-oriented information gathering activities or to further strengthen exchange information duties between States and private individuals and entities undertaking inherently risky activities. Generally speaking, the evolution experienced by the right to access to disaster-related information is consonant with other developments in IDL, concerning for instance the involvement of communities in all phases of the disaster cycle. This may in turn prove particularly effective in facilitating and mitigating the effect of disasters.

The right to be proactively informed by States’ authorities in IDL

The right to be proactively informed in hard law instruments

In the research conducted for this chapter, no case of bilateral agreements was detected providing for an obligation to spread among the public the information gathered through inter-State cooperation. At the regional level instead, both the Aarhus and the CoE Conventions deserve again a closer analysis. As to the former, its Article 5(1) specifically obliges States to proactively disseminate information enabling members of the public who may be affected to adopt ‘measures to prevent or mitigate harm’. The duty is triggered only when there is an ‘imminent threat to human health or the environment, whether caused by human activities or due to natural causes’ (emphasis added). According to the Implementation Guide of the Aarhus Convention (Guide), this provision binds States to release ‘all information to public likely to be affected, including safety recommendations, predictions about how the threat could develop, results of investigation and reporting or remedial and preventive actions taken’. 60 Other provisions of the Aarhus Convention expand States’ dissemination duties beyond situations of imminent threats, requiring public authorities to disseminate: (i) environmental information through electronic databases ‘easily accessible to the public’; (ii) outlook reports on the state of the environment; and (iii) legislation and policy documents on strategies, policies, programmes and action plans prepared at various levels of government. 61 According to the Guide, these Articles trigger ‘a more general requirement for the dissemination of documents that the public has the right to know’ (emphasis added). As to the CoE Convention, its Article 10 construes dissemination in wide terms as well. It indeed establishes that

[j] its extra initiatives and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the amount of promoting.
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the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.

As evident, the use of the expression ‘where appropriate’ leaves States with a degree of appreciation in choosing if to disseminate; in this respect, the Explanatory Report to the Convention recognises that, pursuant to Article 10, ‘[n]ational rules on proactive publication are thus encouraged’ (emphasis added). 63

At the global level, a recent instance of practice explicitly referring to the dissemination of information among the public in the event of disasters is UN Security Council (UNSC) Resolution 2177(2014) on Ebola, which called upon States to ‘enhance efforts to communicate to the public the established safety and health protocols and preventive measures to mitigate against misinformation and undue alarm about the transmission and extent of the outbreak seeming and between individuals and communities’. 64 However, although currently debated in international legal scholarship, 65 it can be doubted that this UNSC resolution would provide for individual rights. On a different note, the 1993 Convention concerning the Prevention of Major Industrial Accidents provides for clear dissemination obligations. 66 Indeed, its Article 16(a) establishes that States parties shall ensure that ‘information on safety measures and the correct behaviour to adopt in the case of a major accident is disseminated to members of the public liable to be affected by a major accident without their having to request it’. 67 Interestingly, this duty is kept distinct from the obligation to ensure that ‘early warning is given as soon as possible in the case of a major accident pursuant to Article 16(b). It follows that this instrument does not limit the duty of disseminating relevant information only when the calamitous event is imminent but enlarges it to allow the population to timely prepare to deal with the effects of an accident.

The right to be proactively informed in soft law instruments

Since 2012, 68 the IFRC has been insisting on the idea that States’ duty to proactively put information in the public domain would be a ‘global political and legal imperative’. 69 In particular, it has been exhorting States to implement measures among at ‘end-to-end’ early warning systems – i.e., system-spanning all steps from hazard detection through to community response knowledge of the risk’. 70 In a similar vein, the 2015–2030 Sendai Framework puts, among other guiding principles, that DRR requires a ‘multi-hazard approach and an acute-risk informed decision-making based on open exchange and dissemination of disaggregated data’ as well as on ‘early, reliable, up-to-date, comparable, science-based non-sensitive risk information, complemented by traditional knowledge’. 71 In order for States to implement such principles, the Sendai Framework calls on them to ‘continually and proactively inform and update the public with non-sensitive hazard-exposure, vulnerability, risk, and loss-disaggregated information, including risk maps . . . in an appropriate format’. 72 Clearly, both the IFRC and the Sendai Framework are promoting an understanding of the right to know as encompassing the obligation for States to proactively disseminate information among the public irrespective of an individual request in such sense, and not only limited to ‘stricto sensu early warning.

As to the ILC, it dealt with dissemination duties in two recent occasions. A careful reading of the language employed by the Commission in such two instances discloses an evolution in its interpretation of the right at hand. The first case is Draft Article 13 of the 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. This article establishes that States shall, by such means as are appropriate, provide the public likely to be affected . . . with relevant information relating to that activity, the risk involved and the harm which might result.
and ascertain their views'. 74 In the Commentary, the Commission acknowledged that the content of Draft Article 13 constitutes a progressive development of international law. It recognized indeed that it was inspired by recent international instruments dealing with environmental issues, requiring States to provide the public with information and to give it an opportunity to participate in decision-making processes. 75 The second instance is Draft Article 9(2) of the 2016 Draft Articles on the protection of persons in the event of disasters – which identified, among other measures aimed at DRR, the dissemination of risk and past loss information. 76 In the Commentary to this article, the Commission specified that it wishes to emphasize the importance of the dissemination and free availability of risk and past loss information, as it is the reflection of the prevailing trend focusing on the importance of public access to information (emphatic added). 77 As evident, although the ILC was not comfortable proclaiming the right to proactively disseminate information held by public authorities as embedded in customary international law, it nevertheless certified that it does not constitute anymore simply a ‘new trend’, but certainly a ‘prevailing’ one.

As to the nature of the right, the ILC says little. In the Commentary to Draft Article 9(2) of the Draft Articles on disasters, it specified that it felt that an explicit reference to information rights ‘was best dealt with in the commentary and not in the body of paragraph 2, since making it a uniform legal requirement could prove burdensome for States’. 79 It is here held that this caveat shall be read in light of the fact, already mentioned, that the ILC relied extensively on the case law of the ECtHR adopting an instrumentalist view of, generally speaking, the right to know. Accordingly, it can be argued that the Commission read the obligation to disseminate as, again, a procedural duty incumbent upon States to prevent the infringements of other rights.

The right to be proactively informed in the practice of human rights bodies and special procedures and regional human rights courts

UN human rights treaty bodies and special procedures have seldom addressed the issue of the right to proactively inform the public in the disaster context. The UN Committee on Economic, Social and Cultural Rights adopted a broad interpretation of the right in its 2013 observations on Japan, where it urged the concerned State to provide the population with comprehensive, credible and accurate information on potential hazards, preventive measures and response plans, and to ensure prompt disclosure of all information when disasters occur (emphatic added). 80 The UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and waste similarly affirmed in his 2013 report on Hungary that ‘[p]eople who live near hazardous establishments deserve to know the dangers and exercise the options of relocating or remaining to mitigate exposure. Hungary should therefore ensure that accurate, comprehensive and timely information on the potential hazards is made public at an early stage of the emergency, in a manner that is accessible to the public and that is intended to be understood by the average citizen’. 81 These documents, however, rather than talking about legal obligations, seem to construe States’ proactive dissemination activities in terms of good practice.

As to regional human rights courts, the following pages will be devoted to examine the ECtHR case law, lacking any relevant practice before the ICtHR and the ACtHR. The ICtHR, whereas eventually recognizing that Article 10 ECHR encapsulates a right to access to information, so far denied that it would be the legal basis for States’ duty to proactively inform the public. According to the ECtHR indeed, Article 10 ECHR on freedom of expression does not impose a general obligation incumbent upon States to collect and disseminate information about potential risks deriving from both natural phenomena and human activities that are not new. Rather, the Court has commonly maintained that such an obligation
would constitute a procedural guarantee stemming from the duty to prevent infringements upon Articles 8 (right to private and family life) and 2 (right to life) ECHR. As recognized by the very same ILC Special Rapporteur on the protection of persons in times of disaster, the ECtHR framed the duty of prevention as one of due diligence. It is hence held that this implies at least three intertwined legal consequences, inter alia: (i) the notion of risk; (ii) the type of information activities that States are bound to undertake and (iii) the legal entitlement to the right at hand.

As to the notion of risk, the Court constantly affirmed that the ECHR shall not be paternalistically interpreted. Therefore, not all risks of violations are covered by its scope—in other words, States' responsibility does not arise in respect of all potential violations. In this respect, a distinction shall be drawn between Articles 2 and 8 ECHR cases. In right to life cases, the Court has generally affirmed that States are under a duty to «adequately inform the public about any life-threatening emergencies, including natural disasters». This positive obligation applies to any activity, whether public or not, in which the right to life may be at stake (thus including conduct and omissions concerning both man-made and natural hazards). However, according to the ECtHR, States' prevention duties are triggered only when a disaster becomes foreseeable, i.e. when the public authorities know or ought to have known that there was a real and imminent risk for the right to life. In Article 8 cases, the Court requires private and family life to be «directly and seriously affected» by the imminent risk. It hence asks for a minimum threshold of harm. Undoubtedly, the duty is triggered when the risk reaches a threshold of seriousness, the consequences of which must be serious and immediate. It follows that, at present, under the ECHR, States are not bound to proactively provide information about disasters, unless a risk to the right to life or the right to private and family life is imminent. As to the notion of «imminent» risk, the Court has adopted a casuistic approach linked to the nature of the risk itself. Specifically, it has differentiated between natural risks and risks arising out of dangerous activities. As to the former, it has pointed out that the unforeseeable nature of natural disasters makes States' margin of appreciation broader and hence the scope of their obligations narrower than in cases of dangerous activities. In these latter cases, the Court has been able to define States' prevention duties in detail, stating that States have an obligation to set in place regulations geared to the special features of the activity in question, particularly with regard to the level of risk potentially involved. They must...
become even more in particular scenario risks in times of financial difficulties. In Budayeva and others v. Russia, for instance, the Court noted that it would harm them for the State concerned to adopt "essential practical measures" (emphasis added) when "the circumstances of a particular case point to the occurrence of a natural hazard that had been clearly identifiable, such as the beginning of an early warning or evacuation order". In recent years, however, the ECtHR started nuancing this approach. First, in the Budayeva case, it understood that preventive measures shall in any case be reasonable and adequate to protect the rights of the individual. Second, in the above mentioned 2015 Özel case, it reaffirmed that, also in the event of natural catastrophes "over which States have no control", prevention means "adopting measures geared to reducing their effects in order to keep their catastrophic impact to a minimum" (emphasis added). This arguably may imply an expansion of the scope of States' prevention obligations; it seems indeed that the Court has put the threshold of States' responsibility lower than in previous cases by affirming that the effects of natural disasters shall be kept "to a minimum": this, in turn, may mean that States are bound to adopt preventive measures irrespective of any sign of the imminence of a natural disaster, when the concerned territory is declared to be inherently at risk.

As to the legal entitlement to the right and consequently to its enforceability, the ECtHR has not embraced the above detected trend of granting to the "public" information rights, i.e. irrespective of whether those ought to be informed may be concerned with or affected by the risk. Indeed, the ECtHR has so far recognised that the positive obligations arising from Article 2 ECHR (right to life) apply vis-à-vis "those citizens whose lives might be endangered by the inherent risks" (emphasis added), whereas those stemming from Article 8 ECHR (right to private and family life) are incurred to persons at real risk of damage to health or family life. In 2012, the Court clearly established that a mere fear of safety and risk was not sufficient for triggering the information duties under Article 8 for a causal link between the risk and the right affected to occur. Interim conclusions

When it comes to the second component of the right to know, i.e. the obligation to proactively put in the public domain information concerning disasters, a definitive answer on its nature cannot be given. Only few conventional examples establish that States shall disseminate information irrespective of the imminence of a risk. In a similar vein, human rights treaty bodies and special procedures always expressed themselves in terms of "should" when they discussed alleged duties of proactive dissemination of information going beyond activities related to "strictly useful or essential information". This should not come as a surprise, in particular in light of the recognition of the right at hand as a self-standing right that entails an excessive burden upon States. Furthermore, should the right to be proactively informed be recognized as an autonomous one, it would be highly controversial to clearly define the precise content of States' positive obligations concerning the dissemination of information. Although welcomed soft law instruments push for broad dissemination activities, it is not clear whether these "non-sensitive hazard-exposure, vulnerability, risk, disaster and loss-aggregated information" should be envisaged as a general yardstick for States' responsibility. Moreover, human rights courts have so far demonstrated that States' duties regarding dissemination of information on disasters varies depending on the context of the case. The ECtHR has maintained in this respect that States' duties would differ vis-à-vis the probability that a given calamity may actually occur, notably, they would be more stringent in case of calamity arising out of the conduct of inherently dangerous activities than in natural disaster scenarios. However, it shall be stressed that recent cases hint at the recognition that principles applicable to dangerous activities may be transplanted to natural disaster scenarios, provided that the risk is inherent to the concerned territory. 238
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In conclusion, although a trend towards an expansion of States’ information dissemination duties with the aim of engaging with the population in all phases of the disaster cycle exists, such a trend is currently way more embryonic than that concerning the right to access to disaster information. Thus, at present an (alleged) autonomous right to know in IDL seems not to encapsulate a States’ general duty to proactively inform the public continuously irrespective of an imminent threat to other human rights.

Conclusions

This contribution aimed at discussing the nature of the right to know in disaster contexts, elaborating especially on its nature, i.e. whether it is a self-standing right or an obligation instrumental to the protection of other human rights. To incline towards one or the other alternative entails substantial consequences, pertaining particularly to the notion of right holders and the circumstances in which the right is triggered.

In order to provide such answer, this chapter separately investigated the two components of the right to know, identified by the HRComm, i.e. the right to access to information, and the right to have information proactively put in the public domain by States. As to the first component, it cannot be denied that it has progressively gained autonomy and that currently an irreversible trend recognizes it as a right per se. Not only does this principle today make an unavoidable part of IDL relevant actors’ lexicon, but it is also entrenched in some applicable treaties. Furthermore, it is affirmed by all universal and regional human rights treaty bodies. It follows that, as a minimum, States are required to give access to information concerning disasters not only to persons potentially affected by natural and man-made risks, but also to those aiming at disseminating such information to the public, and at raising awareness. Arguably, in the near future, it will be generally recognized that States are under an obligation to provide access to disaster information to everybody, irrespective of an interest to be stated. This tendency is consonant with other developments in IDL, notably those regarding the involvement of potentially affected communities in all phases of the disaster cycle, and particularly in preparedness and mitigation activities. Moreover, it is argued that the application of the principle of transparency in the human rights realm will further expand States’ duties with respect to the right to access to information, thus enabling everybody to make them available to the public upon request.

As to the second component of the right to know, contrariwise, it cannot be currently said that it has become emancipated yet, and it probably never will. States’ proactive information obligations are indeed usually portrayed as procedural duties to prevent infringements upon other rights, above all the right to life and the right to private and family life. Before the ECtHR, this has entailed that States have more stringent dissemination duties when it comes to risks connected to the conduct of inherently dangerous activities than in natural disaster scenarios. This stems from the common assumption that natural hazards are unpredictable and that this characteristic would impinge on the capacity of States to be aware of the risk itself. This remark can be made in this respect. Firstly, it shall be stressed that protecting dissemination obligations in terms of due diligence does not relieve States from their responsibility; indeed, in order to respect these protection duties, States must continuously monitor the hazards exposed to their territory and proactively inform the population when a given threshold of seriousness is reached.

Secondly, one may predict that in the future the distinction between natural and man-made disasters from the viewpoint of prevention will wear thin; indeed, one may predict that the trend of lending principles related to industrial activities to natural disasters will consolidate in situations in which natural risks are inherent to a given territory, or in the case of an event particularly prone

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to earthquakes. In these situations, posited that the State is aware of the risk, the threat should always be deemed ‘imminent’; hence, the affected population should be regularly updated with, for instance, contingency plans and location-based disaster risk information.

In conclusion, although the right to know in IDL shall not be ‘utopised’ – that is to say, it shall not be interpreted so vastly as to horizontally impose upon States a too high threshold which may induce disengagement and non-compliance – it is at the same time gaining momentum. Further efforts shall be put in clarifying how States shall practically implement their information duties related to disasters, e.g. by elaborating good practices on accessible and effective disclosure procedures.

**Selected bibliography**


L. Robert (ed), La circulation des concepts juridiques: le droit international de l’environnement entre mondialisation et fragmentation (SLC, 2009) 493.

**Notes**


6 CHR, Freedom of Expression (n. 4) para 62.


8 Ibid.

9 Ibid, para 42.

10 Ibid.


12 Ibid, para 42.

16. According to A. Hoile and V. Rohde, The Constitutional Right to Information: A2 Columbia Human Rights (2013) 261, the constitutional legal concept is beginning to recognize both the constitutional right to information as an autonomous right.
18. See Sossai’s chapter in this volume.
21. See for instance Decision No 1313/2013/EU (n. 22) art 6.
23. According to CoE, Convention on Access to Official Documents, Explanatory Report (18 June 2009) CoE TSER 2, art 3(1)(j) concerns ‘the possibility of limiting the dissemination of information on the environment . . . meant to allow public authorities to carry out effective policies in the area of environmental protection’, for instance regarding ‘threatened animals or plant species’.
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42 HRComm, General Comment No. 34 (n. 7) para 19.


48 Claude-Reyes para 77.


50 Ibid para 77.


52 Ibid.


54 Guja v . Moldova, App. No. 14277/04 (ECtHR, Judgment, Grand Chamber, of 12 February 2008) para 75, where the Court affirmed that ‘[t]he interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence’.


57 All ECHR States parties are also parties to the Aarhus Convention except the Russian Federation, Turkey and San Marino.

58 Steel and Morris v . the United Kingdom, App. No. 68416/01 (ECtHR, Judgment of 15 February 2005) para 89.

59 Moreover, the judges noted that ‘[t]he case raises the issue of the positive obligations of the State’. See Youth Initiative for Human Rights v . Serbia, Joint Concurring Opinion of Judges Sajó and Vučinić.


61 Aarhus Convention, art 5(3)-(5). For further analysis see N. Colacino, ‘Exploring the Legal Nature of the States’ Obligation to Provide Information to the Public in the Case of an Imminent Threat to the Environment’ (2013) 2 Ordine internazionale e diritti umani (2014) 454, 467.

62 Implementation Guide (n. 60) 108.
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63 CoE Convention, Explanatory Report (n. 26).
64 UN General Assembly Resolution 61/295 (19 November 2006), para 10.
65 CoE Convention, Explanatory Report (n. 26).
68 Art. 27 of the new Accords, see also the UN World Conference on Disaster Reduction, Resolution 1, UN Doc. A/CONF.199/24 (12 December 2005).
69 See also the Explanatory Report to the Convention on the Protection of the World Cultural and Natural Heritage (n. 26).
70 Ibid 13, fn 7.
71 Ibid para 19(g).
72 Ibid para 24(e).
73 Ibid para 24(c).
74 ILC, Report of the International Law Commission, Fifty-Third Session (23 April–1 June and 2 July–10 August 2011), Chapter V, International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, UN Doc. A/56/10 (2011) 165. In the Commentary, ibid, the ILC clarified that States are thereby bound '(a) to provide information to the public regarding the activity and the risk and the form in which and by whom the activity is carried out, and (b) to ascertain the views of the public' and specified that the term 'public' includes individuals, interests groups (non-governmental organizations) and independent experts'.
75 Ibid 165.
76 Inter alia, the ILC mentions the Aarhus Convention, the UNFCCC, the CoE Convention, and the Convention on the Transboundary Effects of Industrial Accidents. Ibid 166.
77 For the ILC, draft art 9(2) draws 'inspiration from . . . principles emanating from international human rights law, including the States’ obligations to protect, promote, and fulfill human rights as well as the right to the free circulation of ideas'.
78 Ibid 43.
79 Ibid 50.
82 Although the IACtHR has not yet addressed the issue of the proactive dissemination of information, see Inter-American Juridical Committee, Resolution 147 of the 73rd Ordinary Period of Sessions: Principles on the right to access information (7 August 2008) Principle 10, whereby art 13 ACHR shall be interpreted as encompassing an obligation of 'active transparency'; accordingly, States ought to provide the public with the maximum quantity of information proactively, at least for what concerns the information needed for the exercise of other rights.
83 The leading case in this respect is Guerra para 53; see also Roche v . the United Kingdom, App. No. 32555/96 (ECtHR, Judgment, Grand Chamber, of 19 November 2005), where the ECtHR Grand Chamber unanimously held that the freedom to receive information does not entail positive dissemination obligations.
84 Ibid para 60.
88 Budayeva and Others v . Russia, App. Nos. 15339/02, 11673/02, 15343/02, 20058/02 and 21166/02 (ECtHR, Judgment of 20 March 2008) para 131.
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89  Ibid para 130.
90  See above all Budayeva (n. 88) para 131. In other cases, the Court required a ‘clear risk’, or a ‘high degree of risk’, or a ‘serious and substantial risk’ for the right to life of the complainants. See for instance Kolyadenko and Others v. Russia, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, Judgment of 28 February 2012); Makaratzis v. Greece, App. No. 50385/99 (ECtHR, Judgment, Grand Chamber, of 20 December 2004).
93  Ibid 58.
94  See Dzemyuk v. Ukraine, App. No. 42488/02 (ECtHR, Judgment, Grand Chamber, of 4 September 2014) para 73, where the Court afforded that the applicant did not at all establish a direct link between the operating conditions of the power station... as they failed to show that the operation... exposed them personally to a danger that was not only serious but specific and, above all, imminent.
95  Budayeva (n. 88) paras 34–15, 137.
96  Oneryildiz (n. 94) para 90.
97  Özel and Others v. Turkey, App. Nos. 14350/05, 15245/05 and 16051/05 (ECtHR, Judgment of 17 November 2015) para 189.
98  Above all Budayeva (n. 88) para 134. See also, in cases involving environmental issues, Buckley v. the United Kingdom, App. No. 20348/92 (ECtHR, Judgment of 25 September 1996) paras 74–77; Powell and Rayner v. the United Kingdom, App. No. 9310/81 (ECtHR, Judgment of 21 February 1990) para 44.
99  Ibid para 135. See also Hatton and Others v. the United Kingdom, App. No. 36022/07 (ECtHR, Judgment, Grand Chamber, of 8 July 2003) paras 100–101.
100 Budayeva (n. 88) para 152, 136.
102 Özel (n. 97) para 173.
103 For further analysis on the notion of prevention in IDL see Sossai’s chapter in this volume.
104 Oneryildiz (n. 94) para 90.
106 Hardy and Maile v. the UK, App. No. 31965/07 (ECtHR, Judgment of 14 February 2012) para 187; see also Budayeva (n. 88) para 158.
108 Buckley (n. 98) para 74.