IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case No. 12.108

Marcel Claude Reyes and Others

v.

Chile

WRITTEN COMMENTS OF:

OPEN SOCIETY JUSTICE INITIATIVE
ARTICLE 19, GLOBAL CAMPAIGN FOR FREE EXPRESSION
LIBERTAD DE INFORMACIÓN MEXICO
INSTITUTO PRENSA Y SOCIEDAD
ACCESS INFO EUROPE

March 2006

Table of Contents

Table of Authorities

Cases and Decisions

Constitution and Statutes

Chilean Law No. 19.880 Establishing the Fundamentals of Administrative Proceedings That Govern the Acts of the State Administration (2003)

Chilean Supreme Decree No. 26 Establishing a Regulation on the Secrecy or Reservation of Acts and Documents of the State Administration (2001)

European Union, Directive 2003/4/EC on Public Access to Environmental Information (2003)

European Union, Directive 96/82/EC on the Control of Major-Accident Hazards Involving Dangerous Substances (Seveso II Directive) (1996)

Irish Freedom of Information Act (1997)

Republic of Korea, Disclosure of Information by Public Agencies Act (1996)

United States Freedom of Information Act, 5 U.S.C. 552 (1966)

International Treaties

African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (Banjul, June 27, 1981; entered into force October 21, 1986)

American Convention on Human Rights, OAS Treaty Series No. 36 (San Jose, November 22, 1969; entered into force July 18, 1978)

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, ICCP, EM-I/3 (January 29, 2000; entered into force September 11, 2003)

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43 (Aarhus, June 25, 1998; entered into force October 30, 2001)

European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5 (Rome, November 4, 1950; entered into force September 3, 1953)

Other Documents

African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, adopted at the 32nd Ordinary Session, October 17-23, 2002

ARTICLE 19, *The Public's Right to Know: Principles of Freedom of Information Legislation*, June 1999

Council of Europe, Parliamentary Assembly, Resolution 1087 (1996) on the Consequences of the Chernobyl Disaster

Council of Europe, Recommendation (2002)2 on Access to Official Documents, February 21, 2002

Council of Europe, Recommendation (81) 19 on Access to Information Held by Public Authorities, November 25, 1981

European Commission for Democracy Through Law (Venice Commission), *Consolidated Opinion on Freedom of Expression and Freedom of Access to Information as Guaranteed in the Constitution of Bosnia and Herzegovina*, CDL (2000) 78, October 2, 2000

European Union, *Charter of Fundamental Rights*, December 7, 2000

Inter-American Commission of Human Rights, Application Submitted to the Inter-American Court of Human Rights Against the State of Chile, Case 12.108 *Claude Reyes et al*, July 8, 2005

Inter-American Commission of Human Rights, *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the 108th regular session, October 19, 2000

Inter-American Commission on Human Rights, Report of the Office of the Special Rapporteur for Freedom of Expression, in *Annual Report of the Inter-American Commission on Human Rights* (2003), OEA/Ser.L/V/II.118, Doc. 70 rev. 2

Michael H. Glantz and Igor Zonn, "A Quiet Chernobyl," Natural Science (No. 9/1991)

Organization of American States, General Assembly, Resolution 1932 (XXXIII-O/03) on Access to Public Information: Strengthening Democracy, June 10, 2003

Organization of American States, General Assembly, Resolution 2057 (XXXIV-O/04) on Access to Public Information: Strengthening Democracy, June 8, 2004

The Commonwealth, Barbados Communiqué of the Law Ministers (1980)

The Commonwealth, *Freedom of Information Principles*, adopted by the Commonwealth Law Ministers at their May 1999 meeting, Trinidad and Tobago

United Nations Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and OSCE Representative on Freedom of the Media, Joint Declaration of November 26, 1999

United Nations Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and OSCE Representative on Freedom of the Media, Joint Declaration of December 6, 2004

United Nations, *Rio Declaration on Environment and Development*, UN Doc. A/Conf.151/26 (vol. 1)

I. Introduction

1. The signatory organizations respectfully submit this *amicus curiae* brief for the benefit of the Court's consideration of the salient issues raised by the above-referenced case.

2. The Justice Initiative pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. It has offices in New York (United States), Budapest (Hungary) and Abuja (Nigeria). Among its activities, the Justice Initiative prepares legal submissions for national and international courts and tribunals on questions of law where its expertise may be of assistance. In the area of access to information, the Justice Initiative has extensive experience in promoting the adoption and implementation of freedom of information laws in Eastern Europe, Latin America and elsewhere. It has also contributed to international standard-setting and monitoring of government transparency around the world. As an organization that promotes the highest international standards of freedom of expression and information, the Justice Initiative has a particular interest in the questions raised by this case.

3. ARTICLE 19, Global Campaign for Free Expression, is an international human rights NGO, based in London but with offices in different regions of the world, including in Buenos Aires. Taking its name from Article 19 of the *Universal Declaration of Human Rights*, ARTICLE 19 works globally to protect and promote the right to freedom of expression, including access to information and the means of communication. ARTICLE 19 is well known for its authoritative work in elaborating the implications of the guarantee of freedom of expression in different thematic areas. It has particular expertise in the area of access to information. In June 1999, ARTICLE 19 published *The Public's Right to Know: Principles on Freedom of Information Legislation*,[1] a set of principles on international standards and best comparative practice relating to access to information legislation. In July 2001, it published *A Model Freedom of Information Law*,[2] which translates the Principles into legislative form.

4. Libertad de Información Mexico, Asociación Civil (LIMAC) promotes and defends the right of access to public information at federal and local levels in Mexico, including through strategic litigation. LIMAC is also a leading promoter of government transparency efforts in Latin America. In particular, it has provided assistance for the adoption and implementation of freedom of information laws in several countries of the region (Argentina, Chile, Ecuador, Nicaragua, Paraguay and Peru). As an organization committed to the promotion of the right to information at

---

[1] (London: ARTICLE 19, 1999). Available at: http://www.article19.org/pdfs/standards/righttoknow.pdf.

[2] (London: ARTICLE 19, 2001). Available at: http://www.article19.org/pdfs/standards/modelfoilaw.pdf.

the international level, LIMAC takes a strong interest in the issues presented by this case.

5. Instituto Prensa y Sociedad of Peru (Press and Society Institute, IPYS) defends and promotes freedom of the press, and freedom of expression and information in Peru and Latin America. IPYS pursues these goals through a range of activities, including litigation at the local and international levels. In addition, IPYS works to enhance government transparency and civil empowerment in the region. Since 1999, IPYS has engaged in systematic monitoring of freedom of expression and information throughout the continent, through its network of correspondents in Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Mexico, Paraguay, Uruguay and Venezuela.

6. Access Info Europe is dedicated to promoting the right of access to information in Europe and contributing to the development of this right globally. Its activities include defence of the right to information in Western Europe (including an ongoing campaign to promote reform of the Spanish access to information regime, and research on the role of information commissioners) and participation in European Union transparency projects. Access Info Europe is engaged in intergovernmental standard-setting, including development of a binding treaty on access to official documents by the Council of Europe. It also provides assistance on implementation of access laws in Eastern Europe, and regulation and protection of the right in Latin America (at a regional level and in Chile, Peru and Uruguay).

7. The present case before the Court raises issues of great significance for the development of freedom of information law in the Americas and beyond. Both this Court and the Inter-American Commission on Human Rights ("the Commission") have underscored the importance of the free exchange of information and ideas for the healthy development and safeguarding of democracy. However, the Court has not had thus far an opportunity to consider fully the question of whether the American Convention on Human Rights ("the Convention") guarantees a right of general access to information held by public authorities.

8. That is the central issue addressed by this brief, which draws on relevant international and comparative law and practice from the Americas and other leading jurisdictions. It is on the basis of these standards that we consider the scope of the right to information, and the principles that underlie its protection under the Convention and international human rights law. The brief then discusses whether Chile has complied with its Convention obligations to guarantee freedom of information, both generally and with respect to the specific case at issue.

II. Discussion

A. Summary of Facts

9. The present case involves the denial by the Chilean authorities of a request for information by three Chilean citizens, Marcel Claude Reyes, Sebastian Cox Urrejola

and Arturo Longton Guerrero ("victims"). Mr. Claude Reyes is an environmental academic and activist, who was at the time executive director of the Terram Foundation, a registered environmental group based in Santiago. Mr. Cox Urrejola is a human rights lawyer and executive director of FORJA, a civil society organization that promotes access to justice. Mr. Longton Guerrero was at the time a Member of the Chilean Parliament.

10. The information at the center of this case was requested by Terram Foundation on May 6, 1998, by means of a letter to the Chilean Foreign Investment Committee ("Committee"), an agency of the Chilean Executive. The Foundation's request referred to information in the possession of the Committee related to its approval of a major logging project, known as the Condor River project, to be carried out by a subsidiary of the US-based forestry company then called Trillium Corporation (the company has since changed its name to Savia International).

11. In the early 1990s Trillium bought some 285,000 hectares of native timber land, knows as *lenga*, in the Chilean part of Tierra del Fuego. Shortly afterwards, Trillium proposed the Condor River project to the Chilean authorities, conducted an initial environmental impact assessment in 1995, and started harvesting the *lenga* in 1996. From the very beginning, however, the project met with strong opposition from Chilean and international environmental groups, which raised concerns about the project's impact on the area's fragile ecosystems and what they saw as Trillium's poor record of sustainable logging in the United States and elsewhere. As a result, the Condor River project was halted several times between 1996 and early 1998, including once as a result of a Supreme Court order.

12. It was under this state of affairs that the Terram Foundation filed a request for information collected by the Committee, which had vetted and approved Trillium's preliminary foreign investment application, pursuant to Chilean law. The Committee's information-gathering responsibilities under the law can be summarized as follows:

    a. collect and process the results of inspections carried out by other agencies regarding the applicant company's compliance with its obligations under foreign investment laws;
    b. interact with other agencies that are required to provide information to the Committee or whose prior authorization is required before the Committee can authorize a foreign investment project;
    c. investigate both within and outside Chile the suitability and seriousness of the applicants; and
    d. solicit from other entities in the public and private sector any information and documentation that the Committee deems necessary for carrying out its functions.

13. Given the Committee's powers, on May 6, 1998 Terram Foundation requested access to several categories of documents and information that the Committee ought to possess in relation to the Condor River project. On May 19, 1998, Terram representatives met with the Vice President of the Committee, who agreed to provide information only on the amount of Trillium's total investment, which was later

provided to Terram by fax. Following the Committee's failure to respond to the remaining requests, on June 3 and July 2, 1998, Terram sent two follow-up letters, which also went unanswered. The Committee reacted through a press statement, without providing any information, only after Mr. Claude Reyes and Mr. Longton Guerrero complained publicly about its non-responsiveness.

14. It is undisputed that the Committee provided no information, nor any reasons for its refusal to do so, with respect to Terram's requests for the following data:

    a. any information collected by the Committee on Trillium's track record, in order to satisfy itself of the company's past seriousness and legitimacy; as well as its formal decision on Trillium's application;
    b. any information in the possession of the Committee regarding Trillium's compliance with its obligations under Chilean foreign investment laws, including as to any past violations; and
    c. any information collected from third parties in relation to the above.

15. As a result, the victims filed three successive constitutional appeals against the Committee's effective denial of their request in the domestic courts, claiming a violation of their right to information under the Chilean Constitution and the Convention. All appeals were summarily dismissed as "manifestly ill-founded," including by the Chilean Supreme Court on July 31, 1998.

16. On December 17, 1998, a group of nongovernmental organizations and Members of Parliament ("petitioners") filed a petition on behalf of the victims with the Commission. On March 7, 2005, the Commission reached a decision on the merits of the case, finding Chile responsible for multiple violations of the Convention.[3] In view of this conclusion, the Commission recommended that Chile comply with a number of measures that sought to remedy the individual violations at issue, as well as the systemic shortcomings of the Chilean access to information and access to justice regimes.

17. On July 8, 2005, the Commission, unsatisfied with the State's response to its Article 50 report and recommendations, referred the case to the Court. The Commission submits that the Chilean State has violated the victims' right of access to public information and their right to judicial protection, under Articles 13 and 25 of the Convention, respectively. The Commission additionally submits that, by virtue of its failure to "ensure the victims' rights to access to information and to judicial protection and [to] have mechanisms in place to guarantee the right to access to public information," Chile has also violated Articles 1.1 and 2 of the Convention.[4] We endorse the submissions of the Commission.

[3] Report No. 31/05.

[4] Commission Application of July 8, 2005, para. 102.

B. Article 13 Guarantees A Right Of Access To Information Held By Public Bodies

1. Right to Information in Inter-American Jurisprudence

18. This Court has acknowledged early on that the Article 13 rights of listeners and receivers of information and ideas are on the same footing as the rights of the speaker: "For the average citizen it is at least as important to know the opinion of others or to have access to information generally as is the very right to impart his own opinion."[5] And in 2000, the Commission specifically recognized that "access to information held by the state is a fundamental right of every individual."[6] The existence of such a right draws support from both the language and jurisprudence of Article 13 of the Convention, which guarantees everyone's "freedom to seek, receive, and impart information and ideas of all kinds."

19. In a modern democracy, a very significant part of the totality of information held by "others" is in the hands of the state. That body of information is produced, collected and processed using public resources and it ultimately belongs to the public. The government holds the information as a custodian for the public, and is under a general obligation to make it available, save when a compelling public or private interest dictates otherwise. As such, the right to access information held by public bodies is an integral part of the Article 13 right to freedom of expression—a right that includes, in the words of this Court, "the collective right to receive any information whatsoever."[7]

20. The Commission has already recognized certain aspects of states' obligation to provide information in its jurisprudence, acknowledging, for example, that Article 13 guarantees the "right to truth" about responsibility for serious human rights violations, a right which corresponds to a positive state obligation:

> [T]he right to truth is founded in Articles 8 [right to a fair trial] and 25 [right to judicial protection] of the Convention, insofar as they are both "instrumental" in the judicial establishment of the facts and circumstances that surrounded the violation of a fundamental right. … [T]his right has its roots in Article 13 (1) of the Convention, because that article recognizes the right to seek and receive information. With regard to that article, … the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.[8]

---

[5] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, November 13, 1985, para. 32. The Spanish version of this quote speaks of "informacion de que disponen otros," literally "information available to others."

[6] *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the Commission's 108th regular session, October 19, 2000, para. 4.

[7] *Compulsory Membership* Opinion, para. 31.

[8] *Barrios Altos* Case (*Chumbipuma Aguirre et al. v. Peru*), Inter-American Court of Human Rights, Judgment of March 14, 2001, para. 45. The Court in this case considered it unnecessary to address the claims under Article 13, having held that Peru had violated Articles 8 and 25 of the Convention.

21. The right to access state-held information is further strengthened by its close connection to another fundamental right, enshrined in Article 23 of the Convention: "the right to take part in the conduct of public affairs, directly or through freely chosen representatives." As this Court has noted, "a society that is not well-informed is not a society that is truly free."[9] In a democracy, citizens exercise their self-governance rights not only through free and periodic elections, but also through a myriad of other fora and means of influencing and interacting with those responsible for setting public policies. Both direct and indirect participation, during or outside election periods, would be greatly undermined by the lack of a right of access to government information, and the resulting inability to follow and engage in government decision-making. As the three specialized mandates on freedom of expression have noted,

> [i]mplicit in the freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[10]

22. It is important to note here that the Chilean State does not appear to dispute the claim that there exists a right of general access to information under the Convention. Indeed, the Commission's report on the admissibility of the original petition describes the position of the State as follows: "The State argues that the Vice-President of the Committee on Foreign Investment complied with his obligations under Article 13 by providing some of the information requested by petitioners."[11]

2. Right to Information in State Practice

23. The recognition of a fundamental right of access to state information is well supported by the current status of the right in state practice and international law. More than sixty countries around the world have adopted freedom of information laws (statutes) that provide for access to state-held information.[12] In the Americas, these include Antigua and Barbuda, Belize, Canada, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, and the United States of America. Over forty countries worldwide, including Colombia, Guatemala, Peru and Venezuela, have incorporated the right of access to public information into their constitutional bills of rights, formally recognizing its essential role in the proper functioning of a democratic system.

---

[9] *Compulsory Membership* Opinion, para. 70.

[10] Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, November 26, 1999. *See also* the 2004 Joint Declaration of the three mechanisms, adopted on December 6, 2004, which affirms that "[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation…."

[11] Report No. 60/03, Admissibility, para. 38 (hereinafter Commission's Admissibility Report). We will address below the State's claim that the denial of access to the remaining information was supposedly justified for various reasons.

[12] Country Information Page, http://www.freedominfo.org/countries/index.htm.

24. At least eight countries in the Americas are currently considering proposals to enact national freedom of information laws.[13] In 1999, one year after the filing of the original petition in this case, Chile itself passed a law granting access to the administrative acts of the state administration and their supporting documents.[14] This indicates that a right to information held by public authorities is now the rule in the Americas, as in the rest of the democratic world. The general consensus of the Member States on this issue is most clearly revealed by the OAS General Assembly's 2003, 2004 and 2005 resolutions on access to public information, which recognize the states' obligation to "respect and promote respect for everyone's access to public information", which is deemed to be "a requisite for the very exercise of democracy."[15]

25. Even in the absence of explicit constitutional or statutory authorization, courts in several countries have upheld a fundamental right of access to information as a corollary of freedom of expression and participation rights. The Supreme Court of India addressed the issue in a case involving the government's refusal to release intra-agency correspondence regarding transfers and dismissals of judges. Recognizing a "right to know which seems implicit in the right of free speech and expression," the Indian Court argued that,

> [w]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. … The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State.[16]

26. The Constitutional Court of (South) Korea reached a similar conclusion in a 1989 case involving a municipal office's unjustified refusal to grant the applicant access to certain real estate records he had requested. The Korean Court argued that unhindered

---

[13] These are Argentina, Brazil, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, and Uruguay. In some countries, such as Argentina and Mexico, provinces, municipalities and other sub-national entities have adopted acts that grant a general right of access to information in their possession. See, inter alia, "Report of the Office of the Special Rapporteur for Freedom of Expression," in *Annual Report of the Inter-American Commission on Human Rights* (2003), OEA/Ser.L/V/II.118, Doc. 70 rev. 2.

[14] *Id*., para. 86. The law is known as *Ley de Probidad Administrativa* [Administrative Probity Act], no. 19.653.

[15] In addition, the resolutions provide for the states' obligation to "promote the adoption of any necessary legislative or other types of provisions to ensure [the right's] recognition and effective application." *Resolution 1932 (XXXIII-O/03) on Access to Public Information: Strengthening Democracy*, adopted on June 10, 2003; *Resolution 2057 (XXXIV-O/04) on Access to Public Information: Strengthening Democracy*, adopted on June 8, 2004; and *Resolution 2121 (XXXV-O/05) on Access to Public Information: Strengthening Democracy*, adopted on May 26, 2005.

[16] *S.P. Gupta v. Union of India* [1982] AIR (SC) 149, at 232. India adopted a Right to Information Act in June 2005.

access to state-held information was essential to the "free formation of ideas," which is itself a pre-condition for the realization of genuine freedom of expression and communication.[17] This and subsequent freedom of information decisions of the Korean Court influenced the legislature to adopt in 1996 a comprehensive access to information law.[18]

27. This approach has also been embraced by national courts in the Americas. Thus, the Constitutional Chamber of the Supreme Court of Costa Rica held in a 2002 case that the Central Bank's refusal to disclose a report of the International Monetary Fund, requested by a newspaper, violated the constitutional right to information "to the detriment of all Costa Rican citizens." The Court reasoned that

> the State must guarantee that information of a public character and importance is made known to the citizens, and, in order for this to be achieved, the State must encourage a climate of freedom of information. … In this way, the State … is the first to have an obligation to facilitate not only access to this information, but also its adequate disclosure and dissemination, and towards this aim, the State has the obligation to offer the necessary facilities and eliminate existing obstacles to its attainment.[19]

In reaching its decision, the Costa Rican Court relied emphatically on the symbiotic relationship between the right to information and the rights of democratic participation, arguing that "the right to information … implicates the citizens' participation in collective decision-making, which, to the extent that freedom of information is protected, guarantees the formation and existence of a free public opinion, which is the very pillar of a free and democratic society."[20]

3. Right to Information in International Law and Practice

28. The Inter-American human rights system is not alone in recognizing, at a regional level, the right of the public to receive generalized access to records and information in the hands of the state. So have the other two regional human rights mechanisms, confirming the global trend toward acceptance of the right as a basic individual and collective entitlement.

i. Europe

29. The Council of Europe, the main human rights organization in Europe, adopted its first recommendation on the right of access more than twenty years ago.[21] In 2002,

---

[17] *Forests Survey Inspection Request* Case, 1 KCCR 176 (September 4, 1989). A summary of the judgment is available at http://www.ccourt.go.kr/english/decision.htm.

[18] Disclosure of Information by Public Agencies Act (no. 5242), December 31, 1996.

[19] *Navarro Gutiérrez v. Lizano Fait*, Judgment of April 2, 2002, *as translated in* the 2003 Report of the Special Rapporteur for Freedom of Expression, 161.

[20] *Id*., para. VI.

[21] The 1981 recommendation provided that "[e]veryone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities …." *Recommendation (81) 19 on*

the Committee of Ministers adopted a new recommendation providing for a right to access official documents in the following terms:

> Member states should guarantee the right of everyone to have access, on request, to official documents held by the public authorities. This principle should apply without discrimination on any ground, including national origin.[22]

The Council of Europe is currently in the process of developing a treaty or other binding instrument, which would recognize an individual right of access to official documents.[23]

30. In the 25-member European Union, the Union's bill of rights grants a right of access to documents held by Union institutions to "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State."[24] Considering that the Charter is based on the constitutional traditions of the member states, the inclusion of the right of access to information therein suggests that this right has not only become ubiquitous, but is widely perceived as a fundamental right on the European continent.

31. These recent developments notwithstanding, the European Court of Human Rights has not thus far construed Article 10 of the European Convention on Human Rights as providing for a right of general access.[25] The Court has recognized, however, a right to state-held information under circumstances in which the denial of information affects the enjoyment of other Convention rights, such as the right to respect for private and family life, under Article 8 of the Convention. In *Guerra v. Italy*, a case brought by individuals living near a chemical factory in relation to the failure of the Italian authorities to inform them about the risks of potentially devastating accidents, the Court held that, under such circumstances, Article 8 imposed on states a positive obligation to inform. Failure to do so had left the applicants unable to assess the risks and make informed decisions about living near the hazardous facility.[26]

Access to Information Held by Public Authorities, adopted by the Council of Ministers on November 25, 1981.

[22] *Recommendation (2002)2 on Access to Official Documents*, February 21, 2002, para. III (emphasis added).

[23] In May 2005, the Committee of Ministers tasked a group of experts with "drafting a free-standing legally binding instrument establishing the principles on access to official documents." Decision No. CM/866/ 04052005.

[24] *Charter of Fundamental Rights of the European Union*, December 7, 2000, art. 42. The Charter is not legally binding but can be invoked by EU and national courts.

[25] Article 10 provides, in the relevant part, that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers."

[26] *Guerra and Others v. Italy*, Judgment of February 19, 1998. The Court found that similar positive obligations existed in *Gaskin v. United Kingdom*, Judgment of July 7, 1989 (involving refused access to case records to an adult who had been in the care of the local authorities as a child); and *McGinley and Egan v. United Kingdom*, Judgment of June 9, 1998 (involving refused access to records regarding the

32. As noted, the European Court did not consider Article 10 to be applicable in these cases. In *Guerra*, the Court ruled, in language similar to that employed in the earlier cases, that

> [the] freedom to receive information, referred to in paragraph 1 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him" .... That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.[27]

Relying in part on the nuances of opinion within the Court, various commentators have argued that, by qualifying its holding with respect to the circumstances of each individual case, the Court has left the door open to interpretations of Article 10 that might recognize a right of access in other factual situations. The Venice Commission, the Council of Europe's authoritative advisory body on constitutional matters, reached the following conclusion in a 2000 opinion:

> [T]he case-law of the European Court of Human Rights has not yet given a clear answer as to whether Article 10 entails a general obligation for the authorities to disseminate information of their own motion. It would seem to imply, however, an obligation to provide information on request, subject, of course, to the limitations set forth in Article 10 para 2 of the Convention.[28]

---

potential health hazards resulting from nuclear radiation tests to which the applicants had been exposed while serving in the British army).

[27] *Guerra*, para. 53 (references omitted, emphasis added). Three concurring opinions touched on this issue: Judge Palm, joined by five other judges, agreed that Article 10 was not applicable to this particular case, but in so doing "put strong emphasis on the factual situation at hand, not excluding that under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public." Judge Jambrek considered that Article 10 creates a positive obligation for the State only "when a person of his/her own will demands/requests information which is at the disposal of the government at the material time." Judge Thor Vilhjalmsson, in a partly dissenting opinion, was of the view that Article 10 should have been applied and expressed agreement with the European Commission, which argued in the same case that

> the provision of information to the public was now one of the essential means of protecting the well-being and health of the local population in situations in which the environment was at risk. Consequently, the words "This right shall include freedom ... to receive … information..." in paragraph 1 of Article 10 had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment. *Id*., para. 52.

[28] European Commission for Democracy Through Law, "Consolidated Opinion on Freedom of Expression and Freedom of Access to Information as Guaranteed in the Constitution of Bosnia and Herzegovina," CDL (2000) 78, October 2, 2000, para. 16. The Commission's analysis was in response to a question put by the Bosnian authorities as to whether the freedom of expression guarantees of the Dayton Peace Agreement—which incorporated by reference the European Convention on Human Rights—included a right of access to information.

The Venice Commission thus highlighted the distinction between an unqualified right to proactive dissemination of information by the State, in the absence of any request, and a right to information in response to a specific request by an individual or group. In the latter situation, which is analogous to the facts of the present case against Chile, Article 10 would give rise, in the opinion of the Venice Commission, to a right of access and a corresponding obligation for the state.

33. In assessing the relevance of the European Court's case law, we draw to the attention of this Court two important differences in the respective textual bases. First, Article 10 of the European Convention is cast in negative terms, guaranteeing the freedom to receive information and ideas "without interference by public authority"—in other words, a freedom of primarily horizontal exchanges among individuals and other private entities that should not be disturbed by the state. This conceptual approach chosen by the drafters may underlie, to some extent, the apparent ambiguity of the European Court in relation to the right of access to official information.[29]

34. That is not the case, however, with Article 13 of the American Convention, which guarantees the free exchange of information and ideas in general terms, without any reference to the intervention of the state.[30] Article 13 has been consistently interpreted by the Convention bodies as guaranteeing more than a purely negative freedom from government interference. This is evident in this Court's embracing the notion of the collective right of the public to be informed and in the Commission's recognition of the right to truth (and the corresponding obligations of the state). A right of access to state-held information is a logical component of the right of the public to be informed, to be able to participate meaningfully in governance and to hold the government accountable.

35. In addition, both the text and the jurisprudence of Article 13 indicate that the state has certain positive obligations to act to secure freedom of expression and information. Thus, paragraph 3 of Article 13 provides that this freedom "may not be restricted by indirect methods or means", including the "abuse of … private controls over newsprint, radio broadcasting frequencies or equipment used in the dissemination of information." In this context, this Court has noted that

> Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits "private controls" producing the same result. This provision must be read together with the language of Article 1 of the Convention wherein the States Parties "undertake to respect the rights and freedoms recognized (in the Convention) ... and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms …." Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an

[29] The European Court has recognized, however, that Article 10 may create positive obligations for the state in other contexts. For example, in *Ozgur Gundem v. Turkey* the Court held that Turkey's failure to take steps to protect a newspaper from attacks perpetrated by private persons violated Article 10. Judgment of March 16, 2000, paras. 44-45.

[30] That is not to say, of course, that freedom of information is an absolute right; the present discussion relates to the nature of the right, not its contours.

> indirect character which tend to impede "the communication and circulation of ideas and opinions," but the State also has an obligation to ensure that the violation does not result from the "private controls" referred to in paragraph 3 of Article 13.[31]

Such an obligation includes perforce a positive duty to act to eliminate any private barriers to free and pluralistic communication. The same fundamental interest in the free circulation of ideas and information requires the state, even more compellingly, to act to make available its own information to the citizenry.

36. Secondly, as the Commission emphasizes in its Application, Article 13 of the American Convention, unlike Article 10 of the European Convention, provides for the freedom to seek, as well as receive and impart, information and ideas of all kinds. Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights also contain the word "seek" in their formulations. While the freedom to receive or impart information essentially translates into one's right to share information with other individuals or groups, free of state interference, the freedom to seek would include the right to request information from both private entities and public bodies. In the latter case, the principles of representative democracy require that the public authorities be under a corresponding obligation to provide access. As the Commission has argued in its Application,[32] the practice of the States Parties, described above, in the decades following adoption of the Convention, and the progressive interpretation of Convention Articles 13 and 23 by the Court and the Commission, would allow, and indeed logically require, recognition of a right to seek information held by the state.

ii. Africa and the Commonwealth

37. At the regional level, the right of access to government information has also been recognized by the Commission's African counterpart. The African Commission on Human and Peoples' Rights has not yet had an opportunity to decide, in its adjudication procedure, whether the Banjul Charter grants a right of access to official information. That Commission has nevertheless held, like its Inter-American counterparts, that Article 9 of the Charter protects not only the free speech rights of the speaker, but also the rights of those interested in receiving information and ideas. Thus, in a case against Gambia, the Commission held that the politically motivated harassment and intimidation of journalists not only deprived them "of their rights to freely express and disseminate their opinions, but also the public, of the right to information."[33]

---

[31] *Compulsory Membership* Opinion, para. 48.

[32] Paras 57-60.

[33] *Sir Dawda K. Jawara v. The Gambia*, Decision of May 11, 2000, para. 65. Article 9 of the African Charter on Human and Peoples' Rights provides: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."

38. More recently, the African Commission expressed its position, and its interpretation of Article 9, on the right to information in its *Declaration of Principles on Freedom of Expression in Africa*, which contains a comprehensive statement of the principles applicable in this area. Principle IV of the Declaration provides as follows:

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
>
> 2. The right to information shall be guaranteed by law in accordance with the following principles: everyone has the right to access information held by public bodies; everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right ….[34]

39. The 53-member Commonwealth has also supported the right to information over more than two decades, starting with the 1980 Barbados Communiqué of its Law Ministers.[35] In 1999 the Commonwealth adopted a statement of Freedom of Information Principles, which encouraged its member countries to "regard freedom of information as a legal and enforceable right" and to establish "a presumption in favor of disclosure."[36]

40. This overview of comparative and international law and practice shows that the right of access to official information has become widely accepted in the democratic world, including in the Americas, as a fundamental human right. Whether as part of traditional free expression guarantees or as a basic entitlement in its own right, it is perceived as an integral and imperative component of the broader right to democratic governance. Indeed, any arguments to the effect that the public should <u>not</u> have a right to know what their government knows and does, subject only to compelling exceptions, smack of authoritarianism.

4. <u>The Special Regime of the Right to Environmental Information</u>

41. The information that was requested in this case from the Chilean authorities was related to the authorization of a foreign investment project with major environmental implications. It is therefore relevant to refer here to developments in international and comparative law in the special area of access to information on the environment.

42. Since the adoption of the United Nation's Rio Declaration on Environment and Development (1992), access to environmental information has emerged as an

---

[34] Adopted at the 32nd Ordinary Session, October 17-23, 2002, Banjul, Gambia.

[35] The Communiqué expressed the view that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information." *Quoted in* "Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know," Background Paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: March 30-31, 1999).

[36] Adopted by the Commonwealth Law Ministers at their May 1999 Meeting, Trinidad and Tobago.

essential component of sustainable development and public participation in environmental decision-making. Principle 10 of the Rio Declaration provides:

> At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.[37]

The public's right to know gains special importance in this area in view of the impact of environmental decision-making on the wellbeing and the most basic rights of large numbers of people.

43. Following up on the Rio commitments, the Member States of the United Nations Economic Commission for Europe and the European Union signed in Aarhus, Denmark, in 1998, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[38] Article 4 of the Convention requires all public authorities of the states parties to make environmental information available to the public, upon request, for which there is no need to provide a reason. In the Convention's definition, public authorities include all executive and other agencies "performing public administrative functions under administrative law."[39] "Environmental information" is also broadly defined to include not only technical information on the state of the environment, but also "activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of the environment."[40]

44. The Rio and Aarhus processes have encouraged many countries to adopt legislation providing for a right of access to environmental information, sometimes before even recognizing a general right to information. To ensure compliance of its Member States with their obligations under the Aarhus Convention, the European Union has adopted a number of detailed directives requiring them to enact legislation implementing the right at issue.[41]

5. Obligation to Collect or Generate Certain Information Related to the Protection of Fundamental Rights and Interests

45. Under most domestic freedom of information regimes, public authorities are generally not required to create new information in response to an informational request. However, there do exist in international and comparative law certain positive

---

[37] UN Doc. A/Conf.151/26 (vol. 1).

[38] UN Doc. ECE/CEP/43, adopted on June 25, 1998. The binding treaty, also known as the Aarhus Convention, entered into force on October 30, 2001. It has been ratified by thirty-three countries so far.

[39] Aarhus Convention, art. 2.2.

[40] *Id*., art. 2.3(b).

[41] *See*, in particular, *Directive 2003/4/EC on Public Access to Environmental Information*, January 28, 2003, which replaced an earlier directive on the matter (*Council Directive 90/313/EEC*).

duties for the state to collect or generate information that is necessary to ensure the enjoyment of basic rights and interests.

46. This Court has recognized a "right to truth" that gives rise to state obligations to investigate and shed light on the circumstances of, and responsibilities for, massive human rights abuses. In the circumstances of the *Barrios Altos* case, the Court held that this right is "subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities of the competent organs of the State …."[42]

47. As noted in *Barrios Altos*, the right to information is closely related, in this context, to the right to judicial protection guaranteed by Article 25 of the Convention. The state's failure to conduct diligent investigations into serious rights abuses deprives the victims and their kin of their day in court. Likewise, without information about threats to the enjoyment of one's basic rights, such as the right to life or health, the affected individuals and groups are unable to make use of available remedies to prevent (further) harm, or seek redress after the fact. The state is usually in a much better position than individual victims to secure that essential information, both from its own and private sources—if necessary, through the compelling power of the law. That is, ultimately, what is required by virtue of the states' obligation to not only respect Convention rights, but also ensure their "free and full exercise."

48. The European Court of Human Rights has similarly held, in *Guerra* and its progeny, that "there are positive obligations inherent in effective respect for private or family life" and that the state is required to take "necessary steps to ensure [their] effective protection."[43] The *Guerra* Court concluded that Italy had failed to make available to the affected communities even information it had already collected and analyzed about the health and environmental risks posed by the chemical establishment at issue. However, had no such information been available at the relevant time, generating and publicizing it would have surely been one of the key steps required to ensure the effective protection of the threatened Article 8 rights. Indeed, when basic rights such as the right to life or the right to health are at stake, whether or not the government already possesses the information necessary to prevent and/or remedy their violation is ultimately irrelevant. The obligation to ensure the effective protection of those rights includes the positive duty to investigate, and to take all reasonable steps to collect and analyze the required information. Giving states a "no available information" defense in this context would defeat the very purpose of their positive obligations.

49. The states' obligation to investigate and collect information is most compelling when there is reason to believe that public safety and well-being are endangered. The European Union requires its Member States, for example, to provide adequate information to the public about the risks and protective measures adopted by

[42] Para. 48.

[43] Para. 58.

commercial establishments using dangerous substances that may cause major environmental accidents. The authorities must regularly inform the public about the nature of the activities and dangerous substances used, the potential effects of accidents on the population and the environment, and the emergency plans in case of an accident. [44] These EU-wide norms were adopted in recognition of the fact that—as the Council of Europe's Parliamentary Assembly put it, in the wake of the Chernobyl disaster—"public access to clear and full information [on such matters] must be viewed as a basic human right."[45]

50. A similar case can be made about information on business ventures and other activities with potentially serious—but not necessarily imminent—consequences for the environment and affected communities. After all, environmental calamities have often been compared to "quiet Chernobyls."[46] The Aarhus Convention includes obligations to not only make public environmental information already in the hands of states parties, but also to "collect and disseminate" a minimum of information without which public participation in environmental decision-making would be rendered meaningless. Thus, parties are required to establish "mandatory systems … so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment."[47]

51. The regulation of consumer products and their hazardous effects is another area in which states are increasingly required, under national and/or international law, to proactively collect, analyze and publicly disseminate information. Under the Aarhus Convention, for example, states parties are bound to ensure that "sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices."[48] In their second meeting, the Parties adopted an amendment to the Convention regarding genetically modified organisms (GMOs), whereby

---

[44] Such information must be "supplied regularly and in the most appropriate form, without their having to request it, to all persons and all establishments serving the public (such as schools and hospitals) liable to be affected by a major accident …." Council Directive 96/82/EC on the Control of Major-Accident Hazards Involving Dangerous Substances, adopted on December 9, 1996 (Seveso II Directive), *as amended*, art. 13 and Annex V.

[45] Resolution 1087 (1996) on the Consequences of the Chernobyl Disaster, para. 4.

[46] See, for example, Michael H. Glantz and Igor Zonn, "A Quiet Chernobyl," Natural Science (No. 9/1991), addressing the dire situation of the Aral Sea environment.

[47] Art. 5.1(b). The minimum information that must be made available to the public in relation to such activities includes the following: a detailed description of the proposed activity and its effects on the environment; the measures adopted to prevent or reduce the adverse effects; an outline of the main alternatives considered; and the main reports and advice on the matter received by the relevant authorities. Art. 6.6.

[48] Art. 5.8.

> … each Party shall provide for early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.[49]

Another relevant body of law is the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. The 132 states parties to the Cartagena Protocol, which include 23 states from the Americas, are required to promote and facilitate public awareness, education, and participation relating to GM plants that affect biodiversity conservation and sustainable use.[50]

52. The state's obligation to collect and provide adequate information on environmental threats and their effects on human well-being is also closely linked to the effective exercise of the public's right, guaranteed by Article 23 of the Convention, to have a say in the shaping of environmental policies. Public participation in environmental decision-making has become an essential part of sound environmental policies in the democratic world.[51] Yet, if the information is the oxygen of democracy, the right of democratic participation in decisions that affect the welfare of entire communities would be asphyxiated without proper access to information.

C. Chile Has Failed to "Give Effect" to the Right to Information

53. We have respectfully submitted that the victims have a right, under Article 13 of the Convention, to seek official information, to which right corresponds a positive obligation of the state to provide the requested information. Given the positive nature of this obligation, the right is usually guaranteed domestically through the adoption of laws or regulations that expressly require public authorities to provide information upon request. Such laws often determine in some detail the exceptional grounds on which official information can be lawfully withheld (usually known as exemptions), the procedures for requesting and providing the information, and other practical aspects.

54. At the time of the victims' informational request to the Committee, Chile did not have a law (statute) or other act of general application providing for a right of general access to state-held information. As a result of this lacuna, the requestors' appeals against the Committee's mute denial of access invoked the free expression provisions of the Chilean Constitution and the Convention.[52] However, their constitutional

---

[49] Art. 6 bis, adopted by Decision II/1 at the second meeting of the Parties on May 25-27, 2005. The information to be provided to the public includes: a general description of the GMOs concerned, and their intended uses; the location(s) of the release; the plans for monitoring the GMOs; and the environmental risk assessment. Annex I bis, para. 4.

[50] ICCP, EM-I/3, Art. 23. In addition, each contracting party needs to inform the public about access to information through the Biosafety Clearing-house. Id.

[51] *See* inter alia Principle 10 of the Rio Declaration; and the Preamble to the Aarhus Convention: "to be able to assert [the right to a healthy environment] and observe [the duty to protect it], citizens must have access to information [and] be entitled to participate in decision-making … in environmental matters…."

[52] The victims relied expressly on Article 19.12 and Article 5 of the Chilean Constitution, as well as Article 13 of the Convention. Constitutional Article 19.12 guarantees freedom of opinion and information,

petitions were summarily rejected as manifestly unfounded by the Chilean courts—presumably as a result of a finding that there was no such right of access under the Chilean Constitution.[53]

55. This state of affairs at the relevant time was in violation of Articles 1 and 2 of the Convention, read in conjunction with Article 13. Article 1 binds States Parties to "ensure to all persons subject to their jurisdiction the free and full exercise" of the Convention rights and freedoms. Article 2 complements this obligation by requiring States Parties to adopt "such legislative or other measures as may be necessary to give effect" to Convention rights and freedoms.

56. The Inter-American Court had an opportunity to expound upon the nature of these obligations in its *Advisory Opinion on the Enforceability of the Right to Reply and Correction*, where it argued that Article 2 "codifies a basic rule of international law that a State Party to a treaty has a legal duty to take whatever legislative or other steps as may be necessary to enable it to comply with its treaty obligations."[54] Turning to the specific issue under deliberation, the Court concluded that,

> [i]f for any reason … the right of reply or correction could not be exercised by "anyone" who is subject to the jurisdiction of a State Party, a violation of the Convention would result which could be denounced to the organs of protection provided by the Convention.[55]

57. Likewise, in Chile, the right of access to state information, which we submit is guaranteed by Article 13 of the Convention, could not be freely and fully exercised at the time of the victims' request by virtue of that State's failure to adopt the necessary legislative and regulatory measures required to give effect to it. As a result of this failure—and as the victims' unsuccessful appeals to the domestic courts clearly demonstrate—the right of access was not enforceable under Chilean law. This amounted to a generalized violation of the informational rights of all Chileans and others persons under Chile's jurisdiction, above and beyond those suffered by the victims in the current case.

58. As noted above, in 1999 Chile adopted the Administrative Probity Act, which grants public access to "the administrative acts of the state administration bodies and the

---

whereas Article 5 obliges all state bodies to respect and promote fundamental rights guaranteed by the Constitution and by international treaties ratified by Chile. These include the American Convention of Human Rights, which was ratified by Chile on August 21, 1990.

[53] Commission's Application, para. 82.

[54] Advisory Opinion OC-7/86, August 29, 1986, para. 30.

[55] *Id*., para. 28. The Court's opinion in this instance was requested by Costa Rica, which asked the Court, *inter alia*, whether it had an obligation under Article 2 of the Convention to adopt "the legislative or other measures that may be necessary to give effect to the right of reply or correction" guaranteed by Article 14 of the Convention. In response to this question, the Court concluded, affirmatively, that whenever the Convention right at issue "is <u>not enforceable under the domestic law</u> of a State Party", that State is under an obligation to adopt "the legislative or other measures" referred to in Article 2 of the Convention. *Id*., para. 35 (emphasis added).

documents that support and complement them directly or essentially."[56] This definition of the scope of the right of access is not only vague, but also seriously underinclusive. By tying the right of access to the technical category of the "administrative act", the Act excludes a vast amount of records and other information in the possession of the state that do not constitute "administrative acts" or may not be directly related to final or contentious administrative decision-making.[57] The excluded records would encompass, for example, all sorts of research data collected by government agencies in the fulfillment of their day-to-day responsibilities that may not necessarily lead to any "formal administrative decisions."

59. On August 26, 2005, an amendment to the Chilean Constitution entered into force, which establishes that formal administrative decisions of state authorities, as well as certain related documents and procedures, shall be public.[58] The new constitutional provision, adopted several months after the Commission's critical findings on the merits of this case and the relevant Chilean legislation, retains nevertheless two of the main weaknesses of the Probity Act. First, the new Article 8 falls short of establishing a constitutional right of access to state-held information. Secondly, it continues to restrictively define access to information in relation to formal administrative decision-making, rather than all and any information held by the state.

60. Article 2 of the Convention allows the States a certain choice of means in "giving effect" to the Convention rights, "in accordance with their constitutional processes and the provisions of [the] Convention." The flawed definitions of the 1999 Act and constitutional Article 8 cannot, however, be construed simply as a matter of means of implementation since they go to the essential content of the right to information. These definitions are based on the erroneous premise that access is allowed only to information expressly designated as public, rather than to all information that is not specifically exempted from disclosure in the interest of a compelling and clearly defined public necessity. In other words, they are effectively based on the premise of secrecy as the rule, with access as the exception. As a result, in violation of Articles 1 and 2 of the Convention, Chile continues not to comply with its obligation to ensure

[56] 1999 Act, Article 13.3. The phrase in the Spanish original is "los actos administrativos de los órganos de la Administración del Estado y los documentos que le sirven de sustento o complemento directo y esencial." The 1999 Act is complemented by a 2003 law that seeks to clarify various aspects of the 1999 Act, including the definitions of "administrative act" and "administrative procedure:" Law No. 19.880 Establishing the Fundamentals of Administrative Proceedings That Govern the Acts of the State Administration [Ley que Establece las Bases de los Procedimientos Administrativos que Rigen los Actos de los Órganos de la Administración del Estado], published in the Official Journal of May 29, 2003.

[57] A 2001 implementing regulation defines administrative acts as "formal decisions issued by the organs of the administration, which contain final declarations of will [intent] made in the exercise of a public competency" (in original, "decisiones formales que emiten los órganos de la Administración, en las que se contienen declaraciones finales de voluntad, realizadas en el ejercicio de una potestad publica"). Supreme Decree No. 26 Establishing a Regulation on the Secrecy or Reservation of Acts and Documents of the State Administration, published in the Official Journal of May 7, 2001, art. 3.

[58] The new Article 8 provides as follows, in the Spanish original: "Son públicos los actos y resoluciones de los órganos del Estado, así como sus fundamentos y los procedimientos que utilicen." Law No. 20.050, published in the Official Journal on August 26, 2005.

the "free and full exercise" of the Article 13 right of access to information held by public bodies.

D. Chile's Failure to Disclose the Information Requested by the Victims Violates Their Article 13 Rights

61. The almost complete denial by the Committee, an agency of the Chilean executive, of access to the specific information and records requested in this case, coupled with the summary dismissals of the victims' appeals by the domestic courts, amounts to an infringement of their right to information. Turning now to the issue whether such infringement was justified, we submit that, even if Chile had given general effect to the right to information, it would still be in violation of the Article 13 principles on justified restrictions of that right.

62. Under paragraph 2 of Article 13, any restrictions on freedom of expression must be "expressly established by law to the extent necessary to ensure" one of the following enumerated aims:

    a. respect for the rights or reputations of others; or
    b. the protection of national security, public order, or public health or morals.

63. This Court has interpreted these provisions as imposing a four-part test for the legitimacy of restrictions, which must meet the following requirements:

    a. the existence of clearly established grounds for liability;
    b. the express and precise definition of these grounds by law;
    c. the legitimacy of the ends sought to be achieved;
    d. a showing that these grounds of liability are "necessary to ensure" the aforementioned ends.[59]

    With respect to the last, and often most important, of these requirements, the Court noted that proving the "necessity" of restrictions requires a showing of "compelling governmental interest … that clearly outweigh[s] the social need for the full enjoyment" of Article 13 rights. The "just demands of a democratic society" must also guide, as an overarching value, the weighing of these competing considerations.[60]

    "Clearly established by law"

64. As noted above, the requestors never received an official explanation from the Committee as to why their request was denied, and their judicial appeals were

[59] *Compulsory Membership* Opinion, para. 39. The Court reference to "grounds for liability" is taken from paragraph 2 of Article 13, which provides that the exercise of the right to freedom of thought and expression "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability …." Liability in this context is analogous to restrictions or exemptions to a positive right, such as the right to information, which imposes positive obligations on the state.

[60] *Id*., paras. 44-46.

summarily dismissed by the domestic courts. The Chilean government claims that the denial of information was justified, but it fails to indicate on the basis of what domestic law in effect at the relevant time—apart from a vague reference to "constitutional economic guarantees"[61]—even though it recognizes, unlike the domestic judiciary, that Article 13 of the Convention guarantees a right of access to information.[62] Under these circumstances, we must conclude that the grounds for withholding the information in this case were neither expressly established, nor precisely defined by Chilean law. This is *per se* a violation of Article 13.

65. It is relevant to note here that the great majority of freedom of information laws in existence include relatively detailed provisions on the legal grounds for non-disclosure of information. These provisions, when well-drafted, enable individuals to predict with reasonable certainty the contours of their informational rights under the law—which is the very reason why the Convention requires that any restrictions to rights it guarantees be established by law.

"Legitimate aims"

66. Chile has advanced, in its various submissions, three main lines of defense under Article 13.2, arguing that the denial of information was justified in the interest of protecting (a) the confidentiality of the foreign investor's commercial information; (b) the confidentiality of the Committee's activities; and/or (c) Chile's national economic interests.[63] The State has not indicated, however, to which parts or categories of the requested information each of these supposed justifications apply. This makes it difficult to determine whether these aims are legitimate under Article 13. A number of general observations can nevertheless be made.

67. It can be assumed that some of the information requested by the victims—but certainly not all of it—may have included confidential commercial information

---

[61] Commission's Admissibility Report, para. 39.

[62] In a recent submission, dated December 16, 2005, the State appears to introduce, albeit in very contradictory terms, a new justification: namely, that the information requested by the victims was beyond the collection powers of the Committee—and therefore non-existent—and that the State was hence not required to generate such information. The fact that the State is only now putting forward this factual claim for the first time, after more than six years of proceedings before the Commission, raises serious doubts about its credibility. To this date, the State has yet to provide a complete account of the information contained in the Committee's Trillium file at the relevant time. Only an extreme case of dereliction of duty could explain the Committee's supposed failure to collect any of the information denied to the victims. At the very least, a good portion of the information submitted by Trillium itself would have arguably come under the terms of the victims' informational request. The State implicitly acknowledges this much in the same December 2005 submission, when it indicates that the Vice-President of the Committee made a decision to provide only information that "belonged to the Committee," as opposed to information provided by Trillium or third parties (see p. 19). While we are not able to take the State's claims seriously in this regard, we will nevertheless argue below that the Committee should have collected at least some of the information requested by the victims, even if it did not hold that information at the time of request.

[63] See, inter alia, Commission's Admissibility Report, paras. 38-39; State's Submission of December 16, 2005, pp. 19-20.

provided by Trillium. The withholding of this particular information would be justified, in principle, by the "rights of others" clause in Article 13.2.

68. The State's second argument, on the other hand—that all categories of information denied to the requestors were "related to the characteristics of the Committee itself and its manner of exercising its private functions"[64]—is excessively vague and far-reaching. This argument seems to suggest that every document or information related to an agency's fulfillment of its statutory responsibilities ought to be beyond the public's reach. It is equally unclear what is meant by "private functions" of an executive agency. Such a rationale for exemptions is so broad that it is capable of excluding virtually all records held by government agencies, because in one way or another they are all related to some aspect of their administrative responsibilities. Accepting such an argument would negate the essential content of the right to information.

69. Many freedom of information laws and international instruments allow for an exemption aimed at protecting the confidentiality of internal government deliberations. This is done to ensure that officials can debate issues and share their opinions internally in a frank and honest fashion. The Council of Europe's 2002 Recommendation, for example, protects "the confidentiality of deliberations within or between public authorities during the internal preparation of a matter." This restriction is subject, however, to limitations in time and scope. For example, as is obvious from the text of the above declaration, the exemption applies only while a matter is under "internal preparation." Other countries exempt only opinions contained in internal government communications, but not factual information (see below). We submit that Chile's second argument invokes a legitimate aim only to this extent.

70. In this regard, withholding of information on internal deliberation grounds could only be justified, under Article 13.2 of the Convention, in the interest of "protection of … public order." The Inter-American Court has noted that

> it is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles.[65]

While this may be a rather broad definition of public order, provided by the Court in the context of an advisory opinion, it might be understood to appropriately encompass in our case protection for the confidentiality of internal government deliberations as described above.

71. Chile's third argument, based on protection of national economic interests, is also sometimes considered a valid ground for withholding state information. The Council of Europe's 2002 Recommendation, for example, lists protection of "the economic,

[64] Commission's Admissibility Report, para. 38.

[65] *Compulsory Membership* Opinion, para. 64.

monetary and exchange rate policies of the state" among the exemption grounds. It is, however, completely unclear in what way the disclosure of the information requested by the victims—and what specific part of that information—would have harmed national economic policies.

72. In addition, the notion of state economic interests is potentially extremely broad. If the law is to prevent this notion from irreparably undermining the right to access information, it must be interpreted in a clear and narrow manner. Direct and specific interests, such as protection of the national currency, are quite different from vague and generalized concerns, such as maintaining a positive climate for investment. This interpretation is consistent with the approach chosen by the Commission in its *Declaration of Principles* (see paragraph 75 below). Ultimately, withholding information about investment projects that may cause environmental harm for the supposed sake of promoting foreign investment cannot be considered a measure serving a legitimate aim. For all these reasons, one must conclude that Chile has failed to minimally substantiate its claims under the "economic interest" heading.

"Necessity and Proportionality"

73. We turn now to the question of whether Chile's denial of information in this case, in the supposed interest of protecting internal government deliberations and the commercial secrets of a third party, can be considered necessary and proportionate in a democratic society. As this Court has repeatedly said in its analysis, referring also to the jurisprudence of the European Court of Human Rights, the "necessity" test of Article 13 is stricter than one based on "useful," "reasonable" or "desirable" restrictions, and that it actually requires a showing of a "compelling governmental interest" in restricting the right at issue.[66]

74. Comparative freedom of information law and practice have developed a two-step analysis that should guide decisions regarding the necessity and proportionality of restrictions to the right of access. First, information can be withheld only if its disclosure is likely to cause significant harm to one of the legitimate aims specified by law. Secondly, the anticipated harm must be greater than the public interest in disclosing the information—in other words, if a careful balancing of the conflicting interests indicates that there is a prevailing public interest in disclosure, the information should be made public, despite any lesser harms it may cause.[67]

75. A similar, and indeed even stricter, approach has been adopted by the Commission in its *Declaration of Principles on Freedom of Expression*, which allows only for "exceptional limitations [to the right of access] that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies." The harm and public interest principles have also been

---

[66] *Id.*, para. 46.

[67] For an analytical summary of comparative law and practice, *see* ARTICLE 19, *The Public's Right to Know: Principles of Freedom of Information Legislation*, June 1999, available at: http://www.article19.org/docimages/512.htm.

incorporated by the Aarhus Convention[68] and the Council of Europe's 2002 Recommendation,[69] as well as many national freedom of information laws.

i. Significant Harm to Legitimate State Interests

76. We submit that Chile's justifications for its denial of information to the victims fail to meet this double test. With respect to the first prong of the test, the State has failed to make a case that disclosure of the requested information would have caused significant harm to its legitimate interests for three main reasons.

77. Case-by-case review. First of all, the likelihood of disclosure resulting in significant harm should be examined on a case-by-case basis, i.e. with respect to every document or piece of information requested. It is only by reviewing the nature and content of each specific document that the authorities can assess the harm that its disclosure might cause and the strengths of the public interest disclosure would serve. The requirement of specific assessment of the potential harm is widely accepted as elementary. For example, in *Kuijer v. Council*, the Court of First Instance of the European Communities reviewed the European Council's refusal to provide a Dutch academic with documents regarding the asylum situation in a number of non-EU countries. The Court ruled in favor of the requestor, holding that the Council, which had claimed an "international relations" exemption, had failed to consider in any detail the practical effects that the disclosure would have on EU's relations with those third countries.[70]

78. In contrast, the circumstances of this case strongly suggest a wholesale refusal of information: the Committee never provided any reasons for its denial, and the government's generalized arguments make no reference to the various types of requested documents. For example, the Committee's formal and final decision giving Trillium the "go ahead" is treated no differently from any internal communications that may have led to that decision. This approach is inimical to the very notion of proportionality.

79. Partial disclosure. Another principle, closely related to case-by-case review, is that of partial disclosure, which applies to documents containing information that is confidential only in part. In such cases, the authorities must grant access to the non-exempted parts of the document, to the extent that those can be reasonably

[68] Article 3.4 of the Convention provides that a "request for environmental information may be refused if the disclosure would adversely effect" the enumerated state interests. In addition, the "grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure …."

[69] Under section IV.2 of the Recommendation, "[a]ccess to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the [defined] interests, unless there is an overriding public interest in disclosure."

[70] Case T-211/00 [2002] ECR II-Feb. 7. *See also JT Corporation v. Commission*, Case T-123/99 [2000] ECR II-3269, where the Court of First Instance found against the Commission for its failure, in part, to assess the potential harms from disclosure with respect to the contents of each requested document, rather than entire categories of documents. This was also essential for the Commission to be able to assess whether the requestor was entitled to partial access to each document. Para. 46.

segregated.[71] This flows directly from the principle of minimal infringement of rights, which requires that, in choosing the means and methods for the "necessary" restriction of rights, governments have to adopt the least invasive alternative.[72]

80. It is clear that the Committee did not consider partial disclosure in this case. For example, it is unimaginable that every piece of information held by the Committee regarding Trillium, whether provided by the company itself or another source, was genuinely a commercial secret. The same applies to internal communications of the Committee.

81. Internal deliberations. With respect to the latter issue, comparative law and practice draw two important distinctions. The first is temporal: internal discussions are often protected only while a decision on the matter is pending, and possibly for a short period thereafter. Once a final decision is made, and absent any other legitimate grounds for exemption, internal communications must be disclosed. This is clear, for example, from the text of the Council of Europe's 2002 Recommendation, which, as noted above, protects the confidentiality of government deliberations only "during the internal preparation of a matter."

82. The Court of First Instance of the European Communities established a similar precedent in *British American Tobacco v. Commission*, which involved a request for information on certain policy discussions within the Commission, including as to the position of the various member state delegations on the matter. The Court emphasized the fact that the request was made after the matter had been settled, and therefore the requestor's interest in disclosure was stronger than any interests the Commission might have in the confidentiality of its past deliberations.[73] The same reasoning would apply to the present case, given that the victims' request was made after the Committee had already given the go-ahead to the Condor River project.

83. The second important distinction made in this context has to do with substance: while opinions and other subjective judgments made by officials in the course of internal deliberations are under some legal regimes considered confidential, raw data and

---

[71] The Aarhus Convention guarantees partial access whenever the "information exempted from disclosure … can be separated out without prejudice to [its] confidentiality" (art. 4.6). The Council of Europe's 2002 Recommendation provides:

> If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated. However, if the partial version of the document is misleading or meaningless, such access may be refused.

In practice, partial access is usually granted by blanking out exempted information in paper documents or by leaving blank spaces in electronic documents.

[72] In the words of this Court, a restriction is necessary only if "it cannot be reasonably achieved through a means less restrictive of a right protected by the Convention." *Compulsory Membership* Opinion, para. 79.

[73] Case T-111/00 [2001] ECR II-2997, paras. 56-57.

factual information are not.[74] The rationale for this distinction is that disclosure of factual information in the possession of an agency does not, as a rule, affect the uninhibited and candid exchange of opinions among its staff, the harm which this exemption seeks to avoid.

84. For this same reason, national and international courts have adopted a differentiated treatment of facts and opinions even where the legislative texts are silent on that specific point. For example, the United States Freedom of Information Act (1966), one of the earliest freedom of information laws, exempts from disclosure "inter-agency or intra-agency memorandums or letters" which would not normally be available to third parties under common law.[75] Interpreting the scope of this exemption in *EPA v. Mink*, the U.S. Supreme Court distinguished between "materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." Information of the latter nature must be disclosed whenever it can be separated from the rest of the document without compromising deliberative confidentiality.[76]

85. The EC Court of First Instance reached a similar conclusion in the above-referenced *JT Corporation* case, which involved a request for copies of European Commission inspection reports and correspondence with a foreign government. The Commission refused access, arguing that its investigative activities relied largely on the cooperation and information-sharing of Member States and foreign governments, and their confidentiality expectations—a rationale similar to that of the confidentiality of internal deliberations. The Court ruled for the requestor, however, relying in part on a finding that much of the information at issue consisted of "descriptions and factual findings that clearly [did] no harm to inspection and investigation tasks."[77]

86. The information requested in the present case was information produced and collected by the Committee in carrying out its "due diligence" and watchdog functions with respect to prospective foreign investors. While some of the documents at issue might contain opinion and value judgments made by Committee staff, they must have also included a significant amount of factual and objective information, such as on Trillium's past compliance with Chilean legislation or its track record in projects undertaken within or outside the country. Disclosure of that information would not have affected the Committee's internal deliberations—which, in addition, had been concluded at the time of the request—and therefore would have caused no harm to any legitimate interests under Article 13.2.

---

[74] *See*, inter alia, the Australian Freedom of Information Act (1982), sec. 36.5; the Canadian Access to Information Act (1983), sec. 21.1; and the Irish Freedom of Information Act (1997), sec. 20.2(b).

[75] 5 U.S.C. 552(b)(5).

[76] 410 U.S. 73 (1973), at 89.

[77] Para. 47.

ii. Public Interest In Disclosure

87. In addition, and apart from the question of harm, the Chilean authorities failed to weigh the public interest in the disclosure of the requested information against any competing considerations. It is important to recall, in this context, that Terram's request to the Committee came at a moment of intense public debate about the environmental sustainability of the Condor River project—an activity that had attracted unprecedented scrutiny and criticism from Chilean civil society. The Terram Foundation had been for years a leading contributor to that debate, which, at the time of the request, was focusing on the need for a more complete assessment of River Condor project's environmental impact.

88. At already noted, there can be little meaningful participation in environmental decision-making without access to information about processes and activities that affect the environment. Given what is at stake—including the basic human rights to life and health—denials of the right to environmental information can amount, as the Strasbourg Court has found in its Article 8 jurisprudence, to violations of international human rights law.

89. At the international level, the Aarhus Convention contains the most elaborate interpretation of the related principles of access and public participation in environmental matters. It is relevant here to refer to two provisions of the Convention, in particular. The first one imposes on the States Parties a general obligation to "[p]rovide in an appropriate form information on the performance of public functions … relating to the environment by government at all levels."[78] A more specific provision in Article 6—which deals with public participation in decision-making, including with respect to environmental impact assessments—provides:

> Each Party shall require the competent public authorities to give the public concerned access for examination … to <u>all information relevant to the decision making</u> [about proposed activities that may have a significant effect on the environment] that is available at the time of the public participation procedure…. The relevant information shall include … the <u>main reports and advice issued to the public authority</u>….[79]

90. The information requested by the Terram Foundation would fall under the ambit of these provisions. Even though the Committee did not have, strictly speaking, any responsibilities on environmental matters, the information at its possession at the time was very relevant to the debate on Trillium's environmental track record, and can therefore be equated with environmental information.[80] That information would have

---

[78] Art. 5.7(c).

[79] Art. 6.6 (emphasis added). The Convention defines "the public concerned" as including "non-governmental organizations promoting environmental protection and meeting any requirements under national law." Art. 2.5.

[80] As already noted, the Aarhus Convention has adopted a broad definition of environmental information, which includes any information on "activities or measures, including administrative measures, … affecting

helped Terram and the public at large to assess Trillium's integrity and the credibility of its on-paper commitments to sustainable development.

91. In view of the above, it is clear that the victims' request was supported by a strong public interest in disclosure, which should have been weighed against any legitimate confidentiality interests—to the extent that any such interests existed with respect to some of the requested information, such as third-party commercial secrets or truly deliberative internal exchanges. By failing to take into account the public interest in disclosure, as the record suggests, the Chilean authorities fell once again short of the necessity and proportionality requirements of Article 13.

Obligation to collect basic information about Trillium's record

92. We have submitted that states have an obligation under international law to take appropriate measures to investigate, identify and publicize serious threats to the right to life and health, public safety, and the environment. This obligation is a corollary to their general duty to ensure the exercise of basic rights and seek to prevent violations thereof, whether by its own agents or private entities. In the current case, the Chilean State recognized from the start the major environmental implications of the Condor River project, which, prior to its abandonment by the Trillium Corporation, was subjected to various environment impact assessments. Considering the environmental stakes and the heightened public interest in the transparency of the project, it was justified to expect the authorities, including the Committee on Foreign Investment, to collect and analyze basic information about Trillium's investment record. As noted, this was fully within the legal powers of the Committee, which enabled and indeed required the Committee to collect extensive information both from Trillium itself and other sources. Therefore, even accepting the unlikely premise that the Committee had collected no such information at the time of the victims' request, its failure to do so following the submission of the said request, and the ensuing judicial proceedings, would amount to a violation of the requesters' right to information.

III. Conclusion

93. We have respectfully submitted that the "freedom to seek, receive and impart information and ideas" guaranteed by Article 13 of the Convention, includes a right of general access to state-held information. We have further submitted that Chile has not complied with its Article 1 and 2 obligations to ensure the free and full exercise of that right within its jurisdiction, in part by virtue of its failure to give effect domestically to the right of access, through legislative or other appropriate means.

94. With respect to the facts of the present case, we submit that Chile has violated the victims' rights under Article 13 in multiple respects. The denial of the requested information had no basis in law and, with respect to much of that information, did not

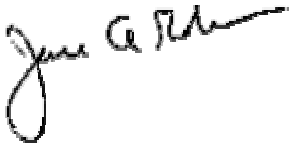
---

or likely to affect the elements of the environment", such as "soil, land, landscape and natural sites." Art. 2.3.

serve any legitimate aim. Finally, it cannot be considered to be a necessary and proportionate restriction of the right to information.

Respectfully submitted,

For the Open Society Justice Initiative Dated: March 28, 2006



_____

James A. Goldston
Executive Director

_____

Darian K. Pavli
Legal Officer

For ARTICLE 19:

_____

Toby Mendel
Law Programme Director

For Instituto Prensa y Sociedad:

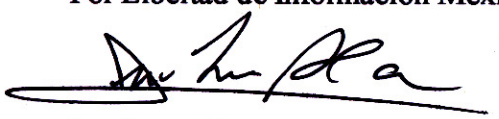
_____

Javier Casas
Director, Access to Information Program

For Access Info Europe:

Helen Darbishire
Executive Director

For Libertad de Información México, Asociación Civil



Issa Luna Pla
Vice-President