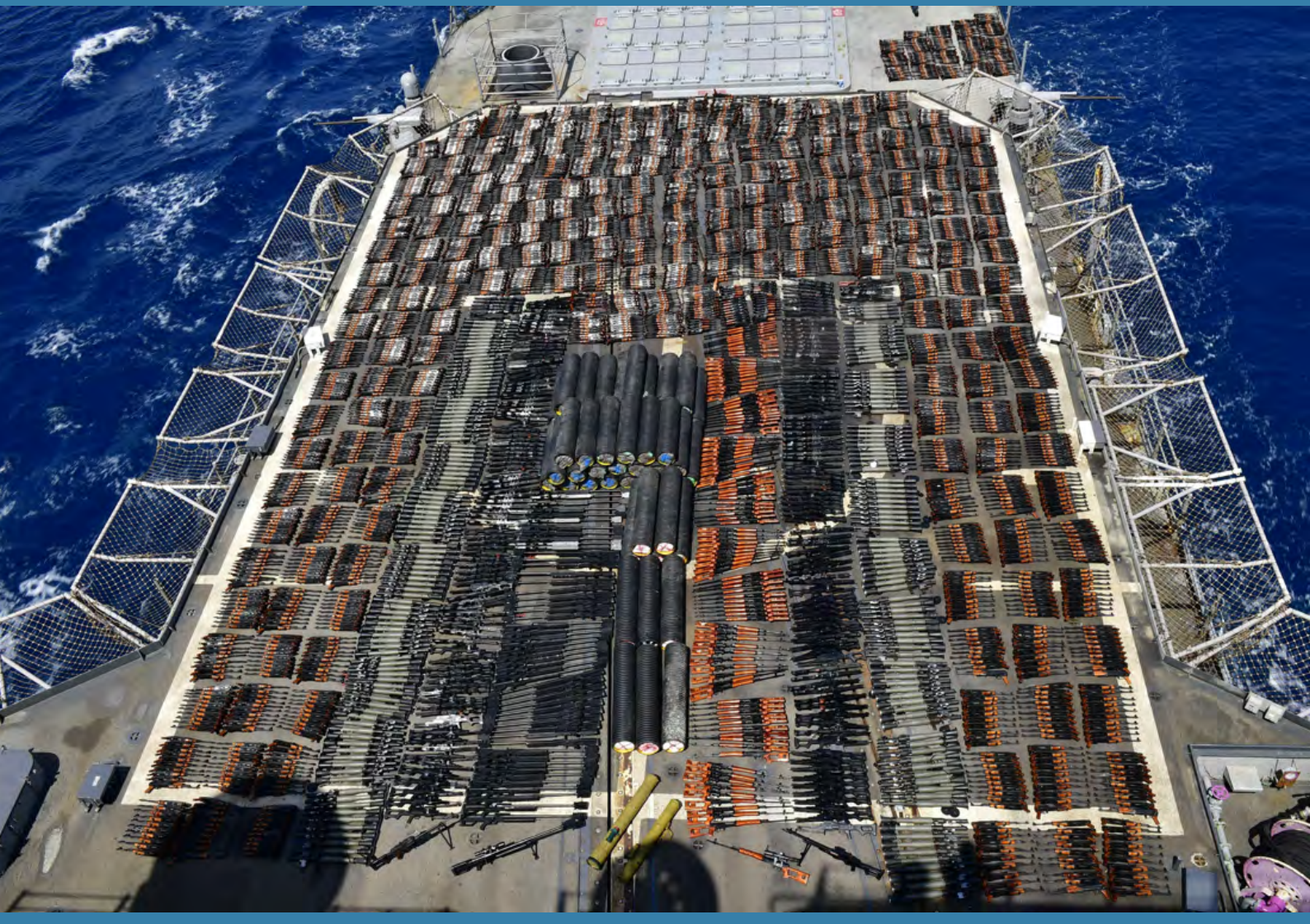
A human rights perspective on arms export licencing and access to information



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EDITORIAL

A human rights perspective on arms export licencing and access to information

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TABLE OF CONTENTS

1. INTRODUCTION

Transparency about arms export has generally been motivated through two rationales. First an inter-state perspective which considers information about arms exports as a trust-building measure. It allows other states to notice when a strong build-up in armament is taking place and to react early on such development. As such it plays a preventive role in arms control. Additional motivations were the prevention of diversion or corruption.

A second motivation has been the intra-state perspective focussing on holding national governments accountable for their arms export policies.[1] Common Position 2008/944/CFSP contributed to the public accountability within the member states through the publication of an EU annual report based on the licencing information contributed by the member states and the publication of a national report by the member states.[2] In 2019 this was augmented with a database containing the same information.

These publications are focussed on political accountability and are measures of active transparency by the arms control administrations or the government to the parliament. The information in these annual arms trade reports should enable members of parliament, press and civil society to evaluate and debate the arms export policies of their governments. Which information is given is the result from the bargaining between parliament and government. While political debates and scandals created in several countries a push towards more information, it tends to be limited in detail.

Common Position 2008/944/CFSP added a third layer of accountability among the EU member states on their implementation of this Common Position. It foresees that each member state circulates a confidential annual report on its arms exports to the other member states. The reasoning for this reporting is to ensure harmonisation across a common EU market and is directed against undercutting of each other licencing decisions. A confidential report is a very limited form of transparency as it is only directed to a small group of actors. However, it is important not to ignore this rationale, as in other related areas, like procurement, it leads to active transparency measures like the publication of tenders and contract awards notices.

One important rationale for transparency is missing among the three previous arguments: a human rights perspective for transparency which entails that victims of human rights violations should have an effective remedy. Access to justice is impossible without adequate information. Persons whose human rights are violated or threatened, and their defenders, should have access to adequate information to enable them to formulate a legal claim. This includes the possibility to have a court review the legality of an export licence as a preventative legal protection.

Active transparency is not the only way how information can become available. In general, the hard limits to transparency are given in freedom of information and secrecy laws. Freedom of information (FOI) laws provide the right and the procedure to obtain information on request. They specify the grounds on which such access to information can be refused. In other words, citizens have a right to information and public authorities are limited in the possibility to refuse access to the requested information to a specific set of reasons. Also, the use of a refusal ground needs to be proportional, and the interests protected by these refusal grounds have to be balanced with the public interest served by the access. FOI legislation moves the treatment of information from access on a 'need to know' principle to limiting access on a 'need for confidentiality' principle.

1 Cops, D., Duquet, N., & Gourdin, G. (2017). Scrutinizing Arms Exports in Europe: The Reciprocal Relationship Between Transparency and Parliamentary Control. Sicherheit und Frieden (S+ F)/Security and Peace, 79-84.

2 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, art. 8.

Historically, the development of freedom of information rights and laws has been motivated by its role in enabling public debate and political accountability. However, the diverse jurisprudence shows also other rationales motivating the access to documents. Legal protection and accountability and the need for information in order to enable an effective remedy for rights violations have also been important justifications for such access.

In a lot of EU member states freedom of information, understood as access to documents held by the state or public bodies, is recognized as a fundamental right in constitutions or recognized as such in the jurisprudence. The UN Human Rights Committee recognizes it in its jurisprudence as included in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) on Freedoms of opinion and expression. According to the European Court of Human rights (ECtHR) the European Convention of Human Rights (ECHR) does not contain a general right to right of access to State-held documents, but it recognizes such a right to be included in several Convention rights under specific circumstances linked to those rights. The Charter of Fundamental Rights of the European Union (CFR) includes similar rights as the ECHR, as well as a general right of access to documents held by the EU institutions.

In our assessment the transparency on arms export controls does not meet these legal standards. Information enabling an effective remedy through the courts is generally not provided, and in several countries, it is insufficient even for political accountability. In this research note we will first give an overview of the legal requirements concerning access to information put forward in the human rights instruments and jurisprudence. In a second part we will point out which information on arms export control needs to be accessible from this perspective.

2. ACCESS TO INFORMATION AND HUMAN RIGHTS

2.1. Access to information

Freedom of information (FOI) laws are relatively recent and such right was therefore not originally included as a fundamental right in constitutions or human rights treaties. Exception is the Freedom of the Press Act from 1766 in Sweden, which also contained a right to access documents held by public authorities. The US had a first access to documents act in 1946, which was not very functional due to the large amount of exceptions, followed by the Freedom of Information Act in 1966. Finland adopted its FOI law in 1951, but Europe got a first wave of such laws in the 1970s (e.g. Denmark and Norway in 1970, France, Luxemburg and the Netherlands in 1978). This was followed by a second wave from the 1990s onwards (e.g. Italy in 1990, Hungary in 1992, Belgium in 1994, Czech republic in 1999, UK and Bulgaria in 2000). The Aarhus Convention from 1998, which contains a right to environmental information, became an important driver of the further spreading and development of FOI laws. The Treaty of Amsterdam from 1997 included a right to access documents held by the European institutions.

Generally, freedom of information laws grant access to documents on request but contain a set of exemptions on which such access can be refused. The public authority in possession of the requested documents has to check how access to these documents can infringe on the interests protected by the refusal grounds.

These refusal grounds often come in two types: absolute and relative refusal grounds. Relative refusal grounds imply that public authorities have to balance the harm or infringement to the protected interest with the public interest served by access to the documents. In this case the fact that access to a document can touch upon a protected interest, e.g. privacy or commercial interests, is in itself not enough for a refusal. The concrete harm done to this interest has to be assessed and compared with the concrete public interest in transparency, or the positive effect that can follow from transparency.

Limitations to transparency have to be proportional and are only acceptable when the public interest protected by the refusal ground, that is the harm prevented by limiting access, outweighs the public interest served by transparency. Absolute refusal grounds do not require such proportionality assessment before refusing access. The fact that access affects the protected interest, even to a minor or limited extent, is enough to lead to a refusal of access. Absolute refusal grounds, therefore, present a serious restriction to transparency.

The extent to which such refusal grounds are permitted is contested and the practice is mixed.

The Aarhus Convention, regulating the access to environmental information, only allows relative refusal grounds.[3] It therefore represents the position that the balancing of the interests cannot be done in a categorical way but needs to be done based on the concrete interests present in the case. In this perspective absolute refusal grounds are a disproportional restriction of access.

However, several European states include absolute refusal grounds in their general freedom of information laws (and therefore establish a distinct regulation for environmental information with only relative refusal grounds). Also, the EU maintains this practice. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents contains some absolute refusal grounds. A distinct access regime of environmental information held by the EU institution is established by Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to

3 Art. 4, par. 4, UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

Justice in Environmental Matters to Community institutions and bodies, which refers in article 6(1) to the refusal grounds of regulation 1049/2001 but makes them all relative refusal grounds.

Belgian jurisprudence of the Constitutional Court accepts absolute refusal grounds and considers that in this case the proportionality assessment has been performed in a general way by the legislator when it adopted its freedom of information or transparency laws.[4] The Constitutional Court checks itself if this proportionality assessment of the legislator is acceptable, which is not always the case[5], but it allows such general assessment. However, a concrete assessment of the harm transparency would cause to the interest protected by the refusal ground is still required before a refusal can be based on such an absolute refusal ground.[6] What is not required any more from the public authority is the balancing with the public interest in transparency. The extent to which this reasoning is acceptable from a human rights perspective and for the international courts depends on the overall proportionality assessment made by those courts.

2.2. The public interest in transparency

A further question we have to consider is: what is the public interest in transparency? As the development of freedom of information laws has been motivated by its role in informing the public and thereby enabling an open debate on public affairs, the interest of the transparency has been mostly considered to be the role the information can play for such public debate.

This is reflected in several international texts.

The Tromsø Convention on Access to Official Documents, drafted by the Council of Europe, mentions in its preamble this rationale as the main motivation for access to official documents:

> *"Considering the importance in a pluralistic, democratic society of transparency of public authorities."*

Considering that exercise of a right to access to official documents:

1. provides a source of information for the public;
2. helps the public to form an opinion on the state of society and on public authorities;
3. fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy;"

Also the EU Regulation 1049/2001 is motivated similarly in its preamble:

> *"(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union."*

4 Constitutional Court (Belgium), 43/2020, 12 March 2020.
5 Constitutional Court (Belgium), 169/2013, 19 December 2013.
6 Council of State (Belgium), 254.486, 14 September 2022.

At the national level, freedom of information laws were introduced with similar motivations. For example, the Belgian law of 1994 was introduced to ameliorate the relations between citizens and the administration. A more transparent public administration would be more controllable and therefore also more legitimate.[7]

Besides promoting the public debate, other rationales motivating the access to documents can also be discerned. Legal protection and accountability, and the need for information in order to enable an effective remedy for rights violations, have also been important justifications for such access.

Another rationale is access to personal data which concerns the requesting individual. Partly this is linked to legal protection, but it also extends outside that purpose and follows from the right to privacy and data protection. A corollary that is often found in FOI laws is the right to correct personal information held by the authority. We will not further discuss this rationale, but it shows that access to information and the public interest in transparency can be based on several fundamental rights and each of these require their specific proportionality assessment when balanced with the interest protected by a refusal ground. In the following part we focus on the interest in transparency linked to the public debate and public accountability on the one hand, and to the interest in transparency linked to an effective remedy on the other.

The Aarhus Convention makes a clear link between access to information, access to justice and public participation in decision making and thereby with both rationales. The Convention provides for "the rights of access to information, public participation in decision-making, and access to justice in environmental matters" "[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (art. 1).

The rationale for these rights is to improve the quality of the decision making by public authorities and the enforcement of environmental law, and by consequence also the effectiveness of environmental protection. The preamble states that "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions". The preamble also recognizes the importance of the role non-governmental organisations can play, including through interest representation through judicial mechanisms. The Convention therefore includes NGOs in the definitions of public to which the procedural rights are granted and considers NGOs promoting environmental protection as having an interest where required. That public participation and these procedural rights would improve the public treatment of environmental issues is also the rationale given in Principle 10 of the Rio Declaration on Environment and Development in 1992, which first put forward these 3 procedural rights.[8]

Public participation in the decision-making procedures makes sure that all interests are properly considered and that all relevant information is included. This is also clear from the fact that the Convention not just provides access rights to information held by public authorities, but also obliges those authorities to possess and update the information relevant to their functions. In addition, the Convention ensures that mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment.

Access to justice makes sure that the public, including through NGOs as a form of collective interest representation, can oblige public authorities and private actors to respect environmental law and can challenge decisions which run counter to their fundamental environmental rights.

Access to information, both through access on request and through mandatory publication, is needed to enable the use of the two other rights. It thereby contributes through enabling public debate, participation and accountability and through enabling an effective remedy.

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7 Chambre (Belgium), 1112/1-92/93, Wetsontwerp betreffende openbaarheid van bestuur (proposal FOI law), 9 July 1993.

8 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

This link was less clearly or systematically made when the earlier and more general FOI laws were adopted, but it was not absent either. If we look to Belgium again, the explanatory memorandum accompanying the Belgian FOI law of 1994 explicitly raises the improvement of legal protection of citizens[9], while also the jurisprudence of the Constitutional Court points to the role of administrative transparency in ensuring the right on an effective remedy[10].

Therefore, the content of the public interest cannot be reduced or limited to only its contribution to the public debate and political accountability. The public interest can also consist in enabling an effective remedy before a court. This is not a purely theoretical discussion, as it provides a different standard to consider which access to information is needed or what the negative effect is of certain restrictions on such access.

2.3. Access to information in the human rights jurisprudence

Access to information was not included as a fundamental right in the post-WWII human rights treaties. Following the spread of FOI laws in the 1990s, it was developed through the jurisprudence of human rights bodies and courts, most explicitly as a part of the right to freedom of expression. In this context we will look at the ICCPR, as main instrument in the UN human rights system, and at the ECHR.

McDonagh points to the difference between the right of access to information as an intrinsic right or as a derivative right instrumental to the realisation of another fundamental right.[11] The instrumental approach implies that the scope and the limits of the right of access to information is derived from its instrumental value for the realisation of that other right. We can notice this in the jurisprudential development, where an access to information right is granted to the extent that it is necessary for the realisation of the right on which it is based.

This jurisprudential development often starts with the recognition that the victim needs to receive information and the sanctioning of a failure of the state to give this information, without that a right of access to documents is made explicit or recognized. An example is the *Guerra* judgment discussed below. However, once that the need to receive information is recognized it will have to be respected in the development and implementation of FOI laws as a public interest in transparency. Important is also that a right to information can be a right of access to existing state-held documents, but also an obligation to produce and give access to certain information instead or above a right to access of documents. This is most clearly developed concerning environmental information and personal data, while the scope of the right to information is less developed or clarified in the legal frameworks or the jurisprudence for other forms of information or fundamental rights.

2.3.1. International Covenant on Civil and Political Rights (ICCPR)

The right of access to information has been developed by the UN Human Rights Committee in its jurisprudence on the freedom of expression, more specifically on the freedom to "seek, receive and impart information and ideas of all kinds" included in article 19, paragraph 2 of the ICCPR. This position was first developed in the UN human rights system by the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression in his 1998 report, which referred to the right to seek, receive and impart information in Article 19 as imposing "a positive obligation on states to ensure access to information, particularly with regard to information held by governments".[12]

9 See note 7.
10 Constitutional Court (Belgium), 43/2020, 12 March 2020, B.39.7.
11 McDonagh, M. (2013) 'The Right to Information in International Human Rights Law', Human Rights Law Review, 13(1), pp. 25-55.
12 McDonagh, M. (2013) 'The Right to Information in International Human Rights Law', Human Rights Law Review, 13(1), pp. 25-55.

The UN Human Rights Committee had first a mixed jurisprudence. In *S.B. v Kyrgyzstan* the HRC decided in 2009 stated that the applicant had not explained why the information he requested, which concerned the pronouncing of death sentences in Kyrgyzstan, was of public interest and therefore declared the application inadmissible. In 2011 the HRC came to a different conclusion in a similar case, *Toktakunov v Kyrgyzstan*, in which it adhered to the position that article 19(2) contained a right of access to state-held information: "The Committee further notes that the reference to the right to 'seek' and 'receive' 'information' as contained in article 19, paragraph 2, of the Covenant, includes the right of individuals to receive State-held information, with the exceptions permitted by the restrictions established in the Covenant." and "In these circumstances, the Committee is of the opinion that the State party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under article 19, paragraph 3, of the Covenant."[13]

Interesting is also the concurring opinion of Committee member Neumann, who agrees with the conclusion but prefers another motivation of it. He tries to limit the reach of the right to information by not solely base it on art. 19(2) but also on the right to take part in the conduct of public affairs in article 25. In this way the right to information gets more closely linked and limited to the rationale of enabling the public debate. The HRC as a whole seems however to conclude to a more expansive notion of the right to information. This also gets confirmed in its General Comment 34, which it adopted in 2011 as well.

The HRC included the right of access to information in its General Comment 34 on article 19 ICCPR and confirmed its position from the *Toktakunov* decision that article 19(2) contained a right of access to state-held information. However, in this General Comment it also made clear that article 19(2) was not the only ground for a right of access to information.

> ***"18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. … Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. … Pursuant to the provisions of article 2, persons should be in receipt of information regarding their Covenant rights in general."***[14]

Article 2 ICCPR contains the right to an effective remedy, while also access to personal data in mentioned among other articles.

This General Comment further specifies that governments have to enact specific procedures for such access on request, like FOI laws, and that refusals need to be reasoned and open to appeal. The right to information based on article 19, paragraph 2 can be subjected to restrictions for the grounds specified in article 19, par 3, which consist of 2 broad grounds: "(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals". Such restrictions have to conform to the necessity and proportionality tests.

We can conclude that the HRC jurisprudence clearly establishes a right of access to state-held documents based on the freedom of expression in article 19(2) ICCPR. But it also discerns such right linked to other rights, including the right to an effective remedy. However, such right of access to information based on other rights and its extent is less clearly developed in this jurisprudence.

13 HRC, Toktakunov v Kyrgyzstan, Communication No. 1470/2006, 21 April 2011, par. 6.3 and 7.4.
14 HRC, General comment No. 34, Article 19: Freedoms of opinion and expression.

2.3.2. European Convention of Human Rights (ECHR)

The ECHR does not contain an explicit right of access to documents. The first development of access to information rights were made as positive obligations. However, not based on the freedom of expression but linked to other rights. Positive obligations were not recognized in the early jurisprudence, but are a jurisprudential development. Rights to information were developed as positive obligations at different speeds and in connection with several rights in the ECHR. For some rights a right of access to state-held documents has been made explicit, for other rights the Court has granted states a larger margin of appreciation in how to fulfil this right to information or has just been less clear.

An explicit recognition of a right of access to state-held documents as part of the right to receive information under art. 10 ECHR was a later jurisprudential development, and influenced by a growing amount of FOI laws and the jurisprudence of other human rights institutions. It is not a general right of access, but only when it is instrumental for the exercise of an individual's exercise of his or her right to freedom of expression. This is evaluated with a set of threshold criteria. Different from the rights to information based on other Convention rights, the right of access to state-held documents under art. 10 ECHR has been developed as part of the negative obligations.

2.3.2.1. Article 10 ECHR: The right to freedom of expression

The right to freedom of expression has been mostly treated from the viewpoint of the actor expressing an opinion and publishing information. However, the right also clearly contains a right of the public to 'receive' information. The right is formulated slightly different in the ECHR from the later art. 19(2) ICCPR in that it does not contain the right to 'seek' information:

> ***Art. 10 §1 ECHR: Everyone 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 authority and regardless of frontiers. ...***

> ***Art. 19 §2 ICCPR: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.***

The European Court of Human Rights (ECtHR) referred explicitly to the right to receive information in 1979 with the *Sunday Times v United Kingdom (No 1)* judgment, when it stated that Article 10 ECHR did not only guarantee the freedom of the press to inform the public but also "*the right of the public to be properly informed*". Even when the applicant was the entity expressing the information, the judgement evaluated the restriction also from the viewpoint of the rights of the public and thereby made explicit the public interest in transparency. Such right to receive information can only be restricted according to the conditions formulated in art. 10 §2 ECHR: it needs to be prescribed by law, have a legitimate aim listed in this article and it has to be "necessary in a democratic society" to achieve this aim. This last condition implies the presence of "a pressing social need" and that the restriction must be proportional. The public interest in transparency has therefore to be balanced with this "pressing social need".

Even when this case did not concern a right of access to state-held documents, it makes clear that interferences with the right to receive information have to be evaluated from the perspective of the negative obligation to respect this right. This explains also the structure of FOI laws: once a right of access to information is granted or recognized, restrictions concern the right to receive information and are only

possible under the conditions of article 10 §2 ECHR. However, this does not clarify yet if and to which extent such right of access to state-held documents exist.

The *Sunday Times* case is also of interest as it concerns an injunction against a publication in order to avoid its influence on a court case. In other words, it concerned the relation between the public debate and the administration of justice. The ECtHR stated:

> *"65. … As the Court remarked in its Handyside judgment, freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (p. 23, para. 49).*
>
> *These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them …*

> *66. The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal tragedy or whether the victims could demand or hope for indemnification only from the community as a whole; fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised and many facets of the existing law on these subjects were called in question.*
>
> *As the Court has already observed, Article 10 (art. 10) guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed (see paragraph 65 above).*
>
> *In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the "authority of the judiciary". ..."*

This reasoning makes clear that freedom of expression is not only linked with political accountability, but also with legal accountability. The public interest in the transparency, here guaranteed through the press rather than by access to state-held documents, must therefore be broadly interpreted and not limited to general information about the conduct of the government.

The public interest in the transparency can also legitimately concern the conduct of private actors and especially so when it is instrumental to evaluate the legal accountability of such an actor. While this case was not brought from the viewpoint of a potential claimant in such a case and from their right to an effective remedy, the interest of potential claimants in the transparency contributes to the public interest in transparency of the receiving public.

Further, the fact that such transparency disturbs the public or private actor, which is potentially held accountable, cannot be a reason to restrict the access. Any protection against such disturbance needs to fulfil the conditions of art. 10 §2 ECHR and therefore also be proportional.

Still, at that moment the ECtHR did not recognize a right of access to state-held information. The main reason was that positive obligations were not recognized as part of article 10 ECHR. However, the Court did so under article 8 ECHR. Therefore, access to information which was denied under article 10 could in some cases be granted under article 8 ECHR. We discuss this jurisprudence on art. 8 ECHR in the next part.

The leading jurisprudential reasoning on art. 10 ECHR and access to information was set in the *Leander v Sweden judgment* in 1987. This case concerned access to a secret file containing security-related information about the applicant. He was refused a job based on that secret file. This evaluation was done both under article 8 and 10 ECHR. Concerning article 10 ECHR the Court stated: "*The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 (art. 10) does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual*".

The ECtHR did not recognize a positive obligation to grant access to this information under article 10, and as there was no 'other' involved willing to impart him that information an interference with his right to receive information was not present. This jurisprudence was followed and referred to in a long series of cases, also those where such access was granted under art. 8 ECHR like the Guerra and the Gaskin case discussed in the next part.

Despite this constant jurisprudence under article 10 ECHR the wave of new FOI laws and access to information rights in constitutions in the 1990s slowly started to affect the jurisprudence on art. 10 ECHR. After 2000 the ECtHR started to evaluate how states applied the refusal grounds in these FOI laws under the negative obligation in art. 10 ECHR as an interference with the right to receive information. Such evaluation was first done in the *Sdruženi Jihočeské Matky v Czech Republic* admissibility decision in 2006, concerning an environmental NGO which requested information on a nuclear reactor under construction and where the applicable law included a right of access to documents.[15] The case was considered non-admissible because the refusal was considered justified under article 10§2 ECHR and was based on security and the protection of industrial secrets. With this decision the ECtHR acknowledged the presence of access to documents rights as a relevant fact for the application of art. 10 ECHR, without including a general right of access based on this article.

In the *Társaság a Szabadság v Hungary* judgment in 2009, concerning access to a request by a politician for review of criminal legislation by the Constitutional Court, the ECtHR acknowledged that with the 2006 decision it had "*advanced towards a broader interpretation of the notion of 'freedom to receive information' … and thereby towards the recognition of a right of access to information*". It also developed this notion further into the acceptance of a right to access documents under article 10 ECHR, while it continues to evaluate the refusal of such request under the negative obligations.

The ECtHR pointed out that article 10 ECHR also protected preparatory steps for journalism, like the gathering of information, and that arbitrary restrictions on such preparation are not allowed. The refusal of the information formed an administrative obstacle and the monopoly on the information by the public authority amounted to a form of censorship. It therefore interfered with the freedom of expression and needed to be justified.

Where the earlier jurisprudence considered only interferences with the right to receive information from others, the ECtHR now also considered a refusal of access to state-held documents as such an interference

15 Wouter Hins, Dirk Voorhoof, Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights.

"*by virtue of the censorial power of an information monopoly*". With this reasoning the Court actually enlarged the protection covered by art. 10 §1 to include a right of access to state-held documents.

At that time the ECtHR still denied that this entailed "*a general right of access to official documents*", which would be a positive obligation, but considered refusals of such access to be restrictions which needed to be justified under the negative obligations in art. 10 ECHR.

A limitation to this right to receive information was that it concerned "information of general interest", which followed from the Court's linking of the freedom of expression of the press with the freedom to receive information by the public in its jurisprudence on press freedom (as in the Sunday Times case). Another development the Court made was that the 'social watchdog' role of the press could also be fulfilled by NGO's. These therefore have in this role the same protection as journalists.

With this judgment the ECtHR broadened the scope of the 'freedom to receive information', as set out in the *Sunday Times* jurisprudence, with a right of access to state-held documents. Restrictions are only allowed under the conditions of article 10§2 ECHR and require a similar proportionality assessment as demanded in the *Sunday Times* and later press-related cases.

This right of access to state-held documents was a new jurisprudential development based on another ground than the earlier developed rights to information linked to the positive obligations under art. 8 ECHR or other rights. This right based on art. 10 ECHR remains instrumentally linked to the social watchdog role and its function to feed the public debate, and it is therefore not a 'general right of access'.

This jurisprudence was confirmed a couple of months later in the *Kenedi v Hungary* judgment, which concerned historical research and where the Court emphasised that "*access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression*". It also drew the logical conclusion from this jurisprudence that such access rights were civil rights under article 6 §1 ECHR. Procedures to obtain and enforce such access rights therefore need to respect its procedural guarantees.

This new jurisprudential approach, confirmed in several other judgments, stood in contradiction with the Leander jurisprudence to which it still was referring as well. The Grand Chamber tried to resolve this contradiction in the *Magyar Helsinki Bizottság v. Hungary* judgment in 2016, which concerned again an access to documents request by an NGO. The ECtHR downplayed the differences and linked the statement originating from the Leander-case to specific circumstances, while it also, after an extensive analysis of international instruments and jurisprudence, reformulated this statement as: "*the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion*" (par. 156).

The ECtHR however adopted the position formulated in *Társaság a Szabadság v Hungary* and included a right of access to state-held documents under the protection of preparatory acts for journalistic and similar activities linked to the 'social watchdog' role. Not as a positive obligation but as part of the right protected through the negative obligation against unjustified interferences with the right to receive information.

The Court further formalized this in a set of threshold criteria under which access to documents could qualify as such a preparatory act linked to the social or public watchdog role.

The first criterium concerns the 'purpose of the information request': "*obtaining access to information would be considered necessary if withholding it would hinder or impair the individual's exercise of his or her right to freedom of expression ..., including the freedom 'to receive and impart information and ideas'*". (par. 159)

The second criterium concerns the 'nature of the information sought'. This information needs to be of public interest: "*the Court considers that the information, data or documents to which access is sought must generally meet a public interest test in order to prompt a need for disclosure under the Convention*".

The third criterium concerns the 'role of the applicant': "*the Court considers that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public 'watchdog'*". The Court recognizes not just the press in this role, but also NGO's, academic researchers, authors, bloggers and even "popular users of the social media". In general, people who inform a public.

The fourth criterium is that the request concerns 'ready and available information'. Art. 10 ECHR does not entail an obligation to collect data or to prepare new documents. There is only an obligation not to interfere with the access to existing information. This criterium therefore limits the right to access to existing documents, instead of a broader right to information.

While FOI laws and access to document-rights in constitutions mostly provide a general right to access and do not require that the applicant states its reasons for the request, some explanation or qualification of the purpose of the request is required to evaluate the applicability of art. 10 ECHR on such request according to the threshold criteria.

When these threshold criteria are fulfilled the request for documents is covered by the right to receive information in art. 10 §1 ECHR. A refusal of access to state-held documents becomes then an interference with that right, and such refusal will therefore have to meet the requirements of art. 10 §2 ECHR. As we already mentioned above, it will have to be 'prescribed by law', pursue one or more of the legitimate aims mentioned in paragraph 2 of Article 10, and be 'necessary in a democratic society'. The government will have to balance the public interest in the transparency with the public interest in the protected legitimate aim. It has a certain margin of appreciation within which it can perform such proportionality assessment.

The ECtHR makes itself a concrete assessment if in the case at hand this proportionality is respected 'in the case as a whole'. This means that absolute refusal grounds, where the legislator has made a prior assessment of the balance between the public interest of the transparency and the public interest protected by a refusal of access, and where therefore the administrative authority only makes a check if the documents fall within the remit of the refusal ground, are not as such illegal. But these absolute refusal grounds must be strictly limited to make sure that the proportionality still is respected within the whole process.

With the *Magyar Helsinki Bizottság* judgment the ECtHR grounded firmly a right for access to state-held documents in the right to receive information in art. 10 ECHR. This right for access has a clear link with the public debate and its extent depends on it being instrumental for such debate. But this right also has a link with being instrumental for accountability, as can be derived from the notion of 'social watchdog'. That this right concerns not only political accountability but can also extend to its instrumentality for legal accountability can be derived from the *Cangı v Turkey* judgment from 2019.

This case concerned access to a report of a meeting of the administrative authority in which it authorised the flooding of an archaeological site. In the evaluation of the purpose of the request and of the social watchdog role of the applicant the ECtHR mentioned not just the purpose and role of informing the public, but also the intended use stated by the applicant of the documents in court procedures and the fact that the organisation in which the applicant participated had initiated annulation procedures against the administrative decisions concerning the site. The Court considered the refusal of the document to be "*an obstacle to the transmission to the courts and to the public of information on the decision-making procedure concerning the protection of the ancient site of Allianoi*" (par. 33, my own translation).

This makes clear that the public interest of the transparency also contains its instrumentality for legal accountability. This is especially the case when other positive obligations are in play as well, as we will see in the next part.

2.3.2.2. The right to respect for private and family life (art 8 ECHR) and the right to life (art. 2 ECHR)

Rights to information have been developed based on other Convention rights, but as part of positive obligations. This has been done most extensively under article 8 ECHR, the right to respect for private and family life.

Positive obligations in general also concern a balancing of interests, but now between the general interest of the community or the rights of others and the interests of the individual. The general interest of the community is not linked any more to the aims listed in the second paragraph of the Convention rights, but these 'may be of a certain relevance'. These aims are the yardsticks to evaluate interferences by the government, while positive obligations have been developed to address a lack or failure of state action instead of limiting excessive interferences by the state.

Such action by the state is especially required to ensure the protection of the Convention rights in horizontal relations between private actors (although not limited to this, as the *Gaskin* case still concerns the relation between the state and the individual). Positive obligations therefore developed together with the horizontal application of Convention rights. The balancing of private interests in horizontal relations required different yardsticks to evaluate state action compared to the balancing of interests in state-individual relations.

The first case where a right to information was recognized due to a positive obligation is the *Gaskin* case from 1989, which concerned an applicant which had been under childcare and wanted access to his personal files held by the social services in order to be able to sue for damages. This case was considered under article 8 and 10 ECHR. While the ECtHR stuck to its Leander jurisprudence concerning art. 10 ECHR, the Court accepted a right to information under article 8 ECHR.

The information requested was, due to its nature as "related to the applicant's basic identity" and providing "the only coherent record of his early childhood and formative years", categorized as falling under the positive obligations included in article 8 ECHR. The existence of the file was not contested as an interference with Gaskin's private life, rather the failure to act by refusing him access to the files formed the contested violation of the positive obligations under article 8 ECHR.

To determine the existence of a positive obligation, the ECtHR evaluated the *"fair balance that has to be struck between the general interest of the community and the interests of the individual"*[16]. In this case the evaluation was negative. While not recognizing an absolute right to access to personal data, the lack of a procedure in which the interest of the individual seeking access was not properly assessed was considered disproportional and therefore a violation.

The ECtHR slowly broadened the scope of art. 8 ECHR to include environmental issues, and with that it also developed rights to information as part of the positive obligations under art. 8 ECHR. The *Guerra v Italy* judgment in 1998 was the first case concerning environmental matters in which a positive obligation to provide information was stated. The case concerned emissions from a chemical factory and its environmental and health consequences.

Again, the Court considered that the applicants did not complain about an interference with their right to private life and family, but about a failure to act to ensure effective protection of this right. Art. 8 ECHR was considered to include positive obligations to ensure such respect, which also applies in environmental matters. More precisely the failure consisted in the lack in the provision of "essential information that would have enabled them to assess the risks".

As such this does not consist directly in a right to access state-held documents. Generally, the ECtHR reviews positive obligations through the fair balance test of the different interests at stake and depending on the margin of appreciation (see for example the *López Ostra v. Spain* judgment of 9 December 1994,

16 ECtHR, Rees, 17 October 1986, par. 37, quoted in ECtHR, Gaskin, 7 July 1989, par. 42.

to which it refers in this judgment), but in the *Guerra* judgment this remains implicit. However, this test remains the background within which the existence, scope and content of obligations to provide information will be considered. If such an obligation entails a right to access documents or consists in some alternative or additional active transparency measure will in this context depend on the margin of appreciation available to the state in how it fulfils its obligation to provide information.

However, in several cases the margin of appreciation is small enough to allow only for a right of access to the relevant documents. This can be noticed in several cases of British soldiers who were subjected to tests with nuclear and chemical weapons. In the *McGinley and Egan v UK* judgment in 1998 the ECtHR stated: "*Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information*" (par. 101).

However, it concluded that no violation had been taken place as the applicants did not make use of a specific procedure available to them to receive this information during the proceedings concerning their pensions. In the *Roche v UK* judgment in 2005 the Court did conclude a violation, as this applicant had sought the information outside of pension proceedings and no procedure was available for him to access the relevant documents. In all these cases access to the state-held documents was considered the appropriate method to provide information. The conclusions in these cases differ only depending on the procedural means available to obtain these documents.

More recent jurisprudence confirms this right to information but broadens its rationale. Now its purpose is not just to enable individuals to assess environmental risks to their health, but it has become a part of a governmental broader decision-making framework in which individuals have a right to participate and to hold states accountable, including before the courts.

Individuals have a right to information not just to enable them to make a personal risk assessment in order to take personal responsibility for dealing with the threats. States have the obligation to protect the individuals by taking the necessary measures for prevention and risk reduction. The right of information now should also enable citizens to hold states accountable.

We can illustrate this with a quote from the *Giacomelli v Italy* judgment from 2006:

> ***"83. A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake (see Hatton and Others, cited above, § 128). The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question (see, mutatis mutandis, Guerra and Others, cited above, § 60, and McGinley and Egan v. the United Kingdom, 9 June 1998, § 97, Reports 1998-III). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, mutatis mutandis, Hatton and Others, cited above, § 128, and Taşkın and Others, cited above, §§ 118-19).***

> ***84. In determining the scope of the margin of appreciation allowed to the respondent State, the Court must therefore examine whether due weight was given to the applicant's interests and whether sufficient procedural safeguards were available to her."***

Similar statements on the right to information and its link with the possibility to challenge governmental decisions in court can be found in the *Tătar v Romania* judgment from 2009 and the *Dubetska v Ukraine* judgment from 2011. The Aarhus Convention had a clear influence, but this jurisprudence also builds on other elements of the ECtHR jurisprudence on positive obligations, like the evaluation of how governmental decision making has assessed the different interests and the threats to those interests. Its relevance therefore exceeds the context of environmental matters.

The recent jurisprudence brings these elements into a coherent framework on what these positive obligations entail. On the one hand, governments have to balance the different interests at stake and do the necessary investigations and information gathering to be able to make an adequate evaluation. On the other hand, the different right holders have a right to access the information and the reasoning behind this governmental decision-making process and a right to challenge it in court.

A similar jurisprudence developed based on the right to life in art. 2 ECHR, especially concerning dangerous industrial activities, workplace safety and foreseeable natural disasters. Again, this jurisprudence was originally strongly related to environmental matters, but the cases related to workplace safety and natural disasters make clear that its principles have a wider application. The case law is scarcer as the ECtHR generally preferred to consider cases under art. 8 ECHR when both grounds were raised, but the Court has considered that in such cases the positive obligations under art. 2 ECHR largely overlap with art. 8 ECHR and that the principles developed in its case law under art. 8 ECHR are also applicable under the right to life.

A summary of the principles is given in the *Kolyadenko v Russia* judgment from 2012 and regularly quoted in later judgments:

> *"157. The Court reiterates that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 (see paragraph 151 above) entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life (see Öneryıldız, cited above, § 89, and Budayeva and Others, cited above, § 129).*

> *158. The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous. In the particular context of dangerous activities special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (see Öneryıldız, cited above, §§ 71 and 90).*

> *159. Among these preventive measures particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels (see Öneryıldız, cited above, §§ 89- 90, and Budayeva and Others, cited above, § 132).*

160. As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres (see Budayeva and Others, cited above, §§ 134-35).

161. In assessing whether the respondent State complied with its positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved. The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation (see Budayeva and Others, cited above, §§ 136-37)."

The violation of the right of information in this and similar cases did not concern a right to access documents on request, but an active information duty of the state about the risks present. However, in line with the art. 8 ECHR jurisprudence, a refusal of such access to documents would, when requested, similarly be considered a violation.

The positive obligations from both art. 2 and art. 8 ECHR clearly entail a right to information concerning the threats or risks to what is protected under these rights. To which extent this also includes a right of access to state-held documents depends on the margin of appreciation. But the recent jurisprudence has clearly included this right to information into prevention and risk reduction obligations of the state and should enable individuals to hold the state accountable, not just in the public or political debate but also before the courts.

This inclusion also presents constraints on how the state can fulfil this obligation to provide information. The provision of information will have to be adequate to make this accountability effective. When the public interest in transparency is considered in FOI procedures, the positive obligations under art. 2 or 8 ECHR entail that the need for this information to ensure effective accountability will have to be taken into account.

2.3.2.3. The right to an effective remedy

One right which is concerned with the effectiveness of this accountability is the right to an effective remedy. This right was regularly touched upon or raised as a violation of art. 6 §1 or art. 13 ECHR. For example, the relationship between the right to a fair trial and the right to information was acknowledged in *McGinley & Egan v UK*: "*if it were the case that the respondent State had, without good cause, prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would have assisted them in establishing … that they had been exposed to dangerous levels of radiation, this would have been to deny them a fair hearing in violation of Article 6 § 1.*" But the ECtHR has generally preferred to deal with information rights under other grounds, like art. 8 ECHR.

However, the European Court of Justice (ECJ) considered this issue in the recent *Antea Polska S.A.* judgment of 17 November 2022. This case concerned a public procurement procedure, in which the losing competitor requested access to information in the tender of the contract winner. While public procurement law contains confidentiality rules to protect trade secrets and similar commercially valuable

information, Antea Polska S.A. claimed that the excessive application of this protection deprived it of its right to an effective remedy.

The ECJ stated that "*the fact that, in the absence of sufficient information enabling it to ascertain whether the decision of the contracting authority to award the contract is vitiated by errors or unlawfulness, an unsuccessful tenderer will not, in practice, be able to rely on its right ... to an effective review*"[17] had to be taken into account.

It further specified that:

> ***"66 Furthermore, in order to comply with the general principle of good administration and to reconcile the protection of confidentiality with the requirements of effective judicial protection, the contracting authority must not only state the reasons for its decision to treat certain data as confidential but must also communicate in a neutral form – to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis – the essential content of that data to an unsuccessful tenderer which requests it, and in particular the content of the data concerning the decisive aspects of its decision and of the successful tender (see, to that effect, judgment of 7 September 2021, Klaipėdos regiono atliekų tvarkymo centras, C927/19, EU:C:2021:700, paragraphs 122 and 123).***

> ***67 Thus, the contracting authority may, inter alia and in so far as it is not precluded from doing so by the national law to which it is subject, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified. In addition, assuming that the non-confidential information is adequate in order to ensure that the unsuccessful tenderer's right to an effective review is respected, the contracting authority may request the successful tenderer to provide it with a non-confidential version of the documents containing confidential information (judgment of 7 September 2021, Klaipėdos regiono atliekų tvarkymo centras, C927/19, EU:C:2021:700, paragraphs 124 and 125)."***

This judgment shows that the right to an effective remedy can also lead to a right to information. This right can take the shape of access to documents. But when other obligations form an obstacle to such access, it can entail the provision of the necessary information in another form. This provision is based on the "general principle of good administration, from which the obligation to state reasons stems"[18] and the information is considered a part of the motivation of the administrative decision.

This judgment was made in the context of competition between economic operators, and therefore in a context with strong rules against sharing confidential commercial information provided by these operators. Thus, there is no reason to limit such information right based on the right to an effective remedy to these competitors or to economic stakeholders. Also, other stakeholders, like potential victims of human rights violations resulting from the business activity of a company or NGOs defending their rights, are entitled to a similar right to information based on the right to an effective remedy.

This judgment was based on general principles of EU law but could have referred to similar rights in the Charter of Fundamental Rights of the European Union. For rights contained in the ECHR the CFR offers at least the same protection and it applies whenever EU law is applicable. This is not limited to the direct application of EU law, like the transposition of directives, but extends to national legislation within the scope of EU law.

An important consequence of this is that this protection, now based on the Charter, is extended beyond some of the limits of the ECHR. The ECHR contains some limitations in terms of jurisdiction or the victim status which are not present in EU law.

17 ECJ, judgment of 17 November 2022, Antea Polska S.A., C-54/21, ECLI:EU:C:2022:888, par. 50.
18 See note 17.

3. TRANSPARENCY ON ARMS EXPORT LICENCING FROM A HUMAN RIGHTS PERSPECTIVE

The right to information contained in the human rights framework provides a standard with which the transparency provided on arms exports and their licencing can be evaluated.

The right to receive information in art. 10 ECHR contains a right to access state-held documents when the four threshold requirements are fulfilled. Refusals of such access need to comply with the possible restrictions of art. 10 § 2 ECHR. The public interest in transparency includes the use of the documents to hold governments or other actors accountable in the public debate, but also in court.

The right to information also follows from the positive obligations included in the right to life, the right to private life and family or the right to an effective remedy. Depending on the margin of appreciation granted to the states such rights to information can entail a right of access to state-held documents, but the evaluation of how states fulfil their positive obligations will take into account also the information provided by the state on its own initiative. The right to information should enable stakeholders to acquire knowledge on how governments have assessed and weighted the interests at stake and to challenge such decision making in court when their interests are not sufficiently weighted.

The public interest in transparency is therefore not limited to enabling public debate in the press, but also should provide the public the necessary information to make an effective legal claim when their interests protected by human rights are not properly taken into consideration.

Arms trade is clearly an activity which potentially endangers lives and can create life-threatening situations. The right to life is therefore applicable to this activity and requires state action to prevent such risks. The positive obligation to protect the right to life has two aspects. First, it involves the duty to provide a regulatory framework. One of the main objectives of arms export control legislation is, or should be, to protect human rights and to ensure respect for international humanitarian law. The second aspect entails a duty of care to actively check to what extent a risk is present and to take the necessary measures to reduce this risk or prevent it from materialising. It sets therefore the task for the administration to put this regulatory framework into practice.

As made clear in the earlier analysis, these positive obligations follow from the right to life, but also include a right to information for stakeholders. There is no reason to exclude arms trade from its application. This should enable stakeholders to obtain knowledge on how the administration performs its task. It should also enable stakeholders to get knowledge of potential shortcomings or errors and to challenge decisions tainted with such shortcomings in court. This right to information has to be balanced with other legitimate interests and its evaluation will be context-specific. But these other interests may not lead to a negation of the right of stakeholders to hold the government accountable and to an effective remedy.

A similar right to information follows from art. 10 ECHR. As arms trade touches upon the right to life and presents the state with a clear task of prevention and protection, it is of public interest. Stakeholders performing a 'social watchdog' role, like NGOs, researchers and press, should be able to get access to documents for the purpose of fulfilling this task.

Certain information about arms trade can indeed lead to concerns when it is made public. However, this is only valid for very specific sets of information and not for the basic facts related to arms export licences and the assessment made in the licencing process. Some of the information available to the government as a result of its regulation of arms trade can indeed lead to security risks when made public. But this concerns only very detailed technological information or information about security measures of transport and storage of certain military goods. And even in those cases it can be doubted if security by obscurity leads to better results than allowing a wider range of actors to participate in control and security measures through transparency.

Another security interest which can be taken into account is the threat to sources or means of information gathering related to the information used in the risk assessment. Again this is very limited set of information to be protected which, in general, can be separated from the information needed and used in this risk assessment.

Refusals based on security can therefore only concern limited amounts of information and not the basic facts of the transaction or the risk assessment.

Commercial confidentiality is not specific to arms trade, but the fact that this sector is strictly regulated and that the state thus has a lot on information leads to a wide range of information which is subjected to such balancing exercise. However, this is not exceptional either as becomes clear from the wide range of activities subjected to licencing and control based on environmental legislation. The strict regulation of the arms trade sector is a consequence of its high risk, which also leads to a strong public interest in transparency.

As made clear in the analysis so far, the public interest in transparency concerns information such that the implementation of this arms export control framework can be assessed and the government can be held accountable for its performance in the public debate and, when necessary, also in court. A properly balanced access to information policy should take into account the protection of commercial information the release of which could effectively distort competition, but avoid any excessive confidentiality. The same is true as regards security interests. On the other hand, this policy should offer access to information needed to allow access to effective remedy by stakeholders, or effective accountability before the courts.

Which information is needed to enable such an effective remedy?

First, such remedy should be possible *a posteriori*, when the arms control framework has failed to ensure protection and arms exports have taken place leading to violations of the right to life. This does not mean that, in such cases, the decision to grant an export licence was by definition itself also a violation of the right to life. This depends on which information the control authority had or could reasonable have had available, the efforts it did to acquire such information and the assessment it made of this information. In other words, the finding of a violation of the right to life through the licencing decision depends on the extent to which such violations were foreseeable.

Second, an effective remedy should also be possible before the export of military goods, in order to allow a preventative control by a court of the export licencing decision. When needed, such remedy should allow the blocking of the export or the retraction or annulation of the export licence before the goods are exported. Therefore, this information about the licence and the risk assessment made by the licencing authority should also be available in due time.

Several elements of information are necessary to allow a stakeholder to make a legal claim before a court about an export licence.

A first requirement is that the existence of an export licence has to be known by the stakeholder. This can seem obvious but often poses a problem in practice. When the existence of export licences only becomes known with the late publication of an arms trade report, at that moment the licence has already expired or is near its expiration time and all or most of the military material it concerns has been exported. The licence also needs to be identifiable to such extent as required by the courts for a properly defined claim. Stakeholders cannot challenge a vaguely described export licence but need to point at it precisely in order to allow a judge to review it.

The minimal elements needed to review an export licence are adequate information about the concerned material, its end user and its envisaged end use. These are the basic elements determining the risk which needs to be assessed. The end use/r certificates and the licences contain this information, together with the limits set by the control authority to that end use or to reselling or re-exporting of the material and the commitments by the end user. These are therefore the logical documents to request in order to acquire knowledge about the authorised export.

Limiting access to specific information, like price information or personal data of the persons involved, is possible when this information creates realistic concerns for commercial confidentiality or privacy. But a complete refusal of access to these documents, or to similar information in other documents, would be a disproportional interference with the right to receive information and make an effective remedy impossible.

The export licence and the end use/r certificate provide the basic facts about the envisaged export, but this is not sufficient for an effective review of the licencing decision. As this concerns the review of the risk assessment

made by the administrative authority, also access to this assessment and the information used for it is needed. Depending on how this assessment is done, some sort of evaluation report or advice will have been made in which the criteria of Common Position 2008/944/CFSP or its transposition in a national law are assessed. This report will also list the factual elements which have been taken into consideration.

It is possible that access to some of the information in such report can be refused, e.g. due to secrecy obligations like in the case of information collected by intelligence agencies or provided by other states. Common Position 2008/944/CFSP requires that the information on negative licence decisions is circulated among the EU member states and that this information needs to remain confidential.

However, this cannot legitimate a complete refusal of access to the whole assessment or of the factual elements taken into consideration. An absolute minimum of information about this risk assessment should be present and made available in the motivation of the licencing decision. Without access to such information a stakeholder is denied the opportunity to assess if the licencing decision is tainted with errors or shortcomings and therefore of the necessary information to make a legal claim.

Last but not least, information about actual exports and transports of military goods can also be needed in sufficient detail. This allows to check if the conditions in the export licences are adhered to or if such goods are exported without licence.

The most obvious source of information would be customs documents, but at the moment this gets blocked because of the customs secrecy, or the confidentiality obligation embedded in article 12 of the Union Customs Code (Regulation (EU) 952/2013). This customs secrecy or confidentiality translates the protection of commercial confidentiality into the customs regulation and can as such be justified as a measure to avoid a distortion of competition.

However, it can be questioned if the refusal of any access to customs documents other than statistical information is not disproportional compared to the public interest in transparency. This is especially the case since enterprises are expected to perform human rights due diligence along their value chain and to communicate with stakeholders. This expectation is formulated in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, which are non-binding documents but also reflect the standard adhered to by governments.

Furthermore, this expectation is increasingly translated into binding regulations, like the Timber Regulation, the Conflict Minerals Regulation, the recently agreed-on Deforestation-free products Regulation or the Batteries and Waste Batteries Regulation, and the now discussed Corporate Sustainability Due Diligence Directive. This shows that, especially where the public interest in transparency is high, the balancing of interests can result in a conclusion different from art. 12 UCC and point to transparency instead. Both enterprises and stakeholders will need detailed supply chain and trade flow information to perform this human rights due diligence or to engage in it.

That such transparency does not have to lead to distortion of competition can also be seen in the US, where such customs information is made public. It is to be hoped for that these changing needs and expectations for information will be reflected in the upcoming review of the Union Customs Code.

The Union Customs Code, and therefore this specific 'customs secrecy', does not apply to other documents relating to certain exports, like the information provided because of safety regulations concerning transport and storage or because of the notification obligations to which exporters are subjected by some of the export control authorities. The general FOI laws apply to these documents and the public interest in transparency as presented in this analysis has to be taken into account.

We can conclude that, from a human rights perspective, access should be given to arms export licences, end use/r certificates and to documents concerning the risk assessment process. While access to specific elements can be limited, the complete refusal of access to the main information in these documents is disproportional to the public interest in obtaining this information.

This also makes clear that the transparency provided on arms export licencing across EU member states is generally below this standard and in need of improvement.

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