Ensure Public Access to Information and Fundamental Freedoms, in Accordance with National Legislation and International Agreements

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Chapter 11
Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

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ABSTRACT:

Access to information is a fundamental right that is a necessary ingredient to inclusive democratic institutions and societies that meet the objective of Sustainable Development Goal 16. Sustainable Development Goal Target 16.10 accordingly calls for access to information and the protection of fundamental freedoms. This paper will examine this target, its origin, scope, application and challenges to its realization. It will also highlight the agreed upon indicators for the assessment and monitoring of this target, and the considerable debate that has surrounded this process. It will then demonstrate how access to information plays a vital role in the context of sustainable development and in the attainment of every individual sustainable development goal, by providing the monitoring and accountability framework for assessing their effectiveness over time.

KEYWORDS:


1. INTRODUCTION

Access to information is one of the fundamental human rights under international law. It is a fundamental ingredient to facilitate the exercise of other human rights and to inclusive democratic institutions. Access to information is a well-known principle that has received considerable attention in the context of human rights, with even entire NGOs devoted to the protection of freedom of expression and the linked right of access to information.

Beyond its traditional understanding as a fundamental human right, access to information also plays an important role to facilitate sustainable development and is gaining increasing attention in that regard. Access to information is necessary implicitly to ensure that any development goals are effective, particularly goals related to delicate interconnected interests like those that surround sustainable development. Although mentioned in relation to specific agreements and obligations, and implicit in ensuring their effectiveness, it did not receive attention as such until the emergence of the Sustainable Development Goals (SDGs), and was specifically enunciated in SDG Target 16.10.

SDG Target 16.10 sets the specific target to "Ensure public access to information and protect fundamental freedoms, in accordance with
national legislation and international agreements. SDG Target 16.10 is thus an important step to ensure that any legal right to access information is given effect, and is an important milestone to ensure that the SDGs in and of themselves may be monitored and effective.

The first section of this chapter will set out the origins, scope and application of access to information as a fundamental freedom and for the protection of fundamental freedoms, and its application in relation to the SDGs. In particular, it will look at the origin of access to information in human rights, the law relating to sustainable development, and national law, as well as the challenges to its realization and application. It will also highlight the valuable role of the media as a facilitator of this right.

The second section of this chapter will explain the tools that apply to SDG Target 16.10 that have been agreed upon by the international community for the development and realization of Target 16.10. It will examine the two indicators that have been developed in this regard, and the discussion among stakeholders related thereto. Given the complexities involved in developing tools and mechanisms to monitor and ensure that any indicator is effective, particularly the indicator whose effectiveness in turn will play a role in the monitoring and effectiveness of the SDGs as a whole, there is much debate in this area, and continued developments. This section will highlight and analyze these.

The final section will conclude by setting out how access to information and the protection of fundamental freedoms ensure institutions and mechanisms that meet the objectives of SDG 16, and lay the foundation for the attainment of the SDGs in their entirety. It will outline how access to information and the "data revolution" may be harnessed for sustainable development agendas, and the valuable opportunity that Target 16.10 plays in this regard.

2. ACCESS TO INFORMATION PROTECTS FUNDAMENTAL FREEDOMS AND ENSURES SUSTAINABLE DEVELOPMENT

SDG Target 16.10 focuses on providing public access to information and protecting fundamental freedoms, in accordance with national legislation and international agreements. Access to information is recognized as a fundamental right in and of itself, but it is also a necessary condition for the enjoyment and protection of other fundamental freedoms. These rights

in turn are perquisites to create the necessary conditions for sustainable development, and for the overall achievement of the SDGs.

The Global Forum for Media Development considers that the new commitment in Target 16.10 has "potentially transformative implications for the free flow of information and independent media development worldwide". Target 16.10 recognizes the principle that the public has the right to all information held by the government, unless the government can demonstrate why specific information should not be disclosed, for privacy, security or other legitimate reasons.

Target 16.10 is particularly important for the media as the understanding of "public access to information" in this context goes well beyond what is conventionally understood as public information. Target 16.10 refers to access to information at a minimum in relation to every single one of the 17 SDGs, and their 169 associated targets. The information encompasses an extremely broad range of public policy issues and objectives, which require extensive data, analysis and debate. Target 16.10 may even include access to information from the private sector, especially where that information is of a public nature.

In principle, "public access to information" is understood as "the presence of a robust system through which information is made available to citizens and others". Access to information accordingly relates to legal rights to information and press freedoms, the quality of information in the public domain, the nature of infrastructure in place to facilitate access, and how the information may be used by individuals.

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3. See also ibid.
4. Ibid.
5. Ibid.
6. Ibid.
Some have observed that "In the entire set of 17 Sustainable Development Goals and the 169 targets proposed by the Open Working Group, [Target 16.10] is the sole provision that would explicitly require UN members to provide information that would show if the new global goals are on track to being met or not."\(^{10}\) There is broad consensus that universal public access to development information and analysis is essential to the success of the SDGs in their entirety\(^{11}\). SDG Target 16.10 accordingly plays a fundamental role in the SDGs as a whole.

In order to fully grasp this fundamental role and its implications, it is necessary to examine the origins and scope of access to information as it has developed in international human rights and more recently in the context of sustainable development. The application of the right to access under national law is also necessary to assess given that the legal guarantees that the public rely on to access information are governed by national law, in accordance with the requirements of international human rights law. The challenges related to access to information and the powerful role of the media as a tool to facilitate access will then be outlined to fully assess the scope of access to information and its role and potential in the context of the SDGs.

2.1. ACCESS TO INFORMATION AS A HUMAN RIGHT

Access to information is undoubtedly a fundamental human right. The UN General Assembly adopted a resolution in its very first session stating that "Freedom of information is a fundamental human right and [...] the touchstone of all the freedoms to which the United Nations is consecrated"\(^{12}\). Access to information plays an important role at various levels: as a right in and of itself, for the fulfillment of all other rights and as an underpinning of democracy\(^{13}\).

The Universal Declaration of Human Rights provides that "everyone has the right to freedom of opinion and expression; this right includes


\(^{11}\) Ibid.


\(^{13}\) T. MENDEL supra n. 12.
freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"14. Access to information is accordingly including in the right to freedom of expression.

Access to information may be considered as the central underlying rationale for freedom of expression15. One expert notes that "The importance of freedom of expression has been explained in three key ways, as an aspect of human dignity, as the means of ascertaining the truth and as a fundamental underpinning of democracy. Freedom of information plays an important role in all three but it is as an aspect of democracy that it is perhaps most crucial. Democracy cannot flourish if governments operate in secrecy, no matter how much open discussion and debate is allowed. Indeed the very nature and quality of public discussion would be significantly impoverished without the nourishment of information from public authorities. To guarantee freedom of expression without including freedom of information would be a formal exercise, denying both effective expression in practice and a key goal which free expression seeks to serve"16.

Article 19 of the 1966 International Covenant on Civil and Political Rights (the Covenant) appears to have received the most attention from experts and commentators. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (the UN Special Rapporteur) highlights that the International Covenant for Civil and Political Rights provides the primary legal standard for the vast majority of communications relating to freedom of expression between the Special Rapporteur and governments17. There are 168 state parties to the Covenant and a wide acknowledgment of its centrality in human rights law18. Article 19 of the International Covenant on Civil and Political Rights provides that:

2. 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.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be

15. T. Mendel, supra n. 12.
16. Ibid.
18. Ibid.
subject to certain restrictions, but these shall only be such as are provided
by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre
public), or of public health or morals.

The UN Human Rights Committee has issued an authoritative
interpretation on the scope and limits of the right to information under
Article 19 of the Covenant. The UN Human Rights Committee highlights
that the right to access information requires that the public have access
to information that is "easy, prompt, effective and practical", and that
states must enact "necessary procedures" to give effect to the right.
The UN Human Rights Committee provides that such "procedures"
under national law must set standards, including limited fees, and that
authorities must provide explanations for withholding information and
establish independent appeal mechanisms for redress, and proactively
disseminate information in the public interest.

Article 19 of the International Covenant on Civil and Political Rights
provides for three requirements that must each be met in order for freedom
of expression and/or access to information to be legally restricted. The UN
Human Rights Committee and the UN Special Rapporteur have confirmed
that these restrictions are to be interpreted and implemented narrowly.
The Human Rights Committee considers that once a restriction on freedom
of expression or access to information has occurred, there is a burden on
the State to demonstrate that it complies with the requirements of human
rights law. In order for a state to demonstrate that a restriction on access
to information is in compliance with international human rights law, the
Human Rights Committee highlights that a state must demonstrate: that
it is necessary for the respect of the rights of others or for the protection of
national security or public order (ordre public) or public health or morals,
and that it is proportionate. The Human Rights Committee highlights that
a restriction cannot put the right itself in jeopardy.

19. United Nations Human Rights Committee, ‘General Comment No. 34, Article 19:
Freedoms of opinion and expression’ 12 September 2011.
20. Ibid, see ‘Open Development: Access to Information and Sustainable Development
Goals’ Report Published by Article 19 in July 2017, at 8 for a more in depth analysis.
21. Ibid.
22. See Human Rights Committee, supra n. 19 at paras. 21-36.
23. Ibid para. 27.
24. Ibid.
The practice and jurisprudence related to Article 19 of the International Covenant on Civil and Political Rights have elaborated upon the three conditions that any restriction on access to information must meet: legality (provided by law); legitimate objective; and necessity and proportionality. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression highlights that the legality requirement is not met simply by formally enacting a national law or regulation. He highlights that the legality requirement indicates that any national law relating to freedom of expression and access to information "must be formulated with sufficient precision to enable both the individual and those charged with its execution to regulate conduct accordingly and be made accessible to the public." The law regulating freedom of expression and access to information must not confer discretion for any restrictions to those charged with the execution of the law.

Article 19(3) requires the pursuit of a legitimate objective that is necessary and proportionate to protect the rights/reputations of others or national security, public order, or public health or morals. The Special Rapporteur highlights that a State must accordingly establish a "direct and immediate connection" between the right to access information/freedom of expression and the threat that is alleged to exist. Any restrictions on access to information and/or freedom of expression "must target a specific objective and not unduly intrude upon other rights of targeted persons, and the ensuring interference with third parties' rights must be limited and justified in the light of the interest supported by the intrusion." Furthermore, the restriction must be the least intrusive option among the options that might achieve the desired result.

The right to freedom of expression and access to information is further recognized in the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Economic

26. See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, supra n. 17 for further details.
27. Ibid at 6.
28. Ibid.
30. see ibid for further discussion.
31. Human Rights Committee, supra n. 19 at para. 35, see ibid.
32. SR report at 7, see A/HRC/29/32, para. 35.
33. Ibid, see Human Rights Committee, supra n. 19 at 34.
34. See Article 10 of the European Convention on Human Rights.
35. See Article 13 of the American Convention on Human Rights.
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Access to information questions accordingly enjoy universal political recognition and application within a larger framework of freedom of expression. It is also undoubtedly grounded in international human rights law as a fundamental human right. Access to information also functions as an important facilitative right to enable individuals to better enjoy their civil, political, economic, social and cultural rights by enabling them to make more informed choices.

2.2. ACCESS TO INFORMATION IN THE SUSTAINABLE DEVELOPMENT CONTEXT

Target 16.10 expressly links the right to access information with rights related to sustainable development. Access to information relating to the environment is key to sustainable development and sound environmental governance. Treating public access to information as a matter of human rights reinforces the aspect of protecting fundamental freedoms, the second component of Target 16.10.

Access to information was first recognized and expressly enunciated in the context of sustainable development in the 1992 Rio Declaration on Environment and Development. Principle 10 of the Rio Declaration on Environment and Development provides that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

36. See Article 9 of the African Charter of Human and Peoples Rights.
37. See United Nations Educational, Scientific and Cultural Organization and the International Programme for the Development of Communication supra n. 7 at 9 for further elaboration on this point.
38. 'Open Development: Access to Information and Sustainable Development Goals' supra note 20 at 6; see page 9 in particular for further elaboration on the protection of the right to access information under other regimes of international law.
40. Ibid at 6.
42. Principle 10 of the Rio Declaration on Environment and Development.
Though the Rio Declaration limited access to information in relation to hazardous activities and materials, it represents an important step to expressly bring access to information into play in environment and development considerations. The Rio Declaration accordingly paved the way for access to information in sustainable development discussions. The key role that the right to freedom of expression and its associated rights of access to information and press freedom may play in sustainable development has been underlined by many, including the Secretary General of the United Nations. The scope of access to information in the sustainable development context has gradually expanded since the 1992 Rio Declaration.

The 2000 Millennium Declaration contains a commitment to "ensure the freedom of the media to perform their essential role and the right of the public to have access to information." Unfortunately, this commitment was not incorporated into the Millennium Development Goals and received little attention. This makes SDG 16, and Target 16.10 in particular, even more important for sustainable development and for advances in relation to access to information. The inclusion of access to information in the SDGs was influenced by the recognized failure of the Millennium Development Goals to effectively incorporate any accountability mechanisms. Throughout the negotiations of the SDGs, Member States expressed a clear intent to ensure that both access to information and protection of individual rights would be monitored through an individual indicator. This intent was given effect in SDG Target 16.10.

Access to information in the context of sustainable development gained momentous ground through the conclusion of the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Aarhus Convention is a unique environmental agreement that links environmental and human rights and establishes that sustainable development can only be achieved through the involvement of all stakeholders. In turn stakeholders may only be engaged and involved if they have access to information.

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43. United Nations, 'The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet: Synthesis report of the Secretary-General on the post-2015 sustainable development agenda.' 4 December 2014 (A/69/700); see also ibid.
45. United Nations, 'The road to dignity...' supra n. 43.
46. Ibid.
47. Ibid.
The preamble of the Aarhus Convention is a prime demonstration of the important role that access to information plays in sustainable development. The preamble highlights that protection of the environment is essential to human well-being and the enjoyment of basic human rights, and recognizes that improved access to information and public participation in decision making contributes to public awareness of environmental issues and gives the opportunity for debate on public concerns. In general terms, the preamble "recognizes that sustainable and environmentally sound development depends on effective governmental decision-making that contains both environmental considerations and input from members of the public." One could consider that SDG Target 16.10 contains the same recognition and basis.

Article 1 of the Aarhus Convention sets out its objective. It provides that "In 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, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention." The concept of "environmental information" is mentioned throughout the Convention, which is defined in the Convention as:

...any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected

49. See the preambular recital of the Aarhus Convention.
51. Article 1 of the Aarhus Convention.
by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above\(^52\);

Access to information within the context of the SDGs would, at a minimum, relate to the above mentioned so called "environmental information." It would also be even broader to include any information in the public interest related to economic or planned activity that could impact sustainable development.

The Aarhus Convention "links government accountability and environmental protection [and] focuses on interactions between the public and public authorities in a democratic context and is forging a new process for public participation in the negotiation and implementation of international agreements\(^53\). It plays a vital role in linking the environment to government accountability, transparency and responsiveness, and posits access to information as a central concern of sustainable development\(^54\).\n
The Aarhus Convention imposes clear obligations on Parties and public authorities to provide for public access to information, public participation and access to justice, which are set out in general terms as general principles that guide the more detailed and specific provisions throughout the text of the Convention\(^55\). Access to information is the first specific substantive obligation of the Convention in Article 4, based on the general principle set out in Article 3. Commentators consider that "it is fitting that [access to information] comes first in the Convention, since effective public participation in decision-making depends on full, accurate, up-to-date information. However, it is equally important in its own right, in the sense that the public may seek access to information for any number of purposes, not just to participate\(^56\)."\n
The obligations in the Aarhus Convention are reinforced and given teeth through the compliance review system established by the Convention\(^57\). This compliance review system is unique in that it allows members of the public to bring issues of compliance directly before it.

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52. Article 2(3) of the Aarhus Convention.
54. Ibid.
55. See ibid for further elaboration, Article 3 of the Aarhus Convention contains the general principles that are elaborated as substantive obligations in Articles 4-9.
57. See ibid and United Nations Economic Commission for Europe, 'Guide to the Aarhus Convention Compliance Committee'.
Although individuals may have recourse to regional human rights bodies to enforce human rights, including access to information, those fora will generally require an exhaustion of local remedies first, meaning an appeal at every level before national courts before elevating the claim to the regional human rights body. The compliance review system of the Aarhus Convention has no such preconditions and appears to be unique in the international legal system.

The compliance review system for the Convention was established in accordance with Article 15 of the Convention, which calls for the Parties to "establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."58. The Meeting of the Parties of the Convention accordingly adopted decision 1/7 on review of compliance at its first session, which creates the Compliance Committee as the main body to review compliance, and sets out the structure and functions of this body, including the procedures to review compliance59.

The Compliance Committee "is unique in international environmental law, as it allows members of the public to communicate their concerns about a Party's compliance directly to a board of independent experts, the Compliance Committee, which has the mandate to examine the merits of the case. The Committee adopts findings and if non-compliance is found, may make recommendations either to the MOP, or, with the Party's agreement, directly to the Party concerned"60.

The Compliance Committee has adopted 46 findings so far; three out of five of these findings have found non-compliance with the Convention61. All of the findings of the Compliance Committee are detailed and publicly available62. The Compliance Committee of the Aarhus Convention will serve as a great means to ensure that Target 16.10 may be effective, as it

58. Article 15 of the Aarhus Convention.
60. Ibid.
will serve as a mechanism by which members of the public can directly enforce their right to access information that may impact the environment or their right to sustainable development more broadly.

In the buildup to the SDGs, the Lyon Declaration on Access to Information and Development was signed in August 2014 to acknowledge that increasing access to information and improving information and communications technologies supports sustainable development. The Lyon Declaration notes that "increased access to information and knowledge, underpinned by universal literacy, is an essential pillar of sustainable development," and considers that increased quality and availability of information and the involvement of communities in its creation will provide more full transparent means of resource allocation. In so doing, it would contribute to sustainable development.

The Lyon Declaration accordingly calls on UN Member States to "acknowledge that access to information, and the skills to use it effectively, are required for sustainable development." This was recognized by SDG 16, and most expressly through SDG Target 16.10.

2.3. ACCESS TO INFORMATION AND PROTECTION OF FUNDAMENTAL RIGHTS UNDER NATIONAL LAW

The national laws that establish access to information generally establish a "right to know" process whereby requests can be made for disclosure of information held by the government for free or at minimal costs, and the governments are typically bound by duty to publish or promote disclosure. Access to information laws have only recently been enacted throughout the world as of the end of the 20th Century and beginning of the 21st Century. Although over 100 Member States of the UN have enacted access to information laws, they have only recently been passed in many countries, and effective implementation has barely begun. Although many constitutions may provide for guarantees relating to access to information, these mean little if there is no specific legislation detailing how that access may be provided.

63. See the Lyon Declaration, available here http://www.lyondeclaration.org/.
64. Ibid.
65. Ibid.
67. Ibid.
68. B. Orme, 'Ensuring Public Access to Information: The UN's New Global Goal' supra n. 2.
69. Ibid.
In principle, SDG Target 16.10 has placed the onus on governments to proactively disclose information or provide explanation as to why information is not made public. Some experts consider that this is an achievement over the previously reigning operating premise that information held by the government will only be shared at the government’s discretion. However, as noted above, international human rights law has placed an obligation on states to provide public access to information and has provided for strict conditions that must be met in order for a state to restrict such access. It is therefore not clear that SDG Target 16.10 accordingly has changed the operating premise of access to information. It is nevertheless clear that it is has strengthened its application and scope, and has given it the teeth to ensure its implementation.

The UN Secretary General’s report on Progress towards the Sustainable Development Goals notes that “Legislation that calls for freedom of information has increased steadily, but slow or inefficient implementation of such laws remains a concern. More than 110 countries have adopted freedom of information legislation and policies. However, expert assessments suggest that 47 of those countries fall short of having clear legal provisions for exceptions to that right, while another 47 countries lack sufficient provisions for public education.” There is clearly therefore much progress to be made before access to information can be meaningfully attained on a universal level as envisaged by SDG Target 16.10. Fortunately, SDG Target 16.10 provides the basis for meaningful access to information on a global scale.

The Kingdom of Sweden was the first nation to adopt legal guarantees relating to access to information in 1766. It took centuries for other regimes to follow suit. The United States was one of the first countries to follow and enact access to information law in 1966. Other states followed suit at the end of the 20th and beginning of the 21st Century. France enacted access to information laws in 1999, and Germany and the United Kingdom enacted similar laws in 2005. Many other countries

70. Ibid.
71. Ibid.
73. Ibid.
have enacted legislation guaranteeing access to information including Fiji, India, Japan and Trinidad and Tobago\textsuperscript{76}. The European Union also adopted legislation regarding public access to European Parliament, Council and Commission documents\textsuperscript{77}.

One of the best national models for Target 16.10 in terms of legal guarantees may be South Africa\textsuperscript{78}. The post-apartheid constitution of South Africa provides that "Everyone has the right of access to information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights"\textsuperscript{79}. The South African Constitution also provides that national legislation must be enacted to give effect to the right, and South Africa enacted the Promotion of Access to Information Act in 1999 for this purpose\textsuperscript{80}.

The South African model does well by recognizing that public information may not always be held by the government, and access to information held by private entities may be necessary for the protection of rights and the public good\textsuperscript{81}. This is where the broad scope of Target 16.10 is particularly advantageous. One of the biggest challenges relating to access to information in the 21\textsuperscript{st} Century is that there is an increasing trend for private actors to carry out functions that were traditionally within the public domain, and private actors increasingly carry out public functions that impact basic rights. National laws in general do not seem to have yet caught up to that trend.

National courts in a number of states have recognized access to information as a fundamental human right and have been an important arm to enforce this right. The Supreme Court of Japan established the principle in 1962 that the guarantee of freedom of expression in Japan's constitution includes a right to access information\textsuperscript{82}. The Supreme Court

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76. See T. Mendels, supra n. 12.
78. See B. Orme, 'Ensuring Public Access to Information: The UN’s New Global Goal' supra n. 2.
79. Section 32(1) of the Constitution of the Republic of South Africa.
80. Ibid Section 32(2); see D. Milo and P. Stein, 'A Practical Guide to Media Law' Lexis Nexis South Africa for further details.
81. B. Orme, 'Ensuring Public Access to Information: The UN’s New Global Goal' supra n. 2.
82. T. Mendel, supra n. 12.
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of India has held in 1982 that "The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression" and that "disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirements of public interest so demands". The Supreme Court of Sri Lanka has noted that "information is the staple food of thought, and that the right to information, simpliciter, is the corollary of the freedom of thought".

At the very general level, national laws related to access to information should be guided by the principle of maximum disclosure and establish a broad presumption in favor of disclosure that is binding on a wide range of bodies that hold information in the public interest. There are two principles that can underpin positive obligations on public authorities in this area: to publish certain material even in the absence of a specific disclosure request; and to actively promote open government including through training and establishing procedures whereby individuals can request and be provided information in the public interest.

There are a number of principles to deal with requests for access to information, including the processing of requests, the exceptions and costs. Of particular importance are the exceptions: first, states must disclose subject to narrowly defined exceptions. Then perhaps most importantly, requests may only be refused on the basis of the exceptions listed in the legislation and only when the authority can show that disclosure would pose a real risk of substantial harm to the protected interest. A state would also need to demonstrate that such a restriction of a fundamental human right is a proportionate response to the potential harm of disclosure on a legitimate interest.

The work of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reveals that this is where most national legislation falls short: demonstrating that non-disclosure meets the tests of necessity and proportionality required in this

83. *S.P. Gupta v. President of India and Ors* [1982] AIR (SC) 149, p. 234; found in *ibid*.
84. *Fernando v. Sri Lanka Broadcasting Corporation and Others*, 30 May 1996, SC Application NO. 81/95, p. 16; found in *ibid*.
85. see *ibid* and Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* n. 17.
86. see *ibid*.
87. *Ibid*.
88. *Ibid*. 

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context\textsuperscript{89}. Further, the laws guaranteeing access to information should provide for an exhaustive list of exceptions that may not be extended through other statutory instruments or practice\textsuperscript{90}.

The Special Rapporteur notes that of the permissible grounds for restrictions, particularly in relation to Article 19 of the International Covenant on Civil and Political Rights, states most often rely on national security and public order\textsuperscript{91}. The Special Rapporteur highlights that although "national security" is undefined in the Covenant, it "should be limited in application to situations in which the interest of the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government, regime or power group"\textsuperscript{92}. He also notes that similarly, "public order" (ordre public) "must be limited to specific situations in which a limitation would be demonstrably warranted"\textsuperscript{93}.

Nevertheless, the Special Rapporteur notes that states often treat national security as a label that would legitimize any restriction\textsuperscript{94}. The UN Human Rights Council has also recognized this problem and has emphasized that national security, including counter-terrorism, must not be used arbitrarily or unjustifiably to restrict the right of access to information and freedom of expression\textsuperscript{95}.

Another important element of national law guarantees to access information are that procedures should provide for an appeal to an independent administrative body that has the power to promote effective compliance with the law\textsuperscript{96}. Another important element is that the cost for the procedure should be minimal\textsuperscript{97}. This recognizes the basic human rights of accessing information and the important role in plays in facilitating open democratic institutions and societies.

\begin{itemize}
  \item \textsuperscript{89} Ibid.
  \item \textsuperscript{90} Ibid.
  \item \textsuperscript{91} Ibid at 7-8.
  \item \textsuperscript{92} Ibid at 8.
  \item \textsuperscript{93} Ibid.
  \item \textsuperscript{94} Ibid.
  \item \textsuperscript{95} Human Rights Council Resolution 7/36 on the Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, referenced in \textit{ibid}.
  \item \textsuperscript{96} Ibid.
  \item \textsuperscript{97} Ibid.
\end{itemize}
2.4. CHALLENGES RELATING TO ACCESS TO INFORMATION AND PROTECTION OF FUNDAMENTAL RIGHTS

The UN Special Rapporteur has identified at least three consistent challenges related to the legality condition of the International Covenant on Civil and Political Rights, that is, that any restriction on access to information and freedom of expression must be provided for by law.98 The first problem that the Special Rapporteur identified is that national laws use broad terms that give authorities vast discretion to restrict expression/access and provide the public with limited guidance about the applicability of the restrictions.99 The Special Rapporteur notes that vague general language gives officials "excessive discretion to determine their meaning".100 He highlights that the recent increase in counter terrorism legislation has raised particular concerns related to vague language, including restrictions on "obscene, gory or offensive material which is likely to cause fear and alarm to the general public".101 The Special Rapporteur considers that these broad limitations "enable the punishment of expression that should not be subject to restriction".102

It is therefore not enough that national law provides for guarantees of freedom of expression and access to information. In order to be compliant with international human rights law, these guarantees must not be formulated in vague broad general terms. In the end the use of broad general language may permit flexibility but it will only cost the society for which that law purports to protect, because broad discretions may be abused and utilized to curtail access to information and the freedom to express opinions, undermining one of the fundamental ingredients of democracy and open societies.

The second major problem identified by the Special Rapporteur in relation to the legality requirement is that legislative processes related to laws that may impact access to information and freedom of expression do not provide adequate time for the public to engage and address human rights obligations of the State.103 Again, there is a trend in particular for counter-terrorism to follow fast track procedures for the adoption of the law, which provides little time for public engagement and debate, including

98. Ibid at 6.
99. Ibid.
100. Ibid.
101. A formulation used in Kenya's counter-terrorism legislation in 2015, found in ibid.
102. Ibid.
103. Ibid.
with civil society and other stakeholders\textsuperscript{104}, and even basic understanding of the potential impact of the law by the lawmakers themselves. The third problem related to the legality requirement identified by the Special Rapporteur is that national laws implementing the guarantees of access to information and freedom of expression do not provide courts or other third-party reviews with the necessary authority to evaluate any claims of non-adherence\textsuperscript{105}.

Unfortunately, most laws regulating access to information also seem to exclude the private sector from the application of their provisions\textsuperscript{106}. There is more and more information that public information that is now vested with the private sector, and access to information laws are not crafted well enough to compel private actors to disclose public interest information\textsuperscript{107}. The more private actors carry out activities of a public nature or that may impact the public good, the more of a negative impact this legal gap will have. UNESCO's Finlandia Declaration accordingly argues that "the right to information encompasses access to information held by or on behalf of public authorities, or which public authorities are entitled to access by law, as well as access to information that is held by private bodies in respect of the exercise of public functions"\textsuperscript{108}.

This trend has fueled efforts to open up the private sector to greater public scrutiny by providing access to publicly held information\textsuperscript{109}. Some private entities are even embracing what is known as the Triple Bottom Line – "a three dimensional performance strategy that incorporates social, environmental and economic reporting as a marker of good corporate governance"\textsuperscript{110}. Through this, companies can disclose information related to sustainable development and protection of fundamental rights\textsuperscript{111}.

Nevertheless, these mechanisms are entirely voluntary at this stage. The extent to which the political good will of private entities may be

\textsuperscript{104} Ibid at 7.
\textsuperscript{105} Ibid.
\textsuperscript{106} United Nations Educational, Scientific and Cultural Organization and the International Programme for the Development of Communication supra n. 7 at 3.
\textsuperscript{107} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
relied on to disclose information in the public interest may legitimately be questioned. The increasing amount of public interest information held by private entities therefore continues to pose a threat to access to information, particularly in relation to SDG Target 16.10.

Beyond this, even in the most developed legal systems with strong guarantees of freedom of information and media, governments routinely withhold data and documents that journalists and civil societies consider should be in the public domain. Further, many less developed countries lack the capacity to collect and disseminate information, and even if they could, few individuals could make practical use of that information.

The UN Special Rapporteur has expressed "deep concern about the state of freedom of expression" in light of his findings based on communications to Governments. The communications between governments and the Special Rapporteur reveal that counter terrorism laws/policies and other laws relating to criminal activity have served to undermine the media, the right to freedom of expression and access to information.

The Special Rapporteur accordingly highlights that "The United Nations has long promoted the idea that expression is fundamental to public participation and debate, accountability, sustainable development and human development, and the exercise of all other rights. Indeed, expression should provoke controversy, reaction and discourse, the development of opinion, critical thinking, even joy, anger or sadness - not but punishment, fear and silence".

The Special Rapporteur highlights that measures to prevent or counter terrorism pose a threat to access information since the measures are "rarely drawn narrowly enough to satisfy the necessity or proportionality criteria". The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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112. B. ORNE, Paper 5, supra n. 10.
113. Ibid.
114. 'Promotion and protection of the right to freedom of opinion and expression', UN Doc A/71/373, Report prepared by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, transmitted to the UN General Assembly through the UN Secretary-General, at 3.
115. Ibid.
116. Ibid.
117. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, supra n. 17. at 10.
has called on states to address such measures proportionately and with precise definitions.\(^{118}\)

The other main challenge surrounding access to information relate to the major divide between the poor and wealthy and the uneven access to technology that provides for the free flow of information.\(^{119}\) Addressing these challenges will require closing the digital divide, with the ultimate goal being universal and free (or at the very least affordable) internet services.\(^{120}\) This is an important step in ensuring that the world’s online information tools are available to everyone.\(^ {121}\) This in turn is an important step in ensuring universal access to information.

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression also highlights another challenge related to freedom of expression related to internet shutdowns. He notes that many Governments disrupt internet and telecommunications services claiming national security or public order reasons, which include shutdowns of entire networks, blocking of various websites and platforms and the suspension of mobile and telecommunications services.\(^ {122}\)

The Human Rights Council has unequivocally condemned any measures to intentionally prevent or disrupt access to or dissemination of information online information.\(^ {123}\) It has called on all States to cease and refrain from such measures.\(^ {124}\) Such measures to block internet platforms and communications infrastructure remain threats, "for even if they are premised on national security or public order, they tend to block the communications of often millions of individuals."\(^ {125}\)

The Global Forum for Media Development considers that "Journalists, along with civil society activists and academic research specialists, are among the few who will use these legal tools professionally for public-service purposes. Their experiences in trying to access information through these legal mechanisms provides the best evidence of whether

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119. B. Orme, 'Ensuring Public Access to Information: The UN’s New Global Goal' *supra* n. 2.
122. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* n. 17. at 9.
123. Human Rights Council Resolution 32/13, para. 10; see *ibid* for further details.
125. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *supra* n. 17. at 9-10, see also A/HRC/32/38.
the system is working in the public interest, as it should, or not". Those who effectively translate information into accessible knowledge for purposeful use play a critical role, including traditional media, civil society organizations and public institutions like libraries. Understanding and assessing the role of the media in this context is necessary to fully understand the application and potential of access to information for societies.

2.5. THE ROLE OF THE MEDIA TO FACILITATE MEANINGFUL ACCESS TO INFORMATION

One of the fundamental ways to ensure public access to information and protect fundamental freedoms is "the existence of free, independent and pluralistic media, which can foster vibrant investigative journalism to hold the UN Member States accountable for their commitments under the 2030 Agenda for Sustainable Development". Independent journalism plays an important role in generating well researched information that may be used by the public to hold governments accountable on SDGs, and that may be used by governments to assess their policy responses to SDGs.

Where access to information laws are adequately in place, an independent and pluralistic media can accordingly facilitate environmental and human rights protection by unlocking access to classes of public information. These actors play a vital role framing the way the public apply and interact with information. Although the information may be generally accessed by the public at large, it is the media that translates mass amounts of information into discernable activities that may actually reach the public for comment and debate, and has the ability, responsibility and power to effectively highlight the activities that may impact the public good. This is an important means to hold governments and other actors to account, and yet another effective means of ensuring the attainment of the SDGs and SDG Target 16.10 in particular. The media must nevertheless be free

126. Ibid.
127. The International Federation of Library Associations and Institutions (IFLA) and the Technology and Social Change Group, University of Washington, 'Development and Access to Information 2017' at 11.
129. Ibid.
130. Ibid.
131. Ibid.
from government or private interference above all else in order to do so in the public interest.

Media in this context refers to all channels that carry news and public information, and may be seen as a way to address the natural imbalance of information between the government and the governed, and between competing private agents. It is particularly fueled by libraries and journalists who may be seen as the main actors who actively facilitate access to information in the public interest to ensure inclusive and democratic societies. The practice of journalism may be seen as a "regular gathering of information, with or without formal training, accreditation or other government acknowledgment, with the intent to disseminate one's findings in any form".

A free, independent and pluralistic media empowers the public to make informed choices and actively participate in democratic processes; and can aid transparency and accountability by exposing abuses of power and by facilitating a dialogue between decision makers and the rest of society. Access to information is included in the right to freedom of expression. An independent and pluralistic media can facilitate access to information, and freedom of expression is a necessary underpinning of an independent and pluralistic media. The media is also crucial to freedom of expression by providing the public platform through which the right is exercised.

The media may nevertheless sometimes serve to "reinforce the power of vested interests and exacerbate social inequalities by excluding marginalized voices [and] may even promote conflict and social divisions". An essential question in relation to free expression, good governance and sustainable development is accordingly how to nurture a media framework and practice that contributes to those goals.

133. Ibid.
134. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, supra n. 17 at 14.
136. Ibid at 3.
138. Ibid.
In order to understand the current state of Target 16.10, the current state of media development should be assessed in terms of independence, access, safety and security. The absence of restrictions on media along with the extent to which all sectors of society, especially the most marginalized, can access the media to gain information and make their voices heard are important elements in this assessment.

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression highlights that "attacks on journalism are fundamentally at odds with protection of freedom of expression and access to information and, as such, they should be highlighted independently of any other rationale for restriction. Governments have a responsibility not only to respect journalism but also to ensure that journalists and their sources have protection through strong laws, prosecution of perpetrators and ample security while necessary." 

Unfortunately, the Report of the Special Rapporteur notes that counter-terrorism laws are used to restrict and penalize reporters and the media. He highlights that "reliance on counter-terrorism serves as a catch-all to throttle the flow of information and justify the detention of journalists, bloggers and other working in the media." In Australia for example, there are allegations that the Border Force Act of 2015 has the effect of criminalizing reporting on detention conditions in immigration facilities. In Turkey, there are allegations that authorities have used anti-terrorism laws to detain journalists and target academics.

The Special Rapporteur notes that "Perhaps most concerning is that Governments often fail to provide measures of protection and accountability that can deter attacks on journalists." There are alarmingly high statistics involving kidnappings, killings and other aggressions against journalists in the Americas that have come to light through the work of the Special Rapporteur for Freedom of Expression of...
the Inter-American Commission on Human Rights. Those statistics also unfortunately reveal very limited accountability for these crimes despite efforts for the creation of special mechanisms to protect journalists.

The UN Special Rapporteur observes that the "widespread failure to hold perpetrators accountable for attacks on journalists suggests the absence of concern for the role that journalists play in democratic societies". He notes that his communications have revealed reports and allegations of killings and disappearance, with the most widespread nature in South Sudan, Mexico, the Philippines and the Russian Federation. In other states like Kuwait and Bahrain, there are allegations that journalists have been stripped of their citizenship, and in Ecuador the Government has filed copyright complaints allegedly in an attempt to take down content that is critical of its activities.

These reports are alarming to the state of access to information given the fundamental role that the media and all of its participants play as a conduit for information between the government and the public. The indicators to assess SDG Target 16.10 on access to information have therefore focused to a large degree on the safety of journalists and others involved in the media and/or the flow of information between the Government and the public, like human rights actors and trade unionists. While it is fundamentally necessary and commendable to have clear legal guarantees for access to information in international human rights law and given effect in national law, without clear indicators to monitor SDG Target 16.10, these guarantees will remain underutilized for the cause of sustainable development.

3. THE TOOLS TO IMPLEMENT AND MONITOR PUBLIC ACCESS TO INFORMATION AND PROTECTION OF FUNDAMENTAL FREEDOMS

Some consider that the factual indicators and institutional mechanisms set in place to monitor progress related to SDG Target 16.10 will determine


148. Ibid.

149. U Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, supra n. 17 at 16.

150. Ibid.

151. see ibid.
the impact of this target on all of the SDGs. Fortunately, there is a sound normative and technical framework for UN monitoring of public access to information which is already taking place, including: i. the adoption by a growing majority of states of legal guarantees of public access to information; ii. Data on national per capita internet use, access and costs from the International Telecommunications Union; and iii. regular reports and data on media independence and the safety of journalists by UNESCO in collaboration with other UN agencies.

Some civil society activists have criticized the reference to national legislation in Target 16.10 as an endorsement of the status quo. Others consider that the selection of appropriate indicators for this Target could remedy any textual gaps. In any case, no single indicator can adequately cover target 16.10 as it deals with the dual issue of access to information and fundamental freedoms. There appears to be general consensus that the indicators should be determined by defining public access to information and fundamental freedoms, and to ensure the safety and security of journalists, human rights activists and other users who routinely access public information.

3.1. THE GLOBAL INDICATORS FOR THE SDGS

General Assembly Resolution 70/1 that adopted the SDGs provides that the goals and targets contained therein will be followed up and reviewed using a set of global indicators, which will be complemented by indicators at the regional and national level developed by Member States. That resolution elaborates that the global indicator framework will be developed by the Inter-Agency and Expert Group on Sustainable Development Goal Indicators, will be agreed by the Statistical Commission.

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152. B. ORNE, Paper 5. supra n. 10.
153. Ibid.
154. Ibid.
155. Ibid.
156. J. SCHUHMANN, C. MURGATROYD, G. MILANTE, 'Goal 16 – The Indicators We Want: Virtual Network Sourcebook on Measuring Peace, Justice and Effective Institutions,' an independent publication commissioned by the United Nations Development Programme and supported by the German Government, at 34.
158. GA Res. 70/1, 25 September 2015, para. 75.
by March 2016 and adopted thereafter by the Economic and Social Council and the General Assembly\textsuperscript{159}.

The General Assembly mandated that the global indicator framework "will be simple yet robust, address all Sustainable Development Goals and targets, including for means of implementation, and preserve the political balance, integration and ambition contained therein"\textsuperscript{160}. The United Nations Statistical Commission endorsed the formation of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators for the development of the indicator framework for the SDGs\textsuperscript{161}.

The Inter-Agency and Expert Group on Sustainable Development Goal Indicators (the Expert Group on SDG Indicators) proposed indicators for the review of the SDGs based on an open and transparent consultative process that involved a large number of stakeholders and was guided by the recommendations and requests of Member States at the General Assembly\textsuperscript{162}. The Expert Group on SDG indicators discussed the issue of interlinkages and multi-purposes of indicators in order to limit the number of indicators\textsuperscript{163}. It also recognized that in several cases, the indicators did not address the multiple aspects of the targets and in the long term, the statistical community will need to identify indicators to complement the existing ones and address shortcomings\textsuperscript{164}. There seems to be ample debate surrounding the indicators developed for SDG Target 16.10; there may therefore be developments related to the formal indicators developed for its assessment.

The Expert Group on SDG indicators highlights that the Secretary-General has been mandated to produce annual progress reports on the SDGs to support their follow up and review, and notes the expectation that the global reporting of progress on the 2030 Agenda will be based on global and regional aggregates of data on indicators as compiled by international agencies based on their respective existing mandates or expertise\textsuperscript{165}. This is an excellent way to utilize the information and expertise already developed.

\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
\textsuperscript{163} see ibid para 22.
\textsuperscript{164} Ibid para 22 and 31.
\textsuperscript{165} Ibid para. 29.
16.10.1 Number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months;

16.10.2 Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information”\(^\text{166}\).

These initial global indicators were submitted to the Statistical Commission in March 2016 and were approved by the Commission as a practical starting point, subject to future refinement\(^\text{167}\). The Commission noted that the development of a "robust and high quality indicator framework" is a technical process that will need to be reviewed over time, and requested the Expert Group on SDG indicators to provide its plans for reviews of the framework by its next session\(^\text{168}\). The Expert Group set out its proposals and action on the indicator framework in December 2016, with no changes to the indicators relating to or discussion of Target 16.10\(^\text{169}\). The United Nations Economic and Social Council (ECOSOC) has recently unanimously adopted the draft resolution containing the global indicator framework for the SDGs in June 2017\(^\text{170}\).

3.2. THE ROLE OF THE GLOBAL INDICATORS FOR THE MONITORING AND ASSESSMENT OF SDG TARGET 16.10

These indicators have received much attention and follow up recommendations from relevant stakeholders. The UN Statistical Commission maintains a metadata repository in respect of each SDG indicator, which reflects the latest information provided by the UN system and other international organizations in preparation for the Secretary-General's annual report on "Progress towards the Sustainable Development Goals"\(^\text{171}\). The data related to Target 16.10 is compiled by

\(^{166}\) Ibid.

\(^{167}\) Ibid, and were agreed upon by the Statistical Commission in its decision 47/101.

\(^{168}\) Commission decision 47/101.


\(^{171}\) Available at https://unstats.un.org/sdgs/metadata/.
the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Office of the High Commissioner for Human Rights (OHCHR)\textsuperscript{172}.

Indicator 16.10.1 relates to the number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates. The rationale for this indicator is that data on such violations against journalists, trade unionists and human rights defenders is necessary to know if fundamental freedoms, including the right to freedom of expression which includes the right to receive information, are protected in accordance with international law\textsuperscript{173}. These violations are considered to have a "chilling effect" on freedom of expression and the corollary right to receive information, along with other fundamental freedoms\textsuperscript{174}.

The institutional information provided in relation to indicator 16.10.1 concedes that estimates on the number of violations are particularly sensitive to the completeness of reporting of individual events\textsuperscript{175}. The information provided further recognizes that "while this indicator does not cover every aspect of this particular target, it does identify one of the most salient and measurable dimensions that impacts on the whole. Further, it is an indicator that draws upon existing UN agreements and mechanisms for data collection"\textsuperscript{176}.

UNESCO and OHCHR are the responsible agencies for compiling these indicators at the international levels\textsuperscript{177}. They note that this is a forward-looking indicator, and that full methodologies will be developed in the course of the implementation of the SDGs\textsuperscript{178}. Indicator 16.10.1 on safety of journalists, human rights activists and trade unionists is an important measurable indicator of the effectiveness of access to information and the right to freedom of expression. Access to information and freedom of expression guarantees have little value and role if journalists, human rights activists and others pursuing the public interest cannot exercise

\textsuperscript{172} See https://unstats.un.org/sdgs/metadata/files/Metadata-16-10-01.pdf for the most recent institutional information related to indicator 16.10.1 and https://unstats.un.org/sdgs/metadata/files/Metadata-16-10-02.pdf for the most recent institutional information related to indicator 16.10.2.

\textsuperscript{173} see the most recently available metadata for indicator 16.10.1 supra n. 172.

\textsuperscript{174} Ibid.

\textsuperscript{175} Ibid.

\textsuperscript{176} Ibid.

\textsuperscript{177} Ibid.

\textsuperscript{178} Ibid.
11. ENSURE PUBLIC ACCESS TO INFORMATION AND PROTECT FUNDAMENTAL

this right in safety\textsuperscript{179}. Indicator 16.10.1 is accordingly considered adequate measurement how access to information and fundamental freedoms are protected in practice, as it focuses on violations that are committed against individuals who generally challenge official positions\textsuperscript{180}.

Indicator 16.10.2 relates to the number of countries that adopt and implement legal guarantees for public access to information. The institutional information related to this indicator is compiled by UNESCO. This is a measurable and relevant indicator that has been supported by a number of stakeholders in general terms, with suggestions for improvement, which will be discussed below\textsuperscript{181}. This indicator also responds to the growing number of states that have already adopted such legal guarantees, and others that are currently moving in that direction\textsuperscript{182}. UNESCO highlights that this "is not a composite indicator, but a logical linkage of laws and policies of practical impact that is relevant to SDG concerns"\textsuperscript{183}.

UNESCO already monitors progress and issues in the area of access to information and freedom of expression within its mandate to protect and promote the right to freedom of expression\textsuperscript{184}. It provides submissions to the Universal Periodic Review and regular reports on World Trends on Freedom of Expression and Media Development\textsuperscript{185}. It is accordingly well suited to provide input on indicator 16.10.2.

UNESCO notes that Indicator 16.10.2 seeks to establish the state of public access to information in terms of three key variables: i. whether there are legal guarantees for public access to information; ii. the extent to which such guarantees reflect 'international agreements' like the International Covenant on Civil and Political Rights; and iii. the implementation mechanisms for such guarantees\textsuperscript{186}. The implementation mechanisms for the guarantees reflect the following variables: i. government efforts to publicly promote the right to information; ii. the public's awareness

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\textsuperscript{179} United Nations Educational, Scientific and Cultural Organization, \textit{Media Development Indicators... supra} n. 132 at 66.

\textsuperscript{180} J. SCHUHMANN, C. MURGATROYD, G. MILANTE, \textit{supra} n. 156 at 75.

\textsuperscript{181} see the most recently available metadata for indicator 16.10.2 \textit{supra} n. 172; and B. ORNE, \textit{Two Indicators... supra} n. 157.

\textsuperscript{182} \textit{Ibid}.

\textsuperscript{183} \textit{Ibid}.

\textsuperscript{184} B. ORNE, \textit{Paper 5... supra} n. 10.

\textsuperscript{185} \textit{Ibid}.

\textsuperscript{186} Metadata for indicator 16.10.2 \textit{supra} n. 172; see also Metadata for 16.10.2; see also United Nations Educational, Scientific and Cultural Organization and the International Programme for the Development of Communication \textit{supra} n. 7 at 10.
of their legal right to information along with their ability to effectively utilize this right; iii. the capacity of public bodies to provide information upon request by the public. The Indicator accordingly collates data from multiple sources, including national human rights institutions, national and international NGOs, academic institutions, and national regulatory authorities, among others.

UNESCO collates some aspects of the data for this indicator using the Media Development Indicators, along with its biennial World Trends in Freedom of Expression and Media Development reports. An important issue to highlight in this context is that access to information laws vary greatly across the world, making it logistically difficult to formulate one question that applies to all countries. Indicator 16.10.2 accordingly deals with guarantees that encompass a wide scope, from very precise broad access to a general government transparency law/guideline, a multi-purpose right to petition statute or regulation, or a very general statement in the constitution. Although the value of including any legal instrument that would not provide a guarantee of public access to information in this data may be questioned, it is difficult to determine where to draw the line in terms of aggregation of data to ensure a meaningful exercise. The work of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression may be utilized in this regard.

UNESCO considers that in practice, legal guarantees for access to information may be assessed in terms of proactive disclosure provisions that establish a legal duty to disclose; mechanisms for the public to request information that has not been disclosed but is relevant to the public interest; narrowly tailored guidelines on restrictions/exemptions to disclosure; and institutional structures that support disclosure, like oversight and redress mechanisms. UNESCO has accordingly devised a framework for measuring indicator 16.10.2 to allow it to compile measurable data for input into the Secretary-General’s SDG Progress Report, among other outputs.

UNESCO considers that its framework for measuring indicator 16.10.2 lives up to the key principles that underpin the right to access information:

187. Ibid.
188. Ibid.
189. Ibid.
191. Ibid.
192. Ibid at 11.
193. Ibid at 14.
that freedom of information laws should be guided by the principle of maximum disclosure; that public bodies (defined as broadly as possible) should be under an obligation to publish key information and ensure that basic laws and information on legal rights are publicly available, accessible and understandable to the public; that public bodies promote disclosure and open government; that restrictions/exceptions should be clearly and narrowly defined and subject to strict "harm" and "public interest" tests; that legal processes for accessing information should not be too costly; that meetings of public bodies should be open to the public; and that laws which are inconsistent with the principle of maximum disclosure should be amended/repealed against the background of international agreements or standards\textsuperscript{194}.

UNESCO has information readily available on national legal guarantees for access to information and the extent to which such guarantees reflect international agreements\textsuperscript{195}. It therefore considers that research will readily demonstrate whether these guarantees exist and the extent to which they reflect international commitments, on paper\textsuperscript{196}. UNESCO nevertheless highlights that this will not aid the monitoring of the effective implementation of such guarantees\textsuperscript{197}.

The World Bank has initiated a project to help countries assess the implementation of access to information laws, to enable them to compare their data with that collected from other agencies\textsuperscript{198}. Other agencies, like the Inter-Parliamentary Union, also collate data involved in access to information and submit information that is assessed in relation to Indicator 16.10.2 and for the Secretary-General's update. These will play a role to mitigate gaps in Indicator 16.10.2 as regards the effective implementation of these regimes, but the challenge will remain. This, among other challenges, have led to a wide discussion among stakeholders and recommendations for alternative means for assessing and monitoring SDG Target 16.10.

\textsuperscript{194.} Ibid at 14-15.  
\textsuperscript{195.} Ibid at 15.  
\textsuperscript{196.} Ibid.  
\textsuperscript{197.} Ibid.  
3.3. OTHER MEANS FOR ASSESSING AND MONITORING SDG TARGET 16.10

The currently formulated Indicators 16.10.1 and 16.10.2 have received some critique and suggestions for improvement. The Global Forum for Media Development proposed the following indicators based on extensive consultation with international civil society groups:

GMFD Indicator 1: Monitoring the adoption and implementation of constitutional, statutory and/or policy guarantees and mechanisms for public access to information

GFMD Indicator 2: Implementation of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity, as mandated by the UN Chief Executives Board and monitored by UNESCO in accord with recent General Assembly and Security Council resolutions on the protection of journalists and independent media.

Many access to information specialists consider that the above indicators are preferable to the two indicators originally proposed by the Expert Group on SDG indicators. Others highlight that it would be preferable to link the indicator for SDG Target 16.10 to the entirety of the SDGs and 169 targets by framing it to relate to access to information relevant to each and all of the SDGs, including implementation of relevant legal guarantees and mechanisms. In any event, it is crucial to recognize that when assessing SDG Target 16.10, a basic binary measurement of the number of laws or policies in place will be insufficient. UNESCO appears to have understood that well.

Laws that may seem suitable on their face may in fact be inadequate or badly implemented, which limits or adversely impacts the access to information target and achieving access to information on the rest of the SDGs and their implementation. Some accordingly advocate for a graduated method of assessment, with phase one assessing the basic national policies on access to information, phase two assessing the adequacy of these laws, and phase three dealing with the implementation.
of these laws and impact on the SDGs\textsuperscript{205}. Given the early development of this process, there appears to be room and advantages for such a graduated approach in this context.

Early discussions of indicators related to SDG Target 16.10 by the Expert Group on SDG indicators focused on the percentage of budget documents, off budget revenue documents, procurement and other natural resource concessions publicly available as a means of assessing access to information\textsuperscript{206}. This formulation was supported by UNDP and others\textsuperscript{207}, but criticized by others for being too narrowly conceived and limiting the broad objective of SDG Target 16.10\textsuperscript{208}.

The GFMD's proposed indicator related to safety of journalists based on the UN Plan of Action on the Safety of Journalists and the Issue of Impunity (UN Plan of Action) would formally incorporate the monitoring framework and regular progress reports by UNESCO on the implementation on the UN Plan of Action into the SDGs\textsuperscript{209}. The UN Plan of Action was adopted by the Chief Executives Board in 2012 in accordance with UN Security Council Resolutions 2222 of May 2015 and 1738 of December 2006, UN General Assembly Resolution 68/163 of December 2013 and 69/185 of December 2014; and UN Human Rights Council Resolutions 21/12 of September and 27/5 of September 2014\textsuperscript{210}.

The UN Plan of Action is accordingly well established within the UN system. The GFMD notes that without incorporating this wider UN Plan of Action, the indicator 16.10.1 would be comprised of reporting deaths, kidnappings and other attacks without the analytical context or background on legal consequences provided by UNESCO's biannual reports in this context\textsuperscript{211}. UNDP and others supported this formulation as an indicator as an alternative to indicator 16.10.1 set by the Expert Group on SDG indicators\textsuperscript{212}.

An indicator based on the UN Plan of Action, however, would not expressy include attacks against human rights activists and trade union organizers as well as journalists. The GFMD has recognized that attacks against human rights activities and trade union organizers are

\textsuperscript{205} See \textit{ibid} at 28-32.
\textsuperscript{206} See \textit{ibid}.
\textsuperscript{207} J. Schuhmann, C. Murgatroyd, G. Milante, supra n. 156.
\textsuperscript{208} B. Orne, \textit{Two Indicators...} supra n. 157.
\textsuperscript{209} Ibid.
\textsuperscript{210} Ibid.
\textsuperscript{211} Ibid.
\textsuperscript{212} J. Schuhmann, C. Murgatroyd, G. Milante, supra n. 156.
also important to provide a full view of the legal, political and social environment relevant to public access to information and the free flow of information\textsuperscript{213}.

The Riga Declaration that was adopted by consensus at the 2015 UN World Press Freedom Day commemoration in Latvia declared that the safety of journalists "are directly relevant to implementing the proposed Sustainable Development Goal 16,"\textsuperscript{214} most particularly target 16.10\textsuperscript{215}.

It is still early on the process and encouraging to see so many concrete options available to ensure that SDG Target 16.10 may be monitored, assessed, and therefore may ultimately be effective.

\section{Public Access to Information and Protection of Fundamental Freedoms as a Key Element of Sustainable Development}

\subsection{Access to Information is Necessary for Democracy and Inclusive Societies}

Access to information is one of the ingredients to democratic institutions and the overall societies and institutions strived for in SDG 16. One UN Special Rapporteur on Freedom of Opinion and Expression observed in his 1995 Report to the UN Commission on Human Rights that "Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked"\textsuperscript{216}.

Some consider that access to information is most important as an "underpinning of democracy"\textsuperscript{217}. It is the key component of transparent and accountable government\textsuperscript{218}, in turn a key component for inclusive democratic societies envisaged by SDG 16. At its very basic level, open

\begin{thebibliography}{99}
\bibitem{213} B. Orne, \textit{Two Indicators... supra} n. 157.
\bibitem{215} \textit{Ibid}.
\bibitem{217} T. Mendels\textit{supra} n. 12.
\bibitem{218} \textit{Ibid}.
\end{thebibliography}
government is essential for citizens to exercise their democratic rights effectively and for voters to be able to assess the performance of elected officials.\textsuperscript{219} Access to information also plays a key role in enabling citizens to understand events that take place within the government, which is particularly important to expose corruption and mismanagement.\textsuperscript{220} The Human Rights Council and the UN General Assembly have referred to freedom of expression and access to information as "one of the essential foundations of a democratic society and one of the basic conditions for its progress and development."\textsuperscript{221} The UN General Assembly further considers that a free media facilitates building inclusive societies and democracies, and fosters intercultural dialogue, peace and good governance.\textsuperscript{222}

In principle, democracy is generally about ensuring that the government acts in accordance with and carries out the will of the people.\textsuperscript{223} This basic accountability is not possible unless "governments operate in an open, transparent fashion, including by allowing people to access the information they hold."\textsuperscript{224} Democracy is also about the responsibility of the government to the people and the notion that civil servants "serve" the people.\textsuperscript{225} This is fundamentally linked to the principle that the public has the right to access information unless there is some overriding public interest reason to justify.\textsuperscript{226}

UNESCO highlights that a "free, independent and pluralistic media has played an essential role in realizing both democratic and developmental rights, and their interconnection."\textsuperscript{227} It notes that "if the media are free, it is likely that a country will be politically stable, have more effective and less corrupt officials, more robust sustainable economic development,  

\textsuperscript{219} Ibid.  
\textsuperscript{220} Ibid.  
\textsuperscript{221} Human Rights Council resolution 21/12, referenced in Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, supra n. 17 at 4.  
\textsuperscript{222} General Assembly resolution 68/163 of 18 December 2013 on the safety of journalists and the issue of impunity, see ibid.  
\textsuperscript{223} see ibid for a further discussion of the relationship between democracy and freedom of expression.  
\textsuperscript{224} Ibid.  
\textsuperscript{225} Ibid.  
\textsuperscript{226} Ibid.  
UNESCO further considers that media pluralism is particularly important for development and democracy, and their interrelationship. It considers that the diversity of content in a pluralistic media landscape "has given representation to public voices and enabled informed development choices to be made." UNESCO accordingly highlights that a free press is a clear counter-balance to corruption. It highlights that a free press contributes to the fight against corruption in the following ways: by providing verifiable information in the public interest, putting issues and voices on the public agenda and raising the level of public scrutiny of national development policies.

UNESCO further notes that "free, independent and pluralistic media are not a goal, but a means towards the development concerns of governance. One can identify media's role in contributing towards promoting human rights, enhancing the right to development, and strengthening governance such as through their vital role during elections. Promoting journalists' safety can contribute towards conflict prevention, post-conflict peacebuilding, etc. Political participation and gender issues are integrally bound up with the media, as are the issues of independent social institutions.

UNESCO therefore supports 'governance', as a frame for a sustainable development objective that is now expressed in SDG 16. It notes that 'governance' is "directly linked to the promotion of free, independent and pluralistic media, particularly in an age when the definition of what counts as media has radically broadened." This reveals that SDG Target 16.10 and its express enunciation of access to information, and the indicators that have been developed to assess its effectiveness, lies at the heart of SDG 16 itself. Furthermore, without the institutions and inclusive free societies envisaged by SDG 16, sustainable development will be very difficult to attain.

4.2. ACCESS TO INFORMATION IS NECESSARY TO ACHIEVE SUSTAINABLE DEVELOPMENT

Sustainable development is a key term and concept in the 21st century to give effect to environmental and social considerations in economic
11. ENSURE PUBLIC ACCESS TO INFORMATION AND PROTECT FUNDAMENTAL...

development, and vice versa. Ensuring rights to access information in the public interest is an important check to ensure that development ensues in the public interest rather than purely driven by economic gains. The SDGs represent 17 substantive noble goals that are elaborated upon in 169 targets. Some of these may be more obviously linked to sustainable development, like poverty, climate action and hunger. SDG 16, with its focus on inclusive societies, access to justice and accountable inclusive institutions, is fundamentally necessary to create and facilitate the conditions for sustainable development to thrive, and for the attainment of each individual SDG.

Access to information, buttressed by SDG Target 16.10, affects all other SDGs and all other rights. The International Federation of Library Associations and Institutions and the Technology and Social Change Group have formed a joint project at the University of Washington Information School on Development and Access to Information that aims to demonstrate how access to information contributes to achievement of the SDGs. This project has established a framework to examine the SDGs through the lens of access to information, and provides a model for understanding the bidirectional relationship between achieving SDG targets and meaningful access to information, as the gains go both ways. This framework is built on extensive research that identifies four dimensions that influence meaningful access to information: technical infrastructure, social context, user capabilities and the legal/policy landscape. Their work is yet another example of the powerful role of access to information on the SDGs as a whole.

The Development and Access to Information Project will track the 17 indicators it has elected as relevant to its terms of reference, including the indicators related to SDG Target 16.10. It will monitor and track these indicators to reveal the way access to information can contribute to sustainable development.

SDG 16 calls for the promotion of peaceful and inclusive societies for sustainable development, access to justice for all and for effective, accountable and inclusive institutions at all levels. Public access to

234. 'Open Development: Access to Information and Sustainable Development Goals' supra n. 20.
235. see ibid.
236. Ibid at 11.
237. Ibid.
238. Ibid at 15.
239. Ibid.
information and the protection of fundamental freedoms are key components of inclusive societies that respond to SDG 16 and facilitate sustainable development. In turn, access to information and protection of the associated fundamental rights are fundamentally necessary to provide the information that will enable communities to respond to and meet the objectives of the SDGs.

One expert considers that "by definition it will be impossible to achieve ambitious global development goals without open access to information about health, education, the environment, human rights and other critical areas – and that in turn requires independent monitoring by media and civil society." Many experts in the area consider that access to information is essential to the SDGs as a whole, and that access to information cannot be achieved without independent media and guaranteed freedom of expression. The International Federation of Library Associations and Institutions considers that access to information "is a fundamental pillar of sustainable development and a cross-cutting means of supporting the agenda's implementation."242

New technologies have led to an increase in the type and volume of data available, which creates valuable opportunities for informing and transforming society, particularly in the context of attaining the SDGs. Experts observe that "Governments, companies, researchers and citizen groups are in a ferment of experimentation, innovation and adaptation to the new world of data, a world in which data are bigger, faster and more detailed than ever before. This is the data revolution." This data revolution may be harnessed to monitor and further the aims of the SDGs, within the spirit of SDG Target 16.10.

In fact, the Secretary-General asked an Independent Expert Advisory Group to make concrete recommendations on bringing about a data

240. B. Orne, Paper 5., supra n. 10.
241. Ibid; see also 'Open Development: Access to Information and Sustainable Development Goals' supra n. 20 at 9.
244. Ibid.
revolution in sustainable development. This Expert Advisory Group released a report, which highlights that "Data are the lifeblood of decision-making. Without data, we cannot know how many people are born and at what age they die; how many men, women and children still live in poverty; how many children need educating; how many doctors to train or schools to build; how public money is being spent and to what effect; whether greenhouse gas emissions are increasing or the fish stocks in the ocean are dangerously low; how many people are in what kinds of work, what companies are trading and whether economic activity is expanding." It accordingly made a number of recommendations to harness this data revolution for sustainable development aims.

4.3. RECOMMENDATIONS TO ENHANCE THE LINK AND UTILITY OF ACCESS TO INFORMATION FOR SUSTAINABLE DEVELOPMENT

Meeting the SDGs will require coordinated action on many interlinked social, environmental and economic challenges, and will require participatory development. This coordinated action in turn will require a significant increase in the data available to individuals, governments, companies, civil society and international organizations to plan, monitor, and be held accountable for their actions. This could serve as a valuable opportunity for the attainment of the SDGs as the volume of data in the world has increased exponentially in recent years, waiting to be harnessed in the name of sustainable development.

The Expert Advisory Group has accordingly observed that "Achieving the SDGs demands embracing the data revolution." The Group thus urges UN Member States and organizations to "dramatically speed up" their work in this field to support sustainable development. Data will be one of the fundamental elements making up the accountability framework

245. See the Data Revolution Group for more basic facts at http://www.undatarevolution.org/.
247. See ibid for a full overview of these recommendations.
248. Ibid.
249. Ibid.
250. Ibid at 5.
251. Ibid at 20.
252. Ibid.
for the SDGs\textsuperscript{253}. SDG Target 16.10, by ensuring access to information and the protection of fundamental rights, in turn ensures the development and accountability of the SDGs themselves.

Though data and access to information is a fundamental tool to realize sustainable development, there is much progress that must be made to enable data to play its full role in the realization of the SDGs\textsuperscript{254}. Most importantly, key gaps need to be closed in access and use of data between developed and developing countries, between the information rich and the information poor, and between the public and private sectors\textsuperscript{255}.

In order to maximize the gains for sustainable development, rules and standards should be aimed at reducing information inequalities and providing the highest quality information in the most easily understood format\textsuperscript{256}. The Expert Advisory Group consider that obtaining and using high quality data to track progress, monitor the use of resources and evaluate the impact of programs and policies is key to create accountable and participatory structures to monitor the SDGs\textsuperscript{257}.

The Expert Advisory Group set out a number of other recommendations to utilize the data revolution for sustainable development gains\textsuperscript{258}. These include: increasing data quality and integrity, particularly through the development of standards to safeguard quality; disaggregating data to the extent possible to help promote and inform evidence based policy making; tightening standards to reduce time gaps between data collection and publication; increasing transparency on all public matters and/or matters related to public funds; increasing data usability; improving transparency and accountability of data governance; enhancing national data resources and capacity, while ensuring the protection of human rights as a core part of each of these activities\textsuperscript{259}.

5. CONCLUDING REMARKS

Public access to information is a fundamental precondition for inclusive democratic institutions and societies. It has long been recognized as a fundamental human right, but has only more recently emerged as

\begin{itemize}
\item \textsuperscript{253} Ibid.
\item \textsuperscript{254} Ibid.
\item \textsuperscript{255} Ibid.
\item \textsuperscript{256} Ibid at 16.
\item \textsuperscript{257} Ibid.
\item \textsuperscript{258} See ibid at 22-23 in particular.
\item \textsuperscript{259} Ibid.
\end{itemize}
a necessary facet of sustainable development. SDG Target 16.10 plays a vitally important role in the context of sustainable development as it brings in access to information into this context for the first time in an explicit and mandatory form.

SDG Target 16.10 calls for public access to information and protection of fundamental freedoms in accordance with national law and international agreements. It therefore requires that national law provide for legal guarantees to ensure access to information, most notably as prescribed by international human rights law. There has been an increasing trend in the 21st century in most national jurisdictions to enact legislation providing for public access to information, but assessing and monitoring this target requires much more than a simple check that national legislation guaranteeing access to information is in place.

The indicators for assessing and monitoring SDG Target 16.10 have accordingly received much attention by relevant stakeholders and access to information specialists. The global indicators established by the Expert Group on SDG indicators focusing on the safety of journalists and media personnel, trade unionists and human rights activities and on national adoption and implementation of legal guarantees for public access to information have generally received broad support.

These indicators are vital to ensure that SDG Target 16.10 may be effective. The more effective SDG Target 16.10 is, the more the SDGs as a whole may be accurately monitored, assessed, and ultimately effective. The indicators for SDG 16.10 have accordingly been explored by experts and specialists and several recommendations have been made to ensure the indicators will be most effective to meet SDG Target 16.10. Given the nascent stage of these indicators just two years after the SDGs were enunciated, there may be room to incorporate these recommendations in future developments. The framework for the development of the formal indicators for the SDGs appears to anticipate such developments.

In any event, it is clear that SDG Target 16.10 represents a milestone for access to information that will play a fundamentally important role to ensure the attainment of each individual SDG. It provides the basis for the attainment of the information necessary to assess and respond to situations to ensure that actions taken in the name of SDGs are effective, and ultimately that the SDGs may be achieved. Without this accountability mechanism, it would be a bit of a blind venture and shot in the dark to hope that actions may in fact contribute to attainment of the SDGs. SDG Target 16.10 thus plays a vital role in ensuring accountability in the context of the SDGs so that they may be effective.