



BACKGROUND PAPER (Final)

Public Accountability and Multilateral Governance: The State of the Art – Challenges for the Region

1. INTRODUCTION: THE UNKNOWN CAN KILL¹

Shortly after midnight on December 3rd, 1984, one of the world's worst industrial disasters unfolded in Bhopal, India. Over 40 tons of lethal gases - including methyl isocyanate, which contains cyanide - leaked from a pesticide plant in the northern part of the city.

The streets of Bhopal filled with the bodies of thousands of victims, many suffering violent deaths. Today, hundreds of thousands of others still suffer debilitating health effects. By some estimates, the death toll has risen to 16,000 or more.

The Bhopal tragedy is shocking because it was entirely preventable. The pesticide factory was owned and operated by an American company, the Union Carbide Corporation, now owned by the Dow Corporation. Union Carbide ignored numerous public warnings and avoided safety precautions that the company would have had to follow in the United States.

The single biggest factor in the Bhopal disaster was the failure of Union Carbide to adequately inform the Indian government, its workers, and the surrounding community of the risks. Union Carbide hid information about the toxicity of the chemicals used at the plant to avoid safety regulations.

The Bhopal accident led to the creation of U.S. law requiring disclosure in some key areas, but even these laws do not apply to the Bhopal case, or any U.S. company's operations abroad.

Since the Bhopal disaster, particularly in the past ten years, around forty countries have passed access to information (ATI) laws. The great majority have been in Eastern and Central Europe and Asia. Only Mexico, Jamaica and Peru from Latin America have joined the club. Africa, sadly, lags even further behind: besides Zimbabwe's repressive Access to Information and Privacy Act, only South Africa has an ATI law. However, there are now signs of activity on the African continent: there are draft ATI bills in a number of places including Nigeria, Ghana, Ethiopia, Tanzania and Mozambique. Furthermore, regional NGO's are beginning to develop right to know strategies and projects: the Media Institute for Southern Africa (MISA) has a new ASK campaign that will run in the countries where it has offices such as Namibia, Botswana, Mozambique, Malawi and Lesotho.

¹ International Right to Know, http://www.irtk.org/what_is_irtk.html#unknown

In addition to the ATI law initiatives taken at a country level, there is an informal, global right to know campaign – a mini growing social movement – which also aims to tackle the issue of access to information. The movement was initially propelled by the efforts of organisations such as ARTICLE 19, the Open Society Institute and the Carter Center, but has been taken up and driven at local level by national level NGOs in Rajasthan, South Africa, Mexico, Bulgaria and Jamaica. The overall goal of this Project, referred to as the Global Transparency Initiative (GTI), is to promote greater transparency at the International Financial Institutions (IFIs) through a variety of coordinated initiatives carried about by civil society organizations (CSOs) around the world. The Project has its genesis in a meeting of two transnational advocacy communities – one working on freedom of information (FOI) and the other focused on IFI reform – in February 2003. At the meeting, representatives from these two communities agreed to work together on a series of initiatives designed to promote greater IFI transparency.

As a result of these national and transnational developments, a new bank of knowledge about ATI law and its potential in poorer, developing countries is emerging (prior to 1990, the only countries with ATI laws were highly developed nations: Sweden, USA, Canada, Australia, New Zealand).

These developments serve as the inspiration for this background paper, which aims to argue for the expansion of the RTK programme to multilateral organizations as well. The aim of this paper is to therefore advocate for a strategic plan driven by African civil society organizations designed to ensure greater transparency at a multilateral governance level in Africa.² The specific multilateral organizations that will be focussed upon are the African Union (AU), the New Partnership for Africa's Development (NEPAD) and the African Peer review Mechanism (APRM).

As a result, the central question posed in this paper is therefore: should African multilateral organizations – especially the APRM – contain a more explicit and useable articulation of the principle of RTK? And furthermore, how can civil society mobilize to effectively advocate for greater access to information in respect of the AU, NEPAD and APRM?

In order to address these questions, this background paper will provide (i) a brief analysis of the APRM, AU and NEPAD structures; (ii) an overview of the access to information laws and policies in the region focusing specifically on Ghana, Nigeria, Namibia, Tanzania, Mozambique, Ethiopia, South Africa and Zimbabwe; (iii) an analysis of the RTK concept; and (iv) challenges facing civil society in respect of creating a culture of openness and transparency at a regional level.

² http://www.internews.org/mra/mrm/oct02/oct02_story11.htm;
http://www.transparency.org/pressreleases_archive/2002/2002.09.19.african_convention.html;
<http://www.ifj.org/default.asp?index=1673&Language=EN>

2. AN OVERVIEW OF THE MULTILATERAL GOVERNANCE STRUCTURES IN AFRICA

2.1 The African Union

The adoption of the Constitutive Act of the African Union (AU) in Lome, Togo in 1998 was a significant development in what Thabo Mbeki, the South African President, refers to as the ‘African Renaissance.’ The Act, which entered into force in July 2001 in Lusaka, Zambia at the 31st Ordinary Session of the Organization of African Unity (OAU), signalled the potential beginning of a new dawn for Africa. The AU replaces the OAU, which was criticized for its adherence to the principle of “non-interference in the internal affairs of member states.”³ This principle of the OAU has led to massive human rights violations on the continent including the atrocities perpetrated in the 1970s by Idi Amin of Uganda, Jean Bedel-Bokassa of the Central African Republic and Marçias Nguema of Equatorial Guinea.⁴

The AU, on the other hand, has significantly watered down the principle of non-interference through its development of human rights and humanitarian principles. The Constitutive Act for instance permits intervention in a member state in respect of grave circumstances such as war crimes, genocide and crimes against humanity. The Act also provides that the AU shall strive to “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”⁵ It has therefore been argued that the AU’s Constitutive Act clearly departs from the regime of the OAU Charter in the area of human rights.⁶

The AU aims to be Africa’s primary institution and principal organization for the promotion of accelerated socio-economic integration of the continent, which will lead to greater unity and solidarity between African countries and peoples. The AU is based on the common vision of a united and strong Africa and on the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion amongst the peoples of Africa. As a continental organization it focuses on the promotion of peace, security and stability on the continent as a prerequisite for the implementation of the development and integration agenda of the Union.

2.2 The New Partnership for Africa’s Development

Established in Abuja, Nigeria on 23 October 2001, the New Partnership for Africa’s Development (NEPAD) has been described as the “partnership of unequal partners”⁷ on the one hand, and as a programme through which “African leaders are setting an

³ Article III (2) of the OAU Charter of 1963

⁴ R Eno ‘The Place of the African Commission in the New African Dispensation’ 11 *African Security Review* (2001) 2

⁵ Art 3(h)

⁶ K Kindiki ‘The Normative and Institutional Framework of the African Union relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal’ 3 *African Human Rights Law Journal* 1 (2003) 100

⁷ S K B Asante ‘A Partnership of Unequal Partners’ *New African* 419 (June 2003) 14

agenda for the renewal of the continent,”⁸ on the other. Basically, NEPAD is an agreement amongst African leaders to eradicate poverty and to ensure the sustainable growth and development of the continent by participating in the world economy.

NEPAD was initially conceived as an independent structure, separate from the African Union. It has been suggested that its formation was a direct political countermeasure to Libya’s proposal to establish the AU.⁹ As a result, the formation of NEPAD is as politically motivated as its claim to develop mechanisms to eradicate poverty. After some concern was raised about the fact that NEPAD programmes were “in competition with the AU programmes as a whole,”¹⁰ it was decided to integrate NEPAD into the structure of the AU. Victor Mosoti,¹¹ legal officer at the United Nations Food and Agriculture Organization, argues that “it was a mistake to place NEPAD under the unwieldy umbrella of the African Union,” since it will “inevitably lead to institutional and legal incoherence.”¹²

This potential institutional and legal incoherence may also extend to the issue of human rights protection mechanisms. Baimu¹³ and Heyns¹⁴ have both argued that NEPAD envisages the creation of additional human rights instruments which may result in a proliferation of human rights protection mechanisms within the AU. They refer specifically to NEPAD’s African Peer Review Mechanism (APRM) which is essentially a voluntary mechanism, allowing African States to review the political, economic and governmental practices of other African States. The idea is to share experiences and best practices amongst States in order to identify deficiencies and assess the need for capacity building.¹⁵

While the APRM is certainly based upon human rights principles enshrined in the African Charter, the fact that it is not a binding legal instrument detracts from its ability to promote and protect human rights. Furthermore, its four areas of review, namely democracy and political governance, economic governance and management, corporate governance, and socio-economic development,¹⁶ do not directly encroach upon the mandate of the African Human Rights Court or the African Commission. In other words, the APRM does not currently explicitly include human rights or access to information within its mandate.

⁸ The New Partnership for Africa’s Development (NEPAD) Framework Document (October 2001) par 46

⁹ Doebbler op cit 18

¹⁰ This statement was made by the Executive Council at the Sun City discussions (May 2003) cited in J Cilliers ‘From Durban to Maputo: A Review of 2003 Summit of the African Union’ *Institute for Security Studies*, Paper 76 (August 2003) 3

¹¹ V Mosoti ‘The New Partnership for Africa’s Development: Institutional and Legal Challenges of Investment Promotion’ *San Diego International Law Journal* 5 (2004) 148

¹² *ibid* 149

¹³ E Baimu *Human Rights Mechanisms and Structures under NEPAD and the African Union: Emerging Trends towards Proliferation and Duplication*, Occasional Paper 15, Centre for Human Rights (2002) 7

¹⁴ C Heyns ‘The African Regional Human Rights System: The African Charter’ *Penn State Law Review* 108 (2004) 694

¹⁵ African Peer Review Mechanism (AHG/235(XXXVIII) Annex. 2

¹⁶ Cilliers op cit 7

Doebbler¹⁷ suggests that in order to limit the potential problems that NEPAD may cause in relation to human rights protection, NEPAD should be incorporated into existing human rights mechanisms. NEPAD could then be used as a means of generating more resources for the existing human rights protection mechanisms envisaged in the African Charter.¹⁸ This proposition is supported by Wing and Smith¹⁹ who suggest further that NEPAD could help to ensure that donor funding and international aid is directed towards human rights bodies by regulating the “budgetary process to increase the effectiveness of limited aid monies.”²⁰

2.3 The African Peer Review Mechanism

The African Peer Review Mechanism (APRM) forms part of the New Partnership for Africa’s Development (NEPAD) structure which in turn falls under the African Union (AU) framework. The APRM, NEPAD and the AU are therefore intimately connected.

Peer review refers to the systematic examination and assessment of the performance of a state by other states (peers), by designated institutions, or by a combination of states and designated institutions. The ultimate goal is to help the reviewed state improve its policy making, adopt best practices, and comply with established principles, codes and other agreed commitments.²¹ While the outcome of the peer review process is never legally binding, its effectiveness relies on the influence of peer pressure. The peer review process can give rise to peer pressure through, for example: a mix of formal recommendations and informal dialogue by the peer countries and public scrutiny. Lessons from peer reviews done elsewhere suggest that the greatest impact is derived when the outcomes of peer reviews are made available to the public. When the media is provided with information on peer reviews, the story can then be mass distributed to the public. It has been suggested by the United Nations Economic Commission for Africa that public scrutiny is the most effective means to coerce change and corrective actions.

The African Peer Review Mechanism (APRM) is an instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism. The mandate of the African Peer Review Mechanism is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance. The APRM is the mutually agreed instrument for self-monitoring by the participating member governments.²²

The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable

¹⁷ op cit 30

¹⁸ ibid 31

¹⁹ A K Wing and T M Smith ‘The New African Union and Women’s Rights’ *Transnational Law and Contemporary Problems* 13 (2003) 33

²⁰ One of the potential difficulties pointed out by Wing and Smith at 70, is that since NEPAD receives its money primarily from G8 countries, its programmes may be influenced by these external countries.

²¹ ‘The African Peer Review Mechanism: Process and Procedures’ United Nations Economic Commission for Africa 11 *African Security Review* 4 (2002) 7

²² http://www.au2002.gov.za/docs/summit_council/aprm.htm

development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building.

3. AN OVERVIEW OF THE ACCESS TO INFORMATION LAWS IN THE REGION

Given the importance for democracy and development of the AU, NEPAD and the APRM, it is important that regional civil society tap into these initiatives and adapts them for application at a regional and country level. It is however important to first get a sense of what the developments with respect to ATI laws are at a country level in order to determine how these developments will impact on and be affected by the new multilateral governance structures in Africa.

3.1 Ghana

Ghana's 1992 Constitution is one of the few constitutions in the world that guarantees both a freedom of expression and a right to information. Article 1 states that sovereignty resides with the people of Ghana meaning that the people of Ghana are both the ultimate repository of state power and participants in governance.²³ Article 21(1)(f) provides

- (1) All persons shall have the right to –
 - (a) freedom of speech and expression, which shall include freedom of the press and other media;
 - (f) Information, subject to such qualifications and laws as are necessary in a democratic society;

In line with Ghana's commitment to international human rights covenants and conventions such as the Universal Declaration of Human Rights, the right to information is part of the general fundamental freedoms and human rights contained in Chapter 5 of the Constitution.

While Article 21(1)(f) confers this right, it also recognises some limitations. Article 2 provides for constitutional challenges to be brought before the Supreme Court, yet it is cumbersome to appeal to this forum anytime there is a conflict of interpretation.

A "Freedom of Information Bill" was drafted in 2002, and has since been approved by the Ghanaian Cabinet. The government is currently working to inform citizens, public servants and the private sector about the provisions of the draft bill in preparation for implementation once the Bill is taken before parliament.

The draft Bill states, "Every person has a right of access to information or part of information in the custody or under the control of a government agency unless the information or that part of the information falls within any of the exemptions specified in Part II." The Bill also outlines responsibilities and procedures for responding to applications for information, requiring that authorities respond to requests within 30 days. The Bill also provides for access to information held by

²³ The Right to Information (Part 1), Legislative Alert, October 1997, Vol. 4

private bodies if the information is required for the protection of “fundamental human rights or freedoms, preservation of public safety or protection of public interest.” The Bill does however include several exemptions to the right to information which could potentially be open to abuse, including an exemption if “the disclosure of the information could reasonably be expected to damage the financial interest of Government,” as well as exemptions for “Frivolous or vexatious application.”

After submission to Parliament, the Bill was sent back to the Ministry of Justice so that certain sections could be amended. The Bill was then resubmitted to Cabinet in April 2004. It is therefore currently before Cabinet and will not likely be submitted to Parliament by the end of 2004.

3.2 Tanzania²⁴

Article 18 of the union Constitution guarantees every person the right to freedom of expression, but also the right to seek, receive and impart information. The Zanzibar Constitution explicitly protects only the right to *receive* information, not the right to seek or impart it. There is no legislation in Tanzania at either the union- or Zanzibar-levels through which the right to information can be realised in practice. Indeed, the National Security Act (1970) gives the authorities on both the mainland and Zanzibar unfettered discretion in deciding what official information should or should not be disclosed to the public.

Another Act which demonstrates just how ingrained the culture of secrecy is in Tanzania is the Prisons Act (1967). This union-level Act applies on both the mainland and Zanzibar. The Act restricts comment by the media or members of the public on the prison system or the conditions under which prisoners are being kept, regardless of whether this is in the public interest or not. This runs counter to the intention of the African Commission on Human and People’s Rights, which has declared that “any restrictions on freedom of expression shall... serve a legitimate interest and be necessary in a democratic society.” The restrictions apply to the behaviour or experience in prison of any ex-prisoner or concerning the administration of any prison, unless reasonable steps to verify such information can be shown to have been taken.

Section 83 of the Act disallows communication with any prisoner and forbids making sketches or taking photographs of a prison or a prisoner within or outside a prison. It also prohibits loitering in the vicinity of a prison or any other place where prisoners may be in the course of their imprisonment. The Act imposes blanket restrictions upon the right to freedom of expression of prisoners which cannot be justified in a democratic society.

3.3 Nigeria²⁵

The Nigerian Constitution does not recognize any right of access to official information either by members of the public generally or by the press. No legislation or administrative procedures exist which specify channels for the release of official

²⁴ www.article19.org

²⁵ *ibid*

information to the public. The Official Secrets Act (1962) is solely concerned with establishing the terms upon which access to official information may be restricted.

The Official Secrets Act is made more forbidding by the fact that government documents are routinely marked "classified", "(top) secret" or "confidential". Members of the public have virtually no access to such documents except for those voluntarily released by very senior government officials or issued as press statements. There is no attempt to distinguish between documents which are genuinely confidential and those for which there is no basis for any sort of security classification.

Furthermore, anyone taking up government employment is obliged to subscribe to an oath of secrecy. Numerous other laws contain provisions prohibiting the disclosure of information even when no justification for such prohibition exists or is stipulated.

Recently, however, the House of Representatives concluded deliberations on the Freedom of Information Bill and passed it with some amendments. The instrument, which seeks to make public documents and information readily available, is aimed at granting access to public records as well as protecting those records which cannot be made public in accordance with the provisions of the proposed law.

It also seeks to empower public officers to disclose public records or information without prior authorization thereof provided it is for public interest and such officials are protected from adverse consequences flowing from such disclosure.

Besides amending the title of the bill to read "Freedom of Access to Information Bill," one of the significant amendments the House made was in Section 3, which deals with "right of access to records". The amendment was ostensibly to allay the fears expressed by some members of Parliament and President Olusegun Obasanjo over granting of access to official information to non-Nigerians.

It was amended to restrict the right of access to records and information to Nigerian citizens only as provided for in earlier versions of the Bill.

As a result, the proposed law continues to place restrictions on those who have a right of access to information, thereby weakening the Draft Bill.

3.4 Namibia

The current Namibian government's approach to access to information is coloured by its longstanding reluctance to address questions and disclose information related to the struggle for independence. Although the government did produce a list of SWAPO fighters killed during the war in 1996, entitled "Their Blood Waters Our Freedom," the list was incomplete, inaccurate and generally failed to inspire confidence or satisfy many of those seeking information regarding relatives and friends²⁶. Since publishing this report, the government has steadfastly refused to undertake any more comprehensive and transparent investigation or documentation of events that occurred during the liberation struggle.

²⁶ Article 19, "Who Wants to Forget?" (December 2000).

A second area of concern, also raised by Article 19, was the broad provision of the Racial Discrimination Prohibition Act (No. 26 of 1991) which acted against the interests set forth both in the Namibian constitution, as the Namibian High Court found, and in section 2 of the Declaration of Principles on Freedom of Expression in Africa²⁷. However, this Act has been effectively struck down by the courts following the Namibian Parliament's failure to reword the Act.

Despite these and other areas of concern, Namibia has made some progress towards an open society, particularly tackling corruption. At the 9th International Anti-Corruption Conference held in Durban, South Africa in 1999, L. H. Du Pisanni, the Deputy Prosecutor General outlined a broad "Anti-Corruption and Promotion of Ethics Initiative" that presented recommendations to Parliament, including "that an affirmative obligation be placed on Government as well as on other public institutions that operate on taxpayers money to disclose maximum information to citizens. A Freedom of Information Act should be passed and Constitutionally safeguarded." These recommendations were carried forward in the form of the National Integrity Promotion Program (NIPP). In Transparency International's global Corruption Perceptions Index for 2003, Namibia was listed at 41, well above the majority of African countries. However, no bill specifically enabling public access to information has yet been passed, although there are reports that there is such a bill under consideration.

3.5 Zimbabwe²⁸

The Access to Information and Privacy Act (AIPPA) was signed by President Mugabe in February 2002.²⁹ While the title refers to FOI and privacy, the main thrust of the law is to give the government extensive powers to control the media by requiring the registration of journalists and prohibiting the "abuse of free expression."

On paper, AIPPA also creates a right of access by any citizen or resident (but not an unregistered media agency or foreign government) to records held by a public body that are generally similar to other FOI laws around the world. There has only been one reported instance of the access to information provision being successfully used by the opposition party.³⁰

Under the rules, the body must respond to a request in thirty days. There are exemptions for Cabinet documents and deliberations of local government bodies, advice given to public bodies, client-attorney privilege, law-enforcement proceedings, national security, intergovernmental relations, public safety, commercial information, and privacy. There is a public-interest disclosure provision that requires the government to release information even if there is no request for a variety of reasons, including matters that threaten public order; the prevention, detection or suppression

²⁷ Article 19, "Incitement to Hatred" (February 1998).

²⁸ Banisar, D The Freedominfo.org Global Survey (May 2004)

²⁹ Access to Information and Protection of Privacy Act (AIPPA), 15th March 2002 (General Notice 116/2002). Amended in June 2003 by the Access to Information and protection of Privacy Amendment Act, 2003, No. 5 of 2003 <http://www.kubatana.net/html/archive/legisl/030611aippamd.asp?sector=LEGISL>

³⁰ MDC Demands Forex Receipts From RBZ, Financial Gazette (Harare), June 13, 2002.

of crime; and national security. It also includes provisions on access and use of personal information.

All journalists and publishing houses are required to register with the newly created Media and Information Commission. The Commission can also conduct inquiries into the Act and order release of documents. Appeals can be made to an administrative court.

The UN Special Rapporteur on Freedom of Opinion and Expression as well as many governments, NGOs and international and national media organizations opposed the law because of the restrictions it places on freedom of expression. Since its enactment, the law's primary use has been in the repression of journalists and independent newspapers. In perhaps the most significant case, the Supreme Court ruled in September 2003 that the Daily News, the nation's only independent daily newspaper, must register with the Media Commission. The Daily News was subsequently shut down by police for failing to register and has remained closed since. Over one hundred journalists have also been arrested, jailed and prosecuted under the Act, which has also been very selectively applied. Journalists with government-owned newspapers have remained unpunished despite publishing documented falsehoods, an offence criminalized under the Act.³¹

3.6 South Africa³²

Section 32 of the South African Constitution of 1996 states:

(1) Everyone has the right of access to – (a) any information held by the state, and; (b) any information that is held by another person and that is required for the exercise or protection of any rights; (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.³³

The Promotion of Access to Information Act (PAIA) was approved by Parliament in February 2000 and went into effect in March 2001.³⁴ It implements the constitutional right of access and is intended to “Foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information” and “Actively promote a society in which the people of South Africa have effective access to information to enable them to fully exercise and protect all of their rights.”

Under the act, any person can demand records from government bodies without showing a reason. State bodies currently have 30 days to respond (reduced from 60 days before March 2003 and 90 days before March 2002).

³¹ Crisis in Zimbabwe Coalition, “Crisis in Zimbabwe Coalition Comments on the selective Application of AIPPA” (January 2004).

³² Banisar, D The Freedominfo.org Global Survey (May 2004)

³³ The Constitution of the Republic of South Africa, Act 108 of 1996.

<http://www.polity.org.za/govdocs/constitution/saconst.html>

Promotion of Access to Information Act, Act 2 of 2000. <http://www.gov.za/gazette/acts/2000/a2-00.pdf>. For a detailed analysis of the Act, see Currie and Klaaren, The Promotion of Access to Information Act Commentary (2002).

³⁴ Promotion of Access to Information Act, Act 2 of 2000. <http://www.gov.za/gazette/acts/2000/a2-00.pdf>. For a detailed analysis of the Act, see Currie and Klaaren, The Promotion of Access to Information Act Commentary (Siber Ink 2002).

The Act also includes a unique provision (as required in the Constitution) that allows individuals and government bodies to access records held by private bodies when it is necessary to enforce people's rights. Bodies must respond within 30 days.

There have been problems in the implementation of the Act and its use has been limited. A survey conducted by the Open Democracy Advice Centre in 2002 found, “on the whole, POATIA has not been properly or consistently implemented, not only because of the newness of the act, but because of low levels of awareness and information of the requirements set out in the act. Where implementation has taken place it has been partial and inconsistent.”³⁵ Almost half of the public employees had not heard of the act. A larger problem pointed out by the Centre for the Study of Violence and Reconciliation is the poor records management of most departments.³⁶

Despite these and many other minor criticisms by both South African and international organisations, the Act provides clear and detailed procedures for accessing a very broad range of both public and private information, the exemption provisions are reasonable and subject to a public interest test and it provides a mechanism for oversight and monitoring which should ensure continued improvements and refinements as the Act begins to have an impact in South Africa.

3.7 Ethiopia

In May 2004, Ethiopia’s Ministry of Information released a draft “Proclamation to Provide for Freedom of the Press.” While this draft improved somewhat on two previous drafts released in 2003, Article 19 sustained concerns in several areas. Notable areas of concern included “the indirect constitutional legitimization of the State’s control over the media” through a clause in the draft countenancing state ownership of media without any reference made to a shift towards public ownership³⁷. In addition, the draft proclamation includes provisions for limitations to the freedom of expression in order to protect “human dignity” that exceed international norms, including those of the Declaration of Principles on Freedom of Expression in Africa. The draft Proclamation also places limitations on who may practice journalism. Article 19 was supported in its criticisms by MISA, the Committee to Protect Journalists and three other press freedom organizations, who jointly submitted a letter to the Ethiopian government voicing their concerns.

More positively, the draft Proclamation also includes a section devoted to guaranteeing access to information, in line with the Ethiopian Constitution’s guarantee of the right to information.

³⁵ Allison Tilley and Victoria Mayer, Access to Information Law and the Challenge of Effective Implementation, in *The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice* (ODAC 2002).

³⁶ Dale McKinley, *The State of Access to Information in South Africa*.
http://www.apc.org/apps/img_upload/6972616672696361646f63756d656e74/CSVR_REPORT_ON_FREEDOM_OF_INFORMATION.doc.

³⁷ Article 19, “Briefing Note on The Draft Ethiopian Proclamation to Provide for the Freedom of the Press” (June 2004).

The 1999-2000 famine in the east and south of Ethiopia prompted Article 19 to re-examine possible links between censorship and famine. In particular, Article 19 suggests that the top-down authority structures of the government interfere with information reports from the local level, resulting in inaccurate assessments of vulnerability at higher levels of government. These inaccurate assessments in turn provoke slow or inappropriate responses once famine ensues³⁸.

The Ethiopian government has also been critical of recent press coverage of the conflict with Eritrea, particularly by Voice of America. In recent years, the Ethiopian government has been prepared to take severe action against the press, including rounding up newspaper and magazine vendors on the 20th of April 2001 and releasing them on condition that they curtail their activities.³⁹

3.8 Mozambique⁴⁰

Whereas the 1975 independence Constitution did not contain any specific provision on freedom of the press, the Bill of Rights in the 1990 Constitution prohibits censorship and guarantees freedom of expression, freedom of the press and the right to information. The adoption of the new Constitution was preceded by a period of public debate, which resulted in important amendments to the original draft. For example, the explicit protection of press freedom was only added following pressure by media professionals and other concerned groups.

Article 74 of the Constitution states:

1. All citizens have the right to freedom of expression and to freedom of press as well as the right to information.
2. Freedom of expression, which includes the right to disseminate one's own opinion by all legal means, and the right to information, shall not be limited by censorship.
3. Freedom of the press shall include, in particular, the freedom of journalistic expression and creativity, access to sources of information, protection of professional independence and confidentiality, and the right to publish newspapers and other publications.
4. The exercise of the rights and freedoms referred to in this article shall be regulated by law, based on the necessary respect for the Constitution, for the dignity of the human person, and for the mandates of foreign policy and national defence.

The Press Law (Article 3) defines the right to information as "the faculty of each citizen to inform him/herself and be informed about relevant facts and opinions, at the national and international level, as well as the right of every citizen to disseminate information, opinions and ideas through the press".

A draft "Bill on Access to Sources of Information" has been prepared, but is still undergoing review. Recent analysis by the Commonwealth Human Rights Initiative (CHRI) suggests that the draft has several faults. Most significant among these, according to CHRI, is that "the Bill contains no clear statement entrenching a "right"

³⁸ Article 19, "Ethiopia: Still Starving in Silence? Famine and Censorship Revisited" (May 2001).

³⁹ Article 19, "Ethiopian Human Rights Defenders Join Journalists In Jail" (May 2001).

⁴⁰ *ibid*

to information.”⁴¹ Other problems with the draft include the requirement to give a reason for requesting information, inadequate provisions for access to privately-held information and inadequate protection for whistleblowers.

4. THE RIGHT TO KNOW: NATIONAL, REGIONAL AND GLOBAL DEVELOPMENTS

The Right to Know (RTK) concept reflects all the laws and programs which promote and advocate for freedom of information. It therefore incorporates access to information laws as well as the legal protection of whistleblowers. Beyond that, the concept symbolizes a growing movement which aims to develop a culture of transparency and accountability at a multilateral governance level. RTK protagonists argue that access to information is inherently connected to the protection of human rights.

The right to information therefore means:

- A right to have access to government and privately held information relating to a legal right. This information could be in the form of records, registers, maps, files, data, drawing etc.
- An obligation on the government and private sector to provide information to the public without being asked to. This will include information on issues concerning projects that directly affect people or the environment, information on health, agriculture etc.

Right to information is linked to other rights i.e. economic, social and cultural rights, and to political and civil rights. A country can boast of democracy if its people can effectively participate in governance. This is only possible if the citizens know their rights. For instance in India the Supreme Court has interpreted the right to know as integral to the right to life.

Such a law creates a mechanism where an individual may access information that may have an impact on the exercise of other rights such as right to adequate health, education, equal employment opportunities, access to property of a spouse. For instance, it will be easy to prove discrimination when there is access to information of all facts surrounding an alleged charge.

The RTK movement spans a diverse range of organizations all working towards greater transparency and accountability amongst corporations, governments and multilateral organizations.

Access to government records and information is an essential requirement for modern government. Access facilitates public knowledge and discussion. It provides an important guard against abuses, mismanagement and corruption. It can also be beneficial to governments themselves – openness and transparency in the decision making process can assist in developing citizen trust in government actions and maintaining a civil and democratic society.

⁴¹ Commonwealth Human Rights Initiative “A Critique of the Mozambique draft Bill on Access to Sources of Information 2004” (February 2004)

Governments around the world are increasingly making more information about their activities available. Over fifty countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and over thirty more have pending efforts.⁴² While FOI acts have been around for several centuries, over half of the FOI laws have been adopted in just the last ten years. The growth in transparency is in response to demands by civil society organizations, the media and international lenders.

While the vast majority of countries that have adopted laws are northern, much of the rest of the world is also moving in the same direction. In Asia, nearly a dozen countries have either adopted laws or are on the brink of doing so. In South and Central America and the Caribbean, nearly half dozen countries have adopted laws and a dozen more are currently considering them. Openness is starting to emerge in Africa. South Africa enacted a wide reaching law in 2001 and many other African countries including Nigeria, Ghana, Ethiopia, Tanzania and Mozambique are developing ATI laws.

As multilateral organizations play an increasingly important role in decision-making processes, the right of access to information has lagged behind. Thus decisions that were once made on a local or national level where the citizen had access and entry into the process are now being made in more secretive diplomatic settings outside the country. In New Zealand and Australia, government policy on food safety is made by a special bi-lateral commission not subject to the national access laws. In Europe, information on unsafe airlines banned by countries from the European Civil Aviation Conference was being withheld prior to the crash of a flight in 2003. Activists have been pressuring organizations such as the WTO, the World Bank and the IMF to release more information on their advice to national governments with limited success. The EU, which is the most highly developed international organization, has one of the most developed access regimes of any multilateral organization, but it is still more limited than that of most of the member countries.

The AU on the other hand, appears to have no existing policy dealing specifically with access to information. The two documents produced by the AU which are related to ATI, are the Draft African Union Convention on Preventing and Combating Corruption,⁴³ and the African Commission's Declaration on Principles of Freedom of Expression.⁴⁴

The Draft Convention on Combating Corruption encourages State parties to adopt legislation which gives effect to the right of access to information in order to fight corruption.⁴⁵ The scope of this Draft Convention is therefore extremely narrow and fails to effectively deal with openness and transparency at a multilateral governance level.

⁴² http://www.freedominfo.org/survey/global_survey2004.pdf

⁴³ Min/Draft/AU/Conv/Comb/Corruption (II) Rev.5
(<http://www.africanreview.org/docs/corruption/convention.pdf>)

⁴⁴ Declaration on Principles of Freedom of Expression in Africa, African Commission on Human and Peoples Rights (2002)

⁴⁵ Article 9 of the Draft Convention

The Declaration on Freedom of Expression, which has yet to be ratified by member States in order to be legally binding, expands upon Article 9 of the African Charter on Human and Peoples' Rights. Article 9, which refers to the right to receive information, has now been elaborated upon in order to give effect to the right to access information. The Declaration contains the following section on access to information:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or
 - protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information
 - of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that
 - which would disclose a serious threat to health, safety or the environment save where the imposition of
 - sanctions serves a legitimate interest and is necessary in a democratic society; and
 - secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

The Declaration on Freedom of Expression has been commended by organizations such as Article 19, as symbolizing a commitment and determination to tackle the continued and increasing violations of the right to freedom of expression and information in African countries. At the same time, the Declaration has no binding force. It is therefore up to each State to decide on whether or not it wishes to incorporate principles enunciated in the Declaration into its laws. This is highly problematic since States are under no pressure or obligation to ensure that they comply with the access to information principles.

As a result, strategies have to be developed to ensure that Africa's multilateral governance structures not only develop policies on access to information, but that those policies are given effect to and implemented at a national level.

5. CHALLENGES FOR CIVIL SOCIETY

Information is the oxygen of democracy.⁴⁶ If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of good government. Bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive. As Amartya Sen, the Nobel Prize-winning economist has observed, there has never been a substantial famine in a country with a democratic form of government and a relatively free press. Information allows people to scrutinise the actions of a government and is the basis for proper, informed debate of those actions.

Most governments, however, prefer to conduct their business in secret. In Swahili, one of the words for government means "fierce secret". Even democratic governments would rather conduct the bulk of their business away from the eyes of the public. And governments can always find reasons for maintaining secrecy – the interests of national security, public order and the wider public interest are a few examples. Too often governments treat official information as their property, rather than something which they hold and maintain on behalf of the people.

The enactment of a FOI law is therefore only the beginning.⁴⁷ For it to be of any use, it must be implemented. Governments must change their internal cultures. Civil society must test it and demand information. Governments resist releasing information, causing long delays, courts uncut legal requirements and users give up hope and stop making requests.

The mere existence of an act does not always mean that access is possible. In some countries freedom of information laws are that, in name only. The Zimbabwean Protection of Privacy and Access to Information Act sets strict regulations on journalists and its access provisions are all but unused. In Paraguay, the Parliament adopted a FOI law in 2001 which restricted speech and was so controversial that media and civil society groups successfully pressured the government to rescind it shortly after it was approved. In Serbia, the Public Information Act was designed to restrict public information, not promote it.

Some laws are adopted and never implemented. In Albania, there has been little use of the law because neither users nor government officials are aware of it. In Bosnia, one of the best designed laws in the world is only used infrequently.

In many countries, the implementing rules deliberately undercut the rights set out in the law. The Panamanian Government enacted a law in January 2002 and then promptly adopted a rule that requires that individuals show a legal interest, a deliberate contradiction of the law. Independent oversight bodies are weakened by lack of funds which prevent timely appeals.

Excessive fees are often charged in some countries to prevent requests. In Ireland, the law was amended in 2003 to impose high fees for those appealing decisions. In

⁴⁶ <http://www.article19.org/docimages/512.htm>

⁴⁷ http://www.freedominfo.org/survey/global_survey2004.pdf

Australia, the Commonwealth law's fees for appeals are so high that few are able to afford to do so.

Information about intelligence services is frequently withheld for national security groups in an overly broad manner that has little to do with protecting the state. The events of September 11 and the global war on terror are often used as justification for keeping information secret, no matter the relevance or harm caused.

To succeed, these restrictions must be resisted. Civil society, the media and other political actors must publicly criticize restrictions and hold campaigns. Courts and ombudsmen must be asked to reject government decisions as being unjustified. Parliaments must step in and reverse changes and amend or replace inadequate laws.

6. CONCLUSION

The dramatic developments in multilateral governance in recent times represent an important moment and an important opportunity for democracy and development on the continent. But there are implicit dangers as well. As the experience with the International Financial Institutions and with equivalent multilateral bodies in Europe and elsewhere has shown, holding transnational state power to account is a singularly difficult task for civil society. Transparency and a meaningful articulation of the right to know concept should be a core value and a central operating principle for each of the new multilateral institutions – to enable citizens and civil society organisations to participate in their policy-making and in their institutional evolution, and to thereby give them legitimacy.

Thus, developing and implementing access to information policies at a multilateral governance level on the continent is essential to ensuring openness and transparency within organizations such as the African Union, NEPAD and the APRM. Equally, policies developed at a multilateral level should filter down to a country level ensuring that a right to know culture is established and protected for the long term, by setting standards to be matched by domestic governments.

This background paper aims to help prompt a necessary dialogue in developing a right to know culture at a multilateral governance level in the region. It is hoped that the meeting at which this dialogue will take place will consider the importance of the RTK concept for democracy in the region, the implications for public accountability of the rapid developments in multilateral governance, and the APRM in particular, and explore the strategic and advocacy options for civil society in ensuring that the right to access to information is realised at both multilateral and domestic levels.

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DEZA	DIREKTION FÜR ENTWICKLUNG UND ZUSAMMENARBEIT
DDC	DIRECTION DU DÉVELOPPEMENT ET DE LA COOPÉRATION
DSC	DIREZIONE DELLO SVILUPPO E DELLA COOPERAZIONE
SDC	SWISS AGENCY FOR DEVELOPMENT AND COOPERATION
COSUDE	AGENCIA SUIZA PARA EL DESARROLLO Y LA COOPERACIÓN

