

Presentation held on 29 August 2013 at the 2013 ILA Regional Conference; to be published in: F. Pazartzis, M. Gavouneli, A. Gourgourinis, M. Papadaki (eds), Reconceptualising the Rule of Law in Global Governance, Resources, Investment & Trade (Oxford: Hart Publishing forthcoming 2015).

The Transparency of Global Governance

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1. Problématique and concepts

In August 2013, the US-American military officer Bradley (Chelsea) Manning, who had transmitted information about war crimes committed by members of the US army during the Iraq war to WikiLeaks, was condemned to a 35 years prison sentence for violation of the Espionage Act.¹ Another individual who has become a globally relevant actor in the context of transparency is Edward Snowden, an employee of the US-American secret service CIA, who revealed to the public and to foreign governments the existence of a secret internet surveillance programme conducted by the United States, PRISM.

PRISM and other surveillance activities of the US-American National Security Agency (NSA), spying on private and inter-agency telephone and internet communication in numerous European States, illustrate the problématique of this paper: in a liberal system of governance, the ideal is that the governors themselves should be transparent about the measures they take or not, while the citizens' sphere of privacy should be respected. Citizens are under no prima facie-transparency obligation – quite to the contrary. PRISM reversed this order: all users of the internet, mostly private individuals, were rendered transparent through the surveillance programme – but that fact was completely concealed to outsiders, the measure itself was intransparent. Snowden rendered the surveillance programme partly transparent. He did this by breaching his obligations under his employment contract, and by committing a crime under US-American law.

May this action, which is illegal under the positive, domestic law of a state, be justified or excusable under some higher principles, maybe under international legal obligations of transparency vis-à-vis foreign states and foreign citizens? The answer to our question depends on the existence of transparency or publicity principles under international law.

'Publicity' is a traditional term of political theory (and political practice). Publicity (δημοσιότητα) contains the word δῆμος, the people. This etymology shows that the ancient Greeks had already realised the inner link between publicness or publicity and democracy. In contrast, 'transparency' has become a more recent buzzword, also in the field of international law and governance. In this contribution, both terms are used interchangeably. By 'transparency', I understand a culture or scheme in which relevant information (on law and politics) is available.

In all major fields of international law – e.g. environmental law, trade and investment law, human rights law, international humanitarian law, health law, peace-and-security law – demands for more transparent institutions and procedures have recently been voiced by civil-society actors, by states, and within the international institutions themselves, and have to a large extent also been honoured. We have called this the transparency turn in global governance.²

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¹ *United States v Private First Class Bradley Manning*, Military Judge Colonel Denise Lind (court-martial Fort Meade, sentence of 21 August 2013).

² See Anne Peters, 'Towards Transparency as a Global Norm' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 607. This contribution builds on the findings set out in more detail in our book.

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The turn concerns, first, transparency *for* governance,³ i.e. requirements imposed by international law on states. Examples are found in the Aarhus Convention⁴ and the Council of Europe Convention on Access to Official Documents (No. 205) of 2009.⁵ A recent example in the field of international security law are the UN Human Rights Council's Framework Principles for Securing the Human Rights of Victims of Terrorism of 2012. One of these principles is the imperative to conduct an effective official investigation of lethal incidents under 'public scrutiny'.⁶

The Human Rights Committee's General Comment No. 34 on art. 19 CCPR of 2011⁷ offered an important, extended reading of the human right to information, and understood it as encompassing a right to access to official documents, held by states, and to those held by functionally public actors. I submit that international organisations might be counted among those actors which exercise public functions.

This leads us to the second dimension of the transparency turn, the increasing demands on the transparency *of* (global) governance actors themselves. Transparency requirements are, e.g., imposed on the EU in the EU Transparency Regulation of 2001.⁸ With regard to the World Trade Organization (WTO), the Sutherland Report devoted an entire section to the debate on improving the transparency of the WTO and civil society involvement.⁹ An example for transparency of an international conference is the Conference/Meeting of the parties of the UN Framework Convention on Climate Change and Kyoto Protocol (COP 16/CMP 6), held in Cancún in 2010, which was explicitly conducted under the heading of transparency.¹⁰

³ See for the distinction between transparency *for* governance and transparency *of* governance Ronald B Mitchell, 'Transparency for Governance: The Mechanisms and Effectiveness of Disclosure-based and Education-based Transparency Policies' (2011) 70 *Ecol. Econ.* 1882, 1882.

⁴ UN Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447 (adopted 25 June 1998, entered into force 30 October 2001).

⁵ Not yet in force (needs 10 ratifications, currently has 6, mostly by Eastern European states and Sweden).

⁶ The states' obligation to protect life obliges them to conduct an effective official investigation whenever individuals have been seriously harmed through the use of lethal or potentially lethal force in a terrorist context (through terrorist acts or through governmental anti-terrorist measures), notably after targeted killing and drone strikes. Ben Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Framework Principles for Securing the Human Rights of Victims of Terrorism, UN Human Rights Council 12th Session Doc A/HRC/20/14 para 36 (4 June 2012), mentions as one of the 'minimum requirements': 'there must be a sufficient element of public scrutiny of the investigation and its results to secure public accountability. This is essential to maintaining public confidence in the authorities' adherence to the rule of law, and prevents any appearance of collusion in, or tolerance of, unlawful acts or omissions.'

⁷ UN Human Rights Committee, International Covenant on Civil and Political Rights CCPR/C/GC/34 General Comment No. 34 (12 September 2011).

⁸ Regulation of the European Parliament and of the Council (EC) 1049/2001 of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents [2001] OJ L145/43.

⁹ Peter Sutherland and others (eds), *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (WTO 2004) 45, paras 183-205.

¹⁰ The Mexican conference's President gave 'full commitment to the principles of transparency and inclusiveness. There will be no parallel or overlapping discussions and I will continue ensuring that all positions are taken into account' (UNFCCC Informal Stocktaking Plenary, Statement by Her Excellency Mrs. Patricia Espinosa COP 16/CMP 6 President (8 December 2010)). In the same sense, see the informal meeting of the President, statement of 5 December 2010: '[t]he Mexican Presidency will continue to work with full transparency and according to established United Nations procedures'. See also UNFCCC Subsidiary Body for Implementation, Synthesis Report on Ways to Enhance the Engagement of Observer Organizations FCCC/SBI/2010/16 (19 October 2010) with a view to the 33rd session in Cancún, 30 November to 4 December

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Furthermore, in 2010, the World Bank issued its ‘World Bank Policy on Access to Information’.¹¹ A final example is the initiative of the ‘Small 5’ (a group of small states) of 2012, which suggested a draft resolution ‘Enhancing the accountability, transparency and effectiveness of the Security Council’¹² that was ultimately not adopted by the UN-General Assembly.

2. The normative quality of transparency

Currently, no general international transparency treaty exists, and such a codification would probably be neither feasible nor desirable. The question is whether a customary international law principle of transparency exists, or a general principle of law in that sense. However, in order to be ‘legalisable’ under these two headings, a concept ‘must meet two fundamental structural preconditions: it must be sufficiently precise to generate an obligation and to assess its implementation, and it must have an obligor and an obligee.’¹³ Both conditions are not easily fulfillable with regard to the transparency buzzword. As a result, it would seem difficult to argue that transparency as such is a norm of hard international law – and maybe it can never become one.¹⁴ But this finding might be of little relevance. Maybe the classic boxes, the ‘sources’ in terms of Art. 38 ICJ-Statute, do not tell us much about the state of international law and its power to influence the behaviour of internationally relevant actors.

3. The value and functions of transparency

In international law and governance, we can discern three clusters of functions: (1) good governance and the rule of law, including foreseeability, accessibility, and legal clarity; (2) accountability, participation, and democracy; (3) effectiveness and efficiency, notably in the financial sector.

I will here discuss only the second cluster. Democracy needs transparency. The classic statement in this regard was tendered by James Madison: ‘[a] popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: [a]nd a people who mean to be their own Governors must arm themselves with the power which knowledge gives.’¹⁵

Transparency is obviously a *conditio sine qua non* for the informed consent of the governed. It is critical for uncovering abuses and defending interests. Transparency can arguably alleviate the ‘democratic deficit’ of global governance. But transparency in itself does not bring about democracy – it is solely a precondition for democratic procedures.

2010, with proposals for ‘ensuring transparency, accountability and information-sharing’ (paras 16-17 and 26-28).

¹¹ World Bank, ‘Policy on Access to Information’ (1 July 2010) <<http://documents.worldbank.org>> accessed 3 February 2014.

¹² UN General Assembly Doc. A/66 L.42/Rev.1 (3 May 2012).

¹³ Beate Rudolf, ‘Is “Good Governance” a Norm of International Law?’ in Pierre-Marie Dupuy and others (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (Engel 2006) 1007, 1026.

¹⁴ See Jonas Ebbesson, ‘Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public’ in Bianchi and Peters (n 2) 49, 73 who sees only ‘normative fragments’ which give only limited support for international law on transparency vis-à-vis members of the public. Alan Boyle and Kasey McCall-Smith find ‘remarkably little identifiable international law underpinning at this rather significant’ transparency practice of international organisations and treaty bodies (Alan Boyle and Kasey McCall-Smith, ‘Transparency in International Law-Making’ in Bianchi and Peters (n 2) 419, 435).

¹⁵ James Madison, ‘James Madison to WT Barry’ in Philip B Kurland and Ralph Lerner (eds), *The Founders’ Constitution* (University of Chicago Press 1987) chapter 18, document 35, writings 9, 103-109. This remark was made in the context of establishing a state-funded educational system (I thank Roy Peled for this information).

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Transparency facilitates control and scrutiny and can thus help to improve accountability. But the question is to whom the accountability of international law and policy-makers, notably the international organisations, should extend – to member states of specific organisations, to all states, to a global citizenry? Who are the relevant and legitimate actors, who should the recipients of the accounts be?

In this context, Allen Buchanan and Robert O Keohane usefully distinguish between ‘narrow’ and ‘broad’ accountability.¹⁶ Broad accountability means not only allowing those who presently receive the accounts (the states, notably the member states of specific organisations) or also others (such as NGOs and populations) who might wish to contest the very terms of accountability. The gist is that ‘broad transparency is needed for critical revision of the terms of accountability.’¹⁷ Seen in this way, transparency becomes even more important for accountability because it can address the accountability mismatch.

But here an objection can be raised: is not transparency merely a surrogate, replacing the much more difficult substantive issues of democracy, good governance, economic efficiency, social justice and the rule of law?¹⁸ Indeed, there does exist the danger that certain types of transparency will degenerate to ‘empty titles of legitimacy’.¹⁹ The debate on transparency ‘masks’ other issues behind it. But the gist is that while transparency is indeed a substitute, it is however a necessary one, because it replaces, in a global and pluralistic political space, the unattainable certitude and conviction about the ‘right’ international law and policy through a procedural device allowing everyone to form his own opinion on matters of global governance.

To conclude, while transparency policies to a certain degree generate only an *ersatz* legitimacy and may even at times be counterproductive, they more often seem to be ‘a reasonable initial step’²⁰ towards improving the accountability and legitimacy of international law and governance. Still, transparency has its drawbacks, to which I now turn.

4. Drawbacks of transparency

First, there are intrinsically negative effects of transparency, notably the dangers posed to the quality of deliberations.²¹ Second, there are countervailing legitimate interests, such as security,²² privacy and business or trade secrets²³ which must be balanced against the benefits

¹⁶ Allen Buchanan and Robert O Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics & International Affairs* 405, especially 427 with a link to transparency.

¹⁷ *ibid* 428.

¹⁸ Virginia Haufler, ‘Disclosure as Governance: The Extractive Industry Transparency Initiative and Resource Management in the Developing World’ (2010) 10 *Global Environmental Politics* 53, 70 on transparency as a ‘default option’.

¹⁹ Lucian Hölscher, *Öffentlichkeit und Geheimnis: Eine begriffsgeschichtliche Untersuchung zur Entstehung der Öffentlichkeit in der frühen Neuzeit* (Klett-Cotta 1979) 170.

²⁰ Haufler (n 18) 70.

²¹ See for a classic critique Hans Morgenthau, *Politics among Nations* (Alfred A. Knopf 1950) 431-433.

²² Anne Peters, ‘Transparency, Secrecy, and Security: Liaisons Dangereuses’ in Julia Iliopoulos-Strangas and others (eds), *Rechtsstaat, Freiheit und Sicherheit in Europa/Rule of Law, Freedom and Security in Europe/Etat de droit, liberté et sécurité en Europe* (Societas Iuris Publici Europaei vol 6, Nomos 2010) 183. See for a powerful argument in favour of disclosure obligations even in matters sensitive for national security deriving from ‘the principle of transparency’ in combination with an ‘emerging positive right to receive information’: Eliav Lieblich, ‘Show us the Films: Transparency, National Security and Disclosure of Information collected by Advanced Weapon Systems under International Law’ (2012) 45 *IsrLR* 459.

²³ For example see WTO, Agreement on Trade-related Aspects of Intellectual Property Rights 1869 UNTS 299 art. 39 (15 April 1994). IAEA, Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards INFCIRC/540 (Corrected) (September

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of transparency. Third, as is the case with basically all policies, transparency measures have their financial costs and may be in simple practical terms unfeasible due to time and space constraints. Fourthly, transparency may only be simulated through data-flooding ('drowning in disclosure'),²⁴ disinformation and propaganda. This has traditionally played an important role in international relations.²⁵

Another point is that transparency measures can be circumvented: the legal and political actors might hold conclave behind the façade of the public meeting, keep secret files apart from those that are public, or minimise record-keeping altogether. If such are the foreseeable or inevitable consequences of transparency or of too much transparency in a certain context, in the end, the entire policy will be rendered ineffective or even counterproductive and thus creating yet more intransparency. This very brief overview about the pros and cons of transparency or of more transparency in global governance leads to some policy recommendations.

5. Policy recommendations

De lege ferenda, international law and institutions should be rendered more transparent, i.e. the current trend should be basically continued and reinforced. However, because of the mixed effects of transparency, any move in this direction must be qualified.

First, total transparency of international law is neither appropriate nor realistic. International law- and policy-makers should treat transparency as a variable of institutional and legal design. They need to balance the potential negative effects against the positive ones.

Second, a (legal) presumption of transparency should be acknowledged.²⁶ A presumption of transparency means that the non-release of documents and the closure of meetings to the public must be specifically justified on the basis of legal exceptions which have been clearly defined and circumscribed prior to the fact. These exceptions can only be granted by stating the reasons for them publicly. The burden of explaining and of proving the need for secrecy is thereby placed on the institution itself – not on those outsiders who request access.

Third, intransparency is rendered the more acceptable the more it is embedded in what Thore Neumann and Bruno Simma have called 'meta-transparency'.²⁷ Meta-transparency means that

1997). Art. 15 requires the International Atomic Energy Agency to 'maintain a stringent regime to ensure effective protection against disclosure of commercial, technological and industrial secrets and other confidential information coming to its knowledge'.

²⁴ Aarti Gupta, 'Transparency under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8 *Global Environmental Politics* 1, 4.

²⁵ Holzner and Holzner quote a senior official of the EU: '[t]he impression of transparency is that it is a straight ray of light. But it can be simulated by a thousand mirrors'. (Burkart Holzner and Leslie Holzner, *Transparency in Global Change: The Vanguard of Open Society* (University of Pittsburgh Press 2006) 102).

²⁶ See Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap 1996) 96, explaining the basis 'for a presumption in favor of publicity and the authority of claims of secrecy and other values that could rebut the presumption'; Joseph Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life' in Matthew J Gibney (ed), *Globalizing Rights, The Oxford Amnesty Lectures 1999* (OUP 1999) 115, 152: '[b]ecause of these limitations of legalistic approaches, emphasis must be placed on creating a culture of openness, where the presumption is that the public should know about and participate in all collective decisions'. Buchanan and Keohane (n 16) 431: '[t]here should be a very strong but rebuttable presumption of transparency'. Orna Ben-Naftali and Roy Peled, 'How Much Secrecy Does Warfare Need?' in Bianchi and Peters (n 2) 321, 323, argue that 'the presumption in favour of secrecy during wartime should be reversed, requiring government officials to shoulder the burden of proof to justify why secrecy is necessary in any particular matter'.

²⁷ Thore Neumann and Bruno Simma, 'Transparency in International Adjudication' in Bianchi and Peters (n 2) 436, 472.

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the reasons for the intransparency (i.e. whether it is necessary at all) and its substantive and temporal scope must be made transparent. In other words, the questions as to whether, how much, and for how long intransparency is warranted (e.g. the need for a closed-door debate, the circumscription of exceptions, possible reform of the policy) must be subject to public debate.²⁸ Thereby an ‘element of public accountability for the secrecy itself’ is introduced.²⁹ In the end, only meta-transparency provides the necessary means for transcending the limits of transparency.³⁰

6. Conclusions

My conclusion is that the rise of transparency demands and their satisfaction in the international sphere, what I called the transparency turn of global governance, manifests a paradigm shift. It is international law’s shifting character from a ‘private’ law to a ‘public’ law character. Traditional international law (being mainly inter-state law) has long been conceived as ‘private law writ large’.³¹ My claim is that international law has been publicised in three senses.

Understanding the first sense requires of us to recall the traditional public-law/private-law distinction. This distinction ultimately stems from the different logics of *iustitia distributiva* (to be realised through distributive, public policies) and *iustitia compensativa* (as realised in the private sphere and through the market).³² The emerging transparency norm within international law – with its quality as an enabler and to some extent a proxy for accountability, participation, and global democracy – is currently strengthening the element of global distributive justice in international law. International law has in that first sense been rendered more like ‘public’ law, a law in the global public interest (‘for’ the public).

Second, international law is becoming ‘public’ law in another sense: a law which constrains political authority, and which seeks to reconcile the exercise of global political authority with individual autonomy.

Finally, international law is becoming international public law in a third sense: it is made – if and to the extent that is transparent – under scrutiny of the public (‘through’ the public) even if not fully made ‘by’ a global public.

In the end, the transparency of governance is only a necessary, and not a sufficient condition for bringing about accountability, and possibly democracy in the global sphere; there is no automatic progress from global transparency to democratic global governance. Moreover, the theoretical conceptualisation and practical implementation of fair global governance mechanisms, procedures, and institutions will depend on further research into additional juridical building blocks such as participation, contestation, or solidarity, to name only a few.

²⁸ Stiglitz (n 26) 152.

²⁹ Gutmann and Thompson (n 26) 104.

³⁰ *ibid* 127 on publicity.

³¹ Thomas Holland, *Studies in International Law* (Clarendon 1898) 152. Montesquieu described international law as ‘*le droit civil de l’univers dans le sens que chaque peuple est un citoyen.*’ (Charles de Secondat, Baron de Montesquieu, *De l’esprit des lois* (livre vingt-sixième, Barrillot & Fils 1748): des lois dans le rapport qu’elles doivent avoir avec l’ordre des choses sur lesquelles elles statuent; chapitre premier – idée de ce livre).

³² Nils Jansen and Ralf Michaels, ‘Private Law and the State’ (2007) 71 *RabelsZ* 345, reprinted in Nils Jansen and Ralf Michaels (eds), *Beyond the State: Rethinking Private Law* (Mohr Siebeck 2008) 15, 62.