Transparency in International Law. Edited by Andrea Bianchi and Anne Peters. Cambridge, New York: Cambridge University Press, 2013. Pp. xx, 620. Index. $140, £90.

"Transparency" is one of those ideas against which it is hard to argue. In this volume, the editors, Andrea Bianchi, a professor at the Graduate Institute of International and Development Studies, Geneva, and Anne Peters, director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany, and a professor at the University of Basel, Switzerland, have gathered together a group of eminent scholars to discuss the different international legal aspects of transparency. In addition to the introduction by Bianchi and the concluding chapter by Peters, the book contains fourteen chapters on transparency in selected areas of international law: international environmental law, international economic law, international human rights law, international health law, international humanitarian law, and international peace and security law. There are also four crosscutting chapters on transparency in, respectively, international lawmaking, international adjudication, business, and international institutions. The issues discussed in the book are wide-ranging: the purposes of international transparency; the arguments for secrecy rather than transparency; the content of transparency in different contexts; the legal status of transparency; the addressees of the obligations; the rights holders; and, finally, the effects of transparency.

Let us start with the reasons why transparency has become such a powerful idea. Transparency is now, as rightly observed by Bianchi, one of the fundamental traits of Western culture, and—as with human rights—few would argue against the need for transparency in the public realm. But Bianchi also reveals some controversial aspects of transparency, exemplified by the disclosure of secret information by WikiLeaks and Bradley Manning. In this context, he points out the "dark sides" of transparency, such as the information obtained not being used for respectable purposes. So transparency is not indisputably good in all contexts. We must examine the objectives behind transparency, define the concept more clearly, and seek a balance in relation to other pertinent concerns.

Peters argues that transparency has both intrinsic and instrumental aspects. It is connected to values such as democracy, rule of law, integrity, and trust. But it may also be an important element in improving the performance and accountability of institutions. These features of transparency become increasingly important internationally as more power is transferred to international institutions. To some extent, international transparency is also necessary in order not to lose the transparency already gained at the domestic level (what Peters calls "compensatory transparency" (p. 540)).

It is, however, difficult to pinpoint exactly what is meant by transparency. As the editors say in the preface, transparency is "not a distinctly legal concept and its contours are rather blurred" (p. xiii). Bianchi reveals that "the definition has haunted us," and the editors' "suggestion to focus on transparency as information about legal processes in the different areas of international law was followed by some [authors] and ignored by others" (p. 8). Peters proposes what seems to be a good definition

in understanding transparency "as a culture, condition, scheme or structure in which relevant information (for example on law and politics) is available" (p. 534). This definition has the advantage of pointing out that transparency concerns access to information and that such information can be of different kinds, from relevant documents to decision-making processes, outcomes, and effects.

The chapters in this book show that international transparency has become more important and that the need for transparency is increasingly reflected in international processes and institutions. One fundamental question is, however, to what extent we can and should transpose what we are familiar with at the domestic level onto the international level.

On the one hand, many similarities clearly exist between these two levels of decision making, and many of the same considerations apply, such as improving performance and accountability and respecting democratic and legal values. On the other hand, we have familiar exceptions, such as the protection of personal and business information, as well as sensitive security information. But, as Peters highlights, a difference between the national and the international levels exists in what she calls the "deliberation exception" (p. 579). Transparency could hinder states or other parties reaching a result through negotiations. And negotiations are arguably more prominent at the international level. Reluctance against transparency in a world where not all states cherish democratic values is also an element of international cooperation. Therefore, it cannot be assumed that states will allow openness about their decision making at the international level. Even if they have a positive attitude towards transparency, its degree and form would not necessarily reflect what we know from the domestic level.

If we start with general aspects of transparency, it is difficult to find international procedures, organizations, and mechanisms subjected to transparency requirements that are comparable to those of domestic law. Alan Boyle and Kasey McCall-Smith open their chapter on international lawmaking by quoting the famous call by President Woodrow Wilson for a system of "'open covenants (. . .) openly arrived at'" (p. 419). While Boyle and McCall-Smith indicate that the international lawmaking process has become more transparent, they acknowledge that "little identifiable international law underpin[s] this rather significant constitutional development" (p. 435).

In their chapter on transparency in international adjudication, Thore Neumann and Bruno Simma examine the different phases in the adjudicatory process, and they show the diversity in the procedural requirements of different courts. It is interesting to note their claim that secrecy in the final drafting and deliberation phase among judges at the international level may be more important than at the domestic level: secrecy protects the independence and integrity of international judges, prevents exposure and exploitation of cultural and professional diversity among them, and may enhance national willingness to implement judgments. Neumann and Simma conclude that, despite institutional diversity, a normative skeleton of an overarching judicial transparency principle at the international level can be identified.

Megan Donaldson and Benedict Kingsbury claim that diversity on transparency also exists in global governance institutions. They argue that there is a trend towards a presumption of transparency and towards further appeal procedures available for information seekers against decisions not to disclose information. But important differences between international institutional policies and domestic law remain: usually no international "right" to information exists, disclosure is less forthcoming, the policies are vaguer, and the review process when access to information is denied is less formalized.

As is well demonstrated in the different chapters of this book, the prominence of transparency varies among different subject areas of international law. A well-known example of a legal instrument promoting transparency is the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[1] discussed by Jonas Ebbesson. But this Convention

[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, July 25, 1998, UN

is only applicable in Europe and Central Asia and only for environmental issues. Furthermore, it only establishes obligations for states, not for international institutions.

The volume also considers transparency in international peace and security law. The usefulness of transparency is evident in the confidence-building measures known from disarmament and nonproliferation treaties discussed by Mirko Sossai. In their chapter on warfare, Orna Ben-Naftali and Roy Peled show—contrary to common assumptions about the need for secrecy when it comes to matters of national security—that a general point of departure should also prevail in this area: the presumption should be in favor of transparency. Furthermore, they claim that "while war requires secrecy, the scope of the latter is far less extensive than is otherwise assumed and granted" (p. 323). This insight indicates that the strength of claims to transparency should be at least as compelling in less extreme circumstances.

Turning now to transparency in international institutions, we can begin with the attempts to open up the decision making in the Security Council. But, as Antonios Tzanakopoulos describes, such efforts have been of little avail. Transparency demands have instead been met by moving decision making to informal meetings. It may be asked whether this adjustment only leaves the members conveniently out of the public eye or actually leads to more effective decision-making processes. In the context of the World Trade Organization (WTO), Panagiotis Delimatsis emphasizes the need for balancing transparency and facilitating confidential negotiations to reach desired outcomes. Hence, transparency may not necessarily enable more effective decision making.

But secrecy may raise legitimacy issues. Delimatsis refers to the legitimacy deficits by nontransparent decision-making processes in the WTO context. The experience of the World Health Organization (WHO), recounted by Emily A. Bruemmer and Allyn L. Taylor, shows the credibility gap that may arise from too much confidentiality. The WHO decision to keep secret the names of experts and the mechanism for evaluating their conflicts of interest in connection with the H1N1 influenza pandemic was heavily criticized, especially by European countries that had spent huge sums of money on vaccines for a pandemic that was far less serious than predicted. Among the issues was whether the experts' ties were too close to the pharmaceutical industry. This concern led to a review process and recommendations from a committee on improving transparency procedures (pp. 283–87). Likewise, Jutta Brunnée and Ellen Hey emphasize the "high legitimacy cost" of the secret diplomacy leading to the Copenhagen Accord on climate change in 2009 (p. 37).

Yet secrecy can be important to certain international institutions. The secrecy of the working methods of the International Committee of the Red Cross (ICRC), as discussed by Steven R. Ratner, is generally seen as being particularly effective. The ICRC undertakes confidential visits to conflict areas, prepares confidential reports, and renders confidential recommendations to the parties involved. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has accepted that ICRC records should be confidential and that its delegates are immune from requirements to testify.[2] Secrecy is also reflected in Article 73 of the Rome Statute for the International Criminal Court (ICC).[3] Ratner claims that the ICRC's "modus operandi . . . offers a compelling counter-narrative" to the usefulness of transparency (p. 318). But he underlines that secrecy can go too far. After its silence during the Holocaust, the ICRC decided that it could issue public denunciations of serious violations of international humanitarian law.

These examples show that a balance must often be struck between transparency and secrecy. The

Doc. ECE/CEP/43, 38 ILM 517 (1999), *at* http://www.unece.org/env/pp/welcome.html.

[2] Prosecutor v. Simić, Case No. IT-95-9-PT, Decision on Testimony of a Witness, para. 74 (July 27, 1999) ("conclud[ing] that the ICRC has a right under customary international law to non-disclosure of the Information").

[3] Rome Statute of the International Criminal Court, Art. 73, July 17, 1998, 2187 UNTS 90 (noting in part that "[i]f the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator").

proper balance should be contextual in the sense that no general solution dictates how the two competing concerns should be weighed in all situations. The balance should vary both with the subject area and with the form of decision making. But the gist of the contributions to this volume is that transparency should be the general rule, while exceptions would require specific justification.

What are the effects of transparency? Donaldson and Kingsbury do not claim to have the answers. Yet they present eleven hypotheses on possible effects on states, entities within states, global governance institutions, and nonstate actors. They suggest that transparency may foster reform and development of an institution. But it may also have negative effects on a relevant institution's policy on which information is produced and made available. Similarly, transparency measures can increase the support of an institution, or they may have the opposite effect. Some states may even reduce cooperation with such an institution. Access to information may alter the relative power between states, within states, and between nonstate actors. The impact of transparency measures may depend on intermediaries, such as nongovernmental organizations (NGOs), that are able and willing to make use of available information.

This analysis illustrates that transparency may or may not have positive effects on international cooperation. It may increase the availability of information to all actors and in this sense contribute to a level playing field. But it may also favor strong states, NGOs, businesses, and other actors that are able to make use of such information. For example, Brunnée and Hey refer to estimates that 80 percent of NGOs attending meetings in international environmental negotiations come from developed countries (p. 35).

But some caution is warranted here. We do not yet have sufficient empirical evidence to conclude which effects existing transparency measures have had. And we do not know much about the likely effects of introducing new measures. The authors of this volume present thoughtful examples from a wide variety of areas and forms of international cooperation, but only the chapter by Cosette Creamer and Beth A. Simmons on the governments' sharing of human rights information with citizens includes empirical findings. Peters, in a short review of existing empirical research, concludes that "depending on the setting and on certain conditions, transparency can have detrimental but also beneficial effects on the quality of international deliberations" (p. 582). This idea should not dissuade us from championing more transparency in international cooperation. But it provides some sobering thoughts on what can be achieved—or hindered—by more transparency. In any case, it calls for more empirical research on the effects of transparency measures.

As has become apparent in the above presentation of the analyses and findings in this volume, the degree and forms of transparency vary significantly among different areas of international law. We have no general treaty on transparency in international cooperation. The diverse practice makes it difficult to establish customary rules. It is also questionable whether the sufficient *opinio juris* exists. Moreover, it is problematic to transpose domestic arrangements to the international level by means of general principles of international law. As pointed out by Peters, transparency may be seen as too vague: "it must be sufficiently precise to generate an obligation and to assess its implementation, and it must have an obligor and obligee" to be considered a norm of hard international law (p. 585).

This concern does not mean that international law has nothing to say on transparency. Recent case law by the Inter-American Court of Human Rights and by the European Court of Human Rights shows increased willingness to establish a right of access to information.[4] General Comment No. 34, Article 19: Freedoms of Opinion and Expression (2011), adopted by the UN Human Rights Committee, speaks of "the right of access to information."[5] These developments are further

[4] *E.g.*, Claude-Reyes v. Chile, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 151, para. 174 (Sept. 19, 2006), *at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf; Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, paras. 37–39 (Eur. Ct. H.R. Apr. 14, 2009), *at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171#{"itemid":["001-92171"]}.

[5] Human Rights Comm., General Comment No. 34, Art. 19: Freedoms of Opinion and Expression, para.

discussed in the chapter on human rights by Jonathan Klaaren as well as in the conclusion by Peters. A difficulty remains, however, that the human rights conventions are only directly applicable to states, not to international organizations and other international bodies. The application of these conventions to private actors, such as corporations, faces even more obstacles. So far, corporate social responsibility has been regulated by soft-law instruments, rather than international hard-law obligations.

This book confirms that the idea of transparency is powerful. It is connected to fundamental values, such as democracy and the rule of law. It is also instrumental in promoting good governance. Transparency has led to profound changes in national legislation, and it is now transforming international law and institutions. But, as noted, the book also demonstrates that the concept is difficult to define and that its legal status is somewhat obscure.

The strength of the idea of transparency leads to a presumption that information and decision making should be transparent, unless compelling arguments justify confidentiality. Such an approach may promote the legitimacy of the international exercise of power and may be a necessary element of international accountability. But, as certain contexts have suggested, too much transparency may prove counterproductive. It may hamper effective decision making, lead to evasion of the use of formal international organs, or cause withdrawal by important actors. Transparency may also have unintended effects in empowering already strong actors at the expense of weaker actors, including developing states. Furthermore, there may be clear limits on how much states and international institutions will allow more transparency. There are also limits on how much we know about the effects of existing and possible new transparency measures. This uncertainty calls for a pragmatic and cautious approach to how much and which forms of transparency should be desired in different contexts.

Unlike many edited books, which may vary both in focus and in the quality of the different contributions, this volume showcases highly qualified authors throughout its pages. The introduction and conclusions by Bianchi and Peters encapsulate and expand the thoughts expressed in the substantive chapters. The book contains some repetitions and lack of conformity in the understanding of fundamental concepts, including transparency. But they should be considered a strength, rather than a weakness, since they reflect different approaches to the study of transparency in international law. The editors have given us new and important insights in the value and function of transparency in international legal cooperation. All in all, they have succeeded in placing transparency on the agenda for international law research.

GEIR ULFSTEIN
Faculty of Law, University of Oslo

19, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011) ("To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.").