

Turning Mirrors into Windows? Reflections on Transparency in International Law

Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law*. Cambridge: Cambridge University Press, 2013. Pp. 620 + xx. £90. ISBN: 978-1-107-02138-9.

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1 Introduction

Transparency is a term that is very much en vogue these days, being frequently invoked in contemporary debates on global governance. For example, *Transparency International*, a non-governmental organisation, is even named after the concept. Closer to legal practice in areas of relevance for readers of this Journal, UNCITRAL has released its *Rules on Transparency in Treaty-based Investor-State Arbitration*, which came into effect on 1 April 2014.¹ Yet there remains confusion as to the scope and meaning of the term transparency, perhaps due to a general problem of definition: to give but one example, the very website of Transparency International is dedicated almost exclusively to the ‘fight against corruption’, which it proclaims as its mission. In this respect, Andrea Bianchi and Anne Peters’ ambitious edited collection, *Transparency in International Law*, represents a very impressive effort to train the international legal lens on a concept that has heretofore received little scrutiny in the field.² The editors have done so with a full understanding of the difficulties inherent in this endeavour. Bianchi’s introduction acknowledges from the outset that, strictly speaking, transparency is not a fully legal standard; instead, it “epitomizes the prevailing *mores* in our society and becomes a standard of (political, moral and, occasionally, legal) judgement of people’s conduct” (p. 2). He

1 United Nations, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (United Nations Publications 2014).

2 The recent *Max-Planck Encyclopedia of Public International Law* (OUP 2012) does not contain a separate entry for the term.

invokes the colourful metaphor from which the title of this piece is drawn regarding visual transparency in relation to windows and mirrors. Peters' conclusion demonstrates a similar ambivalence about the 'transparency turn'³ in international law: transparency is at best a "culture, condition, scheme or structure in which relevant information ... is available" (p. 534).

It seems therefore courageous to embark on a project to engage a group of international legal scholars with the challenge of applying legal logic to the amorphous concept embodied in transparency. The editors have done so with aplomb, presenting a book with a straightforwardly clear structure, which gathers a collection of scholars who engage with transparency in international law in a number of different ways. Andrea Bianchi's introductory chapter, as mentioned above, leads with an overview of some of the challenges relating to the concept of transparency within international law. For readers of this Journal, the most relevant Part focuses on international economic law, for which there are five chapters in all, relating to: the international financial institutions (Luis Miguel Hinojosa Martínez), the World Trade Organisation (Panagiotis Delimatsis), international investment law (Julie Maupin), exchange of information in international taxation (Carlo Garbarino and Sebastiano Garufi), and the protection of intellectual property (Thomas Cottier and Michelangelo Temmerman). The book's scope is not limited merely to international economic law, however, with substantive parts on international environmental law (Jutta Brunnée and Ellen Hey, Jonas Ebbesson), international human rights law (Jonathan Klaaren, Cosette Creamer and Beth A. Simmons), global health law (Emily Bruemmer and Allyn Taylor), international humanitarian law (Steven Ratner, Orna Ben-Naftali and Roy Peled), and international peace and security (Antonios Tzanakopoulos, Mirko Sossai). The collection concludes with a series of 'cross-cutting issues', with contributions on international law-making (Alan Boyle and Kasey McCall-Smith), adjudication (Thore Neumann and Bruno Simma), business in international law (Larry Catá Backer), and global governance (Megan Donaldson and Benedict Kingsbury), before concluding with a lengthy piece by Anne Peters, which seeks to synthesise the whole. Of particular interest for readers will be Catá Backer's critical piece on international business, which engages in a robust critique of transparency as a technique; this point will be elaborated on later in this essay.

Given the breadth and scope of the chapters presented, a number of themes that are raised by the concept of transparency are drawn out, demonstrating its capacity to influence legal debate. The various authors consider the nature

3 Peters borrows the term from Aarti Gupta, 'Transparency under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8 *Global Environmental Politics* 1, 6.

and scope of transparency as a possible legal norm, seeking to pin down, *inter alia*, the obligees and beneficiaries of various transparency obligations; the objects of transparency (e.g., institutions, procedures, meetings, documents); the objectives of transparency; operational questions such as timing, enforceability, and sanctionability; and the scope and nature of exceptions to any putative ‘obligation of transparency’. With respect to its addressees, the authors vary in their focus, with some (e.g., Brunnée and Hey, Ebbesson, Gabarini and Garuf, Creamer and Simmons, Ben-Naftali and Peled, and Sossai) suggesting an obligation on transparency incumbent on States; others (Hinojosa Martínez, Delimatsis, Bruemmer and Taylor, Tzanakopoulos, Neumann and Simma, Donaldson and Kingsbury, Peters) demanding it from international organisations of different kinds; and a few (Ratner, Catá Backer) suggest it is incumbent on non-State or individual actors. That variegated focus on addressees suggests a loose, indeterminate obligation that may be highly-context specific, a point that will be further developed later.

This review essay cannot resolve the question of what is the nature of transparency as a norm within the international legal order. However, using as a springboard the wealth of research that is collected in *Transparency in International Law*, I hope to offer some modest reflections as to the specifically legal nature of transparency, and the manner in which it has and might be made operative within international law. What is more, the debate on the binding nature of transparency raises interesting questions as to the ‘darker sides’ of the legalisation debates that are current in international legal scholarship. It was wise for Andrea Bianchi to highlight these in the book’s introduction; the tone set out from the beginning has been one of caution and modesty, rather than the robust and dogmatic defence of a norm “universally perceived as a positive value” (p. 2).

2 The Nature of Transparency as a Legal ‘Norm’

A central question raised by most of the contributors to the volume relates to the legal quality of transparency: within international law, what is the nature of the concept? From the outset, the editors of the collection seem themselves to be ambivalent; they are frank in admitting the difficulties in even defining the term for the purpose of a project (p. 8) named after the term, not least due to the difficulties in identifying the precise content of the principle. As Simma and Neumann note in their chapter on transparency in international adjudication, “there is remarkably little identifiable international law underpinning this rather significant constitutional development. It is easy enough to justify

the principle that law-making should be transparent and to justify it. It is far harder to translate this conclusion into something an international lawyer can work with. This is, by itself, a remarkable and quite sobering conclusion” (p. 435). As such, one can understand why the editors decided ultimately to allow individual contributors to come to their own specific definitions in relation to their chapters: Bianchi and Peters “wanted this collection of essays to reflect different understandings of transparency across the disciplinary board” (p. 8).

That lack of centralisation has led to a number of different approaches used so as to accommodate transparency within the pantheon of generally accepted sources of international law. Brunnée and Hey embed transparency in treaty law, as does Peters (pp. 583–584); to their mind, the obligations themselves are sufficiently expressed in treaty obligations to disclose, notify, and grant access to information that an ‘obligation of transparency’ would be constituted under these rules. Indeed, there are a number of examples of such treaties and guidelines invoked by the contributors to the volume, for example, in international environmental law treaties (Brunnée and Hey, pp. 30 *et seq.*), disarmament treaties (Sossai, p. 394), and OECD and UN guidelines on the participation of corporate actors in international transactions (Catá Backer, pp. 483–5).

But can one say that a political standard of transparency has crystallised into a specifically *legal* international rule? As Boyle and McCall-Smith have pointed out, “[i]t is relatively easy to discuss this topic in terms that a political philosopher might begin to recognize. It is much harder to discuss it in terms familiar to an international lawyer” (p. 430). Throughout the edited collection, the contributors demonstrate a considerable degree of ambivalence as to whether transparency practices have crystallised into a hard norm of customary law (see, e.g., Peters, p. 568, Tzanakopoulos, pp. 381–2; Maupin, p. 171). Even if one uses the relatively elastic test for customary international law employed by Peters, “for determining whether this practice is conceived as legally mandated is to entertain whether a rollback is conceivable; if not, then an *opinio juris* might be deemed to exist” (p. 584), transparency may very well fail for vagueness, as Peters herself concedes (Peters, p. 585). Indeed, questions remain: what is the nature, scope and extent of any obligation of transparency? To whom are obligees accountable, and under what circumstances? What sort of breach can trigger a sanction as an accountability mechanism, and what sort of sanction would that be? Who may determine that a breach has occurred, and what remedies are available to an injured party? For international lawyers to neglect to seek the answers to these questions opens a space for actors to contest the very terms of accountability itself (Peters, p. 568); in

due course, it threatens to diminish the value of transparency as a meaningful concept in international law.

Despite these concerns, the push to embed transparency as a legal norm continues. Elsewhere, for example within the specialised regimes of international environmental law⁴ and international economic law,⁵ transparency has been argued to have already emerged as a 'general principle of law'. Devika Hovell has even gone so far as to argue that there is in fact a general principle of law across public international law embodied in a norm on transparency, which confers a general right of access to information held by those exercising public powers and in relation to the exercise of those public powers.⁶ Such a claim has not gone uncontested: for example, even if transparency, as embodied in a right of access to information, is relatively widespread in domestic legal systems (as canvassed, for example, in Creamer and Simmons' chapter on national human rights institutes, pp. 245 *et seq.*), it does not automatically follow that the principle may simply be transposed into international law. Whatever the extent to which transparency laws proliferate around the world, there are important structural and substantive elements that need to be met in order to transpose the domestic law principle of transparency onto the international law plane.⁷ Both Peters (p. 585) and Bianchi (pp. 5–6) expressed considerable ambivalence as to whether the conditions required to make operative the principle of transparency have been met on the international plane.

What is more, as Tzanakopoulos points out (p. 380), this is not least due to the lack of comparable international judicial institutions or other effective supervisory bodies that function similarly to domestic supervisory institutions. Peters does raise a number of valid points in response to this claim.

4 Makane M. Mbengue and Mara Tignino, 'Public Participation and *Amicus Curiae* in Water Disputes' in E. Brown Weiss et al. (eds.), *Fresh Water and International Economic Law* (OUP 2009) 367–405.

5 Carl-Sebastian Zoellner, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law' (2006) 27 *Michigan J. Int'l L.* 579–628.

6 Devika Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions' in Jeremy Farral and Kim Rubenstein (eds.), *Sanctions Accountability and Governance in a Globalized World* (CUP 2009) 92, 97. But *cf.* Boyle and McCall-Smith, in the volume under review, p. 430; and Tzanakopoulos, in the volume under review, p. 380.

7 The test of transposition is drawn from *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (New Application: 1962), ICJ Reports 1970, Separate Opinion of Judge Sir Gerald Fitzmaurice 64, 66 (para. 5); and Alain Pellet, 'Article 38' in Andreas Zimmerman et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd ed., OUP 2012) MN 267.

Domestic freedom of information regimes do not necessarily provide for full-fledged external judicial review but only establish agency-internal oversight mechanisms (p. 545). Also, if the human right to information can be reasonably applied to international organisations, one structural difference between domestic and international law would be minimised. Moreover, practice suggests that a great many national legal systems have been prepared to acknowledge transparency without any constitutional primary norm requiring them to do so. Yet Peters herself concedes that international law lacks a foundation in democratic procedures, any system of checks and balances, or, finally, any separation of powers, which would have provided for a degree of disclosure of government information within a domestic legal order (p. 546). Granted, these separations are being challenged within domestic legal orders, with respect to the prerogative of the executive vis-à-vis foreign policy decisions at least (Peters, p. 547). But it may be a step too far to argue, as she does, that the “rootedness and refinement of transparency-based compliance mechanisms facilitate the operation of an international transparency norm” (p. 547).

The debate on how the concept of transparency should be fitted within the traditional taxonomy of sources of international law obscures the more interesting point that, whilst the principle may not have gained the status of hard law itself, it is far from irrelevant. It is true that, for a principle such as transparency to be legally operative, certain structural preconditions must be met: the principle must be sufficiently precise to generate an obligation, for example, and its addressees (both obligor and obligee) should be sufficiently clearly identified (Peters, p. 585). And yet perhaps ‘legally operative’ is too high a threshold: as Bianchi notes, a ‘normative transparency principle’, in the sense of a “connector between the law and changing social realities” (Bianchi, p. 7), can be discerned whatever its formal quality.

Certainly, the contributors to the volume have been creative in seeking to elucidate the contours of transparency in international law in this respect. Neumann and Simma talk of a ‘considerable *acquis* of hard-law obligations’ and the ‘normative skeleton’ of an overarching transparency principle, undetermined and context-specific, which seems to emerge from the practice of international judicial institutions (p. 476), although the ambit of such a principle is not necessarily laid out. Donaldson and Kingsbury arrive at a similar conclusion, situating transparency as some form of general principle or transcendent, revived *jus gentium*: “internal policies and practice likely have at least the potential to give rise to a tissue of legal, or legally significant, norms, at some future point” (p. 518).

Bianchi takes a more restrained position, and is content with the idea of ‘transparency as concept’, which breaks emphatically from the traditional

categories of legal sources: transparency can be a ‘normative prescription’ (p. 7), a form of ‘meta-legal’ principle⁸ or what Vaughan Lowe has called ‘interstitial norms’,⁹ that can serve to direct normative processes and the interpretation of legal prescriptions. More cautiously, but in a similar vein, Antonios Tzanakopoulos puts forward the claim that transparency is no primary obligation, but an ‘ancillary obligation’ incumbent upon the Security Council. He roots this ancillary obligation in the residual right of States to control the legality of Council action,¹⁰ as in order to exercise such a right, States “must also have the concomitant (ancillary) right to demand sufficient information on which to reach a conclusion” (pp. 385). Lowe’s concept of interstitial norms is also relevant for Tzanakopoulos’ attempt to situate the concept of transparency: because it is a norm with no independent normative charge of its own, transparency “cannot be seen as prescribing or permitting or prohibiting any specific action; we do not know how much of it is good; it is context-dependent ... it is when transparency operates as a norm that is ancillary to the operation of other norms, in order to regulate or harmonize their relationship, that it becomes meaningful” (p. 385).

Another creative attempt to reconcile transparency in international law is found in Neumann and Simma’s concept of ‘meta-transparency rules’, rules that recognise, from a systemic perspective, the responsibility of international courts and tribunals, and perhaps other international actors, to give reasons and conditions for secrecy, and otherwise informing about transparency mechanisms (p. 474). To Neumann and Simma, these meta-transparency rules are inherently dependent rules, rooted either in primary norms on transparency, or justifications for a lack of transparency (pp. 472–3); but they constitute a ‘pivotal functional aspect’ of transparency as well as a “core value of publicly responsible and responsive courts in modern information societies” (pp. 473–474). Such meta-transparency rules also serve to shift the burden of initiative: the decision-making institution becomes proactive in disseminating information and granting access, or in giving reasons for withholding such information or access (p. 475; and later, Peters, p. 548), although this is not an absolute rule, as in some circumstances that ‘burden of initiative’ should rightly fall upon observers.

8 Roberto Ago, *Lezioni di diritto internazionale* (Giuffrè 1943) 65.

9 Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 207–226.

10 For which Tzanakopoulos has argued elsewhere: see Antonios Tzanakopoulos, *Disobeying the Security Council* (OUP 2011) 54–84.

3 The Instrumentalisation of Transparency

3.1 *Transparency in the Service of Substantive Values*

Whether an ancillary obligation, a meta-transparency rule, or a connector, the abundant practice canvassed by the various contributors to the volume demonstrates its normative value for a number of actors in their engagement with international law. The question then arises as to what precisely is achieved when the principle of transparency is upheld or applied. A dominant *leitmotiv* of the book is to suggest that the promotion of transparency through certain procedures is very much in the service of other values, for example cooperation, institutionalisation and legalisation (see, e.g., Delimatsis, p. 139), legitimacy,¹¹ legality and good governance (see, e.g., Brunnée and Hey, pp. 47–48; Ebbesson, pp. 51–2; Bruemmer and Taylor, pp. 284–5), or effectiveness¹² and trust between relevant actors who have already agreed to certain obligations in treaty form (Ebbesson, p. 49; Catá Backer, pp. 483–5). Boyle and McCall-Smith (p. 420) link transparency to making international institutions responsive to wider constituencies, irrespective of their oft-undemocratic decision-making processes. Donaldson and Kingsbury go further, and claim that transparency plays an inherent role in decision-making and governance itself (p. 509).

Similar reasoning pertains to particularised substantive values. With respect to the WHO, Bruemmer and Taylor suggest that the success of procedural reporting mechanisms provides a useful transparency framework in the pursuit of improving global health standards (p. 272). The essentially context-dependent conception of transparency developed by most of the contributors confirms the embeddedness of transparency within institutions and procedures, an important point that emerges across the legal regimes covered in this edited volume. In this respect, transparency transcends being merely a technique, but equally demonstrates how it operates in service of other normative objectives, with important consequences: “to decide with respect to human or institutional conduct what and how to reveal, to monitor it, and to determine the parameters of that exercise, is effectively to guide that conduct” (Catá Backer, p. 500). The next sections will cover how transparency alternatively

11 A ‘daunting term’ for the positivist lawyer: Tzanakopoulos, p. 375. *But see generally* Thomas Franck, *The Power of Legitimacy among Nations* (OUP 1990) 19, 24: legitimacy is the property of a rule that derives from the general perception on the part of those affected by it that it has come into being and operates in accordance with the ‘right process’, thereby exerting on them a pull towards compliance.

12 See, e.g., Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007) 40.

serves to channel and safeguard certain values, or acts as a disruptive agent, challenging existing frameworks.

3.2 *Transparency and Access to Information*

Certainly, transparency has emancipatory potential, and can act as what Peters calls a ‘power-shifter’, challenging the mix of political power and secrecy (pp. 554–55) that leads to the abuse of power: “[t]ransparency empowers outsiders because it equips them with information and thereby creates a precondition for holding power-holders to account” (p. 555; see also Tzanakopoulos, p. 391). Because transparency remains bound up with the circulation of information and with the political and power dimensions of knowledge (Donaldson and Kingsbury, p. 522), the link between transparency and the right to access to information is thus easily justified. If nothing else, it serves to alleviate the ‘information asymmetry’ between those who hold information and those who seek to access it (Peters, p. 567). One sees that relation in Creamer and Simmons’ piece on national human rights institutions (‘NHRIs’), which links the right of access to information even more firmly to substantive values. The important monitoring function of NHRIs helps to consolidate transparency as a mechanism for the protection of human rights (p. 243), and even democratic consolidation, development and good governance generally (p. 244). The same point is made by Klaaren (p. 226; see also Peters, pp. 586 *et seq.*), who situates the human right to information as a ‘vehicle’ (p. 234) for the operationalisation of transparency in international law, to be linked with the various forms in which it is justified both on the international and the domestic planes. On the international plane, such a right to access to information held by the State seems confirmed in case law¹³ and other supervisory instruments.¹⁴

In a similar vein, access to information can also serve as a means to secure wider legitimacy. To consider the example used by Julie Maupin, within the decentralised international investment system, transparency questions do not centre on procedural issues of access. Rather, transparency serves as a device through which to challenge practices that are so diverse that they unwittingly

13 IACtHR, *Claude-Reyes and Others v. Chile*, Judgment of 19 September 2006 (Merits, Reparations and Costs), Series C No. 151, para 77; ECtHR, *Társaság a Szabadságjogokért v. Hungary*, Judgment, 14 April 2009, Application No. 37374/05, para 36.

14 See, e.g., the Report of the Special Rapporteur of the African Commission of Human and Peoples’ Rights on Freedom of Expression and Access to Information in Africa, ‘Resolution 122: Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa’, 28 November 2007 <www.achpr.org> (1 August 2014).

contribute to a lack of transparency, such as inconsistency in the publication of awards (Maupin, p. 161), the participation of arbitral secretariats in the internal deliberations of panels (p. 165), or even the amassing of specialised experience within certain firms that is not divulged publicly (pp. 165–66). In this respect, rather than a question of resisting power, transparency can also serve as a pragmatic acknowledgment that information is obscured to the public due to secrecy and confidentiality, and requires systematisation so as to be comprehensible (pp. 157–8). Transparency then helps to expose the inner workings of the system to the public, and Maupin suggests an important role for legal scholarship, in the absence of formal systematisation, in helping to illuminate practice and to systematise its effects. After the publication of this book, for example, the adoption of the UNCITRAL Rules on Transparency in Investor-State Arbitration, coming into effect on 1 April 2014, served to implement many of these concerns into a set of unified guidelines. UNCITRAL Rules contain provisions on: the exercise of discretion by an arbitral tribunal operating under these rules; an obligation to take into account the public interest in transparency;¹⁵ obligations of publication of documents at different stages in arbitral proceedings;¹⁶ and the obligation to conduct oral proceedings in public.¹⁷ The European Union's recent public consultation on modalities of investment protection and investor-to-State dispute settlement (ISDS) relating to the Transatlantic Trade and Investment Partnership (TTIP) also made explicit reference to these new UNCITRAL Rules.¹⁸

3.3 *Transparency in Procedure*

In the service of values, in particular access to information, transparency seems an important benchmark against which to measure procedures and processes in a number of areas of international governance. Transparency is again operationalised in a functionalist manner: with respect to promoting participation of States, intergovernmental organisations and even non-State actors, which are increasingly being granted 'observer status' in decision-making processes (Boyle and McCall-Smith, pp. 422 *et seq.*). Such transparency

15 UNCITRAL Rules, *supra* note 1, Art. 1(4)(a).

16 *Ibid.*, Art 3. This obligation is triggered at the commencement of proceedings (Art 2), and extends to a wide range of documents, but is not absolute: Art 7.2 provides for a number of exceptions where confidential or protected information need not be disclosed to the public.

17 *Ibid.*, Art. 6.1.

18 See available documents at <trade.ec.europa.eu/consultations/index.cfm?consul_id=179> (14 July 2014).

manifests itself with respect to deliberative or law-creative processes, some of which (e.g., multilateral treaty negotiations) are designed with an outward-facing component. Such outward-facing processes include the deliberative records of the decisions of international organisations or *travaux préparatoires* behind treaties, information relating to the fulfilment of treaty obligations, or with respect to non-participants being granted access to information (pp. 431 *et seq.*).

In international environmental governance, Brunnée and Hey emphasise the inter-relation between the transparency *of* governance (exposing decision-making processes to outside bodies) and transparency *for* governance (the use of transparency mechanisms as policy instruments) (p. 25). Rooting the justifications for transparency in an interactional account of international law,¹⁹ according to which the legality of international norms is rooted in shared understandings and a Fuller-ite account of legality, Brunnée and Hey outline a survey of the available mechanisms in international environmental institutions and the challenges they face. For them, the very effectiveness of international environmental regulation is rooted in the exchange of information, cooperative practices, and reporting mechanisms, all of which reflect transparency *for* governance. Transparency is proceduralised, the upholding of the principle being in the service of the effectiveness of the international environmental regime. The key concern raised is to control discretion: without fixed deliberative processes or rules for the exchange of information, transparency remains abstract. Jonas Ebbesson defines it in a similar sense in relation to disclosure of information, data, and decision-making procedures (p. 52). The concomitant obligation to disclosure is that of information-gathering: it is a requirement to consolidate or to hold information (p. 60); of consultation (pp. 61–2) of the wider public throughout all stages of a decision-making process; and of access to justice (pp. 63–4), through which to challenge decisions, acts and omissions. Again, transparency is proceduralised, its instrumentalisation in the pursuit of legality laid bare (p. 73).

The concept of transparency seems to take on a different colour in international economic law, being linked primarily to a commitment to rationality: “a transparent institution will receive more inputs from interested stakeholders and will be *naturally inclined* to more reasoned decision-making” (Hinojosa Martínez, p. 77). That commitment to rationality emerges particularly strongly in the international financial institutions surveyed by Hinojosa Martínez. For the World Bank, a body dedicated to international development, such

19 As was developed in Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).

transparency would enable local communities to adapt their projects to the conditions of the field. Rather than a means to control politics, transparency seems to accept the influence of politics in decision-making (p. 78), instead demanding that there be no usurping by technocrats of legitimate decision-making processes. Hinojosa Martínez distinguishes between documentary transparency, decision-making transparency and operational transparency (p. 80), describing how the IMF and the World Bank fall short on many of those fronts (pp. 92–3, 103–4), as do less-formalised mechanisms (the G-20, the FSB).

At the WTO, that element of political transparency (in its decision-making processes) seems also to be reinforced: the ill-reputed ‘Green Room’ tactics of pre-agreement practiced earlier amongst developed States seem to be waning in favour of a more participatory structure (Delimatsis, p. 117). As with international environmental regulation, transparency is placed in the service of achieving greater legalisation, this time in the form of institutionalisation—more procedures, more law, more norms—rather than in the effectiveness of governance. Again, discretion is to be confined and reduced.

With respect to disarmament regimes, as addressed by Mirko Sossai, transparency again plays a different role. Given the confidence-building aspects of disarmament treaties and the obligations to notify, to consult, or to make declarations that are specified in the various disarmament and arms control treaties, transparency manifests itself through the obligations to produce and to disclose information. Various mechanisms have been set in place to verify the exactitude of these claims, in particular with respect to nuclear, biological and chemical weapons: such verification measures are in many respects the operationalisation of transparency (Sossai, p. 394). These aim not only to build confidence between State parties but also to encourage democratic oversight and public scrutiny (Peters, p. 572). Again, there seem to exist two measures through which to assess transparency in relation to disarmament: the availability of information or data in registers (Sossai, pp. 395–400), and the transparency of the process of verification, or through which interests are safeguarded (pp. 401–404), broadly mirroring other regulatory regimes such as environmental or economic law.

3.4 *Transparency and the ‘Deliberation Exception’*

One area of procedure in which transparency necessarily must be confined is in relation to third-party dispute settlement, which Peters calls the ‘deliberation exception’ (p. 576). In this context, the guiding principle of transparency comes into conflict with other important principles with which it must be balanced, both within a judicial proceeding but also beyond the parties to a given

dispute. These include the principle of impartiality, which in turn requires upholding an appropriate vision of due process, the rights and interests of the parties, and the secrecy of deliberations (Delimatsis, pp. 128–9; Neumann and Simma, p. 472).

When mapping the transparency rules of various international courts and tribunals (the ICJ, the WTO, the ECtHR, the ICTY, and the ITLOS), Neumann and Simma identify the heterogeneous practices of these institutions with respect to the access of the public to the submissions of parties, the conduct of oral proceedings, and the dissemination of the decisions of these institutions. Broadly speaking, transparency of procedure could be said to exist so far as to allow actors other than the parties access into the internal functioning of the institution, presumably in the name of legal certainty and predictability, but equally to safeguard the legitimacy of the institution and burnish its reputation for impartiality (p. 472). Transparency is not absolute, however: a common institutional thread for these third-party dispute settlement organisations is the consistent protection of the secrecy of deliberations (pp. 457 *et seq.*). As Peters suggested, transparency in exposing deliberations might be problematic: it tempts participants to posturing and rigidity, rather than genuinely negotiating and deliberating amongst themselves; it denies deliberators the freedom to take controversial views or to change their minds, consider alternatives, and weigh consequences (Peters, p. 577). What is more, it opens judges, arbitrators, and other dispute settlers to control by other actors, in particular with respect to States who could, by monitoring the discursive behaviour of individual judges, seek to influence them (Neumann and Simma, p. 457); this is so even with the WTO dispute-settlement system that may be the most important, and certainly is one of the only, compulsory adjudicatory systems linked with a particular substantive regime in international law. The values safeguarded by the confidentiality of deliberations, therefore, must be carefully balanced with the social benefits of public deliberation and negotiation that a robust application of transparency would entail.

4 Transparency and Security Concerns

A few pieces in this edited collection squarely challenge the notion that transparency, if understood purely as access to information or to knowledge about decision-making processes, is to be understood as an unqualified good. The essay by Ben-Naftali and Peled relating to the national security discourse frequently invoked by States to justify secretive practices (pp. 332 *et seq.*), for example, seeks to decouple the link made in situations of war between

transparency and risk (p. 361), and aims to narrow the scope of secrecy claimed by States and other actors in situations of war. But rather than to offer a framework to point to a way forward, the piece seeks primarily to highlight the need for a robust debate (p. 362).

Another illustration of the problems associated with blanket applications of transparency may be illustrated by assessing the practice of the Security Council. To suggest that the Security Council might possibly serve as a guardian ensuring compliance with international law would be implausible: that body is by design a forum for negotiation, and expressly designed to be opaque in many respects (Tzanakopoulos, p. 367). Nothing in the Charter, save the obligation under Article 24 (3) of the Charter to submit reports to the General Assembly, mandates either the United Nations or the Security Council to act transparently (p. 381). Only Rule 48 of its Provisional Rules demands that the Council meet in public; and this is in fact undermined by the fact that most of its substantive decisions are made through informal working methods not provided for in its Provisional Rules of Procedure (p. 372). Such practices may be due to the traditional exigencies of international diplomacy, certainly, but may equally relate to the sensitive and delicate task of carrying out negotiations in relation to the Council's mandate of maintaining international peace and security. Despite efforts to bring forth greater transparency in the work of the Council, in particular the 2012 draft resolution on Security Council reform sponsored by Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland (the 'S5' States),²⁰ or the work of the 'Accountability, Coherence and Transparency Group' of States,²¹ no concrete measures have yet been adopted.

Finally, transparency may simply be outweighed by other overriding considerations. Steven Ratner's piece on the International Committee of the Red Cross ('Red Cross') exposes two 'secret sides' of the Red Cross' work that

20 'Improving the Working Methods of the Security Council', UN Doc A/66/L.42/Rev.2 (4 April 2012), which made a number of proposals that would have requested the Council to make a number of changes to its working methods so as to improve transparency. The 'Small Five' withdrew the resolution on 4 June 2012 when faced with resistance from the veto-wielding members of the Council: see UN Press Release GA/11234 (GAOR 66/108 (16 May 2012) <www.un.org/News/Press/docs/2012/ga11234.doc.htm> (1 August 2014).

21 A group 'actively working on reforming the working methods of the current (not expanded) Security Council:' Austria, Chile, Costa Rica, Estonia, Finland, Gabon, Hungary, Ireland, Jordan, Liechtenstein, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Saudi Arabia, Slovenia, Sweden, Switzerland, Tanzania (obs) and Uruguay. For further information, see the Report from *Security Council Report* (25 March 2014), available online at <www.securitycouncilreport.org/special-research-report/security-council-working-methods-a-tale-of-two-councils.php> (1 August 2014).

permeate its history, and yet require a measure of secrecy for their continued success. First comes the Red Cross' private promotional work, as opposed to the 'humanitarian diplomacy' in which it engages in multilateral fora (p. 300), and for which it is best known. Through this quiet engagement with States and other actors, the Red Cross seeks to disseminate expertise and to lobby decision-makers so as better to comply with international humanitarian law, which is consonant with its mission to serve as the 'promoter and guardian' of that legal regime.²² Secondly, the Red Cross communicates privately with parties to an armed conflict, aiming to collect relevant information, report to authorities as to relevant events, and address violations.²³ As 'corrosive' as such practices may be to a mechanical respect for transparency (p. 303), the desire for confidentiality stems in part from its overriding need to maintain its reputation of impartiality, so as to enjoy continued access to conflicts and to maintain open dialogue with parties. The Red Cross takes great risks obliging parties to armed conflict to engage in meaningful dialogue with it, and there is a risk that lifting such secrecy would compromise its ability to communicate effectively with parties, given the sensitivity of dealing with State and non-State actors when the same are in a situation of armed conflict. This view has proven compelling in practice: at the ICTY, the Red Cross has argued successfully for the confidentiality of its communications with parties, as well as to secure immunity from requirements to testify before the Tribunal.²⁴ The Red Cross' secrecy seems to stem, as such, from the secrecy inherent in the conduct of armed conflicts themselves (see Ben-Naftali and Peled, p. 321).

22 International Committee of the Red Cross, 'What is the ICRC's Role in Ensuring Respect for Humanitarian Law?' (1 January 2004) <icrc.org> (1 August 2014). That privileged position has long been recognised by States, as the four Geneva Conventions (and the Additional Protocols appended thereto) contain rules that, *inter alia*, recognise the Red Cross' right to provide humanitarian assistance (see, e.g., Article 9 of the First Geneva Convention, Article 125 of the Third Geneva Convention, Article 59 of the Fourth Geneva Convention, and Article 18 of the Second Additional Protocol), and proscribe as a war crime the misuse of the Red Cross' emblems (the red cross, red crescent, red crystal and red Shield of David) (Article 85 of the First Additional Protocol, and Article 2 of the Third Additional Protocol).

23 There is a published doctrine detailing the Red Cross' steps in intervening with parties to an armed conflict: see ICRC, 'Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence' (2005) 87 *Int'l Rev Red Cross* 393.

24 ICTY, *Prosecutor v Simić et al.: Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness*, Decision, 27 July 1999, Case No. IT-95-9.

More problematic has been the practice of the Red Cross to keep confidential the legal interpretations of IHL that it has communicated to governments: this practice seems quite at odds with its claimed guardianship function with respect to that legal regime (p. 305), and raises the question as to whether opacity in communications with parties is taken for granted, or undermines the effectiveness of the Red Cross' recommendations to parties which may disregard these. Much like the confidentiality of judicial proceedings discussed earlier (the 'deliberation exception', above), the effectiveness of the Red Cross' confidential interventions is extremely difficult to assess, as any such exercise would require either a measure of disclosure unacceptable to the Red Cross, or a measure of conjecture that makes any such analysis ill-informed. Moreover, although it is true that the general public remains deprived of the Red Cross' views on any number of legal and factual questions, Ratner makes a compelling point that the Red Cross' overriding focus on facilitating compliance with law has to be presumed sufficient justification for its intransparent practices (p. 315):²⁵ "contrary to the assumptions or findings of other chapters in this volume ... transparency by an institution that promotes compliance with international law as to its legal and factual conclusions and its inner operations is not necessary for compliance or the rule of law generally" (p. 316). The important point remains that the Red Cross sees itself as accountable to victims, where there is no inherent tension between secrecy as a *modus operandi* and accountability, and the access gained by the Red Cross might be due to its general practice of secrecy: "its hesitancy to criticize a government publicly or dictate the law to it too directly may indeed be the price for the access and the resulting humanitarian benefits" (p. 319).

5 The Intrinsic Value of Transparency: Democracy and Participation in Global Governance

Taking the contributions to this collection as a whole, it is evident that systematising them and arriving at any assessment about the value of transparency remains problematic. Should transparency be viewed as a global public good, given its status as a "global value or objective" (Peters, pp. 542–543)? It is true that transparency serves as the cornerstone in supporting the performance and accountability of governance, and is equally bound up with values such as democracy, rule of law, integrity and trust; accordingly, "the commitment to

²⁵ Ratner, in this respect, draws from Joseph Raz, *Practical Reasons and Norms* (OUP 1990) 178–82.

transparency manifests normative convictions, and voluntary transparency sends a political signal about these" (p. 558). But Peters goes further: for her, transparency *reconfigures* the reality of global governance; it is a 'necessary' substitute in so far as it "replaces the unattainable certitude and conviction about the 'right' international law and policy through a procedural device allowing everyone to form their own opinion on matters of global governance" (pp. 570–571). This statement, above all, belies the faith in *legalisation* that is embedded within the notion of transparency.

Donaldson and Kingsbury situate the development of transparency as a norm in global governance as part of Kingsbury's wider project of identifying a new 'global administrative law' (p. 504). In this respect, such norms reflect a broader pattern through which global governance is made subject to procedural norms reflecting basic principles of administrative law as it exists within States.²⁶ Theirs is an essentially interactional account of how transparency can affect relations between States, entities within States, global governance actors, and non-State actors, and goes so far as to suggest that changes in laws and policies with respect to access to information have the potential to shape and change how global governance institutions perceive their role and function—that the collection, transmission and dissemination of information is "one of their major global governance functions" (p. 531). To embark on such a policy would "[n]ot only reproduce central features of what has come to be an important aspect of public law within States, but ... imply a degree of responsiveness to a much larger and more diffuse public" (p. 531; see also Peters, pp. 537–538). That step would be to "embody a claim of political authority on behalf of existing institutions" that could be challenged in a manner reminiscent of domestic public law (p. 532).²⁷ It is an essentially systemic claim, the idea that the need for regulation on the global level leads to the thickening of institutions and norms.

Peters suggests, as she has done elsewhere,²⁸ that the phenomenon of globalisation has led to a 'globalisation-induced intransparency' that requires

26 Kingsbury has written about this elsewhere: *see generally* Benedict Kingsbury, Nico Krisch and Richard Stewart, 'Emergence of Global Administrative Law' (2005) 68 *L. Contemporary Problems* 15.

27 This argument has been made elsewhere; *see, e.g.*, Hovell, *supra* note 5, p. 113; Beate Rudolf, 'Is "Good Governance" a Norm of International Law?' in P.-M. Dupuy et al. (eds.), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (Engel Verlag 2006) 1007–1028; Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2005) 115 *Yale L.J.* 1490–1562, 1530–31.

28 Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden J. Int'l L.* 579.

‘compensatory transparency measures’ (p. 539, and pp. 540–542). To her, the mere exercise of political power by international organisations illuminates the need for transparency in order to ensure the legitimacy of that exercise of power, which would serve to explain the increased adoption of transparency measures by various international organisations as they came to exercise increased political power (Peters, p. 557). According to this argument, because transparency is inherent in decision-making and governance, it requires further legalisation in line with the increased intensity of global governance and its assumption of functions previously fulfilled by domestic actors (p. 541; see also Donaldson and Kingsbury, pp. 503–4). The link to democracy is elucidated further: ‘[t]ransparency is obviously a *condition sine qua non* for the *informed* consent of the governed’ (p. 563, emphasis in original), allowing the public to evaluate the rationality of measures and decisions, but protecting against over-reaching and encouraging public participation. This seems to work well in domestic law, but Peters stretches the analogy into international law, suggesting that it can alleviate the democratic deficit in international organisations as well as international law-making processes. She goes so far as to suggest that transparency is a constitutive element of a ‘new kind’ of global democracy (p. 564), in the service of greater accountability. How so? Peters situates it in theories of deliberation and reflexive democracy:²⁹ because officials and other actors must give reasons and disclose information that justifies their actions, the act of reason-giving or of deliberation shapes the objective and arguably serves to define the legitimacy of the policy, furnishing a sort of legitimacy-through-procedure. So goes this claim, transparency, like publicity, contributes to the desirability of the policy as such (p. 565). It might indeed explain why organisations suffering through legitimacy crises tend to reach for these, although as Peters cautions, “[t]ransparency in itself does not bring about democracy—it is solely a precondition for democratic procedures” (p. 566).

6 The Darker Sides of Transparency: Concluding Reflections

There is nothing new about a claim to elevate transparency as a component of a wider scheme of democratic governance. Peters goes so far as to suggest that transparency is transformative for international public law, making it more

²⁹ Specifically, those of Amy Gutmann and Dennis Thomson, *Democracy and Disagreement* (Harvard University Press 1996) ch. 3, ‘The Value of Publicity’. The present author has written elsewhere about the judicial act of giving reasons for its judgments, see Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) ch. 4.

like public law than its private law origins (p. 601): “transparency is both the driver and the manifestation of a paradigm shift to ‘public’ international law” (p. 602).

Yet, for all this, there remain serious questions as to how this can be accommodated within international law, not least the subsisting concern as to the relevance of democracy as a norm of international law, wittingly dismissed as ‘flimsy as a philanderer’s promise’ by Bianchi in this very volume (p. 3). Indeed, as Larry Catá Backer argues, transparency can exist both as technique and norm, as the aggregate of methods of producing information for use in managing and policing power relationships (Catá Backer, p. 478). According to this view, which draws heavily from the work of Michel Foucault,³⁰ the concept of transparency is deployed internally to enhance operations and discipline members, and externally to enhance legitimacy (norm) and accountability (technique) among stakeholders who have an interest in but not a direct participation in the operation (p. 478).³¹ If taken seriously, these claims strongly undermine the normative value of transparency as a concept.

In this respect, this edited collection once again demonstrates the care and thought that have been given to the project, in the form of the caution and detachment expressed by its editors in their approach to the concept of transparency. Rather than a teleological approach, pre-committed to upholding transparency as an unqualified good, the editors do not shy away from a measured ambivalence, perhaps one even borne from having shepherded the project to completion. Bianchi challenges the ‘transparency as information’ meme head-on, and rejects the idea that information is a synonym for knowledge, especially when illegal means are used to achieve transparency (pp. 12–13). Such ambiguity is, in the final analysis, inherent in information itself: information “has no inherent value ... its value is highly dependent on context” (p. 15). In fact, he goes so far to suggest that transparency can even serve as ‘illusion’, where procedural rigour takes the place of actual substantive transparency (pp. 16–17), and may even serve to facilitate the entrenchment of power relations: “[t]hose who create and shape knowledge at all possible levels possess power. Availability of, and access to, information are part of the equation as knowledge is formed on the basis of information. Discursive strategies

30 Catá Backer draws expressly from Michel Foucault, “‘Society Must Be Defended’: Lectures at the Collège de France 1975–1976’ (D. Macey trans.) (St Martin’s Press 2003), 37 likening transparency to one of those “formal constituting structures of organization” that constitute the “tight grid of disciplinary coercions that actually guarantees the cohesion of that social body.”

31 Foucault, *supra* note 30, pp. 38–9.

elaborated by knowledge-wielding bodies are controlling. Transparency is part of such strategies for better or worse.” (p. 18). This concern about transparency as an illusion is further elaborated by Boyle & McCall (p. 478), who criticise transparency as a ‘veil’ or ‘disguise’ of the more important discussions of participation and accountability of institutional actors. That point is also taken up by Catá Backer, who suggests that transparency exists as a deflection that “produces incoherence of legal norms and subjects the concept-symptom of transparency to its own indeterminacy and ultimately to incoherence even as symptom” (Catá Backer, p. 479).

That concern about transparency in power relations is even shared by Peters, who elsewhere in her piece defends robustly the inherent value of transparency. Although she heralds a move from ‘reactive’ to ‘proactive’ transparency (p. 536), she does not insist on this point uncritically, and acknowledges that transparency does not empower all stakeholders equally, but rather favours those with the expertise and agility to react to the information available, in particular, political actors of the First World who can better exploit the opportunities for influence that are created by improving transparency (Peters, p. 555; but *cf.* Donaldson and Kingsbury, p. 526). This may equally be so if transparency subsequently becomes a tool used for simulating access to information, for example through ‘data flooding’, disinformation and propaganda, or what Peters calls the ‘politics of spectacle’, in which neither decision-makers nor the public truly engage (p. 573). As a governance mechanism, therefore, transparency remains a ‘double-edged sword’ (p. 573), capable of engendering greater trust in decision-making processes, but also susceptible to appropriation by powerful actors.

Transparency is embedded into the discourse; this remarkable book stands as testimony that it is not going away. As Peters concludes, “the question is not whether international law should be transparent but to what extent, and what form this should take” (p. 601). *Transparency in International Law* represents the most comprehensive effort to date to systematise and make intelligible the concept for all international lawyers. In that regard, it has been successful: besides being comprehensive, the book is unified by the very openness through which its contributors have engaged with the concept of transparency, an approach that has allowed each chapter to be highly context-specific without detracting from the overall aim of the volume. What is more, each of the chapters that maps out the operation of the concept in a specific field of international law are indispensable reading for specialists and practitioners in those fields alike. As mentioned, the chapters on international economic law (Part II, Chapters 2–8) will be of heightened interest for readers of this Journal, as they provide both a comprehensive and accessible description of

how transparency operates in international investment and trade law, describing both the state of the art in terms of existing documents, but also the challenges that nevertheless surround the concept.

Equally, readers would be well-advised to consider the wider normative aspects of the concept of transparency, covered in the four concluding chapters and Bianchi's introduction. As this book vividly demonstrates, transparency's malleability into nearly infinite forms, not all of which are unqualifiedly positive, once again reinforces the challenges in accommodating such a concept into international legal scholarship, and the importance of caution. The warning raised by Bianchi, in this respect, provides an apt conclusion to this piece. Returning to his metaphor of transparency as a window through which to view the world, he concludes instead that "[u]ltimately, [transparency] is a mirror—rather than glass—in which our visions materialize and our desires come true, a visual illusion the power of which we find hard to resist the power of illusion hardly hides the illusion of power. It is a sound reflex to beware of both" (p. 19).³²

32 Invoking Freud's caution of illusions as 'mirrors' and not 'glass;' see Sigmund Freud, *The Future of an Illusion. Civilization and its Discontents, and other works (1927–1931)* (Hogarth Press 1973) 30–1.