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On Power and Illusion: The Concept of Transparency in International Law

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1. Transparency as Culture

Transparency has become one of the fundamentally distinctive traits of contemporary Western culture.[1] It is recommended by psychologists to recover trust after infidelity; and it is increasingly imposed on banks and financial institutions. Non-transparent financial transactions, no matter how insignificant, by spouses may lead to a central banker's resignation.[2] Medical practice leans dangerously towards unconditional forms of transparency: you may be unceremoniously told that you are going to die just for the sake of transparency (particularly vis-à-vis the physician's professional insurance!). Worldwide campaigns have been led in the name of transparency by not-so-transparent organizations, as was the case of WikiLeaks, against the abuse of power by States. Transparent portable phones present one of the most pressing research challenges for electronic gadget designers.[3]

We demand transparency of our partners, our colleagues, the city council, the government, international institutions and even the objects we use. Short of God, whose will and deeds are by definition inscrutable,

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[1] See, for example, Warren Bennis/Daniel Goleman/James O'Toole, *Transparency: How Leaders Create a Culture of Candor* (San Francisco: Jossey-Bass, 2008); and Suzanne J. Piotrowski, *Transparency and Secrecy: A Reader Linking Literature and Contemporary Debate* (Lanham: Lexington Books, 2010).

[2] See Haig Simonian, 'Swiss Central Bank Chief Quits', *Financial Times* (10 January 2012), 1.

[3] See, for example: Stuart Cunningham/Peter S. Excell, 'e-Culture and m-Culture: The Way That Electronic, Computing and Mobile Devices Are Changing the Nature of Art, Design and Culture', in John Dill et al. (eds.), *Expanding the Frontiers of Visual Analytics and Visualization* (London: Springer, 2012), 285–302.

transparency is demanded of everyone. Transparency epitomizes the prevailing *mores* in our society and becomes a standard of (political, moral and, occasionally, legal) judgement of people's conduct. A narrative of transparency permeates our daily life. It is a deeply rooted belief. Transparency is all around us.

As is also the case with human rights, it is almost impossible to find someone who would agree to say anything negative about transparency in public.[4] No one would ever dare contest something that is universally perceived as a positive value. The unconditional virtue associated with transparency also explains the publication of this book. I have never before experienced such unfaltering enthusiasm for a book proposal. In fact, the publisher was so eager to go ahead with the project and the two anonymous peer reviewers (but why do they need to be anonymous in an era of transparency?) were so unusually positive and flattering about the project, that I thought to myself there must be something wrong.

In contrast, the opposites of transparency, such as secrecy and confidentiality, have taken on a negative connotation. Although they remain paradigmatic narratives in some areas, overall they are largely considered as manifestations of power and, often, of its abuse. The simple truth is that we no longer see why one should be secretive about their business, whatever the latter is. All the more so if the activity in question concerns the administration of the public good. Not even in such areas as security and public order is public opinion particularly in favour of tolerating restrictions on transparency. The State secrets privilege that is often invoked in courtrooms to shield governmental officials against scrutiny in security-sensitive cases causes most people to frown.[5] We are prepared to concede that to make available to the public at large (among whom there may well be some ill-intentioned individuals) the scientific findings of a group of scientists who have modified the

[4] This is without prejudice to critical attempts to re-imagine the human rights doctrine: Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford/Portland: Hart Publishing, 2000).

[5] See, for instance, the public outcry caused by the invocation of the State secrets privilege in legal proceedings related to extraordinary renditions in the United States and Italy, respectively: US Court of Appeals, *Arar v. Ashcroft*, Decision of 2 November 2009, 585 F 3d 559 (2nd Cir. 2009) (en banc); and Tribunale Ordinario di Milano in composizione monocratica, Sezione IV Penale, *Adler, Monica Courtney et al.*, Verdict of 4 November 2009, No. 12428/09, judgment filed on 1 February 2010, both cases concerning extraordinary renditions; and the recent decision concerning an FBI programme of surveillance on the civilian population: US Central District Court of California, Southern Division, *Fazaga v. FBI*, Decision of 14 August 2012, 2012 WL 3327092.

human-to-human transmissibility of the H5N1 avian flu virus and turned it into a potential weapon of mass destruction might present a few shortcomings.[6] However, we do not hesitate in demanding more transparency from the way in which we are diagnosed as being mentally disturbed and treated by psychiatrists. The polemic preceding the publication of the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders* attests to such growing demand.[7]

Overall, the world to which we aspire is a transparent one. The purpose of the following remarks is to call the wisdom of this aspiration into question by investigating a few of the dark sides of transparency and by showing that some of its promises may just be illusory. It goes without saying that in doing so I shall attempt to be as transparent as possible.

2. Transparency in International Law (so far)

Transparency is not immediately associated with international law. The world of international diplomacy and high politics has long been depicted as secretive and enigmatic, far removed from the public's eye. The shrewdness and reputation of politicians and diplomats was measured by their ability to act discretely, striking deals behind the scenes and avoiding public scrutiny. It would be inaccurate to state that those days are over. After all, secret treaties have not disappeared and, occasionally, important decisions are taken in a manner not dissimilar to a round of cups and balls. But the culture all around has changed. We do resent decisions by the Security Council or by the International Monetary Fund when these are perceived as biased or taken in a less than transparent fashion. We are still flabbergasted at a round of cups and balls but we no longer believe in magic. We know there is a trick behind it and we want to be able to work it out, possibly by looking it up on the internet. We are used to the availability of information and we take it for granted that our appetite for knowledge can always be satisfied. Whereas secrecy is

[6] David P. Fidler, 'Risky Research and Human Health: The Influenza H5N1 Research Controversy and International Law', *American Society on International Law: Insights* 16 (2012).

[7] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR Fourth Edition* (Arlington: American Psychiatric Publishing, 4th edn, 2000). The fifth edition is expected to be published in March 2013. On the controversy, see Lisa Cosgrove/Sheldon Krimsky/Manisha Vijayaraghavan/Lisa Schneider, 'Financial Ties Between DSM-IV Panel Members and the Pharmaceutical Industry', *Psychotherapy and Psychosomatics* 75 (2006), 154–160; and Shankar Vedantam, 'Patients' Diversity Is Often Discounted', *Washington Post* (26 June 2005), A10.

conveniently relegated to the inner layers of one's own self – where the darkest sides of life are kept hidden from the intrusive outside world – we have come to expect, particularly from others, full disclosure and transparency of conduct, speech and thought.

It is perhaps no wonder that similar expectations have arisen in respect of international law. These expectations for transparency are even more acute in light of the latter's potential for epitomizing everyone's desire for a better world. In recent decades, mostly due to the human rights movement and to the expectations raised by the international criminal justice system, international law has increasingly been perceived as a tool of redemption.[8] It is often looked at as the ultimate remedy against the scourges of humanity: human rights abuses, environmental degradation, terrorism, and so on and so forth. Scholarly constructions aiming to reproduce (and enhance) domestic paradigms have considered transparency to be part and parcel of a principle of democratic governance[9] the foundation of which in international law still appears as flimsy as a philanderer's promise. What looked like an emerging right at a time when international cooperation was at its apex,[10] before the tragic events of 9/11 came to shake it, has faded almost to the point of vanishing.

Yet the language of transparency continues to be spoken by those whose unfalteringly optimistic view of international law cause them to see the emergence of a global administrative space[11] or a process of

[8] See, for instance, Martti Koskenniemi, 'The Lady Doth Protest Too Much – Kosovo, and the Turn to Ethics in International Law', *Modern Law Review* 65 (2002), 159–175, 172 referring to the discipline of international law that is 'relearning the crusading spirit, and the civilizing mission'; see also David Kennedy, 'The Disciplines of International Law and Policy', *Leiden Journal of International Law* 12 (1999), 9–133, 93–101; and David Kennedy, 'When Renewal Repeats: Thinking against the Box', in Wendy Brown/Janet Halley (eds.), *Left Legalism/Left Critique* (Durham/London: Duke University Press, 2002), 371–419, 392–393.

[9] Devika Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions', in Jeremy Farrall/Kim Rubenstein, *Sanctions Accountability and Governance in a Globalized World* (Cambridge University Press, 2009), 92–122, 113. See also Beate Rudolf, 'Is "Good Governance" a Norm of International Law?', in Pierre-Marie Dupuy et al. (eds.), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (Kehl: Engel Verlag, 2006), 1007–1028.

[10] See Thomas M. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86 (1992), 46–91.

[11] Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', *Yale Law Journal* 115 (2005), 1490–1562, 1530–1531.

democratization of the international community.[12] In both strands of scholarship, transparency is associated with a public law paradigm that is transposed onto the international legal system to provide good governance and enhance its overall legitimacy and effectiveness. However, transparency as such is used sparingly and, almost invariably, in an accessory, secondary role. It is often subservient to other principles and/or values and rarely plays a prominent role in the international political agenda. If it were ever to compete for an Oscar, transparency would probably be nominated in the 'best supporting actress' category. Even in the context of the United Nations' many initiatives to promote the rule of law, transparency is not an indispensable element, albeit occasionally quoted in relevant documents and resolutions.[13] In all events, it constitutes just one part of a greater whole.

In more traditional circles, transparency has little currency, if any at all. It has occasionally been qualified as a general principle of law, which would be applicable in certain specific areas such as international environmental law[14] and international economic law.[15] Admittedly, there have been some attempts to frame transparency within the traditional doctrine of sources. While transparency obligations can be incorporated into treaties, which at most may raise an issue of interpretation of the relevant text, no one has (so far) had the temerity to characterize transparency as a rule of customary international law. The most obvious reflex for international lawyers would be to characterize transparency as a 'principle' under article 38(1)(c) of the Statute of the International Court of Justice. As has been rightly pointed out, this qualification is not without its difficulties, given the problematic character of defining

[12] See, for example Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012), particularly section 1, 3–143; and Anne Peters, 'Dual Democracy', in Jan Klabbers/Anne Peters/Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009), 263–341.

[13] Until recently hardly any reference was made to transparency in UNGA resolutions on The Rule of Law at the National and International Levels, adopted on a yearly basis by the UNGA. See: A/RES/64/116, 15 January 2010; A/RES/65/32, 10 January 2011; A/RES/66/102, 13 January 2012. However, express reference to transparency is made in UNGA, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/67/L.1, 19 September 2012, para. 25.

[14] Makane Moïse Mbengue/Mara Tignino, 'Public Participation and *Amicus Curiae* in Water Disputes', in Edith Brown Weiss et al. (eds.), *Fresh Water and International Economic Law* (Oxford University Press, 2005), 367–405.

[15] Carl-Sebastian Zoellner, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law', *Michigan Journal of International Law* 27 (2006), 579–628.

the precise content of such a principle,[16] let alone the possibility of reproducing at international law the domestic law conditions that can make it operational at the domestic law level, most notably judicial enforcement.

Caution is exercised on all sides. Transparency as practice, norm, rule or principle is generally seen as 'developing' or 'emerging'. Whatever its nature, it is usually described as if it were *in statu nascendi*, a potential that has not yet turned into actuality. However, its righteousness and desirability is hardly ever called into question. Its advent is a matter of time, at least according to those who look at international law as a narrative of unhindered progress.[17]

3. Transparency as Concept

The difficulty in determining its status against the background of the traditional sources of international law does not deprive transparency of an existence in its own right as a concept, as a mental representation of a general idea elaborated in one's mind on the basis of experience and intuition. Normative concepts and prescriptions of a varied nature may exercise significant influence on international legal processes regardless of their formal status. Such concepts are often translated into law by means of 'principles', not in the traditional meaning of article 38(1)(c) of the Statute of the International Court of Justice, but rather in the sense of normative prescriptions of a general character. The 'translation' is compelled by the well-known hostility of the lawyerly world towards what positivists would call 'extra-legal considerations'.[18] Unless something is expressed in a form that is couched in legal terms, it has a slim chance of being accepted within the discipline. Hence the need to qualify as 'principles' those concepts that would otherwise have no standing in the world of legal imagery and representation.

[16] Hovell, 'The Deliberative Deficit' 2009 (n 9), 112–113.

[17] See Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: Asser Press, 2010).

[18] Judge Spencer and Judge Fitzmaurice refer to 'considerations of a non-juridical character' in ICJ, *South West Africa Case (Liberia and Ethiopia v. South Africa), Joint Dissenting Opinion of Judge Spencer and Fitzmaurice*, Judgment of 21 December 1962, ICJ Reports 1963, 466. On how to distinguish 'non-legal' approaches from the so-called 'traditional' methodology, see Olivier Corten, *Méthodologie du droit international public*, UBlire Références 8 (Brussels: Edition de l'Université de Bruxelles, 2009).

International legal scholarship has devoted little attention to the issue of normativity outside the traditional discourse on the doctrine of sources. In fact, the idea of the existence of concepts and/or values that find their roots in the societal body and contemporary culture is not novel. It is somewhat reminiscent of Roberto Ago's notion of meta-legal principles of a general nature that would shape the content, interpretation and enforcement of international legal rules,[19] a notion that has been more recently taken up and expanded upon by Antonio Cassese.[20] Vaughan Lowe in turn has highlighted the existence of 'interstitial norms', which would operate in the interstices of primary rules in order to ensure that the legal system conforms with the contemporary ethos.[21] Lowe's theory has the merit of departing from the traditional doctrine of sources by providing new insights that clearly point to an increasing normative modularity in international law.[22] It would be a naïvety of sorts to maintain that contemporary international law only accommodates in its normative structure binding and directly enforceable rules. Some normative prescriptions accomplish different tasks in specific areas; others perform a more systemic role. In many ways these concepts or norms – oftentimes couched in terms of principles – operate as permanent connectors between the law and the changing societal realities.[23] They direct normative processes and the interpretation of legal prescriptions. Their legal relevance is self-evident, their qualification less so.

Transparency is not just difficult to couch in legal terms. It is also difficult to grasp in terms of content. Not even the one NGO that is expressly devoted to transparency issues provides a general definition of transparency: Transparency International only defines transparency in

[19] Roberto Ago, *Lezioni di diritto internazionale* (Milan: Giuffrè, 1943), 65.

[20] Antonio Cassese, *Diritto internazionale (a cura di Paola Gaeta)* (Bologna: Il Mulino, 2006), 271–272; Antonio Cassese, *International Law* (Oxford University Press, 2nd edn, 2005), 46–48; and even more specifically Antonio Cassese, *Diritto internazionale (a cura di Paola Gaeta)* (Bologna: Il Mulino, 2003), 61.

[21] Vaughan Lowe, 'The Politics of Law-making: Are the Method and Character of Norm Creation Changing?', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2000), 207–226.

[22] Andrea Bianchi, 'Principi di diritto, modularità funzionale e relatività normativa: Il concetto di precauzione nel diritto internazionale', in Andrea Bianchi/Marco Gestri (eds.), *Il principio precauzionale nel diritto internazionale e comunitario* (Milan: Giuffrè, 2006), 429–459.

[23] Lowe, 'The Politics of Law-making' 2000 (n 21), 221: '[i]nterstitial norms are the points where general culture obtrudes most clearly into the processes of legal reasoning'.

relation to corruption.[24] In fact, the definition issue has haunted us (i.e. the co-editors) from the outset of this project. Transparency is often associated with information and knowledge, legitimacy and accountability, participatory democracy and good governance. It means different things to different people in different contexts. It disperses in endless correlations to elude definition and rationalization. Certainly, we provided a definition when submitting our research proposal, as these days one hardly ever gets a research grant unless social sciences methodology is used. We chose for that purpose the definition given by the UN Economic Commission for Asia and the Pacific, as it was one of the few that focused almost exclusively on the aspect of information.[25] Authors were given great latitude in terms of discretion, with the result that transparency was articulated in different guises in their individual contributions. Our suggestion to focus on transparency as information about legal processes in the different areas of international law was followed by some and ignored by others. Some contributors adopted specific definitions,[26] while others took for granted the meaning of the term as well as its connotations. This was part of the intellectual exercise, as we wanted this collection of essays to reflect different understandings of transparency across the disciplinary board.

Regardless of the definitional conundrum, to deal with transparency as a concept presents several advantages. It allows an evaluation of its contours without the strictures of any value-laden, *a priori* definition and

[24] Transparency International, *Strategy 2015* (Berlin: Transparency International, 2011), 6.

[25] 'Transparency means (. . .) that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media'. See United Nations Economic and Social Commission for Asia and the Pacific, 'What is Good Governance?', 2007, available at: www.unescap.org.

[26] See, for instance, Julie Maupin, 'Transparency in International Investment Law: The Good, the Bad and the Murky', chapter 6 in this volume, where she adopts a definition based on Abram Chayes, Antonia Handler Chayes and Ronald B. Mitchell: Abram Chayes/Antonia Handler Chayes/Ronald Mitchell, 'Managing Compliance: A Comparative Perspective', in Edith Brown Weiss/Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, Global Environmental Accord: Strategies for Sustainability and Institutional Innovation 39 (Cambridge Mass.: MIT Press, 1998), 39–62, 43: '[w]e use "transparency" to mean the adequacy, accuracy, availability, and accessibility of knowledge and information about the politics and activities of parties to the treaty, and of the central organizations established by it on matters relevant to compliance and effectiveness, and about the operation of the norms, rules, and procedures established by the treaty'.

it makes it less difficult to imagine that a normative prescription may exist in our mind, irrespective of any textual reference. Indeed, however difficult it may be to define it in precise terms we do possess an *intuitive* understanding of what transparency is. Paraphrasing St Augustine, one could say: '[w]hat then is transparency? If one asks of me, I know; if I wish to explain to him who asks, I know not'.[27]

It has to be conceded that, unlike other concepts that play a similar function in international law, the exact contours of the notion of transparency are particularly blurred. An effective way of attempting to grasp a concept which may be otherwise difficult to define is to resort to a metaphor. Metaphors are powerful tools of mediated knowledge that may help us to understand reality better, particularly when they provide mental links and associations to objects and situations that we experience in our daily life.[28] As regards transparency, the most effective metaphor to convey its fundamental idea is that of a clean window that you can look through. Many of us would find this 'image' or 'projection' a good analogy[29] or metaphor[30] for transparency.

And yet, even so, the idea of transparency can remain elusive. Do I have a clear view if I look through the clean window? What if my view is blurred? Is what I see reality or just a mental representation of what I expect to see? Does it make a difference whether the window is open or closed? Is transparency equivalent to nothingness? What if the outside is dark or if the sun is shining? Would what I see then not be different? To what extent could different types of window glass alter my perception of what I see? Is standing behind a perfectly transparent window equivalent to standing outside? Is what I see not dependent also on the position in which I am behind the window? By moving a few inches either side or by turning my eyes up or down, left or right, what I see can be remarkably different. I could probably go on and on and bore the reader with further

[27] In the original the query concerns time rather than transparency: 'Quid est ergo tempus? Si nemo quaeret, scio; si quaerenti explicare velim, nescio' (see James J. O'Donnell, *Augustine: Confessions*, vol. 1 (Oxford: Clarendon Press, 1992), book XI, Caput 14, 154.

[28] See George Lakoff/Mark Johnson (eds.), *Metaphors We Live By* (University Of Chicago Press, 2nd edn, 2003); Mark Johnson (ed.), *Philosophical Perspectives on Metaphor* (Minneapolis: University of Minnesota Press, 1981); George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (University of Chicago Press, 1990).

[29] William B. Mock, 'An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development', *Dickinson Journal of International Law* 18 (2000), 293–304, 296.

[30] Mark Fenster, 'Seeing the State: Transparency as a Metaphor', *Administrative Law Review* 62 (2010), 617–673.

questions related to the fairly simplistic and arguably misleading character of the window analogy. The truth is, however, that despite its fallacies, we still find the image of the window a good example of what transparency stands for. After all, we expect to see things beyond a clean window. We expect to have access to reality and apprehend it through our sight and comprehension. In other words, we expect to have unhindered access to physical data or information; we expect transparency 'to open a window' on information.

4. Transparency as Information

The expectation of seeing through the window or through any other transparent material for that matter can be misleading, particularly if one expects to seize raw data or information in the purity of its pristine state. The problem with grasping the essence of such data or information is that in reality there is no such thing to be grasped. Data does not speak for itself, nor does information. In fact, the availability of information presents several dark sides. Even the most ardent supporters of transparency recognize that in our epoch of information technology the vast quantity of data and the ease with which it may be disseminated 'may lead to chaos and breakdown'.[31] Indeed, the idea that the availability of information is tantamount to empowering the people of the world (or of the State) against power and its many agglomerations is simplistic. Just as in economics 'more information does not always produce markets that are more efficient',[32] data that is made available is not necessarily information that can be used directly by consumers. By the same token, information in other areas, including politics and law, has to enter the realm and meet the requirements of 'complex chains of comprehension'[33] in order to be aptly employed, and its actual use will not necessarily be righteous!

The high level of manipulability of information, the risk of an information overload or of a disinformation campaign are all potential dark

[31] Daniel C. Esty, 'Environmental Protection in the Information Age', *New York University Law Review* 79 (2004), 115–211, 171.
[32] Archon Fung/Mary Graham/David Weil, *Full Disclosure: The Perils and Promise of Transparency* (New York: Cambridge University Press, 2007), 173.
[33] David Weil/Archon Fung/Mary Graham/Elena Fagotto, 'The Effectiveness of Regulatory Disclosure Policies', *Journal of Policy Analysis and Management* 25 (2006), 155–181, 157.