

The Transparency Turn of International Law

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Abstract

In all major fields of international law—e.g. environmental law, economic law, human rights law, international humanitarian law, health law, peace-and-security law—demands for more transparency have recently been voiced by civil-society actors, by states, and within the international institutions themselves—or transparency has been brought about by illegal means. In response, much more transparency has been created in international institutions and procedures in the last 10 years. This paper diagnoses a genuine “transparency turn” in international law, it analyses the functions and drawbacks of increased transparency in global governance (especially for the well-functioning of negotiations and deliberations); it asks whether a cross-cutting legal principle of transparency is emerging, and what this might mean for international law as a whole. It concludes that from a governance perspective, transparency is only a necessary, and not a sufficient condition for bringing about participation, accountability, and possibly democracy in the global sphere.

Keywords

Global governance – Accountability – Publicity – Participation – Legitimacy

1 Problématique and Concepts

PRISM and other surveillance activities of the US National Security Agency (NSA), spying on private and inter-agency telephone and internet communication in numerous European States, illustrate the problématique of this paper: in a liberal system of governance, the ideal is that the governors themselves should be transparent about the measures they take or not, while the citizens’

sphere of privacy should be respected. Citizens are under no *prima facie*-transparency obligation—quite to the contrary. PRISM reversed this order: all users of the internet, mostly private individuals, were rendered transparent through the surveillance programme—but that fact was completely concealed to outsiders, the measure itself was intransparent. A person such as Edward Snowden rendered the surveillance programme partly transparent. He did this by breaching his obligations under his employment contract, and by committing a crime under US law. May this action, which is illegal under the positive, domestic law of a state, be justified or excusable under some higher principles, maybe under international legal obligations of transparency vis-à-vis foreign states and foreign citizens? The answer to our question depends on the existence of transparency or publicity principles under international law.

“Publicity” is a traditional term of political theory (and political practice). In contrast, “transparency” has become a more recent buzzword, also in the field of international law and governance. In this contribution, both terms are used interchangeably. By “transparency”, I understand a culture or scheme in which relevant information (on law and politics) is available.

In all major fields of international law—e.g. environmental law, trade and investment law, human rights law, international humanitarian law, health law, or peace-and-security law—demands for more transparent institutions and procedures have recently been voiced by civil-society actors, by states, and within the international institutions themselves, and have to a large extent also been honoured. We have called this the transparency turn in global governance.¹

The turn concerns, first, transparency *for* governance,² i.e. requirements imposed by international law on states. Examples are found in the Aarhus Convention³ and in the Council of Europe Convention on Access to Official

1 See Anne Peters, “Towards Transparency as a Global Norm”, in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Cambridge: CUP 2013) 607. A shorter sketch of this contribution will appear in Fotini Pazartzis and Maria Gavouneli with Anastasios Gourgourinis and Matina Papadaki (eds.), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment & Trade* (Oxford: Hart 2015). I thank the editors for allowing me to use and build on that material.

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

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

Documents (No. 205) of 2009.⁴ A recent example in the field of international security law are the UN Human Rights Council's Framework Principles for Securing the Human Rights of Victims of Terrorism of 2012. One of these principles is the imperative to conduct an effective official investigation of lethal incidents under "public scrutiny".⁵

The second dimension of the transparency turn are the increasing demands on the transparency of (global) governance actors themselves. Transparency requirements are, e.g., imposed on the EU in the Transparency Regulation of 2001.⁶ With regard to the World Trade Organization (WTO), the Sutherland Report devoted an entire section to the debate on improving the transparency of the WTO and civil society involvement.⁷ Furthermore, in 2010, the World Bank issued its "World Bank Policy on Access to Information".⁸ A final example is the initiative of the "Small 5" (a group of small states) of 2012, which suggested a draft resolution "Enhancing the accountability, transparency and effectiveness of the Security Council"⁹ that was ultimately not adopted by the UN General Assembly.

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

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

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

7 Peter Sutherland et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organization 2004) 45, paras. 183–205.

8 World Bank, "Policy on Access to Information" (1 July 2010), available at <http://documents.worldbank.org> (accessed 3 February 2014).

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

2 The Normative Quality of Transparency

Currently, no general international transparency treaty exists, and such a codification would probably be neither feasible nor desirable. The question is whether a customary international law principle of transparency exists, or a general principle of law in that sense. However, in order to be “legalisable” under these two headings, a concept “must meet two fundamental structural preconditions: it must be sufficiently precise to generate an obligation and to assess its implementation, and it must have an obligor and an obligee”.¹⁰ Both conditions are not easily fulfillable with regard to the transparency buzzword. As a result, it would seem difficult to argue that transparency as such is a norm of hard international law—and maybe it can never become one.¹¹ But this finding might be of little relevance. Maybe the classic boxes, the “sources” in terms of Art. 38 ICJ-Statute, do not tell us much about the state of international law and its power to influence the behaviour of internationally relevant actors.

3 A Human Right to Information as a Catalyser of Transparency

The right to information could function as a catalyser for the consolidation of the transparency principle. This right is foreseen in all regional and universal human rights agreements. It is today no longer interpreted exclusively as a governmental negative obligation not to mount obstacles to the diffusion of information which is already present in the public space, but as a positive right. The European Court of Human Rights for example has derived from the provision of article 10 of the ECHR (the freedom to receive or to communicate information and ideas) an individual right of access to public documents.¹² This

10 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: N.P. Engel Verlag, 2006) 1007, 1026.

11 See Jonas Ebbesson, “Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public”, in Bianchi and Peters (n. 1) 49, 73 who sees only “normative fragments” which give only limited support for international law on transparency vis-à-vis members of the public. Alan Boyle and Kasey McCall-Smith find “remarkably little identifiable international law underpinning at this rather significant” transparency practice of international organisations and treaty bodies (Alan Boyle and Kasey McCall-Smith, *Transparency in International Law-Making* in Bianchi and Peters (n. 1) 419, 435).

12 ECtHR, *Gillberg v. Sweden*, Grand Chamber Judgment of 3 April 2012, Application No. 41723/06, para. 93.

decision endorses a novel and important enlargement of the scope of application of that provision *ratione materiae*.

But how should the scope *ratione personae* of that right be defined, concerning the addressee (obligor) of the right of access? The human rights conventions are addressed to states as debtors. But for the right to information to function effectively as a catalyser of global transparency, it would need to be rendered opposable against other actors, not only against states. Because of the relative increase in competences and of real power of international organisations, important information on law and politics is no longer only in the hands of states but is also held by international organisations. The right of information should, if it is to remain effective, be opposable to the actual holders of relevant information. It could for example be useful to raise this right vis-à-vis the World Bank, concerning bank decisions to finance developmental projects that are ecologically sensitive.

The Human Rights Committee's General Comment No. 34 on art. 19 CCPR of 2011 goes along these lines. It offers an important, extended reading of the human right to information, and understands it as encompassing a right of access to official documents held by states, and to documents held by functionally public actors.¹³ I submit that international organisations might be counted among those actors which exercise public functions. They would thus be obligors of the human right to information.

4 The Value and Functions of Transparency

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

I will here discuss only the second cluster. Democracy needs transparency. The classic statement in this regard was tendered by James Madison: “[a] popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever

13 UN Human Rights Committee, International Covenant on Civil and Political Rights CCPR/C/GC/34 General Comment No. 34 (12 September 2011), para. 18: “Article 19, paragraph 2 embraces a right of access to information held by public bodies (...) [and] may also include other entities when such entities are carrying out *public functions*” (emphasis added).

govern ignorance: [a]nd a people who mean to be their own Governors must arm themselves with the power which knowledge gives".¹⁴

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

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

In this context, Allen Buchanan and Robert O. Keohane usefully distinguish between "narrow" and "broad" accountability.¹⁵ Broad accountability means not only allowing those who presently receive the accounts (the states, notably the member states of specific organisations) but others (such as NGOs and populations) to contest the very terms of accountability. The gist is that "broad transparency is needed for critical revision of the terms of accountability".¹⁶ Seen in this way, transparency becomes even more important for accountability because it can address the accountability mismatch.

But here an objection can be raised: is not transparency merely a surrogate, replacing the much more difficult substantive issues of democracy, good governance, economic efficiency, social justice and the rule of law?¹⁷ Indeed, there does exist the danger that certain types of transparency will degenerate to "empty titles of legitimacy".¹⁸ The debate on transparency "masks" other issues behind it. But the gist is that while transparency is indeed a substitute, it is however a necessary one, because it replaces, in a global and pluralistic

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

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

16 *Ibid.* 428.

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

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

political space, the unattainable certitude and conviction about the “right” international law and policy through a procedural device allowing everyone to form his own opinion on matters of global governance.

To conclude, while transparency policies to a certain degree generate only an *ersatz* legitimacy and may even at times be counterproductive, they more often seem to be “a reasonable initial step”¹⁹ towards improving the accountability and legitimacy of international law and governance. Still, transparency has its drawbacks, to which I now turn.

5 Drawbacks of Transparency

Firstly, there are intrinsically negative effects of transparency, notably the dangers posed to the quality of deliberations²⁰—I will turn to this below. Secondly, there are countervailing legitimate interests, such as security,²¹ privacy, and business or trade secrets²² which must be balanced against the benefits of transparency. Thirdly, as is the case with basically all policies, transparency measures have their financial costs and may be in simple practical terms unfeasible due to time and space constraints. Fourthly, transparency may only be simulated through data-flooding (“drowning in disclosure”),²³ disinformation

19 Haufler (n. 17) 70.

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

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

22 For example see art. 39 of the WTO Agreement on Trade-related Aspects of Intellectual Property Rights 1869 UNTS 299 (15 April 1994). IAEA, Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards INFCIRC/540 (Corrected) (September 1997). Art. 15 requires the International Atomic Energy Agency to “maintain a stringent regime to ensure effective protection against disclosure of commercial, technological and industrial secrets and other confidential information coming to its knowledge”.

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

and propaganda. This has traditionally played an important role in international relations.²⁴

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

6 Transparency and Diplomatic Negotiations

One of the biggest problems which could result from a potential international transparency norm concerns the field of international law-making which traditionally is the result of diplomatic negotiations. In fact, confidentiality is deemed to be a fundamental feature of the diplomatic arena. A British diplomat wrote: “The old principle that the art of negotiation depends on reliability and confidence is an eternal principle”.²⁵

But is confidentiality and hence opacity in fact an “eternal” and indispensable element in the process of the elaboration of international law? This seems not to be the case from the perspective of the deliberative paradigm of international relations as conceptualised *inter alia* by Thomas Risse. In that analysis, argumentation is contrasted with negotiating. “Argumentation” is defined as a communicative behaviour based on variable preferences and arguments. The objective is to reach a justified consensus. In contrast, “negotiating” is communicative behaviour which is based on fixed preferences, seeking to satisfy revindications, and in which menaces and promises are exchanged. Risse and others have shown that arguing is not only an epiphenomenon of power and self-interest but also constitutive of international relations.²⁶

24 Holzner and Holzner quote a senior official of the EU: “[t]he impression of transparency is that it is a straight ray of light. But it can be simulated by a thousand mirrors”. (Burkart Holzner and Leslie Holzner, *Transparency in Global Change: The Vanguard of Open Society* (University of Pittsburgh Press 2006) 102).

25 Harold Nicolson, *Diplomacy* (Oxford: Oxford University Press, 3rd ed., 1963), 255.

26 Seminally Thomas Risse, *Let's Argue!*, (2000) 54 International Organization, 1–39.

The essential point is that the difference between “arguing” and “bargaining” lies in the triadic nature of the former.²⁷ Arguing includes reference to an external, generally accepted authority which validates the empirical and normative claims made. This external authority can be the public which assumes the function of an arbiter of the best argument. This public may also be the general international public which observes international negotiations. Within this paradigm, transparency seems to be an indispensable element of global governance. The more the international legal processes evolve from the mode of negotiation towards a mode of argumentation, the more negotiations are compatible with publicity and transparency.

An example for an attempt to render diplomacy more transparent are the recent climate negotiations. The Conference/Meeting of the Parties of the UN Framework Convention on Climate Change and Kyoto Protocol (COP 16/ CMP 6), held in Cancún in 2010 was explicitly conducted under the heading of transparency and inclusion.²⁸ A recent judicial decision on treaty negotiations has likewise underscored transparency: The European Court of Justice upheld (against the Council) access of an individual to a document which concerned the opening of negotiations between the European Union and the United States of America with a view to the conclusion of an international agreement. Taking into account the fact that “public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations”,²⁹ Article 4(1) of the European Transparency

27 Cornelia Ulbert/Thomas Risse, *Deliberately Changing the Discourse: What Does Make Arguing Effective?*, (2005) 40 *Acta Politica* 351, 352–53.

28 The Mexican conference’s President gave “full commitment to the principles of transparency and inclusiveness. There will be no parallel or overlapping discussions and I will continue ensuring that all positions are taken into account” (UNFCCC Informal Stocktaking Plenary, Statement by Her Excellency Mrs. Patricia Espinosa COP 16/CMP 6 President (8 December 2010)). In the same sense, see the informal meeting of the President, statement of 5 December 2010: “[t]he Mexican Presidency will continue to work with full transparency and according to established United Nations procedures”. See also UNFCCC Subsidiary Body for Implementation, Synthesis Report on Ways to Enhance the Engagement of Observer Organizations FCCC/SBI/2010/16 (19 October 2010) with a view to the 33rd session in Cancún, 30 November to 4 December 2010, with proposals for “ensuring transparency, accountability and information-sharing” (paras. 16–17 and 26–28).

29 ECJ General Court (first chamber), *Council v. in ‘t Veld*, 3rd July 2014, Case C-350/12 P, para. 86, citing the Court of First Instance, para. 88 of the attacked judgment.

Directive³⁰ foresees that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards: international relations (...) unless there is an overriding public interest in disclosure”. The ECJ held that the general interest in rendering the demanded document (a legal opinion concerning the opening of the treaty negotiations) public should prevail.

But what is at stake if diplomatic processes become more transparent? What negative effects occur once non-participants are allowed to listen to the negotiations and deliberations? In the face of the public, the participants in the negotiations might seek to avoid conveying the impression of uncertainty, weakness, and staggering. They might be tempted to adopt more radical positions and remain inflexible when they are in front of a broad audience. Transparency might therefore push them to entertain a discourse which is more rigid, to keep up a façade, and to avoid bold or immature statements. The result might be the increased risk of a stalemate (because a compromise will be less easily found) or—inversely—the conclusion of a hasty agreement.³¹

On the other hand, transparency might also have positive effects on diplomatic negotiations. One of these positive effects is what John Elster has called “the civilising force of hypocrisy”.³² Transparency could lead law- and decision-makers to base their positions on socially accepted norms. Social pressure would lead them to justify their positions with reference to a general interest and not their selfish interests. Even if these positions are hypocritical, they can lead to better results, because the “bad” arguments are officially banned and will therefore have much less impact on the decision finally taken.³³

In light of the positive and negative effects of transparency on deliberations and negotiations, institutional designers should envisage both opaque/

30 Note 6.

31 Sissela Bok, *Secrets* (New York: Pantheon, 1982), 175 and 184.

32 Jon Elster, “Deliberation and Constitution Making”, in Jon Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998), 97–122, 111.

33 Jon Elster did not focus on public as opposed to private communication but contrasted the argumentative modes of “arguing (giving reasons) and bargaining (threats and promises)”. He thought that “secrecy tends to induce bargaining and publicity to induce argument” (Jon Elster, *Strategic Uses of Argument*, in Kenneth J. Arrow et al. (eds.), *Barriers to Conflict Resolution* (New York: Norton, 1995), 237–257, 252). “Roughly speaking, arguing is better than bargaining because of the civilizing force of hypocrisy, and private settings are better than public settings because they leave less room for pre-commitment strategies and overbidding (...). The real choice, therefore, may be between the second-best and the third-best options” (ibid., 250). (Original in Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, The Storrs Lectures (New Haven: Yale Law School, 1991)).

confidential and transparent elements or phases for international law-making processes. In order to identify and circumscribe exceptions to the principle of transparency of deliberations/negotiations, we can rely on existing, notably empirical, scholarship on the effects of public scrutiny on international negotiations. The allowance to conduct discussions behind closed doors could, for example, be conditioned on the reproduction of public pluralism within this closed circle, by granting access to non-public sessions to certain actors only.³⁴ Another idea would be to allow participants to conduct preparatory non-public discussions on the condition that the committee members must later publicly pronounce themselves on the reasons for which they have taken a specific decision or have concluded a certain agreement.³⁵

7 Policy Recommendations

This very brief overview about the pros and cons of transparency or of more transparency in global governance leads to some policy recommendations. *De lege ferenda*, international law and institutions should be rendered more transparent, i.e. the current trend should be basically continued and reinforced. However, because of the mixed effects of transparency, any move in this direction must be qualified.

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

Second, a (legal) presumption of transparency should be acknowledged.³⁶ A presumption of transparency means that the non-release of documents

34 Simone Chambers, *Behind Closed Doors: Publicity, Secrecy and the Quality of Deliberation*, (2004) 12 *The Journal of Political Philosophy* 389, 390.

35 Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, (2004) 53 *Drake Law Review* 11, 53, on the laws of the EU and the US on agency meetings.

36 See Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap 1996) 96, explaining the basis “for a presumption in favor of publicity and the authority of claims of secrecy and other values that could rebut the presumption”; Joseph Stiglitz, “On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life”, in Matthew J. Gibney (ed.), *Globalizing Rights, The Oxford Amnesty Lectures 1999* (OUP 1999) 115, 152: “[b]ecause of these limitations of legalistic approaches, emphasis must be placed on creating a culture of openness, where the presumption is that the public should know about and participate in all collective decisions”. Buchanan and Keohane (n. 15) 431: “[t]here should be a very strong but rebuttable presumption of transparency”.

and the closure of meetings to the public must be specifically justified on the basis of legal exceptions which have been clearly defined and circumscribed prior to the fact. These exceptions can only be granted by stating the reasons for them publicly. The burden of explaining and of proving the need for secrecy is thereby placed on the institution itself—not on those outsiders who request access.

Third, intransparency is rendered the more acceptable the more it is embedded in what Thore Neumann and Bruno Simma have called “meta-transparency”.³⁷ Meta-transparency means that the reasons for the intransparency (i.e. whether it is necessary at all) and its substantive and temporal scope must be made transparent. In other words, the questions as to whether, how much, and for how long intransparency is warranted (e.g. the need for a closed-door debate, the circumscription of exceptions, possible reform of the policy) must be subject to public debate.³⁸ Thereby an “element of public accountability for the secrecy itself” is introduced.³⁹ In the end, only meta-transparency provides the necessary means for transcending the limits of transparency.⁴⁰

8 Conclusions

My conclusion is that the rise of transparency demands and their satisfaction in the international sphere, what I called the transparency turn of global governance, manifests a paradigm shift. It is international law’s shifting character from a “private” law to a “public” law character. Traditional international law (being mainly inter-state law) has long been conceived as “private law writ large”.⁴¹ My claim is that international law has been publicised in three senses.

Orna Ben-Naftali and Roy Peled, “How Much Secrecy Does Warfare Need?” in Bianchi and Peters (n. 1) 321, 323, argue that “the presumption in favour of secrecy during wartime should be reversed, requiring government officials to shoulder the burden of proof to justify why secrecy is necessary in any particular matter”.

37 Thore Neumann and Bruno Simma, “Transparency in International Adjudication”, in Bianchi and Peters (n. 1) 436, 472.

38 Stiglitz (n. 36) 152.

39 Gutmann and Thompson (n. 36) 104.

40 Ibid. 127 on publicity.

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

Understanding the first sense requires of us to recall the traditional public-law/private-law distinction. This distinction ultimately stems from the different logics of *iustitia distributiva* (to be realised through distributive, public policies) and *iustitia compensativa* (as realised in the private sphere and through the market).⁴² The emerging transparency norm within international law—with its quality as an enabler and to some extent a proxy for accountability, participation, and global democracy—is currently strengthening the element of global distributive justice in international law. International law has in that first sense been rendered more like “public” law, a law in the global public interest (“for” the public).

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

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

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

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