

## BOOK REVIEWS

Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law*, United Kingdom, Cambridge, Cambridge University Press, 2013, 642 pp., ISBN 9781107021389 (hardback), £90.00, US\$140.00  
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Transparency has become a catchcry across a host of international law regimes. Hailed as an attribute of good governance, a safeguard against corruption, and an instrument of empowerment for diverse stakeholders, its frequent invocation has led to a growing interest in the parameters of the concept and its relationship (if any) with international law.<sup>1</sup>

Bianchi and Peters' co-edited book *Transparency in International Law* seeks to map transparency practices in a range of regimes while also providing a deeper analysis of the concept's substance and legal status. This ambitious project casts its empirical net widely. The book comprises 20 chapters organized into sections on international environmental law, international economic law, international human rights law, international health law, international humanitarian law, international peace and security law, and cross-cutting issues. Within these sections, contributors address the application of transparency to states, international organizations, NGOs, and private entities. Chapters by the two co-editors bookend the volume, providing an overview of the project and a range of conclusions on conceptual and normative aspects of transparency.

The co-editors address the complexities of transparency – its fuzzy contours, its potential pitfalls, and its awkward legal status – with a welcome frankness. A key feature of the volume is their decision not to define 'transparency' at the outset. Instead, Bianchi and Peters opt to leave the question of definition to the individual contributors and to await 'the result of their inductive analysis'.<sup>2</sup> This decision helps to expose the multitude of transparency mechanisms in operation, while also stimulating a rich dialogue on the parameters of transparency in the contributions.

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1 See for example J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (2013), which was reviewed in 27 *LJIL* 804, in September 2014.

2 A. Bianchi and A. Peters (eds.), *Transparency in International Law* (2013), xiii.

Some chapters eschew definitions in favour of an account of potential matters encompassed by transparency,<sup>3</sup> or adopt a definition that is limited to the specific field or regime discussed.<sup>4</sup> Others adopt a definition that, while specific, contains elements that could usefully be transposed into discussions of other fields.<sup>5</sup> Finally, some adopt definitions that aspire to general application. For example, Tzanakopoulos defines transparency as ‘a general right of access to information held by those exercising public powers and in relation to the exercise of these public powers, irrespective of motives or specific interest on the part of those requesting access to the information’,<sup>6</sup> while Creamer and Simmons focus on the obligation of output, characterizing transparency as ‘the dissemination of regular and useful information’.<sup>7</sup> In the book’s final chapter, Peters concludes that transparency is a ‘culture, condition, scheme or structure in which relevant information (for example on law and politics) is available’.<sup>8</sup>

While the lack of an encompassing analytic framework stimulates diverse insights, it can also at times be frustrating. Differences in definitional choices may hinder the reader’s capacity to detect commonalities in transparency mechanisms across regimes. An example of this complexity is the range of approaches to the relationship between transparency and related ‘good governance’ principles such as participation or effective review.<sup>9</sup> Some contributions take a confined view of transparency and deliberately avoid discussion of these principles,<sup>10</sup> while others discuss participation or review in depth as elements or instruments of

3 See, e.g., M. Donaldson and B. Kingsbury, ‘Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance Institutions’, in Bianchi and Peters (eds.), *supra* note 2, 502 at 504.

4 For example, Sossai considers that in the field of disarmament and arms control, ‘transparency means State openness, to be achieved by way of voluntary notifications or compulsory declarations regarding the data on arms, policies and activities’: see M. Sossai, ‘Transparency as a Cornerstone of Disarmament and Non-proliferation Regimes’, in Bianchi and Peters (eds.), *supra* note 2, 392 at 393.

5 In the international environmental law context, Brunnée and Hey apply a broad approach to transparency as “the opposite of secrecy” (citing A. Florini, ‘The End of Secrecy’, (1998) 111 *Foreign Policy* 50, at 50, 53), focusing on the ideas of transparency of governance (the transparency of activities and procedures of international environmental institutions) and transparency for governance (the use of transparency as a policy instrument to influence an actor’s conduct) (citing R. B. Mitchell, ‘Transparency for Governance: The Mechanisms and Effectiveness of Disclosure-based and Education-based Transparency Policies’, (2011) 70 *Ecological Economics* 1882); J. Brunnée and E. Hey, ‘Transparency and International Environmental Institutions’, in Bianchi and Peters (eds.), *supra* note 2, 23 at 25.

6 A. Tzanakopoulos, ‘Transparency in the Security Council’, in Bianchi and Peters (eds.), *supra* note 2, 367 at 374–5, noting c.f. D. Hovell, ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions’, in J. Farrall and K. Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (2009), 92 at 97.

7 C. Creamer and B. A. Simmons, ‘Transparency at Home: How Well Do Governments Share Human Rights Information with Citizens?’, in Bianchi and Peters (eds.), *supra* note 2, 239 at 240, citing R. B. Mitchell, ‘Sources of Transparency: Information Systems in International Regimes’, (1998) 42 *International Studies Quarterly* 109, at 109, which refers to ‘the acquisition, analysis, and dissemination of regular, prompt, and accurate regime-relevant information’.

8 A. Peters, ‘Towards Transparency as a Global Norm’, in Bianchi and Peters (eds.), *supra* note 2, 534 at 534.

9 Transparency, participation and effective review are three of the elements addressed in global administrative law, along with reasoned decision and legality. See B. Kingsbury, N. Krisch, and R. B. Stewart, ‘The Emergence of Global Administrative Law’, (2005) 68 *Law & Contemporary Problems* 15, at 17.

10 See, e.g., J. A. Maupin, ‘Transparency in International Investment Law: The Good, the Bad and the Murky’, in Bianchi and Peters (eds.), *supra* note 2, 142 at 149.

transparency.<sup>11</sup> The chosen definition of transparency will also affect an understanding of its potential shortcomings. For example, warnings of ‘information overload’ as a possible negative consequence of transparency may be less relevant if transparency is characterized as the dissemination of ‘relevant’ or ‘useful’ information.

One of the most refreshing features of the volume is its willingness to explore counter-narratives and transparency’s potential ‘dark sides’. Bianchi’s opening chapter cautions against an unnuanced view of transparency and emphasizes the concept’s susceptibility to manipulation. Across the board, one finds resistance to the notion of ‘absolute transparency’ and a strident defence of the need for pockets of confidentiality to protect certain stages of deliberations, confidential business information, and core elements of national security. In such cases, transparency may be neither desirable nor effective: Hinojosa Martínez predicts that excessive disclosure policies could push sensitive negotiations into informal venues, while Donaldson and Kingsbury note that transparency requirements may lead an institution or its members simply to stop recording certain information.<sup>12</sup> These insights demonstrate the complicated interrelationship between transparency and confidentiality and the potential for transparency mechanisms to be circumvented.

The volume also provides a nuanced picture of secrecy in global governance. In a compelling chapter, Ratner surveys the unapologetically secretive International Committee of the Red Cross (ICRC), which uses confidentiality as an instrument to ensure access to victims and to promote candour between parties to a conflict. While confidentiality is not absolute, a decision by the ICRC to disseminate information is based on ‘an internal judgment as to what will be most effective for victims’.<sup>13</sup> The ICRC example highlights that confidentiality may itself be a tool for promoting full and frank disclosure, albeit to a strictly limited audience.

A central concern of the project is the legal characterization of transparency. At the outset, Bianchi reflects that transparency is ‘not immediately associated with international law’, and that it is difficult to slot into the traditional sources of international law.<sup>14</sup> Concluding that transparency is best understood as a ‘concept’,<sup>15</sup> Bianchi draws on Vaughan Lowe’s discussion of ‘interstitial norms’<sup>16</sup> to situate transparency as one of several concepts or norms that act as ‘permanent connectors between the law and the changing societal realities’.<sup>17</sup>

11 See, e.g., Brunnée and Hey, *supra* note 5, at 30–37; J. Ebbesson, ‘Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public’, in Bianchi and Peters (eds.), *supra* note 2, 49 at 52, 61–65.

12 L. M. Hinojosa Martínez, ‘Transparency in International Financial Institutions’, in Bianchi and Peters (eds.), *supra* note 2, 77 at 110; Donaldson and Kingsbury, *supra* note 3, at 523.

13 S. R. Ratner, ‘Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross’, in Bianchi and Peters (eds.), *supra* note 2, 297 at 304.

14 A. Bianchi, ‘On Power and Illusion: The Concept of Transparency in International Law’, in Bianchi and Peters (eds.), *supra* note 2, 1 at 3, 5–6.

15 *Ibid.*, at 6.

16 A. V. Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’, in Michel Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 207 at 221.

17 Bianchi, *supra* note 14, at 7.

Within the contributions, conclusions on the legal status of transparency vary depending on the precise institution or issue discussed. Tzanakopoulos' account of the UN Security Council persuasively argues that transparency cannot be characterized as a customary law obligation and that it is somewhat fruitless to try to anchor it as a 'general principle' under Article 38(1)(c) of the Statute of the International Court of Justice. However, he proposes an alternative conception of transparency as an ancillary obligation imposed on the Security Council by reason of its institutional structure and the ultimate right of states to control its legality.<sup>18</sup> Boyle and McCall-Smith conclude that while it is easy enough to identify practice, 'it is harder to identify a generally applicable legal principle underpinning transparency in the deliberative phase of international law-making, or its limits'.<sup>19</sup> In a careful investigation of access to information policies in global governance institutions, Donaldson and Kingsbury conclude that there is no one 'law' of transparency in force, although it is possible to discern 'some pathways by which a "global administrative law" of transparency may be developing'.<sup>20</sup> Discussing these differing findings, Peters concludes that, while the blurry contours of transparency speak against its characterization as a norm of 'hard international law', it retains an important role as a normative principle.<sup>21</sup>

While the empirical studies do not support the finding that a generally-applicable legal standard of transparency has developed, it is undeniable that there is a broad trend towards the implementation of transparency mechanisms.<sup>22</sup> The volume's sections give a snapshot of an emergent moment in global governance, an ongoing project that is occurring not necessarily as a result of top-down strictures but through cross-fertilization and answered calls for information from a diffuse group of stakeholders. That said, the different studies reveal variations in transparency mechanisms both within and between legal regimes. Maupin's conclusion in her standout contribution that the international investment regime is 'too complex, decentralized and multi-faceted to allow for the simple implementation of transparency principles across the board' has a broader truth for international law as a whole.<sup>23</sup>

Peters is upfront about the fact that the concluding chapter, which seeks to bring together findings throughout the volume, does not – and perhaps cannot – provide a 'coherent picture' of the concept of transparency.<sup>24</sup> Although the book does not present a unified thesis on transparency in international law, it succeeds in its aim of providing a solid foundation for future scholarship through sound empirical research and rigorous analysis across a range of institutions and issues. In all, this

18 Tzanakopoulos, *supra* note 6, at 385.

19 A. Boyle and K. McCall-Smith, 'Transparency in International Law-Making' in Bianchi and Peters (eds.), *supra* note 2, 419 at 430.

20 Donaldson and Kingsbury, *supra* note 3, at 515, 533.

21 Peters, *supra* note 8, at 585–6.

22 *Ibid.*, at 536.

23 Maupin, *supra* note 10, at 166.

24 Peters, *supra* note 8, at 535, 605.

book is an excellent addition to the literature, with rich pickings for those working both on transparency and on the individual institutions and issues that are surveyed.

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Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights*, London, Hurst, 2014, 224 pp., ISBN 9781849044097, (paperback) £16.99  
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On 5 August 2014, Human Rights Watch reported that an activist in Thailand was secretly detained, beaten and tortured by the Thai junta.<sup>1</sup> In June 2014, independent human rights experts expressed concern about arbitrary detention in Thailand,<sup>2</sup> and the High Commissioner for Human Rights corresponded with the Thai authorities, emphasizing the need to comply with international human rights law. There was no reply and the abuses continued.<sup>3</sup> Aside from the statement by the experts and the communication from the High Commissioner, there were no resolutions adopted by the UN Human Rights Council on the human rights violations in Thailand. An observer would be forgiven for thinking that the UN does little to protect human rights.

There are a number of institutions, some political and some quasi-judicial that form the 'UN Human Rights Machinery'. The UN Human Rights Council, the specific treaties bodies, Special Procedures, and the Office of the High Commissioner for Human Rights, are complementary and 'interconnected bodies' with mandates to protect human rights (p. 139). The UN Charter declares the need to 'reaffirm faith in fundamental human rights', and the protection, promotion, and development of human rights makes up one of the three pillars of the UN: maintain peace and security, self-determination and development, and protect and promote human rights. Yet, as the example from Thailand highlights, the UN human rights machinery does not always help the victims of human rights abuses. *Failing to Protect: The UN and the Politicisation of Human Rights* asks why an international organization mandated to protect human rights repeatedly fails to achieve this goal.

The UN Human Rights Council is the principal human rights body of the UN, and the principal focus of Freedman's book. Established by General Assembly Resolution 60/251 in March 2006, the Council was created to replace the Commission on Human

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1 'Thailand: Investigate Alleged Torture of Activist' (*Human Rights Watch*, 5 August 2014) <[www.hrw.org/news/2014/08/05/thailand-investigate-alleged-torture-activist](http://www.hrw.org/news/2014/08/05/thailand-investigate-alleged-torture-activist)> accessed 18 August 2014.

2 "'Fundamental Rights at Stake in Thailand' – UN Experts Concerned about Arbitrary Detentions and Restrictions' (*United Nations Human Rights*, 13 June 2014) <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14696&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14696&LangID=E)> accessed 18 August 2014.

3 'Press Briefing Notes on Thailand' (*United Nations Human Rights*, 5 August 2014) <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14918&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14918&LangID=E)> accessed 18 August 2014.