Oxford Public International Law

Transparency

Thore Neumann, Anne Peters

Content type: Encyclopedia entries
Product: Max Planck Encyclopedias of International Law [MPIL]
Module: Max Planck Encyclopedia of International Procedural Law [MPEiPro]
Article last updated: June 2019

Subject(s):

Transparency — Arbitration, procedure — International courts and tribunals, procedure — Confidentiality

Published under the direction of Hélène Ruiz Fabri, with the support of the Department of International Law and Dispute Resolution, under the auspices of the Max Planck Institute Luxembourg for Procedural Law.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

A. Disclaimer

1 The views and opinions expressed in this article are those of the author and do not purport to reflect the positions of any entity the author was or is affiliated with.

B. Basics

1. Introduction

2 'Judicial publicity' or 'open justice' are procedural maxims which have been at the core of many domestic procedural law systems at least since or in the wake of the enlightenment (see, eg, von Coelln, 2005, 49, 60 *et seq;* Roure, 2006, 742). That justice be performed under the public eye, and in that sense be transparent, has become a basic legal or even constitutional and human rights-based requirement. This quest is also deeply entrenched in the societal and cultural understanding of judicial institutions in democratic States.

3 With regard to international courts and tribunals, the affirmation of public justice has not been as straightforward. The idea that sovereign States can be drawn before and appear in open court just like private parties and be 'spectated upon' by a world audience has sometimes been met with a certain unease: For example, France's representative during the drafting sessions of the Statute of the → *Permanent Court of International Justice (PCIJ)* argued that '[S]tates must not be assimilated to individuals; it must not be necessary to conduct suits between States in such a way as to embitter their mutual relations' (League of Nations, Minutes of the Meetings of the Sub-Committee of the Third Assembly Committee [1921], 137). Similar reservations were voiced during the debate whether hearings before the World Trade Organization dispute settlement panels (→ *Panel: Dispute Settlement of the World Trade Organization (WTO)*) should be made public. Here, it was argued by some States that transparency might interfere with the 'government-to-government nature of dispute settlement' (Ehring, 2008, 1025, 1032). Along this line, States, in designing and using international courts and tribunals, have from time to time been keen to retain a certain control over the issue of procedural transparency.

4 Recent developments, however, suggest an overarching trend towards a broader and more consolidated espousal of judicial transparency also at the international plane (see on the general 'transparency turn' in international law and its implications in detail Peters, 2013, 534 *et seq*, and Peters, 2015, 4–9): During the last decades, States and/or courts themselves, or their parent organizations, have created new transparency-promoting legal instruments such as the → *United Nations Commission on International Trade Law (UNCITRAL)* Transparency Rules (→ *Rules on Transparency in Treaty-based Investor-State Arbitration: United Nations Commission on International Trade Law (UNCITRAL)*), which narrow down party control of and tribunal discretion on transparency (Shirlow, 2016, 642–47), and the landmark Mauritius Convention (→ *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*). The actors have remodelled procedural regimes in favour of transparency (cf for example the International Center for Settlement of Investment Disputes' ['ICSID'] 2006 transparency reform, see for an analysis and criticism Wong and Yackee, 2010, 253–61, 268). They have fleshed out transparency-related norms (cf. eg, the Rules of Procedure of the European Court of Justice ('ECJ') [2012], which introduce a new Article 79 (1) with more detailed rules on the reasons for exceptional confidentiality during the oral phase of proceedings). The relevant actors have applied and interpreted existing procedural regimes in favour of transparency (cf, eg, the progressive interpretation of the WTO Dispute Settlement Understanding ('DSU') and its Annex 3 in favour of an option for open hearings during Appellate Body proceedings; Ehring, 2008, 1028–30 and Alvarez-Jiménez, 2010, 1083–84). Moreover, courts have created new practices and programmes such as outreach strategies (cf, eg, International Criminal Court ['ICC'], Summary of the Integrated Strategy for External Relations, Public

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

Information and Outreach). The parent organisations or courts have adopted soft law (cf, eg, Council of Europe Recommendation Rec (2002) 13 of the Committee of Ministers to Member States on the publication and dissemination in the member states of the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights [2002]) and other measures fostering procedural transparency. And they have introduced or revamped web-based case-law databases and other practical measures to boost transparency (see, eg, International Court of Justice ('ICJ'), Report of the International Court of Justice for the Period 1 August 2016 to 31 July 2017 [2017], para 17: 'The Court […] endeavours to ensure that its decisions are well understood and publicized as widely as possible throughout the world, through its publications, the development of multimedia platforms and its own internet site, which was recently completely redesigned and updated to make it more user-friendly.'). In traditional-style courts and in arbitral regimes and in diverse areas of international adjudication, the proliferation of publicity and thus of transparency in international judicial and quasi-judicial proceedings has become a distinct trend and era in the historic development of international adjudication.

5 The present entry provides an overview of the basic problems and discussions associated with international judicial transparency as an emerging, over-arching procedural principle of international courts and tribunals. After conceptual clarifications (sec B.2), we explore the historical origins of transparency in international adjudication (sec C). In a second step, we address major rationales and functions which international judicial transparency may serve across the different courts and tribunals (sec D). A main question is whether transparency fulfils different functions in international as opposed to domestic adjudication. The next part (sec E) describes common doctrinal and technical issues arising with regard to the two most important manifestations of international judicial transparency, namely public access to international court files and documents including judgments and awards (sec E.1) and access to oral hearings (sec E.2). In the last part, we draw some conclusions on the normative ramifications of the general trend towards more transparency in international procedural law (sec F).

2. Terminology and Concept

6 Transparency ('seethroughability' or translucence) is no traditional term of international law including international procedural law (see on the terminology and concept of transparency in international law Bianchi, 2013, 1–19 and Peters, 2013, 534 *et seq)*. Most of the statutes, rules and regulations of international courts and tribunals still do not use it. Only recently has the term been employed in legal texts, ie in the UNCITRAL Transparency Rules and in treaties which refer to these Rules, see, eg, the Mauritius Convention or Article 8.36 Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part [2016] ['CETA']. International courts and tribunals themselves often use 'transparency' as a synonym for 'judicial publicity' or 'openness' (see eg *Prosecutor v Bashir*, 2013, para 10: '[…] transparency is reflected in the principle that all hearings and the records related thereto should be public […]') or in order to describe the objective of publicity rules (see, in the context of Art 6 (1) European Convention of Human Rights ('ECHR'), the → *European Court of Human Rights (ECtHR)* case *Şimşek v Turkey*, 2012, para 28). So transparency mainly refers to the accessibility of international proceedings and of court-related information by the general public.

7 The relative success of the term 'transparency' in discussions on international procedure during the last decades suggests a need for a novel terminology. 'Transparency' sounds more result-oriented than 'openness' and 'publicity' – terms which arguably do not stand for actual perceptive achievement and visibility. Transparency hence better captures that information should not only be disclosed and accessible but also understandable and usable

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

by stakeholders (Brants and Karstedt, 2017, 1; see however, in the EU context, Alemanno and Stefan, 2014, 98, 103–5, 108 who stress that transparency is a 'component' or 'corollary' of the openness principle and that 'openness' – rather than transparency – *inter alia* also encompasses active information efforts by the institutions). For the purpose of this article, transparency in a *formal* sense is the bulk of rules and practices which govern the transportation of case-related information from an internal, professional communicative sphere to external actors who are not formally involved in the proceedings and the presentation of such information. *Substantively and normatively*, transparency means that relevant information is available *and* processed in a way that observers may gain an optimum of understanding of a court or tribunal and its proceedings. The latter aspect is not only the aim or function of transparency but constitutes its normative essence. This is because transparency is inherently geared towards communicative success. It is meant to bridge the structural information gap between an institution like a court and general society. This entails that information is not randomly streamed out but organized and adequately presented with the view of actually telling a general audience how a court operates and what it decides.

8 In the context of international investment arbitration and WTO dispute settlement, transparency is often discussed in connection with *amicus curiae*. The UNCITRAL Transparency Rules treat information access and *amicus curiae* participation under the same overall header 'transparency' (Scherer, Gehring, and Euler, 2018, 5; Shirlow, 2016, 628–29 with reference to the drafting history in this regard). Deliberation theory justifies this conceptual nexus. Also, the democratic legitimacy rationale of transparency emphasizes the participatory elements of the concept (see also sec D.4 below). Nevertheless, *amicus curiae* schemes prompt distinct questions which are dealt with in separate entries (→ *International Courts and Tribunals, Amicus Curiae*; → *Amicus curiae: Dispute Settlement of the World Trade Organization (WTO)*; → *Amicus curiae: Investment Arbitration*; → *Amicus curiae: European Court of Human Rights (ECtHR)*; → *Amicus curiae: Inter-American Court of Human Rights (IACtHR)*; → *Amicus curiae: African Court on Human and Peoples' Rights (ACtHPR)*; and → *Amicus curiae: Human Rights Bodies*; see also in favour of a conceptual separation, eg, European Parliament, *In Pursuit of an International Investment Court* [2017], 17). Moreover, this article focuses on (judicial or quasi-judicial) procedures and excludes matters with a predominantly institutional significance (such as transparency in the selection of judges, see in this regard Mackenzie and others, 2010, 137 *et seq*), or administrative bearing (such as budgetary transparency).

C. Historical Foundations

1. History of Ideas

9 International judicial transparency or publicity *avant la lettre* can be tracked back to the early stages of international dispute settlement theory. An important pre– or early-enlightenment example is Emeric de Crucé's *Le Nouveau Cynée* published in 1623, in which the author proposed – as a means for safeguarding peace – a scheme for a standing international congress based in Venice at which all great international Powers should be represented through ambassadors (Crucé, 2004, 93). The idea that (certain) disputes between different 'powers' were not only a matter between those immediately involved but could concern the 'public' in the form of a community of 'powers' set the course towards a public-interest based approach to institutionalized international dispute settlement which underlies modern conceptions of public international adjudication.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

10 It was in particular during the 18th and 19th centuries, however, that the idea of publicity in the modern sense – fuelled by an increase in public communication, newspapers and the development of a public sphere – constituted a pivotal element of political theory (see, eg, Wegener, 2006, 120 *et seq*). Protagonists of enlightenment thought discovered both the potential of publicity as a guiding principle of governmental ethics and the value of → *public opinion* as an effective means to keep officials in check. The idealization of publicity as a veritable *idée directrice* of good governance lasted well into the 19th century and beyond. And it significantly influenced and helped advance theorizing on international adjudication in the 19th century.

11 Jeremy Bentham's widely known essay 'Plan for an Universal and Perpetual Peace' contains suggestions regarding the publicity of the proceedings of an (international) 'Congress or Diet' which was possibly meant to settle disputes between States: The 'opinion' of such entity should be reported and circulated 'in the dominion of each State' and rules of press freedom, incorporated in the instrument establishing such organization, could make enforcement mechanisms practically expendable (Bentham, 1843, 554). But as the 'Plan for a Universal and Perpetual Peace' was erroneously edited, it is not clear whether these suggestions actually refer to the judicial function of an international tribunal in the modern sense (Hoogensen, 2005, 42, 47, 86 *et seq).*

12 James Mill sharpened the idea of public international adjudication in his 'Essay on the Law of Nations' (Mill, 1825/1903, 32). Mill made 'publicity' an integral part of his scheme. He enumerated objects of publicity: '[…] [P]ublicity should be carried to the highest practicable perfection. […] [T]he best means should be in full operation for diffusing a knowledge of the proceedings of the tribunal; a knowledge of the cases investigated, the allegations made, the evidence adduced, the sentence pronounced, and the reasons upon which it is grounded' (Mill, 1825/1903, 32). He also suggested that knowledge of the cases before an international tribunal should form 'a necessary part of every man's education' (Mill, 1825/1903, 32). According to Mill, an essential function of the publicity of an international tribunal was to safeguard compliance with its judgments. It would appeal to the 'moral' sentiment of ordinary citizens 'which would, in time, act as a powerful restraining force upon the injustice of nations, and give a wonderful efficacy to the international jurisdiction' — given that every Nation was anxious to retain a good reputation (Mill, 1825/1903, 32).

13 Mill (and possibly Bentham) thought of international adjudication as a complex endeavour involving societies as a whole and not merely governments. The argument hints at a modern judicial as opposed to a traditional arbitral conception of international dispute settlement proceedings. By suggesting education about international law and procedure and asking for domestic press freedom, Mill and Bentham hit a core structural challenge, namely the dependence of international courts on the functioning of domestic public spheres to actually reach individual stakeholders. The lack of a sufficient domestic infrastructure of public communication and information has in fact become a problem especially for modern international criminal courts (Kavran, 2017b, 126; see also below para 76 *in fine)*.

14 At the same time, Mill's (and possibly Bentham's) early concept of international judicial publicity was an extrapolation of their general idea of publicity as a means of controlling and checking on (the international actions of) domestic governments. It possibly did not occur to these authors that international tribunals, as power-wielders of some sort, could themselves be in need of external checks and that international judicial publicity could

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

contribute to providing those. This suggests that the authors did not conceive international judicial publicity in strict parallel to domestic judicial publicity.

15 Throughout the 19th and early 20th century, the notion of publicity and public opinion as a safeguard for compliance with international arbitral or judicial decisions and/or international law in general became a popular, albeit not universally accepted, argument. It was taken up by parts of the peace movement, which in the 19th century became one of the most important non-governmental driving forces in the advancement of international arbitration and adjudication (O'Connell and Vanderzee, 2014, 44–45). For example, the founder of the American Peace Society, William Ladd, in his influential Essay on a Congress of Nations enthusiastically propagated the idea of public opinion as a tool to 'enforce' sentences of an international court: 'I believe that, even now, public opinion is amply sufficient to enforce all the decisions of a Court of Nations, […] and public opinion is daily obtaining more power. If an Alexander, a Caesar, a Napoleon, have bowed down to public opinion, what may we not expect of better men, when public opinion becomes more enlightened? The *pen* is soon to take the place of the *sword*, and reason is soon to be substituted for brute force in settling all international controversies. Already, there is no civilized nation that can withstand the frown of public opinion' [emphasis in original] (Ladd, 1840/1906, 77). Ladd generally referred to 'public opinion' as the 'queen of the world' (Ladd, 1840/1906, 1). Unlike Bentham and Mill, Ladd and other authors often did not directly refer to the publicity of international proceedings and of awards/judgments as such but invoked the 'sanctioning' power of a (however defined) 'public opinion'. But such 'public opinion' could not form without a minimum degree of publicity of the proceedings. These authors, too, therefore presupposed the availability of judicial information on concrete proceedings to the public.

16 The argument played a specific role in international legal discussions on the 'sanctions' available in arbitration: A number of authors agreed that international arbitral tribunals could not be equipped with coercive powers to enforce their sentences but disposed of the non-legal 'sanctions' of public opinion and/or 'morals' instead. The concept of 'moral sanction' meant that States purportedly abided by arbitral sentences rendered against them because they sought to eschew the moral wrong associated with non-compliance. Both types of 'sanction' – public opinion and international morals – seem to be conceptually related (Lovrić-Pernak, 2015, 73–74), because the sentiment of being morally bound typically develops from a process of public communication.

17 After the turn of the century, increasing globalization and a newly-felt internationalism might account for the persisting optimism of some authors about the 'sanctioning force' of global public opinion. A prominent contribution was the 1908 address by the American lawyer, politician and 1912 Nobel Peace Prize laureate Elihu Root before the American Society of International Law (Root, 1908, 451 *et seq*, Slaughter, 2006, 203 *et seq).* According to Root, public opinion could be a driving force for compliance with international law: 'Now, however, there may be seen plainly the effects of a long-continued process which is breaking down the isolation of nations, permeating every country with better knowledge and understanding of every other country, spreading throughout the world a knowledge of each government's conduct to serve as a basis for criticism and judgment, and gradually creating a community of nations, in which standards of conduct are being established, and a world-wide public opinion is holding nations to conformity or condemning them for disregard of the established standards' (Root, 1908, 454, cited also by Slaughter, 2006, 204). Root acknowledged that public opinion could only serve as a boost for compliance where the international legal issues at hand were sufficiently clear and simple to understand. Beyond such cases, arbitration could function as a proxy: Public opinion could support a demand to submit a dispute to arbitration and an arbitral award rather than

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

discuss the underlying complex issues itself. Thereby public opinion could push, by extension, for compliance with the relevant legal norms (see Root, 1908, 456).

18 Root's argument stuck even during the inter-war period. In 1929, the American lawyer and lecturer Jackson H Ralston, discussing the enforcement of international awards, wrote: 'There seems no appropriate place in the textbooks for the all-pervasive and all-powerful influence of international public opinion' (Ralston, 1929, 108). Compared to physical enforcement mechanisms, the 'sanction' of public morals could be more effective because 'force incites to evasion, whereas there is little escape from a moral condemnation, resting upon the public opinion of the community for its sanction. … [T]urning to the international field, we may conclude that just as force … against individuals is believed to lower the moral tone of the community, so likewise would the application of force in any degree as between nations have a similar tendency' (Ralston, 1929, 109–10). To back his belief in public opinion as a sanction, Ralston argued that States had usually accepted awards rendered against them ('though often with regret and protest', Ralston, 1929, 109). Ralston, who himself had been involved in international arbitrations as a counsel for the United States, used the argument of the 'public opinion sanction' to defend international law and arbitration against post-First World War skepticism about their efficacy (Ralston, 1929, 108). Despite the general experiences with propaganda and warmongering during the First World War, Ralston did not critically engage with the volatility, susceptibility to manipulation and potential of fragmentation of such elusive a concept as public opinion.

19 Publicity and public opinion played a multi-faceted role in the first major impulse made towards an international criminal jurisdiction. In 1872, Gustave Moynier, then-president of the International Committee for Relief to the Wounded (later: → *International Committee of the Red Cross (ICRC)*), published his *Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève* (Moynier, 1872). Here, Moynier tried to transfer basic ideas on the organization and procedure of the influential → *Alabama Arbitration* to the (then dormant) field of international criminal justice (Hall, 1998, 61). On the one hand, Moynier's proposal arose from new scepticism against the 'moral sanctions-arguments': Contrary to his earlier views, Moynier now believed that additional – ie judicial – means were needed to secure compliance with international humanitarian law, (Moynier, 1872, 122; Hall, 1998, 60–61). On the other hand, Moynier still thought that the judgments of an international tribunal could (only) be implemented by the force of public opinion: The national authorities should carry out the punishment ordered by the tribunal, and they could only be compelled to do so by means of public opinion – not by 'material forces' (Moynier, 1872, 126). Echoing Bentham and Mill, Moynier stated: 'I have sought to make sure that the work of the tribunal is as widely public as possible, […] in order to form and enlighten public opinion, which will serve as its support base.' ('[…] j'ai cherché à assurer aux travaux du tribunal la publicité la plus étendue, […] pour former et éclairer l'opinion publique, qui lui servira de point d'appui.' [translation by the authors], Moynier, 1872, 128). He suggested that the judgments of the tribunal should be sent to each State member and be translated and published in the States' official journal (Art 8 para 1 of the proposal; Moynier, 1872, 131). By such means, the judgments would have mandatorily entered the domestic public spheres and would have been receivable by individuals behind the 'state veil' – a suggestion which seemed avant-garde in 1872, given the 19th century's rather rigid interpretation of → *domaine réservé*. Thereby, Moynier seemed to realize that transparency might have a special function when it came to prosecuting individuals (Hall, 1998, 74). However,

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

Moynier's proposal failed to address judicial publicity as a matter of an accused's right to a fair trial (Hall, 1998, 70–71, 74).

2. Historical Practice

20 During the 19th century, aspects of transparency or publicity only rarely formed part of the → *compromis* between States, or only indirectly. For example, certain agreements concluded between Great Britain and Portugal between 1855 and 1872 mentioned the arbiter's competence to decide on the publicity and secrecy of hearings but mainly as an example of his powers to determine the procedure (see Art 5 Memorandum between Great Britain and Portugal in the Croft Affair [1855/1923]; Art 5 Memorandum between Great Britain and Portugal in the affair *Yuille, Shortridge & Co* [1861/1923]; Art 6 Protocol between Great Britain and Portugal in the Isle of Bulama affair [1869/1923]; Art 6 Protocol between Great Britain and Portugal in the Delagoa Bay Affair [1872/1954]: 'The arbitrator shall be free to proceed with such arbitration and all that is associated with it when and as he deems appropriate, … [he may conduct the proceedings] either in camera, in public, in the presence or in the absence of either of the two [State] representatives, and either orally, or by written discussion or otherwise.' ('Il sera loisible à l'arbitre de procéder à cet arbitrage et à tout ce qui en dépend quand et comme il le jugera convenable, […] soit à huis clos, soit en public, soit en la présence soit en l'absence de l'un ou l'autre des deux agents, et soit de vive voix, soit par discussion écrite ou autrement.') [translation by the authors]). These *compromis* reflected a general standard of the time that absent any regulation on the aspect, matters of procedural publicity and secrecy – at least regarding the hearings – fell within the ambit of the arbiters' general discretion in conducting the case (Mérignhac, 1895, 243; Acremant, 1905, 86; cf also generally de Martens, 1887, 153; more cautiously Mani, 1980, 147; Mani also states that with regard to written proceedings, 'secrecy has been strictly observed'). Importantly, this suggests that there was no general, overarching presumption or implicit rule of overall procedural confidentiality applicable to inter-State arbitral proceedings throughout much of the 19th century.

21 In fact, arbitral proceedings during the 19th century were at times surprisingly transparent – more transparent than many of today's international proceedings – if judged by the amount of details which made it into the general news. One of the most prominent early international high publicity cases was the *Alabama* Arbitration between the United States and Great Britain 1871–1872 (see generally Bingham, 2005). The submissions by the United States were summarized in the press at an early stage (see 'The Geneva Tribunal: The Case of the United States as it Will be Presented', New York Times, 16 December 1871, 1; 'The Alabama Claims. The American Case', Manchester Guardian, 27 December 1871, 8). At that time, the British side's arguments reportedly had not been made known publically. The asynchronous publicity of the parties' arguments before the tribunal was highlighted in the United States press since it left the public in the dark about the British demands while the British press could extensively comment upon the United States' arguments ('The London Press on the Alabama Claims – Hostile Comment on the "Case" of the United States', New York Times, 3 February 1872, 3). Apparently, the meetings of the tribunal were not generally open to the public (see eg 'Foreign News by Cable. Impenetrable Secrecy Still Maintained in Geneva', New York Times, 26 July 1872, 1: 'The Alabama Claims Arbitration Tribunal reassembled … this afternoon. … The rigid secrecy heretofore observed in relation to the proceedings of the tribunal is strictly maintained, and nothing of the least importance concerning the meeting of today can be ascertained.'; see also Mérignhac, 1895, 243, with further reference, and Acremant, 1905, 88; cf, however, de la Pradelle and Politis, 1923, 919: 'La publicité des débats a été la règle devant le tribunal de Genève […]'). But the tribunal decided at some point that certain parts of the oral proceedings up until then (eg statements, declarations) could be made public (United States Department of State, Papers

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

Relating to the Treaty of Washington, Volume IV, Geneva Arbitration, Protocol VIII, 28 June 1872, 25–26).

22 Another important precedent for procedural publicity was the 1893 Bering Sea arbitration between Great Britain and the United States over the territorial status and sealing rights in the Bering Sea. At an early stage, the tribunal decided, without giving reasons, that it lacked competence to make a substantial decision on the publication of the written party submissions (Tribunal Arbitral des Pêcheries de Behring, 23 Février – 15 Août 1893, Sentence, Déclarations et Protocoles des Séances, Protocole I, Meeting of 23 March 1893, 36, 39). However, at the end of its second meeting on 23 March 1893, the tribunal officially 'announced that the proceedings were now public, and admission to the [oral] discussions would be upon the presentation of cards of submission to be issued by the Secretary of the Tribunal' (Tribunal Arbitral des Pêcheries de Behring, 23 Février – 15 Août 1893, Sentence, Déclarations et Protocoles des Séances, Protocole II, Meeting of 23 March 1893, 44, 48; see also Moore, 1898, 809 and Mani, 1980, 147, also with further examples). The protocols do not state whether or not the parties were involved in the decision-making on this matter or whether the tribunal made the decision on its own.

23 The Bering Sea Arbitration was an early example in which a tribunal consciously addressed the issue of publicity of the hearings at the beginning of the proceedings and made arrangements for public access. The meetings, which took place until August 1893, were reportedly frequented by journalists and by members of the public from different countries ('The Behring Sea Arbitration', The Times, 11 May 1893, 5: 'There was a large audience, composed of both foreigners and Americans, as well as English residents.'). Major newspapers followed closely and reported on all important aspects and details of the meetings. Even specific evidentiary issues and technical legal arguments made it into the daily news (see'The Behring Sea Question before the Court of Arbitration', The Times, 28 March 1893, 13 – with details on the composition of the tribunal, the procedural status and a précis of the substantial questions and arguments of the case; 'The Behring Sea Arbitration', 6 April 1893, 3 – on matters of evidence; 'The Behring Sea Arbitration', 11 May 1893, 5, – on the presentation of the British arguments before the tribunal; 'The Behring Sea Arbitration – I. The Preliminary Motions', 25 May 1893, 8 – with a detailed summary of the proceedings so far, the legal issues and arguments, 'The Behring Sea Arbitration – II. The Case for the United States as Presented by Mr. Carter', 29 May 1893, 4 – with a detailed summary of the US' arguments, 'The Colonies', 17 July 1893, 8 – on the closing of the public oral phase of the proceedings and the announcement of the tribunal's retirement to deliberate in private).

24 With the Hague Convention for the Pacific Settlement of International Disputes of 1899, procedural publicity finally became the subject of multilateral procedural regulation. Possibly due to the experiences with the sometimes highly politicized and publicly debated 'grand arbitrations' of the late 19th century, the model arbitration procedure provided for in the Hague Convention was in principle to be largely confidential (see Art 41 (2): '[The discussions] are only public if it be so decided by the Tribunal, with the assent of the parties.'). Only the arbitral award was to be announced publicly (see Art 53). Even this went further than today's → *Arbitration Rules (2012): Permanent Court of Arbitration (PCA)*: If one party objects, an award may only be made public under narrow, exceptional circumstances (Art 34 (5)).

25 Moreover, the 1907 Convention Relative to the Creation of an International Prize Court (which never entered into force) is of special interest (see → *International Prize Court (IPC)*). The (oral) procedure and the judgments of the international court itself were intended to be public in principle (Art 39 and Art 45). The oral proceedings were supposed to be public 'subject to the right of a Government who is a Party to the case to demand that

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

they be held in private'. This was a sovereignty-friendly, unilateral 'opt-out' solution. The 1907 Prize Court Convention is important because it reversed the rule-exception structure, making procedural transparency the rule – at least as far as open hearings were concerned.

3. Interim Conclusions

26 This glimpse into the origins of 'international judicial transparency' before and at the beginning of the institutionalization of the international judiciary shows that both in theory and in practice, the concepts of international adjudication and transparency have been deeply intertwined. The 18th/19th century enthusiasm for governmental publicity at least partly promoted the idea that international adjudication should and could be effective. That idea was initially confronted with a dilemma: On the one hand, institutionalized hard enforcement mechanisms by tribunals were feared to unacceptably contravene national → *sovereignty* and/or the ideal of peace among nations. On the other hand, it was clear that international adjudication would be futile without at least some form of implementation scheme. For some, the concepts of publicity and of the 'soft' sanction of public opinion provided the intellectual *fundamentum* for a way out of this conundrum (see, in particular, Ladd, 1840/1906, 76–78). This may have made international adjudication a more realistic prospect and motivated calls for its further development.

27 An important catalyst for the institutionalization tendencies at the turn of the century was the exceptional media publicity that some of the 'grand' international arbitrations received. International arbitrations and domestic newspapers entered into a symbiosis: In times of a profoundly commercialized press (see, eg, Conboy, 2004, 111–12, 113 *et seq)*, international arbitrations provided highly narratable news events which created a news market value because they combined the dramatic setting of any court(-like) proceeding with the exoticism of reports from far-away places (Rantanen, 1997, 613), the societal relevance of the underlying political dispute and a certain diplomatic 'glamour' factor surrounding the proceedings (eg, during the Bering Sea arbitration, The Times wrote on 23 February 1893, 10 ('Court Circular'): 'The Marchioness of Dufferin and Ava gave an "at home" last night at the British Embassy at Paris in honour of the representatives in the Behring Sea arbitration case (→ *Bering Sea*). There was a crowded and brilliant gathering.'). The pool of competing newspapers and their reporting, for its part, provided an early resonating body for the work and achievements of international arbitral tribunals and the States behind them.

28 However, heated press coverage, for example of the Alabama Arbitration, possibly also contributed to a nuanced assessment of the value of publicity. Despite some persisting enthusiasm about *public opinion* as a soft means of enforcement (see sec C.1 above), legal commentators at the turn of the century addressed the topic of procedural *publicity* more soberly than, for example, Mill in 1825, weighing the pros and cons of publicity (Mérignhac, 1895, 243–44; Acremant, 1905, 87–88, Lammasch, 1914, 164). And journalists themselves reflected critically on their coverage of international arbitrations: In a lead article in the Swiss 'Neue Zürcher Zeitung' of 1872, the author criticized a certain pro-British bias in the coverage of the Alabama arbitration by his newspaper and acknowledged specific reporting responsibilities of the press of States which dispatch officials as arbiters to a tribunal. Newspapers of such States should pay specific attention to an impartial and balanced reporting because the arbiters might be specifically influenced by the public opinion of their home countries (see 'Die Alabamafrage', Neue Zürcher Zeitung, 9 February 1872, 1).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

29 Moreover, in the late 19th century and the beginning of the 20th century, the accountability and 'control' rationale of judicial transparency became more important (Mérignhac, 1895, 243; Acremant, 1905, 87, Lammasch, 1914, 164 with further reference). Judicial publicity was not only seen as an enabler of international adjudication but also as a check on adjudicators – just like in the context of domestic courts. In practice, this understanding manifested itself in a beginning watchdog journalism with regard to international proceedings: For example, several newspapers in 1872 reported on the alleged bias of an expert who had substantively contributed to the decision-making in the so-called San Juan arbitration ('The San Juan Award', The Times, 30 October 1872, 7, citing a report by the Manchester Guardian).

D. Rationales and Functions of International Judicial Transparency

30 The rationales and functions of judicial transparency depend on a variety of factors including the particular cultural, historical and theoretical perspectives on the judiciary, the different functions a court plays in a society, the type and jurisdiction of the court, its position within a multi-instance system of judicial review, the type and character of the procedural law it applies, the exact part of the procedure to which transparency refers, etc. The discussion on courts in modern-day democracies typically focuses on a set of basic rationales. Judicial transparency is connoted with or said to serve the fair trial principle, the absence of bias during proceedings, the public scrutiny and potential disciplining of judges for misconduct, possibly the quality of evidence, a general education of the people about the law, and the generation of public trust in the judiciary (see in the different domestic legal contexts, Jaconelli, 2002, 29 *et seq*; von Coelln, 2005, 198 *et seq;* Schilken, 2007, 114 *et seq*). Transparency is also considered an important factor in enhancing the (democratic) legitimacy of adjudication (Roure, 2006, 737–79; von Coelln, 2005, 167 *et seq)*.

31 For international courts and tribunals, many of the aforementioned rationales intuitively play a similar role. However, some play out differently or carry more weight here. It is submitted that for reasons elaborated below, we generally need *more* transparency in international as opposed to domestic adjudication. This is not to say that transparency in international adjudication does not have its drawbacks. Like in domestic adjudication, limitless or uncontrolled transparency could harm the human beings and institutions involved in the proceedings. It could disrupt the decision making process among judges, jeopardize the orderly conduct of a case and encourage polarizing and tension-fueling media coverage. Transparency could thus make it more difficult for a court to successfully fulfill its mandate. There may be both general and case-specific reasons for non-transparency or → *confidentiality of proceedings*. Therefore, the arguments in favour of and against transparency need to be carefully balanced, depending on the concrete circumstances in which a court operates and the case it processes. This caveat, however, does not change our argument that transparency may in part function differently in international as compared to domestic adjudication and that specific structural conditions under which international courts operate suggest to increase the level of transparency here (see below secs E.1(a)–(d)).

32 In the following, the functionality of transparency for (1) fairness and a rule-of-law-based procedure, (2) compliance, (3) systemic operability, and (4) democratic legitimacy and accountability is discussed. These rationales generally play an important role across all types of international courts and tribunals, while their exact scope and weight may differ between the various institutions and contexts. They can be distinguished from other, more court type-specific transparency rationales which are not treated in this entry. Such type-specific rationales often result from the particular mandates and functions an international court fulfills. For example, procedural transparency in international criminal courts may

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

also serve purposes of deterrence – a rationale which arguably does not play an equally pronounced role in other contexts of adjudication.

1. Fairness and Rule-of-law–based Procedure

33 Transparency allows court observers to scrutinize the judges' behaviour vis-à-vis the parties (or the accused, for that matter). Thereby, judges will be encouraged *ex ante* to abide by fairness-related international procedural principles such as *audiatur et altera pars* (→ *General Principles of International Procedural Law*). And they may be susceptible to public critique *ex post*, if they fail to uphold fairness and impartiality standards in the judicial process (Grossman, 2009, 142; Alemanno and Stefan, 2014, 106–7; von Schorlemer, 2012, 1199–200). Transparency may also further the general development of standards for procedural → *fairness* and impartiality in that the procedural conduct of judges and arbiters in a given case, if made transparent, can be referred to – either as a positive or as a negative example – in other proceedings (Coe, 2006, 1357). The 'procedural fairness rationale' of judicial transparency is in particular recognized by international criminal courts because here, the (procedural) fundamental rights of individuals are at stake: For example, referring to the ECtHR's jurisprudence on Article 6 ECHR, the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* in the → *Tadić Case* prominently stated that '[t]he principal advantage of press and public access is that it helps to ensure that a trial is fair' (*Prosecutor v Tadić,* 1995, para 32). Likewise, the ICC has emphasized that '[…] one of the fundamental aspects guaranteeing the fairness of the proceedings lies in the transparency of these proceedings' (*Prosecutor v Bashir*, para 10). But also in other domains of international adjudication, fairness is fundamentally associated with procedural transparency: For example, the 2014 Mauritius Convention states in its preamble that 'the […] [UNCITRAL Transparency Rules] would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes'.

34 Generally, the mechanisms by which transparency positively affects procedural fairness and impartiality appear to work in a similar way in domestic and in international adjudication. Both in many domestic systems and at the international plane, transparency creates accountability: Experts and lay-persons can observe proceedings and may call out judicial misconduct. Often, international courts are even under closer scrutiny than most domestic courts because the nations-spanning constituencies of international courts are necessarily larger. Due to a potentially larger swarm surveillance effect at the international plane, public monitoring of courts may actually be more close-knit here. Concomitantly, publicly demonstrating fairness and impartiality in the conduct of proceedings may be more important for international than for domestic courts: The former are generally more prone to be drawn into the grinder of geopolitical conflicts and to be politically instrumentalized. Publicly showcasing an unmitigated adherence to and espousal of widely accepted basic values of fairness and impartiality as common denominators and core markers of a non-political, judicial-style type of dispute settlement can hence be a prophylactic and defence strategy against political instrumentalization and compromising (Terris, Romano, and Swigart, 2007, 147–50, 170).

2. Compliance as an Important Aspect of Effectiveness

35 Effectiveness has traditionally been at the core of functional considerations in favour of transparency in international courts. One dimension of effectiveness is compliance with international judgments and awards. Transparency plays a role in enhancing the compliance pull of international judgments because it is a necessary precondition for outsiders to measure compliance in the first place. Compliance is shown by a comparison of State behaviour with the normative instructions and expectations stipulated by a judgment (Huneeus, 2014, 443, with further reference). If the contents of a judgment or award are

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

not generally known, the public or any third parties cannot perform such comparison. Being able to measure compliance for its part is a pre-condition for members of the international community and/or private entities to react to possible non-compliance. Such reactions may inc public and political, diplomatic and/or civic societal pressuring (Paulson, 2004, 457; Warioba, 2001, 50; Llamzon, 2008, 836 *et seq*) and concrete political or legal sanctions against a non-complying State as well as a general loss of reputation (Jones, 2012, 60 *et seq* and 65 *et seq*). These *ex-post* effects mainly attach to the transparency of the judicial output. But transparency during pending proceedings may also be relevant for safeguarding post-procedural compliance because it enables (non-involved) States and non-State actors to exert pre-emptive political pressure, especially in cases where a State demonstrates a basic recalcitrance against a court's authority during the oral and written proceedings. Other actors may rally early opposition against anticipated non-compliance and generally raise expectations for compliance. Ideally, such measures may quench a defeated party's flirting with non-compliance from the outset. To a certain degree, these effects can also be encouraged and steered by international courts themselves (Huneeus, 2014, 452 with further references): for example, courts can amplify transparency (eg through more frequent press releases, etc) in cases where they anticipate non-compliance.

36 The mentioned non-institutionalized compliance-inducing effects of judicial transparency are sometimes supplemented by structured monitoring procedures such the Council of Europe's supervisory mechanism for compliance with ECtHR decisions (→ *Execution of Judgment: European Court of Human Rights (ECtHR)*) (Huneeus, 2014, 451). Such mechanisms require a different, non-judicial form of transparency in that they impose reporting obligations on the State. By drawing attention to non-compliance, however, they also indirectly extend and maintain the actual (judicial) publicity of the original judgment in the post-adjudication phase. In doing so, they stand for themselves in incentivizing compliance (Huneeus, 2014, 451) and also reinforce the diffuse transparency-based compliance-fostering effects described above by giving 'discursive tools to civic society and other states interested in pressuring for compliance' (Huneeus, 2014, 451).

37 The efficacy and compliance rationale of judicial transparency is particularly important in the context of international courts and tribunals, given the generally less developed rules and mechanisms for the enforcement of their judgments, even where concrete 'hard-type' enforcement options exist (eg the 'retaliation'procedure in the WTO's Dispute Settlement Understanding under Art 22.2 *et seq; → Arbitration on the Level of Retaliation: Dispute Settlement of the World Trade Organization (WTO)*; → *Cross-retaliation: Dispute Settlement of the World Trade Organization (WTO)*). By contrast, the function of transparency as an element in the 'soft' enforcement of judgments plays only a marginal role on the domestic level. In that respect, functional considerations for judicial transparency differ considerably in both spheres.

3. Systemic Operability

38 Judicial transparency may be conducive to the operability, development and professionalization of the legal system in which a court is embedded. Downstream operability-enhancing effects may concern, in the first place, the predictability and usability of the law: The more case-law on the application and the interpretation of a law is publicly available, the more certain and the better operable a legal norm becomes (in the context of investment arbitration cf, eg, Knahr and Reinisch, 2007–-2008, 112; Wong and Yackee, 2010, 253). In this regard, judicial transparency may set in motion a clarification spiral: A higher level of legal certainty and predictability may reduce the number of disputes and cases brought before courts (Knahr and Reinisch, 2007–2008, 112), thereby sparing the latters' capacities for deciding the really hard cases. Upstream effects concern the feedback function of publicized judicial proceedings and decisions. They may reveal shortcomings of

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

a legal provision to all parts of a legal system (Jaconelli, 2002, 35) and induce academic and official discourses on the modification and development of the law (Knahr and Reinisch, 2007–-2008, 115).

39 These effects are particularly important for international law which is – for structural reasons – particularly prone to legal uncertainty. A comparatively large body of non-codified law exists. Treaty provisions are often the result of a hard-fought political compromise which may include strategic vagueness (Knahr and Reinisch, 2007–2008, 111–12). The interpretation may be more difficult due to multilingualism. The law is made in a decentralized fashion rather than by a centralized, integrated legislator, and for this reason alone harbours inconsistencies and contradictions. Additional data in the form of court decisions as authoritative (albeit non-binding) reference points and as publicized application experiences of a norm is hence important for appliers of international law. The systemic need for publicly available court decisions is reflected in Article 38 (1) (d) ICJ Statute, which mentions 'judicial decisions' as subsidiary means for the determination of rules of law. Formally, this clause does not demand the publicity of concrete decisions in the first place. But it can be read as an expectation for and as presupposing the publicity of a critical mass of international judicial decisions.

4. Democratic Legitimacy and Accountability

40 Judicial transparency is seen as an important element in the legitimation, increasingly also in a democratic sense, of international judicial activity – both by scholars (von Bogdandy and Venzke, 2014, 210 *et seq,* 236 *et seq;* Grossman, 2009, 153 *et seq)* and by (organs of) international courts themselves (*Commission v Breyer*, 2016, paras 97–102). Generally, the democratic legitimacy of international adjudication faces a 'triple dilemma' (Ulfstein, 2011, 147 *et seq*): First, the democratic legitimacy of judicial activity *per se* is *prima facie* precarious because the attributive nexus between the democratic will of the constituencies and the judicial output of a court is interrupted by the independence of judges. This applies also to international courts (Ulfstein, 2011, 147). Second, traditional legitimation strategies known from the domestic context (to counterbalance the democratic deficit formally created by judicial independence) do not work in an equally efficient way at the international plane. There are no democratic laws which constrain the judicial decision-making or which can easily override a judgment. International law is overall less democratic because domestic parliaments are usually involved only *after* mainly secret treaty negotiations. Also, modifying the law by one State according to the democratic will of its citizens is not as easy at the international plane as in the domestic context (von Bogdandy and Venzke, 2014, 165 *et seq;* see, however, Helfer and Slaughter, 2005, 945–46). Democratic deficits of international legal norms are hence imprinted on or are reproduced in the decisions of international courts which apply those norms. Third, international courts suffer from the same general democratic legitimacy deficits as other international governance institutions and their actions (Peters, 2011, 293–95).

41 Procedural transparency is said to potentially alleviate, albeit not solve these dilemmas (von Bogdandy and Venzke, 2014, 210, 236 *et seq;* von Staden, 2012, 1032). As has been pointed out by the ECJ's Advocate General Bobek, transparency works here in a twofold way (ECJ, *Commission v Breyer*, 2016, paras 97–102): It fosters accountability of courts vis-à-vis a watchful public. It thereby helps identify and single out irregularities and judicial overstep (see on the aspect of a control of judges already League of Nations, Minutes of the Meetings of the Sub-Committee of the Third Assembly Committee [1921], 137–38). It also allows stakeholders to voice criticism of a court (Popescu, 2010, 60) and even to try to convince their government not to have recourse to an international court, to use it in a specific fashion or even to withdraw its support for a court (Grossman, 2009, 153 *et seq,* 157–58; Helfer and Slaugther, 2005, 952–53). These mechanisms relate to the court as an

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

institution or to its jurisprudence in general and can only foster the democratic legitimacy of a concrete decision in an indirect, diffuse way.

42 Transparency also enables and promotes public deliberation of court cases and a general understanding of proceedings and decisions; see *Commission v Breyer*, 2016, paragraph 100: '[…] the openness of courts encourages public debate. It fosters the participation of the citizens in the building, through discussion and exchange of ideas, of a public opinion in Europe. Debate may notably be triggered by [non-governmental organizations], associations, journalists, social watchdogs, researchers or whistle-blowers who contribute to raising citizens' awareness on specific issues of public interest. Thus, more openness is likely to increase public confidence in the judiciary' (footnotes omitted). Public discourses accompanying the work of an (international) court may inform judges about public positions on a certain legal problem or the politics behind such a problem (von Coelln, 2005, 181 *et seq*). Procedural transparency during the different phases of international proceedings may, and in fact often does, even ignite case-specific public discourses paralleling the proceedings as they progress. Such discourses are facilitated by the development of new genres of fast-paced academic publishing such as blogs, etc. Especially publicly voiced expert and scholarly opinions may filter through to the sphere of judges and may be taken into consideration by them (this is not to say that judges should succumb to public *pressure;* see on this Terris, Romano, and Swigart, 2007, 170–74). When such discourses work well, individual constituencies function as *'amici curiae populares'* even where formal participatory instruments do not exist. The evolvement of case-specific public and expert discourses accompanying the proceedings is all the more probable, the more politically and legally significant a case is and the more time proceedings take. These discourses are hence a realistic source of (deliberative) democratic legitimacy especially in international adjudication where cases often revolve around high stakes, attention-generating legal and factual disputes. In fact, international courts are often immersed in their own court-specific public spheres: → *non-governmental organizations* and loose scholarly networks which focus on a specific court and which may build up a marketplace of ideas around it. Such engaged members of the public may through academic communication and education also act as transmission belts for the wider public's ideas.

43 The functioning of transparency to this effect is important for the democratic legitimacy of international courts because it enables individual stakeholders to directly and specifically engage in the topics relevant to an international proceeding. Transparency hence provides a direct chain of communication and thus legitimation between courts and non-State constituencies (as opposed to State-mediated transparency, for example through State conferences, reporting obligations, international organizations in which States are represented and to which international courts report, etc, see Neumann and Simma, 2013, 470 *et seq).*

44 Transparency and its deliberation-fostering function also play a role for legitimation chains running via States: Transparency enables domestic publics to see how their agents represent them in international judicial fora (Grossman, 2009, 153, 158). Based on such insights, domestic publics may discuss the performance of their governments before an international court. Thereby, they may indirectly influence the proceedings because State litigators may take public opinion into account when contriving litigation strategies, submit a certain perspective on the interpretation of the law (Wong and Yackee, 2010, 252) and exercise their procedural rights according to the public will. Certainly, a court may overwrite a party's submissions by deciding against it. But even the chance to influence the outcome and the fact that an international court must substantively react to a State party's (public opinion-backed) submissions may matter. Domestic public discourses attaching to

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

the litigation behaviour of a State thus are a source of indirect democratic legitimacy for international court proceedings.

E. Core Manifestations of International Judicial Transparency

45 International courts and tribunals – much like domestic ones – employ various procedural and practical means to make their work known to the general public. These may include opening procedures to the public, providing general access to procedure-related information, issuing of reports, public notifications, press releases and other forms of public relations work, and the like (Grossman, 2009, 153; see for a comprehensive catalogue of suggested transparency elements in international criminal proceedings Kavran, 2017b, 143). In the following, we focus on access to documents and oral hearings as the two single most important legal instruments by which members of the public may gain insights into the proceedings before international courts and tribunals. Legal issues revolve around five basic parameters: the object of publication ('what'), the basic decision on publication and the exceptions ('if' and 'under what circumstances'), the timing ('when'), the publicizing entity ('who'), and the modalities and procedures of publication ('how').

1. Transparency of Documents

46 Third-party access to international court documents (ie documents filed in connection with a concrete proceeding), allows observers to engage in the details of international proceedings and attain a comprehensive picture about a concrete case. The publication of documents can generate trust even among those observers who do not have the capacity to work through large volumes because it signals that a court, or the parties, by sharing even details and authentic working documents with the public, have in fact nothing to hide (on transparency's function as a – trust-generating – 'proxy', Peters, 2013, 568–70). International procedural law on this matter is often far from complete. Furthermore, the relevant rules and practices vary (Neumann and Simma, 2013, 444). This makes it hard to identify overarching procedural standards.

(a) The Objects of Transparency

47 Rule 26 (i) ICJ Rules and Article 3 (1)–(3) UNCITRAL Transparency Rules enumerate different categories of documents that may pertain to the case file of an international proceeding and that are potentially subject to transparency obligations (see also the extension of the scope of Art 3 (1) UNCITRAL Transparency Rules by Art 8.36 (2) CETA and by draft Art 3.46 (2) EU-Vietnam Investment Protection Agreement [2018]; see in detail European Parliament, In Pursuit of an International Investment Court [2017], 120 *et seq*). A basic distinction is between judicial decisions and other documents. The publication of the former is often regulated separately in the statutes and rules of international courts and tribunals (see also below sec E.1(b)).

48 Other documents are, for example, parties' submissions, exhibits, court orders, and internal court documents. International procedural law tends to treat the various types differently regardless of their exact contents which are only examined in a second step. For example, the ICJ's and the International Tribunal of the Law of the Sea ('ITLOS')' Rules make the publication of parties' written submissions subject to special conditions regarding the timing and the procedure (Art 53 (2) ICJ Rules of Court [1978] ['ICJ Rules'] and Art 67 (2) ITLOS Rules of the Tribunal [2009] ['ITLOS Rules']; see also below sec E.1(c)). *E contrario,* these conditions do not apply to the publication of other documents such as court orders and minutes of public sittings. The latter types of documents are however in fact publicized (see indirectly Rule 26 (i) ICJ Rules). The UNCITRAL Transparency Rules subject expert reports, witness statements, exhibits, etc (Art 3 (2) and (3)) *per se* to stricter conditions of publication than parties' submissions, procedural orders, etc. (Art 3 (1)). In practice, these distinctions are sometimes written over in favour of broader transparency

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

by procedural orders or agreements which refer to the UNCITRAL Rules (see *BSG Resources v Guinea*, 2015, paras 4, 12). In ICSID arbitrations, tribunals have time and again adopted a highly nuanced approach and have individually assessed document by document whether the publication of each type of document is appropriate (see in particular *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, 2006, paras 148–63; see Knahr and Reinisch, 2007–2008, 106–9, 115–16).

49 By contrast, the ECtHR pursues a primarily content-related regulatory approach. Under Rule 33 (1) ECtHR Rules, which fleshes out Article 40 (2) ECHR, documents deposited with the registry by the parties and third parties (be it written party submissions, correspondence, exhibits, etc.) are generally publicly accessible, unless they pertain to friendly settlement negotiations or their *contents* infringe upon, in the eyes of the president of the chamber, one of the interests worthy of protection mentioned in Rule 33 (2) ECtHR Rules (ie public morals, security, etc.). Nevertheless, a certain *type*-related differentiation exists also in the procedural law of the ECtHR: Rule 33 (1) ECtHR Rules refers only to documents filed at the registry by the parties and third parties and not to those filed by the court itself (ie correspondence, etc.). This rule distinguishes between external and internal documents and hence looks at a given document's author before looking at its contents. The Convention for its part does not say that public access pertains only to the external documents. However, it grants the President of the Court a broad leeway to 'decide otherwise'. This could be seen as the legal basis for the mentioned differentiation in the Rules. In any case, the Court has stated that it will not grant access to internal court documents (ECtHR, Access to Case Files).

(b) Regulatory Approaches to the Transparency of Documents

50 The judicial output is the most important category of tribunal-related, publicizable information. The rules of international courts and tribunals generally make judgments accessible to the public without further conditions. Often, judgments are publicly pronounced in open hearings (see eg Art 24 (3) first sentence Statute of the Inter-American Court of Human Rights ('IACtHR') [1979]; European Union ('EU'), Art 37 second sentence Statute of the ECJ [2010]; Art 88 (1) ECJ Rules; Art 74 (5) fourth sentence and Art 83 (4) first sentence Rome Statute of the ICC [1998]; Art 58 second sentence and Art 67 ICJ Statute; Arts 94 (2) and 107 (1) ICJ Rules; ICTY, Rule 98ter (a) and Rule 117 (d) Rules of Procedure and Evidence [2015]; Art 30 (4) second sentence and Art 40 (2) Statute of the ITLOS [1982]; Arts 112 (4) second sentence, 124 (2) and 135 (1) ITLOS Rules).

51 The importance of transparency of the output is also underlined by the fact that even arbitral procedural regimes with a high degree of party-control over transparency such as the ICSID and the PCA Arbitration Rules show some leniency when it comes to the publicity of the awards: Under ICSID, a minimum of transparency is mandatory even when the parties object to the publication of the award. In such a case, ICSID must publish at least 'excerpts of the legal reasoning of the tribunal' (ICSID, Rules for the Procedure for Arbitration Proceedings [2006] ['ICSID Arbitration Rules'], Rule 48 (4) second sentence). The PCA Arbitration Rules, since 2012, provide certain exceptions to the rule that both parties must consent to the publication of an award: A party may now unilaterally publish an award *inter alia* 'where and to the extent disclosure is required of [said] party by legal duty' (Art 34 (5) PCA Arbitration Rules). The provision resolves the potential conflict with domestic Freedom of Information ('FOI') laws in favour of access. It shows how the general FOI trend in domestic legal systems (eg Banisar, 2006) has driven pro-transparency changes in international procedural law. This might have far-reaching implications for international arbitral transparency. With regard to future cases, the introduction of Article 34 (5) PCA Arbitration Rules is a potentially great step because it allows a State party –

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

absent any agreement overriding Article 34 (5) – to considerably shape arbitral transparency by means of its domestic legislation.

52 By contrast, the standard of transparency regarding procedural documents other than judgments and decisions is generally lower. Here, a large spectrum exists. Solutions range from no public access as a principle at the WTO (Art 18 (2) first sentence DSU, concerning written submissions) and the ECJ (at least with regard to public access to the case files, see *Sweden v API*, 2010, para 99; Alemanno and Stefan, 2014, 122). The next grade is limited, legitimate interest-based access to the case files on a case-by-case basis at the European General Court (see in detail EU, Rules of Procedure of the General Court [2018], Art 38 (2)) or delayed public access, subject to a discretionary decision by the court 'after ascertaining the views of the parties' at the ICJ (Art 53 (2) ICJ Rules, concerning the pleadings, ie written submissions, and annexes). The highest degrees of transparency are reached where broad and proactive access regarding many categories of documents is granted, based on a 'package deal'-consent by the parties under the UNCITRAL Transparency Rules (see Art 1 (2), Art 3) and with full-fledged access subject only to clearly circumscribed exceptions at the ECtHR (Art 40 (2) ECHR, ECtHR Rules of Court [2018], Rule 33 (1), (2); see for a comparison *Commission v Breyer*, 2016, paras 105–17). At international criminal courts, 'public filings by the parties' are likewise generally published (Kavran, 2017a, 973).

53 At the ECJ, pressure has been increasing from outside (Alemanno and Stefan, 2014, 125–26) and from within the court to develop more transparency-friendly rules on access to the case files. Advocate General Bobek, in an opinion on a dispute over public access to certain pleadings before the ECJ on the basis of the EU's Transparency Regulation, noted a trend towards open access to judicial documents among domestic and international courts. He called upon the ECJ to follow suit and provided detailed suggestions on how access rules might be structured (*Commission v Breyer,* 2016, para 114 and paras 117, 118 *et seq*). In its judgment (*Commission v Breyer,* 2017, the Court did not address, let alone embrace these arguments. Nevertheless, given the general relevance and *de lege ferenda*-style of Advocate General Bobek's suggestions, the Court might still do so in the long term. This would certainly be an important further step in the general development towards more transparency of documents at international courts.

(c) Timing

54 International procedural law at times tends to withstand early transparency. Especially the parties' submissions may often not be published during the course of proceedings or in certain phases. At the ICJ, the Rules do not allow public access to the parties' submissions before the commencement of the oral phase but only 'on or after the opening of the oral proceedings' (Art 53 (2) ICJ Rules). At the opening of the oral phase, the written submissions (also called pleadings) are generally published proactively by the court (Higgins, 2001, 124 calls this an 'important point of principle'). The publication of pleadings does not extend to their translations (see critically Miron, 2016, 384). States not involved in the proceedings may be granted access to the pleadings even before the opening of the proceedings, 'at any time' (Art 53 (1) ICJ Rules). At the ITLOS, the publication of parties' submissions before the oral phase of proceedings requires a positive decision by the tribunal or the president, suggesting a case-by-case approach regarding an early publication. At the ECJ, the publication of parties' submissions during pending proceedings under the EU's Transparency Regulation (Regulation (EC) No 1049/2001) has been deemed problematic by the Court (*Sweden v API*, 2010, para 92 *et seq)*. ICSID tribunals have also

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

voiced reservations against an early publication of documents (see, for example, *Loewen v United States*, 2001, para 26, cited also by *Biwater Gauff v Tanzania*, para 137 *et seq*).

55 International courts generally justify delays in the publication of documents during pending proceedings with the need to protect the integrity of proceedings and the sound administration of justice. Judicial proceedings – so the argument runs – should especially at an early stage be shielded from outside influence, politicization and a pressurizing of judges and parties (see, eg, ICJ, *Fisheries Case, United Kingdom v Norway*, Correspondence of 28 September 1949, 629; Mani, 1980, 150, 152). Arguably, however, the global culture shift towards transparency in governance and the concomitant normalization of transparency will in the long run enable individuals and institutions to cope better with public pressure and exposure. Representatives of State parties and international judges can increasingly be expected to withstand such pressure. Also, no information or only 'half-information' during on-going proceedings might damage the authority of a court, the trustworthiness of parties and the further *déroulement* of a proceeding, too. We therefore submit that the postponement of the publication of pleadings as a *default* rule and a presumption that early transparency will harm the proceedings is no longer adequate. When public discussion on an individual case does spiral out of control or where other urgent reasons militate against early transparency, it may be warranted to make a case-specific exception to the publication of documents or to take other protective measures. The explicit 'prompt disclosure' approach taken by the UNCITRAL Transparency Rules is therefore a step forward: Under Article 3 (4), most documents shall be communicated to a document repository 'as soon as possible', and the latter is expected to make them publicly available 'in a timely manner' (see also Kee, 2018, 121–23) – subject to confidentiality measures in specific cases (Art 7 UNCITRAL Transparency Rules).

(d) The Publicizing Actor

56 Across the board of international courts and since the early days of international arbitration, the question whether the parties *themselves* may publish their own or even the other side's written submissions, and other materials from the proceedings, is controversial. On the one hand, the concern is that courts must remain in control of the proceedings including the publication of materials in order to protect the sound administration of justice from politicization and outside pressuring and to safeguard the equality of arms of the parties. On the other hand, an obligation of international procedural confidentiality incumbent on parties to a proceeding may collide with domestic (legal) standards of governmental transparency which, after all, are an expression of national sovereignty (Neumann and Simma, 2013, 441–44, 445–47, with further references). In some cases, international courts have solved this obvious tension to the detriment of transparency, providing for a prohibition on publishing pleadings before the court has decided on that matter (*Passage through the Great Belt,* Letter to Finland, cited after Valencia-Ospina, 1997, 216–17; Talmon, 2012, 1122 (with further reference)). In other cases, concern for the integrity of proceedings has not warranted a wholesale confidentiality obligation as a rule, even though the court or tribunal itself does not publish the parties' submissions or allows public access (cf, for example, *Federal Republic of Germany v European Parliament and Council of the EU*, 2000, para 10; Art 18 (2) second sentence DSU). A different, transparency-friendly strategy which evades the above-mentioned tension is pursued by the ECtHR and by the UNCITRAL Transparency Rules: Here, parties' pleadings are made public by the court or tribunal itself, as a rule. It does not seem necessary then to prohibit the publication of the written pleadings *by the parties.* Only as an exception, access to the

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

pleadings or memorials may be restricted for considerations of judicial integrity (see Rule 33 (2) ECtHR Rules *in fine;* Art 7 (6) and (7) UNCITRAL Transparency Rules).

(e) Modalities

57 An important distinction is between proactive access to documents and reactive access solely upon request of an interested person (see on the importance of proactive judicial information dissemination Darbishire, 2010; in the context of international courts, Neumann and Simma, 2013, 474–76). Proactivity has only recently become a key demand of freedom of information and of (judicial) transparency. But practices of proactive information dissemination are not a novel aspect of international judicial transparency. For example, Series A, B (or later A/B) of the Publications of the Permanent Court of International Justice ('PCIJ') contained Judgments, Advisory Opinions and Orders and Series C the 'Pleadings, Oral Arguments and Documents'. These were published in the form of book volumes by a private publishing company; it appears that no formal request to the Court to obtain them was necessary. The ICJ has continued this publication practice and in addition publishes documents from the case file such as written party submissions on its website (Higgins, 2001, 124; for a general argument in favour of both online and print publications see Roosenboom, 2004, 546–47, 551). Formally, proactive publication is not directly addressed by the Rules (although Rule 26 lit. (i) ICJ Rules might be construed to that effect). This is different at the ICC. Its Rules and Regulations provide that many documents from the case record must be published on the Court's website, and hence proactively. ICC, Regulations of the Court [2017], Regulation 8 (c) reads: 'The following materials shall be published on the website of the Court: […] (c) Decisions and orders of the Court and other particulars of each case brought before the Court as described in rule 15; (d) Any other material as decided by the Presidency, the Prosecutor or the Registrar.' The provision appears to refer to Rule 15 of the ICC Rules of Procedure and Evidence [2013] which states that the records contain 'all the particulars of each case brought before the Court'. The ICC Rules might be read as demanding that the entire case record be made public on the court's webpage. But this interpretation might go too far, because the definitive article in Regulation 8 (c) is lacking (it says 'other particulars' instead of 'the other particulars'). In any case, the implementation of a comprehensive, publicly accessible court records database is still 'work in progress' at the ICC (Kavran, 2017a, 970).

58 Further, the new publication system established under the UNCITRAL Transparency Rules boosts proactivity (Shirlow, 2016, 629). Article 3 (4) and Article 8 provide that many documents from the case files of international investment tribunals are published by a central repository 'in a timely manner'. Although neither the Rules nor the newly established transparency register itself provide detailed rules on how the public may access the register, the latter is so far set up as a freely accessible (but not yet much used) online database (www.uncitral.org/transparency-registry/registry/index.jspx, last accessed 14 March 2019). Proactivity is however not yet an overarching standard in international adjudication even for core documents such as parties' submissions. The ECtHR grants individual access to the case-files only upon an individual (online) application to the court.

59 Altogether, international procedural law on the public accessibility of court documents beyond judgments and final decisions is still fragmented. However, as a possible beginning trend, an increasing similarity to domestic FOI laws is visible. For example, the ECtHR's regime (Rule 33 ECtHR Rules) in parts, and even more so the UNCITRAL Transparency Rules mirror basic elements of FOI laws. These laws comprehensively regulate transparency. In substance, they usually contain a basic far-reaching obligation of transparency regarding all governmental information with a distinctly circumscribed typology of exceptions and regulate the modalities of access to information (Banisar, 2006, 20–26). At least the UNCITRAL Transparency Rules fulfill these criteria, and their independent standing outside the UNCITRAL Arbitration Rules adds to their FOI-law-like

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

appearance. A basic difference to many FOI laws remains, though: The rules on access to documents at international courts and tribunals do not clearly stipulate an individual *right* of citizens to access information.

2. Transparency of the Oral Hearings

60 Open oral hearings are not technically an *élément constitutif* of courts and judicial proceedings (→ *Hearings: International Courts and Tribunals*). Nevertheless, lay publics perceive open court hearings usually as the single most important feature of the judicial character of a proceeding. This is not without reason because oral hearings showcase how a court impartially applies the law, hears both parties and grants them equal opportunities to make their case (see also on the 'fairness rationale' of transparency, sec D.1 above; eg, Alvarez-Jiménez, 2010, 1092–93). By means of making the hearings public, a court maintains, *vis-à-vis* a public audience, its institutional identity as a judicial organization (Ehring, 2008, 1029;. Shirlow, 2016, 638 with further reference). This is especially important for international courts and tribunals. In a decentralized system without a clear-cut separation of powers and a wider spectrum of procedures (negotiations, inquiries, good offices, mediation, conciliation, arbitration, adjudication) and institutions, courts and tribunals may be specifically required or motivated to identify themselves as judicial institutions vis-à-vis stakeholders and audiences. Also, the oral hearing typically forms the most accessible 'window' into international court proceedings. It is hence not surprising that international courts and tribunals have implemented a comparatively high standard of transparency of oral hearings.

(a) The Object of Transparency

61 The question whether oral hearings should be conducted at all is not only a question of procedural design but also of transparency. A court or tribunal can effectively cut out transparency-friendly provisions on open hearings by simply refusing to conduct a hearing. Admittedly, transparency rules generally do not create or shape the object (in our case the hearing) whose public accessibility they regulate in the first place (because otherwise, the normative contents of transparency would be borderless). Normally, the fact of an oral hearing and its publicness are two distinct things (von Feuerbach, 1821, 195–96). Nevertheless, the ECtHR has developed a *jurisprudence constante* on the right to an oral hearing as a necessary corollary to the right to a 'public' hearing guaranteed by Article 6 (1) ECHR (eg, *Salomonsson v Sweden*, 2002, para 34; *Mirovni Inštitut v Slovenia,* 2018, para 36).

62 A general normative nexus between the principle of oral hearing and its publicness is not established by the procedural rules of international courts and tribunals. Sometimes, dissenting judges at the ICJ have deplored the lack of oral hearings in specific procedural situations such as counter-claims (→ *Counterclaim: International Court of Justice (ICJ)*). But this criticism was not explicitly founded on considerations of procedural transparency but rather on adverse effects for the administration of justice and the equality of parties (eg, ICJ, *Jurisdictional Immunities of the State,* Order of 6 July 2010, Dissenting opinion of Judge Cançado Trindade, paras 30, 154). But the implications of fewer oral hearings for the procedural transparency of international courts have been stressed by scholars. For example, Cavallaro and Brewer have argued that a decline in the number and length of oral hearings at the IACtHR has led to a decline in media attention to international human rights cases before the court which could then hamper its efficacy (Cavallaro and Brewer, 2008, 793, 797 *et seq*). Due to the importance of open oral hearings for the transparency and for the institutional identifiability of international courts as judicial institutions, courts should

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

take the value of procedural transparency into account when deciding whether an oral hearing should be conducted.

(b) Regulatory Approaches to the Transparency of Oral Hearings

63 Generally speaking, the rules of international courts and tribunals on the accessibility of hearings are slightly more transparency-friendly than the rules on access to documents (see for a comparative overview also von Schorlemer, 2012, 1204–6). A general presumption of openness is in place, for example, at the ICJ (Art 46 ICJ Statute; Art 59 ICJ Rules), the ITLOS (Art 26 (2) ITLOS Statute; Art 74 first sentence ITLOS Rules), the ICC (Art 64 para 7, Art 67 (1) first sentence Rome Statute), the ECtHR (Art 40 (1) ECHR; Rule 63 (1) ECtHR Rules), the IACtHR (Art 24 (1) IACtHR Statute; Art 15 (1) second sentence IACtHR Rules), the ECJ (Art 31 ECJ Statute), and at tribunals applying the UNCITRAL Transparency Rules (Art 6 (1) UNCITRAL Transparency Rules). At these courts and tribunals, closed sessions are – *de jure* – an exception which must be justified, albeit not necessarily *vis-à-vis* the public. Also, openness amounts to an automatism; no specific or formal decision regarding public access to hearings has to be made by the respective court or tribunal.

64 No such presumption of openness can be found in the ICSID Arbitration Rules (see Rule 32 (2) ICSID Arbitration Rules) and in the WTO's Dispute Settlement Understanding. In both cases, the tribunal, or the panel, respectively, must render a positive decision in favour of transparency. In the WTO, the case-law has interpreted the Dispute Settlement Understanding and the panels' Working Procedures (Appendix 3 DSU) progressively and allows for open hearings during both panel and appellate body proceedings if both parties agree (Ehring, 2008, 1024–30; Alvarez-Jiménez, 2010, 1083–84).

65 The exceptions to the publicity of hearings have become more refined over time. This can be witnessed at the ECtHR: The Court's Rules until October 1998 provided the mere blanket statement that '[t]he hearings shall be public, unless the Court shall in exceptional circumstances decide otherwise.' Since then, the Rules enumerate reasons warranting closed hearings which mirror Article 6 (2) ECHR (see Rule 63 (1) second sentence ECtHR Rules). The ECJ in 2012 introduced a provision (Art 79 (1) ECJ Rules) which gives examples of 'serious reasons' under which the Court may derogate from the general rule that hearings must be public according to Article 31 ECJ Statute. The international criminal courts have also developed more comprehensive regulation of the exceptions to publicity. While the ICTY's Statute mentions the protection of the safety, security or identity of a witness as witness-related reasons for a reduced publicity of hearings (Rules 79 (A) (ii), 75 (B) ICTY Rules of Procedure and Evidence), the ICC's Rules of Procedure in addition explicitly allow for protective confidentiality measures in cases of self-incrimination of a witness (Rule 74 Sub-Rule 2 and 7 ICC Rules of Procedure and Evidence). The trend towards a more detailed regulation of the exceptions of hearings' publicity is manifest also in newer procedural regimes, ie in the African Court on Human and Peoples' Rights' ('ACtHPR') Rules of Court [2010] (Rule 43 (2)) and in the UNCITRAL Transparency Rules (Arts 6 (2), 7 (1), (2) UNCITRAL Arbitration Rules). The trend has not, however, materialized at the ICJ or the ITLOS. Their Statutes and Rules do not specify any material reasons for limiting publicity (von Schorlemer, 2012, 1202). The court or tribunal enjoys a broad discretion to limit publicity and the parties may ask for confidentiality by unanimous vote (von Schorlemer, 2012, 1201–2).

66 The more detailed and differentiated rules strengthen transparency, because they force courts and State parties to justify more precisely their orders of or requests for confidentiality. The regulatory trend demonstrates that States and international courts as

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

the creators of international procedural law have become more conscious of the value and importance of judicial transparency over time.

(c) Modalities

67 Immediate physical access to the courtroom is generally distinguished from access by secondary means, ie through reporting on hearings, minutes of hearings, or recordings. Webcasts have become standard, eg, at the ICC, the ITLOS, the ECtHR (see for a comprehensive overview Plagakis, 2013, 92–111), and less so at the ECJ (European Parliament, In Pursuit of an International Investment Court [2017], 122 with further reference; in favour of broadcasts at the European courts Alemanno and Stefan, 2014, 128–29, 132). They are rather scarce in investor-State dispute settlement under ICSID with an upward trend: The total number of cases in which the ICSID implemented webcasts rose from one in 2010 (the year when this option was established) to seven in 2017 (ICSID, Annual Report 2010, 32 and Annual Report 2017, 65).

68 The option for broadcasts is usually not written in the rules of procedure. A prominent exception is Regulation 21 (1) ICC Regulations with the general rule that '[t]he publicity of hearings may extend beyond the courtroom and may be through broadcasting by the Registry […]' (Kavran, 2017a, 968). The ICC's Regulations of the Registry also provide for basic stage directions to the audio-visual assistants at the court on how to conduct recordings (see in particular Regulation 41 (2)) and how to filter out certain materials in broadcasts (see Regulation 42 (3)–(5)). The density of the ICC's Registry Regulations reflects the perils of undue exposure of individuals involved in criminal proceedings. The Regulations on audiovisual recordings are also meant to protect the secrecy of deliberations among judges (Regulation 42 (3)) and the privacy of visitors to the public gallery (Regulation 42 (5)). Another important development is Article 6 (3) UNCITRAL Transparency Rules which explicitly refers to 'video links or such other means' as among the possible 'logistical arrangements to facilitate the public access to hearings.' The tribunal organizes the broadcasting of hearings 'where appropriate' and hence on a case-by-case basis. Still, the imperative wording ('shall make arrangements') suggests that the tribunal is under a procedural obligation to consider how public access to the hearings might be 'facilitated'. Also, a tribunal decision on the modalities of access to the hearings does not require the parties' consent. But the Transparency Rules do not make broadcasts mandatory in cases where hearings are open to the public. This confirms the general picture that the broadcasting of hearings has become a popular and growing practice but not (yet) an overarching procedural norm.

69 Webcasts of court proceedings are embedded in the trend of broadcasting sessions of international institutions and the establishment of official international broadcasting and information dissemination infrastructures such as UN WebTV. This makes the international institutions less dependent on domestic means and domestic public spheres. The trend aligns the traditionally distinct concepts of open justice on the one hand and the transparency of international governance institutions on the other hand. Moreover, webcasts at international courts with a court-owned broadcasting and information technology emancipate the courts from external media. The 'virtual' immediate courtroom publicity through digitalized spectatorship (Vismann, 2011, 310) protects international courts against the danger of information entropy caused by erroneous media reporting (Kavran, 2017b, 127–31). While the media continue to process and interpret raw information, they are less needed as pure fact carriers.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

(d) Timing

70 Timing is relevant for non-immediate (non-physical) access, ie reporting on hearings or broadcasts. Here, access is sometimes delayed by news embargos or delays in broadcasting. A recognized reason for delaying access is the protection of witnesses' testimonies. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the ICJ prohibited courtroom visitors from 'divulging the content of testimony before the end of the oral proceedings' at a specified date (Press Release No 2014/8, 20 February 2014, 2). Admitted media representatives likewise had to maintain confidentiality until after the oral hearings and had to sign a code of conduct. The ICJ apparently carefully balances the need for transparency and the reasons warranting secrecy in a given case and appears to be ready to find compromise solutions even if those may be more cumbersome to implement than an outright closure of the hearings to the public. Another commonly accepted ground for delays is the protection of confidential information against accidental disclosure during hearings. On this ground, webcasts are usually delayed at least 30 minutes so that the material can be redacted (see for example *BSG Resources v Guinea,* para 14 (ii)). After the suicide of the Croatian former general Slobodan Praljak when he received his conviction by the ICTY in front of the running camera, the ICTY was recommended to delay also the broadcasts of sessions in which a judgment is read (ICTY, Statement on the independent review regarding the passing of Slobodan Praljak [2018]).

71 In conclusion, the normative status of transparency regarding oral hearings at international courts is solid. A presumption of openness is in place across many different types of institutions and there is a trend towards a more detailed regulation and standardization of exceptions. Future developments might include a more distinct normative backing of webcasts as the most important means to overcome the geographical distance between international courts and their constituencies (Terris, Romano and Swigart, 2007, 174–79, 227; on the problem of 'distance' Kavran, 2017a, 976–77; Kavran, 2017b, 126 with further reference). The ICC's detailed rules ('stage directions') on the implementation of webcasts may be a helpful reference point for further normative developments also at other courts which want to ensure that the transparency benefits of webcasts are not outweighed by the dangers associated with court broadcasts such as undue public exposure of individuals and a disruption of proceedings.

3. Reasons for Diversity

72 This overview shows that the implementation of transparency varies in the different international courts. One explanation of these variances is that the various functions of transparency and/or their relative weight differ between international courts of different types (see sec D above). For example, as indicated above (sec D.1), the fairness rationale of transparency carries specific weight in international criminal and human rights courts because these directly deal with the personal fate of individuals (the accused or victims). The treatment of such individuals by judges and court personnel during oral hearings hence is a more sensitive issue than, for example, the conduct of ICJ judges vis-à-vis State representatives. This fact (and the human rights dimension of transparency) might partly explain the slightly more transparency-friendly and differentiated norms guaranteeing open hearings at international criminal and human rights courts in comparison to ICJ proceedings, for example (see sec E.2(b) above). It may also explain why the ICC has – contrary to other courts – introduced highly developed and detailed rules on how audio-visual broadcasts should be implemented (see sec E.2(c) above). Moreover, additional,

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

mandate-specific transparency functions at some courts such as deterrence in international criminal adjudication may be the reason for the high level of transparency at these courts.

73 At the same time, other mandate-specific considerations may partly outweigh the benefits of transparency at some courts, and this might explain graduations in transparency. For example, courts and tribunals hearing inter-State disputes such as the ICJ, ITLOS, and the WTO tend to allow for greater party influence and partly give the institution discretion on some aspects of transparency — unlike international criminal courts and tribunals. One consideration here may be the attractiveness of such fora for their users: States should not be discouraged from seizing a court for fear of unwanted (and unavoidable) public and media exposure (cf already Lammasch, 1914, 164; the statement by France's representative in League of Nations, Minutes of the Meetings of the Sub-Committee of the Third Assembly Committee [1921], 137; Mani, 1980, 150). The underlying idea seems to be that it is better to have a (partly) non-transparent proceeding which successfully settles a potentially dangerous conflict than no proceeding at all. With the rise of *governmental* transparency and the freedom of information boom in domestic legal systems, this argument may continue to lose weight in the future, though. As governments and their activities become ever more transparent, international judicial transparency will no longer deter governments from going to an international court.

74 Further factors beyond the mandate-related and functional considerations account for the transparency differences between international courts and tribunals. The historical context in which a court or its statute or rules were created and/or amended matters. More recent or recently amended procedural systems tend to provide more detailed rules on the exceptions to public hearings, thereby strengthening transparency (see sec E.2(b) above). The vagueness of the ICJ's statutory rules and the broad discretion for Court decisions on limitations of publicity may be the product of a time when the need to publicly justify and explain international judicial activity was felt less urgently than today.

75 Factual aspects such as the usage rate of an international court may explain differences regarding the details of transparency. For example, despite its overall progressive stance on transparency, the ECtHR does not score high in practical access to certain case file documents. In particular, these are not uploaded proactively (ie in the ECtHR's Hudoc database). In this respect, the ECtHR differs from other international courts or procedural systems (sec E.2(c) above). This transparency 'blind spot' may have to do with the Court's high caseload in combination with the specific requirements for personal data protection: If all case file documents were to be automatically published, vast efforts would have to be made to revise documents for confidentiality issues and redact certain passages. Generally, considerations regarding costs and human resources obviously affect the transparency level of international courts. Not all courts are equally well-funded. Low funding may not only discourage courts from taking complex *practical* steps to further transparency (ie establishing high-capacity electronic databases, etc.). It might also keep them from introducing far-reaching *legal* transparency standards which they could not implement in practice.

76 Finally, the stakeholder structure of international courts varies, and this also accounts for different degrees of transparency. For example, among the ICC's primary constituencies are those affected by its cases, ie individuals who are often based in conflict or post-conflict zones. The Court's geographical and cultural remoteness from those zones and the lack of infrastructure essential for constituting a functioning domestic public sphere in conflict-ridden societies, creates specific difficulties for the court seeking to reach its primary constituencies (Kavran, 2017b, 126). The Court has therefore engaged in implementing high-capacity transparency mechanisms such as outreach campaigns and comprehensive

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

media strategies (Kavran, 2017b, 127–36) – measures which are not necessary at many other courts and tribunals.

F. Conclusions

77 Transparency is – both in theory and in practice – linked to the historic development of international adjudication. It specifically supports the functioning of international courts in various ways. Its main components are increasingly backed by procedural rules and regulations, partly even in international arbitral systems which have been traditionally closed. These findings point to the development of transparency as an overarching, general principle of international procedural law (Neumann and Simma, 2013, 476). Such a general principle does not mean that all international courts and tribunals must open their proceedings to the public through equal or similar means. Also, a considerable number of international proceedings – especially arbitral proceedings – still remain to a large degree shielded from public scrutiny and will probably remain so in the future.

78 However, the historical foundation, the functionality, the normative consolidation across different courts and tribunals, and the concomitant practice suggest that a duty to take transparency into account exists as a matter of international legal principle. This generates procedural obligations both for law-makers and law-appliers. First, all creators of international procedural law (States and courts), are obliged to take into consideration and weigh the public's potential interest in access to the proceedings. They must have reasons should they formulate a rule against transparency (cf *Commission v Breyer*, 2016, para 117: '… seeing the robust trend pointing in a clear direction [towards openness], buttressed by strong normative arguments as to why reasonable openness of courts is a good thing, a very convincing explanation would be needed for suggesting that the Court of Justice is and ought to be different in this regard.'). Second, a similar duty of consideration is incumbent on the law-appliers: Where the applicable procedural law in question grants discretion on an aspect of transparency or can be construed in favour of transparency, the law-applying actor must carefully ponder the public interest in following the proceedings and reduce confidentiality to the necessary minimum. The mentioned procedural obligations have the practical effect of augmenting the level of reflection of the involved actors when deciding on transparency and may lead to a regular and institutionalized critical questioning of the reasons for confidentiality. This could — in a positive feedback loop — increase the overall amount of actual transparency and would do justice to the general trend in international law and institutions to be more transparent towards stakeholders.

Anne Peters

Cited Bibliography

A von Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (Heyer Gießen 1821).

J Mill, 'Essay on the Law of Nations (1825)' in University of London (ed), *James Mill, Essays on Government, Jurisprudence, Liberty of the Press and Law of Nations, written for the Supplement to the Encyclopaedia Britannica* (London 1903).

W Ladd, 'Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms' (1840, reprint edn OUP New York 1906).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

J Bentham, 'A Plan for an Universal and Perpetual Peace' in *The Works of Jeremy Bentham, vol 2, Principles of International Law, Essay IV* (J Bowring ed, Tait Edinburgh 1843), 546–60.

'The Alabama Claims. The American Case', Manchester Guardian (27 December 1871), 8.

'The Geneva Tribunal: The Case of the United States as it Will be Presented' New York Times (16 December 1871), 1.

'Die Alabamafrage' Neue Zürcher Zeitung (9 February 1872), 1.

'Foreign News by Cable. Impenetrable Secrecy Still Maintained in Geneva' New York Times (26 July 1872), 1.

'The London Press on the Alabama Claims – Hostile Comment on the "Case" of the United States', New York Times (3 February 1872), 3.

G Moynier, 'Note sur la création d'une institution judiciaire international propre à prévenir et à réprimer les infractions à la Convention de Genève' (1872) 11 Bulletin international des Sociétés de secours aux militaires blessés 122.

'The San Juan Award' The Times (30 October 1872), 7.

F de Martens, *Traité de Droit International*, Tome III (Librairie Marescq Aîné Paris 1887).

'The Behring Sea Arbitration' The Times (6 April 1893), 3.

'The Behring Sea Arbitration' The Times (11 May 1893), 5.

'The Behring Sea Arbitration – I. The Preliminary Motions' The Times (25 May 1893), 8.

'The Behring Sea Arbitration – II. The Case for the United States as Presented by Mr. Carter' The Times (29 May 1893), 4.

'The Behring Sea Question before the Court of Arbitration', The Times (28 March 1893), 13.

'The Colonies' The Times (17 July 1893), 8.

'Court Circular', The Times (23 February 1893), 10.

A Mérignhac, *Traité théoretique et pratique de l'arbitrage international: Le rôle du droit dans le fonctionnement de l'institution et dans des destinées futures* (Larose Paris 1895).

JB Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party: Together with Appendices Containing the Treaties Relating to such Arbitrations, and Historical Legal Notes on other International Arbitrations Ancient and Modern, and on the Domestic Commissions of the United States for the Adjustment of International Claims* vol 4 (Government Printing Office Washington DC 1898).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved. Subscriber: University of Basel; date: 21 January 2022

A Acremant, *La procédure dans les arbitrages internationaux* (Sueur-Charruey Paris 1905).

E Root, 'The Sanction of International Law' (1908) 2 ASIL 451–57.

H Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange* (Kohlhammer Stuttgart 1914).

A de la Pradelle and N Politis, *Recueil des Arbitrages Internationaux*, Tome II (Pedone Paris 1923).

JH Ralston, *International Arbitration from Athens to Locarno* (Stanford Palo Alto 1929).

VS Mani, *International Adjudication: Procedural Aspects* (Radiant New Delhi 1980).

T Rantanen, 'The globalization of electronic news in the 19th century' (1997) 19 Media, Culture & Society 605–20.

CK Hall, 'Première proposition de création d'une cour criminelle internationale permanente' (1998) ICCR 59–78.

R Higgins, 'Respecting Sovereign States and Running a Tight Courtroom' (2001) 50 ICLQ 121–32.

JS Warioba, 'Monitoring Compliance with and Enforcement of Binding Decisions of International Courts' (2001) 5 MaxPlanckUNYB 41–52.

J Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP Oxford 2002).

M Conboy, *Journalism: A Critical History* (Sage London 2004).

É Crucé, *Le Nouveau Cynée ou Discours d'État*(A Fenet and A Guillaume eds PUR Rennes 2004).

C Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987' (2004) 98 AJIL 434–61.

A Roosenboom, 'Publications of International Courts and Tribunals' (2004) 3 LPICT 543–51.

T Bingham, 'The Alabama Claims Arbitration' (2005) 54 ICLQ 2005 1–25.

C von Coelln, *Zur Medienöffentlichkeit der Dritten Gewalt* (Mohr Tübingen 2005).

LR Helfer and AM Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 39 CalLRev 899–956.

G Hoogensen, *International Relations, Security and Jeremy Bentham* (Routledge Abingdon 2005).

D Banisar, *Freedom of Information around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International London 2006).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

J Coe, ‘Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership’ (2006) 54 University of Kansas Law Review 1339–85.

S Roure, ‘L'élargissement du principe de publicité des débats judiciaires: une judiciarisation du débat public’ (2006) 68 Revue francaise de droit constitutionnel 737–79.

AM Slaughter, ‘Rereading Root’ (2006) 100 Proceedings of the ASIL Annual Meeting 203–16 (with introductory remarks by CN Brower and comments by A Carty and JM Zasloff).

B Wegener, *Der geheime Staat: Arkantradition und Informationsfreiheitsrecht* (Morango Göttingen 2006).

C Knahr and A Reinisch, ‘Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise’ (2007–2008) 6 LPICT 97–118.

E Schilken, *Gerichtsverfassungsrecht* (Heymanns Cologne 2007).

D Terris, C Romano, and L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (OUP Oxford 2007).

J Cavallaro and SE Brewer, ‘Reevaluating Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court’ (2008) 102 AJIL 768–827.

L Ehring, ‘Public Access to Dispute Settlement Hearings in the World Trade Organization’ (2008) 11 JIEL 1021–34.

AP Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2008) 18 EJIL 815–52.

N Grossman, ‘Legitimacy and International Adjudicative Bodies’ (2009) 41 GWashIntlLRev 107–62.

A Alvarez-Jiménez, ‘Public Hearings at the WTO Appellate Body: The Next Step’ (2010) 59 ICLQ 1079–98.

H Darbishire, *Proactive Transparency: The Future of the Right to Information?* (World Bank Institute Washington DC 2010).

R Mackenzie, K Malleson, P Martin, and P Sands, *Selecting International Judges: Principle, Process and Politics* (OUP Oxford 2010).

CL Popescu, ‘La cour européenne des droits de l’homme’ in H Ruiz Fabri and JM Sorel (eds), *Indépendance et impartialité des juges internationaux* (Pedone Paris 2010) 39–136.

J Wong and J Yackee, ‘The 2006 Procedural and Transparency-related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns’ in K Sauvant (ed), *The Yearbook on International Investment Law & Policy 2009–2010* (OUP Oxford 2010) 257–61.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

G Ulfstein, 'The International Judiciary' in J Klabbers, A Peters, and G Ulfstein, *The Constitutionalization of International Law* (OUP Oxford 2011) 126–52.

C Vismann, *Medien der Rechtsprechung* (Fischer Frankfurt 2011).

HL Jones, 'Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since *Nicaragua*' (2012) 12 Chicago-Kent Journal of International and Comparative Law 57–98.

S von Schorlemer, 'Article 46' in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams, M Kashgar, and D Diehl (eds), *The Statute of the International Court of Justice* (OUP 2nd edn Oxford 2012) 1197–1206.

A von Staden, 'Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiary and Judicial Standards of Review' (2012) 10 ICON 1023–49.

S Talmon, 'Article 43' in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams, M Kashgar, and D Diehl (eds), *The Statute of the International Court of Justice* (OUP 2nd edn Oxford 2012) 1088–171.

A Bianchi and A Peters (eds), *Transparency in International Law* (CUP Cambridge 2013)

T Neumann and B Simma, 'Adjudication' in A Bianchi and A Peters (eds), *Transparency in International Law* (CUP Cambridge 2013) 436–76.

A Peters, 'Towards Transparency as a Global Norm' in A Bianchi and A Peters (eds), *Transparency in International Law* (CUP Cambridge 2013) 534–607.

S Plagakis, 'Webcasting' in: J Nakagawa (ed), *Transparency in International Trade and Investment Dispute Settlement* (Routledge Abingdon 2013) 84–118.

A Alemanno and O Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51 CMLR 97–140.

A von Bogdandy and I Venzke, *In wessen Namen? Internationale Gerichte in Zeiten globalen Regierens* (Suhrkamp Berlin 2014).

A Huneeus, 'Compliance with Judgements and Decisions' in C Romano, K Alter, and Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP Oxford 2014) 437–63.

ME O'Connell and L Vanderzee, 'The History of International Adjudication' in C Romano, K Alter, and Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP Oxford 2014) 40–62.

K Lovrić-Pernak, 'Aim: Peace – Sanction: War, International Arbitration and the Problem of Enforcement' in T Hippler and M Vec (eds), *Paradoxes of Peace in Nineteenth Century Europe* (OUP Oxford 2015) 62–74.

A Peters, 'The Transparency Turn of International Law' (2015) 1 Chinese Journal of Global Governance 3–15.

A Miron, 'Working Methods of the Court' (2016) 7 Journal of International Dispute Settlement 371–94.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

E Shirlow, 'Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration' (2016) 31 ICSID Rev/FILJ 622–54.

C Brants and S Karstedt, 'Introduction: The Rational and the Emotional: Issues of Transparency and Legitimacy in Transitional Justice' in C Brants and S Karstedt (eds), *Transitional Justice and the Public Sphere* (Hart Oxford 2017) 1–13.

O Kavran, 'International Criminal Courts and the Right to Information' (2017a) 15 JICJ 953–83.

O Kavran, 'International Judicial Institutions: (Re)Defining 'Public' Proceedings?' in C Brants and S Karstedt (eds), *Transitional Justice and the Public Sphere* (Hart Oxford 2017b) 125–45.

C Kee, 'Article 3. Publication of documents' in D Euler, M Gehring, and M Scherer, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (CUP 2nd edn Cambridge 2018), 91–127.

M Scherer, M Gehring, and D Euler, 'Introduction' in D Euler, M Gehring, and M Scherer (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (CUP Cambridge 2018) 1–6.

Cited Documents

African Court on Human and Peoples' Rights, 'Rules of Court' (2 June 2010), <http://en.african-court.org/images/ProtocolHost%20Agrtmt/Final_Rules_of_Court_for_Publication_after_Harmonization__Final__English_7_sept_1_.pdf> (accessed 10 August 2019).

COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights).

COE 'Recommendation Rec(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and the case-law of the European Court of Human Rights', adopted by the Committee of Ministers on 18 December 2002 at the 822nd meeting of the Ministers' Deputies.

Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, entered into force provisionally on 21 September 2017), [2017] OJ L11/23.

Convention relative to the Establishment of an International Prize Court (signed 18 October 1907, not yet entered into force) (1908) 2 AJIL Supp 174.

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

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

European Court of Human Rights, ‘Rules of Court’ (as amended with effect from 1 August 2018).

European Parliament, Directorate General for External Policies, ‘In Pursuit of an International Investment Court: Recently negotiated investment chapters in EU Comprehensive FTA in comparative perspective’, July 2017, EP/EXPO/B/INTA/2017/02.

European Union–Vietnam Trade and Investment Agreements (Draft), Authentic Text as of August 2018, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (accessed 10 August 2019).

Hague International Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 4 September 1900) (1898–99) 187 CTS 410.

ICSID, ‘Annual Report 2010’ (2010).

ICSID, ‘Annual Report 2017’ (2017).

ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (effective 10 April 2006).

International Court of Justice, ‘Report of the International Court of Justice for the Period 1 August 2016 to 31 July 2017’ (General Assembly, Official Records of the Seventy-second Session, Supplement No 4, A/72/4, 2017).

International Criminal Court Assembly of States Parties, ‘Rules of Procedure and Evidence’ (3–10 September 2002) Official Records ICC-ASP/1/3 (2019 edn, ICC-PIOS-LT-03004/19_Eng).

International Criminal Court, ‘Regulations of the Court’, ICC-BD/01-01-04 (adopted by the judges of the Court on 26 May 2004, as last amended on 12 November 2018, ICC-BD/01-0516).

International Criminal Court, ‘Regulations of the Registry’ (first approved by the Presidency on 6 March 2006, as last amended on 1 August 2018, ICC-BD/03-03-13).

International Criminal Court, ‘Summary of the Integrated Strategy for External Relations, Public Information and Outreach', <https://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf> (accessed 10 August 2019).

International Criminal Tribunal for the former Yugoslavia, ‘Rules of Procedure and Evidence’ (as last amended on 8 July 2015, IT/32/Rev.50).

International Criminal Tribunal for the former Yugoslavia, ‘Statement on the independent review regarding the passing of Slobodan Praljak’, <http://www.icty.org/en/press/statement-on-the-independent-review-regarding-the-passing-of-slobodan-praljak> (accessed 14 March 2019).

League of Nations, ‘Minutes of the Meetings of the Sub-Committee of the Third Assembly Committee, 6th Meeting of 29 November 1920’ in Permanent Court of International Justice, *Documents concerning the action taken by the Council of the*

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court (Geneva 1921) 137–41.

‘Memorandum between Great Britain and Portugal in the affair *Yuille, Shortridge & Co.*, 8 March 1861’ (reprinted, in French translation, in A de la Pradelle and N Politis, *Recueil des Arbitrages Internationaux*, Tome II (Pedone Paris 1923) 89–91).

‘Memorandum between Great Britain and Portugal in the Croft affair of 14 May 1855’ (reprinted, in French translation, in A de la Pradelle and N Politis, *Recueil des Arbitrages Internationaux*, Tome II (Pedone Paris 1923) 12–13).

Permanent Court of Arbitration, ‘Arbitration Rules 2012’, <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/> (accessed 10 August 2019).

Protocol between Great Britain and Portugal in the Delagoa Bay Affair (signed 25 September 1872) (reprinted in A de la Pradelle and N Politis, *Recueil des Arbitrages Internationaux*, Tome III (Pedone Paris 1954) 600–2).

Protocol between Great Britain and Portugal in the Isle of Bulama Affair (signed 13 January 1869) (reprinted in A de la Pradelle and N Politis, *Recueil des Arbitrages Internationaux*, Tome II (Pedone Paris 1923) 606–8).

Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union (adopted 6 July 2016, entered into force 1 August 2016) OJ L200/16.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

Rules of Court of the International Court of Justice (entered into force 1 July 1978, last amended 14 April 2005).

Rules of the International Tribunal for the Law of the Sea (as amended on 17 March 2009).

Rules of Procedure of the Court of Justice (adopted 25 September 2012), [2012] OJ L265/1 (as last amended on 19 July 2016, OJ L217/69).

Rules of Procedure of the General Court (2 May 1991) [2015] OJ105/1 (as last amended on 11 July 2018, OJ L240/68).

Rules of Procedure of the Inter-American Court of Human Rights (approved 25 November 2000, as amended in November 2009).

Statute of the Inter-American Court of Human Rights (adopted 31 October 1979, entered into force 1 January 1980) 19 ILM 635.

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

Statute of the International Tribunal for the Law of the Sea, Annex VI to the United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 561.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

Tribunal Arbitral des Pêcheries de Behring, 23 Février–15 Août 1893 Sentence, Déclarations et Protocoles des Séances (Imprimerie Nationale Paris 1894).

UNCITRAL, 'Rules on Transparency in Treaty-based Investor-State Arbitration'. (2014).

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (signed 10 December 2014, entered in force 18 October 2017).

United States Department of State, 'Papers Relating to the Treaty of Washington, Volume IV, Geneva Arbitration' (Government Printing Office Washington DC 1872), 15–48.

WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)' (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401.

Cited Cases

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia v Serbia, ICJ, 20 February 2014, Press Release No 2014/8, p 2.

Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, Procedural Order No 3, 29 September 2006, ICSID Case No ARB/05/22.

BSG Resources Limited v Republic of Guinea, Procedural Order No 2, 17 September 2015, ICSID Case No ARB/14/22.

Commission v Breyer, Opinion of Advocate General Bobek, CJEU, 21 December 2016, Case C-213/15 P.

Commission v Breyer, Judgment, CJEU, 18 July 2017, Case C-213/15 P.

Federal Republic of Germany v European Parliament and Council of the European Union, Order, CJEU, 3 April 2000, Case C-376/98.

Fisheries Case, United Kingdom v Norway, ICJ, Correspondence of 28 September 1949, 1 February 1952, vol IV, 628-29 (no 21).

Jurisdictional Immunities of the State, Germany v Italy: Greece intervening, Order, Dissenting opinion of Judge Cançado Trindade, ICJ, 6 July 2010, paras 30, 154.

Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission, Association de la presse internationale ASBL (API) v European Commission and European Commission v Association de la presse internationale ASBL (API), Judgment, CJEU, 21 September 2010, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P.

Loewen Group, Incorporated and Raymond L Loewen v United States, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, ICSID Case No ARB (AF) 98/3.

Mirovni Inštitut v Slovenia, Judgment, ECtHR, 13 March 2018, App 32303/13.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022

Passage through the Great Belt, Finland v Denmark, Letter to Finland (quoted in E Valencia-Ospina, 'Financing, Administering and Making Known the Work of the Court' in C Peck and RS Lee (eds), *Increasing the Effectiveness of the International Court of Justice, Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Nijhoff The Hague 1997) 207–32).

Prosecutor v Omar Hassan Ahmad al Bashir, Decision Requesting Observations from the Republic of Chad on the Possible Reclassification of Document ICC-02/05-01/09-150-Conf-Anx1, 18 April 2013, ICC-02/05-01/09.

Prosecutor v Duško Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ICTY, 10 August 1995, IT-94-I-T.

Salomonsson v Sweden, Judgment, ECtHR, 12 November 2002, App No. 38978/97.

Mehmet Emin Şimşek v Turkey, Judgment, ECtHR, 28 May 2012, App No. 5488/05.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2022. All Rights Reserved.
Subscriber: University of Basel; date: 21 January 2022