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The Case of the ICC-NGOs Partnership

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RETHINKING TRANSPARENCY THROUGH THE PUBLIC-PRIVATE PRISM: THE CASE OF THE ICC-NGOS PARTNERSHIP

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Abstract

This article considers how arguments about transparency have shaped the institutional set up of the International Criminal Court (ICC) ever since its establishment, forging and reinforcing the very idea of what transparency means in an international justice context. In particular, the paper examines how transparency, constructed as broader public access, has shaped the relationship between the ICC as a *public* institution and non-governmental organizations (NGOs) as *private* actors. The public/private prism is rendered necessary for it enables one to appreciate more clearly the largely neglected double-edged character of transparency as a tool of global governance. While, on the one hand, transparency has '*publicised*' institutions and areas of international law by marking a shift from the private/bilateral dimension to a public/global character, on the other hand, it has also '*privatised*' those areas and institutions in international law by enabling the participation of private actors within their life and activities. As such, this contribution invites critical reflections on the implications of understanding transparency as wider public participation, and on the relations it engenders between international courts and tribunals as public institutions and NGOs as private actors within the international justice project.

1. INTRODUCTION: THE EMERGENCE OF TRANSPARENCY IN INTERNATIONAL LEGAL DISCOURSE

The language of transparency is by far pervasive in international law discourse. Unlike a decade ago, when transparency was perceived to have 'little currency, if any at all' in international law,[1] today the concept of transparency appears more popular, more attractive, and more catalytic than ever across international legal areas. There are many ways in which transparency features the international legal discourse: in opposition to secrecy, typical of diplomacy, or to confidentiality, typical of privacy-sensitive proceedings.[2] While a few accounts have treated it as a legal principle stemming from 'information obligations of states – to collect, report, or publish' as well as from 'traditional forms of reporting, monitoring and verification',[3] transparency has been mostly invoked in the context of good

[1] Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press, 2013) 1-19, referring to 'more traditional circles'.

[2] See eg, Bianchi, ibid, 1-2, describing transparency as a culture (at 1), in contrast to secrecy and confidentiality (at 2). In the context of international criminal justice, see inter alios Carsten Stahn, 'Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC' (2017) 15 *Journal of International Criminal Justice* 413.

[3] Tom Sparks and Anne Peters, 'Transparency Procedures', in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law*, 2nd ed, (Oxford University Press, 2021) 904-919, 904. For domestic and comparative practice on transparency, see Bradley and others lamenting the circumvention of 'transparency mandates' by the executive branch, determined by the choice of nonbinding international agreements. Curtis A Bradley, Jack Goldsmith and Oona Hathaway, 'The Rise of Nonbinding International

governance and institutional design/reform, as an aspirational value,[4] a culture,[5] an ethical principle,[6] a criterion for democratic accountability[7] and legitimacy,[8] or a demand enabling public participation.[9]

In terms of publicity, transparency has been invoked as a principle from which legal rights and obligations may be inferred, for one the right to access information and the obligation to disclose such information.[10] For instance, in the field of investment arbitration, in 2013 the UN Commission on International Trade Law (UNCITRAL) has adopted its 'Rules on Transparency in Treaty-based Investor-State Arbitration',[11] with the aim to set out the 'highest standards of transparency'.[12] Interestingly, the UNCITRAL describes the importance of transparency in investment arbitration as follows:

> Traditionally, arbitration proceedings were confidential (reflecting the norm in international commercial arbitration). However, there are ISDS cases that involve questions of *public interest*, such as environmental and social policy issues, where transparency of the proceedings and the resolution are important. UNCITRAL has therefore adopted texts to provide for transparency in ISDS, known as the "UNCITRAL Transparency Standards".[13]

Agreements: An Empirical, Comparative, and Normative Analysis' (2023) *The University of Chicago Law Review 1281*, 1285-6, 1346-64.

[4] See eg Devika Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions' in Jeremy Farrall and Kim Rubenstein (eds), Sanctions, *Accountability and Governance in A Globalised World* (Cambridge University Press, 2009) 92-122, at 92 describing it as a 'desirable institutional value'.

[5] Bianchi (n 2), 1; Anne Peters, 'The Transparency Turn of International Law' (2015) 1 *The Chinese Journal of Global Governance* 3, 4.

[6] See eg Julie A Maupin, 'Transparency in International Investment Law: The Good, the Bad and the Murky' in Bianchi and Peters (eds), *Transparency in International Law* (n 1) 142-171, 164-165, 169.

[7] Anne Peters, 'Towards Transparency as a Global Norm' in Bianchi and Peters (eds), *Transparency in International Law* (n 1) 534-607, 568, defining transparency, participation and accountability as 'kindred values' constituting the 'tryptichon of global good governance'. See also Henk Addink, *Good Governance: Concept and Context* (Oxford University Press, 2019) 111-128; Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15, 17. For *contra* views ('the right to opacity'), see Dimitri van den Meerssche, 'Virtual borders: International law and the elusive inequalities of algorithmic association' (2022) 33 *European Journal of International Law* 171, 194-196, 203-204.

[8] Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics and International Affairs* 405, 428; Addink, ibid, 111. See also A Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 *Leiden Journal Of International Law* 491, 493, describing transparency of decision-making as a factor to be used to appraise the legitimacy of an institution.

[9] See eg Luke Moffett, 'Elaborating justice for victims at the international criminal court: Beyond rhetoric and the Hague' (2015) 13 *Journal of international criminal justice* 281.

[10] See eg in the context of international human rights law, ECtHR, *Gillberg v Sweden*, Application No 41723/06, Grand Chamber Judgment, 3 April 2022, para 93, recognising an individual right of access to public documents for article 10 ECHR. On the point, see Peters (n 5), pp 6-7 and 12. See also Hovell (n 4) 97; Patrick Birkinshaw, 'Transparency as a Human Right' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006) 47-58.

[11] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014) | United Nations Commission On International Trade Law.

[12] UNCITRAL, 'Report of the Working Group II on the Work of Its Fifty-Fourth Session' A/CN.9/717 (2011) paras 26. On the point, see also Gary J Shaw, 'The 2022 ICSID rules: A leap toward greater transparency in ICSID arbitration' (2023) 38 *ICSID review* 54, 55.

[13] UNCITRAL Website <Transparency Registry | United Nations Commission On International Trade Law> (emphasis added). The UNCITRAL Transparency Standards comprise: 1. The Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules", 2013); 2. The United Nations Convention on

More recently, the International Centre for Settlement of Investment Disputes (ICSID) adopted a set of amended rules, hinging on issues of transparency, among others.[14] Both instruments refer to transparency in the context of publication of material and access to proceedings, thus connoting transparency in this particular way rather than other possible ones.

In the different area of international health law, transparency features prominently, too. For instance, the World Health Assembly (WHA) has adopted internal guidelines and policy documents that make reference to transparency as a guiding principle for the World Health Organization (WHO) to partner with non-state actors. Among these documents, the Framework of Engagement with Non-State Actors (FENSA) adopted by the WHA in 2016 mandates that any engagement be carry out according to overarching principles that expressly include transparency.[15] Similar initiatives concerning transparency have unfolded in the governance of artificial intelligence (AI)[16] as well as in the extractive industry sector.[17] A discrete section of the 2020 Artemis Accords, which seek to govern civil activities in outer space, is also devoted to transparency.[18]

In the context of international criminal justice, transparency has fostered new design settings. An example is offered by the International Criminal Court (ICC) and the Assembly of States Parties (ASP) as its governing body, where transparency has been primarily constructed in terms of wider public participation, empowering non-governmental organizations (NGOs) to oversee and become involved in the activity of the ASP, ultimately acting as guarantors of public interest. For the purposes of this contribution, NGOs are defined as 'self-governing, private, not-for-profit organizations…[which] are neither part of government nor controlled by a public body',[19] are neither 'established by a governmental entity [n]or by an international agreement',[20] and which put in place activities corresponding to specific interests whereby they consciously seek to influence outcomes of political processes, including arrangements, norms, policies and structures in the international society at large.[21] Based on this, the distinctive traits on which I will build my argument are the *private* character of these organizations – on

Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency", 2014); and 3. The Transparency Registry.

[14] See ICSID Arbitration Rules (2022), in particular Chapter X, Rules 62-64 dealing with the publication of awards, orders, decisions and documents filed during the proceedings.

[15] Framework of Engagement with Non-State Actors (WHA6910), para 5, *lit* h: 'Any engagement must…be conducted on the basis of transparency, openness, inclusiveness, accountability, integrity and mutual respect.' See also WHO Basic Documents (Forty-ninth edition, 2020), p 107-8, paras 37-43.

[16] See eg Committee on Artificial Intelligence (CAI) of the Council of Europe, Consolidated Working Draft on the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Role of Law, CAI(23)18, 7 July 2023, in which transparency is set out in Article 7 amid 'general common principles applicable to design, development, use, and decommissioning of artificial intelligence systems'.

[17] See eg Eliana Cusato, 'Transnational law and the politics of conflict minerals regulation: construing the extractive industry as a "partner" for peace (2021) 12 *Transnational Legal Theory* 269, in particular 275 and 278-280: 'Transparency is thus encouraged not only because it fosters democratic checks upon institutions, but for its capacity to attract foreign investments.'

[18] Artemis Accords – Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes (13 October 2020), Section 4.

[19] Cenap Cakmak cited in Patricia Casandra Papuc, 'Analysis of the Increasing Role of NGOs in International Public Law' (2020) 27 *Lex ET Scientia International Journal* 113, 115.

[20] ECOSOC Resolution 1996/31, para 12, available at <resolution-1996-31.pdf (un.org)>.

[21] Jan Aart Scholte, 'Civil Society and Democracy in Global Governance' (2002) 8 *Global Governance: A Review of Multilateralism and International Organizations* 281, 284. See also Julie Mertus, 'Considering nonstate actors in the new millennium: Towards expanded participation in norm generation and norm application' (2000) 32 *New York University Journal of International Law and Politics* 537.

which I will return later – and their autonomy from the public control, even if and when acting in partnership with the state. Although recognising that 'civil society' might be understood as a broader concept than NGOs,[22] I will use the two terms interchangeably.

The role of NGOs has indeed been central to the discourse about transparency in relation to the ICC, since its very establishment. The first President of the Court, Phillippe Kirsch, considered that 'The ICC's relationship with other international actors will also be significant as it meets the challenge of building a *transparent and accessible Court*. The ICC enjoyed the support of the international public, NGOs and civil society in the years leading up to the establishment of the Court. This dialogue with international civil society will continue to be valuable as the Court moves forward with its operations."[23] As a reflection of this, some States called on 'all the State Parties, the Court and civil society to continue their joint efforts to ensure that good governance, transparency and cohesion continue to be promoted and implemented.'[24] The partnership between the Court and civil society has also been regarded as indispensable to realise the ICC system and has indeed consolidated throughout the years to grant civil society access to the sessions of the ASP. In particular, in 2003, the Coalition for the ICC (CICC) was officially recognised by the ASP the role of facilitating the participation of civil society in the annual sessions of the Assembly.[25]

However, the broader participation of NGOs carries more profound questions as to what such participation entails for the international justice project. In other words, enabling NGOs to oversee the activity of the ASP, eg during the election of judges as occurred in 2017 during the 16th ASP session,[26] or of ICC Prosecutor more recently, implies looking at them as guarantors of a public interest space. This might be problematic in and of itself, being these actors private and opaque in character.[27] In this vein, this contribution argues that conceptualising transparency requires first of all to conceptualise the publicness of international law in relation to actors and institutions performing in areas of public interest. Publicness is here meant as the feature of being subjectable to demands of public scrutiny. This features attaches to actors bound by a public mandate (such as public institutions), as well as to subject matters that inherently attain to whole collectivities or polities. As such, performing in areas of public interests

[22] Scholte, ibid.

[23] Address by President Phillippe Kirsch to the Assembly of States Parties to the Rome Statute, New York, 8 September 2003, available at https://asp.icc-cpi.int/sites/asp/files/NR/rdonlyres/1389834D-9368-4464-A8A2-2D026D4D243E/146370/PK_20030908_En.pdf (last visited 19 January 2023). Emphasis added. Kirsch also emphasized that "The Judges are fully aware that transparency and inclusiveness are important for this process [the preparation of Regulations for the proper functioning of the Court]. We are currently looking into the most appropriate ways to enhance public awareness and ensure a wider participation in the process."

[24] See e.g. the Statement on behalf of the Republic of Albania to the 20th session of the Assembly of States Parties to the Rome Statute, The Hague, 6-11 December 2021, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ASP20.GD.ALB.06.12.pdf (last visited 19 June 2023).

[25] <Our story | Coalition for the International Criminal Court (coalitionfortheicc.org)> (last visited 30 August 2023).

[26] The CICC reports this achievement as follows: 'A number of important positions in the Rome Statute system are filled at the 16th session of the Assembly of States Parties (ASP), including six judicial vacancies, the ASP president and two ASP vice-presidents. Once again, we campaign for states to nominate and elect highly-qualified and independent candidates to key positions in the Rome Statute system through fair, *transparent*, and merit-based nomination and election processes.' <Our story | Coalition for the International Criminal Court (coalitionfortheicc.org)> (emphasis added)

[27] As noted by some commentators, NGOs are characterised by a 'relative intransparency', sometimes even making of secrecy and confidentiality traits of their identity. See Peters, 'Towards Transparency as a Global Norm' (n 7), 551. See also Steven Ratner, 'Behind the Flag of Dunant: Secrecy and the Compliance Missions of the International Committee of the Red Cross' in Bianchi and Peters (eds), *Transparency in International Law* (n 1) 297-320.

should attract transparency demands as much as it would attract the participation of 'public interest defenders'. And yet, whilst international courts and tribunals fall squarely into categories of public, the activities of actors allegedly performing a public scrutiny function on the work of courts and tribunals, like NGOs, have so far largely escaped demands typically associated with the public dimension. Put differently, while transparency has fostered demands vis-à-vis public institutions, the extent to which similar demands may be invoked towards private actors performing in areas of public interest remains to be explored.

This line of reasoning also concedes –at a more experimental level than on a normative plane– that actors that are not formally public in character (on the same strength as states and state-authorities, or intergovernmental organizations) may legitimately engage with areas of public interest and claim to represent such interests.[28] This remains all but uncontroversial from a normative standpoint,[29] although several accounts uncritically acclaim NGOs acting as public interest defenders just as a desirable development in international law.[30] The institutional diversity and plurality that characterises international law today shall thus not obfuscate what is at stake here, namely the implications ensuing from a process in which private actors progressively gain authority in the realm of the (international) public. In the words of Samantha Besson, '[institutions of international law] have indeed become increasingly private or at least straddle the public/private distinction, thereby diluting the relevance of public institutions therein or at any rate their specificities and those of their responsibility.'[31]

By looking at the ICC as a case study, I explore how arguments about transparency, constructed as broader public access to the activities of the Court, have shaped its institutional set up from the outset, reinforcing or even forging the very idea of what transparency means in an international justice context. I then critically analyse the implications of associating transparency with greater involvement of private actors as guarantors of spaces of public interest and on its significance for the international justice project. As such, this paper aims to contribute the scholarly debate which broadly interrogates the conditions under which non-state actors may legitimately perform in areas of public interest and what role civil society could play in a 'reconfigured democracy for globalisation.'[32]

This contribution is articulated in three sections. Besides laying down key definitions, Section 2 introduces the public/private divide as an epistemic tool that helps ordering rather than 'legalising' complex practices. As such, I suggest to resort to the public/private divide as a lens that can better exhibit

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[28] For a broader analysis on the point, see Letizia Lo Giacco, 'Private Entities Shaping Community Interests: (Re)Imagining the "Publicness" of Public international Law as an Epistemic Tool' (2023) 14 *Transnational Legal Theory* 270-306. See also, Sigfrido Burgos Cáceres, 'NGOs, IGOs, and International Law – Gaining Credibility and Legitimacy through Lobbying and Results' (2012) 13 *Georgetown Journal of International Affairs* 79, 85: 'Locals do not choose the,, yet NGOs claim to be fighting for various issues at the behest of the people.'

[29] Lo Giacco, ibid, in particular 287-292.

[30] The point has been acutely remarked and elaborated upon by MJ Durkee under the expression 'strong legitimacy optimism'. See Melissa J Durkee, 'International Lobbying Law' (2018) 127 *Yale Law Journal* 1742, 1759.

[31] Samantha Besson, 'Theorizing International Responsibility Law, an Introduction' in Samantha Besson (ed), *Theories of International Responsibility Law* (Cambridge University Press, 2022) 1-24, 8.

[32] Scholte (n 21), 285. See, more recently, Annabelle Littoz-Monnet and Ximena Osorio Garate, 'Knowledge politics in global governance: philanthropists' knowledge-making practices in global health' (2023) *Review of International Political Economy* 1-20, arguing (at p 20), in relation to philanthropists in the field of global health and beyond: '[Ownership and control over knowledge and data] …also triggers questioning in terms of transparency and accountability. The private nature of philanthropic foundations means that they are neither publicly accountable for their actions nor subject to any particular expectations in terms of transparency. As such, they are outside the scope of public oversight, and, increasingly so, of academic research, too.'

the issues associated with the role of NGOs in relation to international (public) institutions. Section 3 zooms in on the special relationship between the ICC as a public institution and NGOs as private actors, overviews and problematises some recent developments which reinforce understanding transparency in terms of 'broader public participation'. Section 4 considers how private actors may legitimately engage with public interests to the extent of exerting forms of authority in a reconfigured institutional environment, and the role that transparency may play therein.

2. PUBLIC/PRIVATE DIVIDE AS AN ORDERING TOOL

As shown by the cursory overview above, transparency has been central to important reforms within international institutions concerning publicity, on the one hand, and wider public participation, on the other. With regard to the latter, the growing role of NGOs within international (public) judicial institutions has been treated in a positive light for it promises to 'give people a voice'.[33] It is in fact not unusual that NGOs 'claim to act as a "global conscience", representing broad public interests.'[34] Yet, at a closer scrutiny, this growing role should attract some caution, not least for the reconfiguration of the public/private divide that arguably ensues from it.

In the globalisation era, descriptively defined as the period marked by 'an increase of transnational actors with political negotiation power, global threats, challenges beyond the capacity of states to regulate, and far-reaching changes in societal and political integration',[35] associated with deterritorialization and the erosion of state autonomy from foreign actors,[36] the distinction between public and private has often been deemed irrelevant.[37] Some commentators have for instance underscored that, rather than been neatly separated, in practice the 'private' acts through the 'public' and vice-versa, making the meaning of public and private categories unstable over time.[38] However, the purpose of maintaining such a distinction is not to test the extent to which it holds in practice, or to assert whether or not a purely public dimension can be verified in the empirical world. The purpose is rather to use it as an ordering tool in which the 'public' carries some epistemologies (eg state-related, concerned with public interest) while the 'private' embeds others (eg self-interested, profit-oriented, not subject to public scrutiny).[39] Accordingly, there are at least three ways in which the public-private divide may function as an ordering tool: first, as a source-based distinction depending on the legal sources that govern a certain legal issue; second, as an actor-based distinction, where it is public any dispute involving states or public authorities;

[33] Martine Beijerman, 'Conceptual confusions in debating the role of NGOs for the democratic legitimacy of international law' (2018) 9 *Transnational Legal Theory* 147, 151.
[34] Raphael H Ben-Ari, *The Legal Status of International Non-Governmental Organizations – Analysis of Past and Present Initiatives* (1912-2012), (Brill, 2013), 1.
[35] Stephan Hobe, 'The Era of Globalization as a Challenge to International Law' (2002) 40 *Duquesne Law Review* 655, 656. See also Andrew Byrnes, Mika Nishimura Hayashi, Christopher Michaelsen, 'Introduction' in Andrew Byrnes, Mika Nishimura Hayashi, Christopher Michaelsen (eds), *International law in the new age of globalization* (Brill, 2013), 1-3; Eyal Benvenisti, and George W Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (Cambridge University Press, 2017), 1.
[36] This point is aptly captured by Burgos Cáceres, referring to a 'new system' where a 'myriad of new actors' operate (ie action groups, NGOs, transnational networks, multinational corporations) '[suggesting] that states no longer have a monopoly on international intercourse.' Burgos Cáceres (n 28), 79.
[37] Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective (2011) 38 *Journal of Law & Sociology* 50; Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2014).
[38] A Claire Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4 *Review of International Political Economy* 261, 262.
[39] On the point see also Lo Giacco (n 28).

thirdly, as a substance-based distinction where it is public any matter that is of concern of the international community (eg when regulated by a multilateral international convention).

Accordingly, this contribution conceives of transparency as lying at the very intersection of the public and the private dimension, where 'public' is primarily understood as related to the state and its polity, and it is an attribute of institutions that are state-created (like international organizations). 'Private' is instead defined *a contrario* as non-state-related. However, as I have hinted earlier, private actors have been increasingly active in areas traditionally conceived within the remit of states, thus questioning the contours of what one may define as public. Such engagement, however, does not make private actors public. For instance, the private character of an NGO that advocates public interests before an investment tribunal or a private company to which the management of national prisons is outsourced would not turn into public just because of their engagement with areas of public interest, nor would such an engagement make that area of interest private based on the involvement of private actors in its management. For these purposes, areas of public interest are considered those warranting collective decision-making, being this of concern of a polity at the domestic level, as much as of the international community at the international one.[40] Said differently, the concept of public is not rendered irrelevant by practices that seemingly commodify public interests or simply make them a terrain of operation for private actors. The force of the concept rests with its epistemic value, as a foundational notion that aspires to lead practices rather than being forged by them.[41]

Similarly to claims to efficiency and/or technical expertise that are typically invoked by public institutions to justify the engagement with private partners (so-called public-private partnerships), claims to transparency provide the conditions for private actors to participate in public institutions and for public institutions to admit and even favour such participation. In this light, the concept of transparency appears a marker of global governance, that is, of how international legal settings, and the mode of governing more broadly, are changing in relation to the blurring public/private divide. This position draws on accounts that have diagnosed a close relationship between transparency and global governance processes, looking at the latter as 'a manifestation of a paradigm shift from a "private" to a "public" law-character of international law'.[42]

However, it critically appreciates the ambivalence of transparency as both a marker of *publicness*, and a catalyser of *private participation*. In other words, on the one hand, transparency denotes the 'public' character of a certain subject, that is, a space where international public interests should be protected and, thus, also be subjected to public scrutiny.[43] In this sense, claims to transparency contribute to the construction of the dimension of publicness against blurred legal realities that characterise globalisation processes. On the other hand, demands of transparency are conducive to making that space accessible to private actors[44] and enable them to exert their influence over it.

[40] Interestingly, Venzke defines 'public interest litigation' as 'judicial action is support of cause that have not found effective recognition in the political process.' Ingo Venzke, 'Public Interest in the International Court of Justice – A Comparison between *Nuclear Arms Race* (2016) and *South West Africa* (1966)' *Symposium on the Marshall Islands Case* (2017-2018) 111 *AJIL Unbound* 62, 68.
[41] On the point, see also Lo Giacco (n 28).
[42] Anne Peters, 'Towards Transparency as a Global Norm' (n 27), 536.
[43] On the point, see among others, Peters (n 2), 15: 'International law has…been rendered more like "public" law, a law in the global public interest ("for" the public).'
[44] 'Private actors' are here understood *a contrario* as all actors not being public or state-related.

3. THE CASE OF THE ICC: GENEALOGY OF A SPECIAL PARTNERSHIP WITH NGOS

The relation between public institutions and NGOs is a longstanding one.[45] As examined by Steve Charnovitz, since late 18th century first transnational groups, like peace societies and representatives of oppressed people, organised around common issues and collective goals, 'using intergovernmental meetings as opportunities for coordinated lobbying and mass publicity.'[46] Aside from participating in diplomatic conferences such as the Hague Peace Conferences of 1899 and 1907, NGOs 'also achieved much by sparking intergovernmental cooperation'.[47]

Globalisation with the 'integration of the world economy and the increasing recognition of global problems'[48] has intensified this interaction. One reason for this is the impact that NGOs may generate on the 'democratic deficit' can be partially mitigated by greater transparency and the wider involvement of NGOs and civil society,'[49] which make 'powerful instrumentalities for external transparency.'[50] However, while practices have been flourishing, few rules have been set out to govern NGOs and civil society participation in the work of international institutions.[51]

The problématique of transnational private actors exercising political power has been framed under the rubric of accountability.[52] Two main frameworks help systematise positions vis-à-vis private actors operating in areas of public interest: multistakeholderism and rule of law approaches.[53] While multistakeholderism stresses the importance of civil society's participation in global governance, the rule-of-law responses seek to extend to non-state actors the same principles that limit the action of public institutions in a democratic society when engaging in areas of public interest.[54] As such, the rule-of-law approaches build on the analogy with democratic domestic orders to extend similar normative requirements onto the international legal order. However, as underscored by some, the analogy cannot square perfectly with reality for the international legal order differs quite significantly from the domestic one.[55] In a way, if multistakeholderism points to the increased legitimacy and accountability generated by a wider public participation via transparency initiatives, consultation procedures and dialogue

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[45] Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance'(1997) 18 *Michigan Journal of International Law* 183, in particular 195-212. For an overview of NGOs (referred to as 'international public interest organizations') in the context of international judicial institutions, see also Dinah Shelton, 'The International Court of Justice and Nongovernmental Organizations' (2007) 9 *International Community Law Review* 139,

[46] Charnovitz, ibid, 197.

[47] Ibid, 198.

[48] Ibid, 265.

[49] Alan Boyle and Kasey McCall-Smith, 'Transparency in International Law-Making' in Bianchi and Peters (eds), *Transparency in International Law* (n 1) 419-435, 421. See also Scholte, 'Civil Society and Democracy in Global Governance' (n 22), 281, 289-295.

[50] Boyle and McCall-Smith (n 49), 425.

[51] Ibid, 422.

[52] Anne Peters, Till Förster and Lucy Koechlin, 'Towards Non-State Actors a Effective, Legitimate and Accountable Standard Setters' in Anne Peters et al (eds), *Non-State Actors as Standard Setters* (CUP, 2009) 492-562.

[53] Rachel Griffin, 'Public and private power in social media governance: multistakeholderism, the rule of law and democratic accountability' (2023) 14 *Transnational Legal Theory* 46.

[54] Ibid, 47.

[55] See eg Samantha Besson, 'The Democratic Legitimacy of WTO Law – On the Dangers of Fast-food Democracy' Working Paper No 2011/72, December 2011, 1-37 available at < The Democratic Legitimacy of WTO Law – On the Dangers of Fast-food Democracy (wti.org)> (last accessed 30 August 2023).

platforms between public institutions and non-state actors, rule-of-law approaches stress the accountability that non-state actors should bear vis-à-vis the subjects of a polity, for their involvement in areas of public interest.[56] Accordingly, rule-of-law responses claim to extend rule of law norms into the private sphere, so that non-state actors performing like states are also constrained by the principles binding on state power.[57] These two conceptions of the relationship between public institutions and private actors have largely underpinned governance initiatives within international institutions. As this section will show, multistakeholderism has informed the approach of the ICC to civil society actors and continues to reproduce on what they have been enabled to do as legitimate stakeholders within the ICC system.

In fact, while within the UN system the increased relevance of NGOs in international affairs has been somehow marked by the adoption of Article 71 of the UN Charter, authorizing the Economic and Social Council (ECOSOC) to grant NGOs a consultative status within such body, the role of NGOs within the International Criminal Court (ICC, 'the Court) has not been comparably formalised in the rules governing the functioning of the Court. Among relevant provisions, Article 15(2) of the Rome Statute affords the Prosecutor the power to seek additional information in relation to alleged crimes. However, this provision cannot be read as providing NGOs with a right to be heard by the Prosecutor.[58] Similarly, Article 44(4) of the Rome Statute provides that '[t]he Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by…non-governmental organizations to assist with the work of any of the organs of the Court', thus granting a power to the Court to accept the assistance of NGOs, although not a right to NGOs to participate in the work of the ICC.[59]

Notwithstanding, the synergy between the ICC and NGOs has been a pilar in the construction of the ICC system. A network of initially 25 civil society organizations, denominated Coalition for the ICC (CICC, 'the Coalition'), took shape in the 1990s to advocate for the establishment of a permanent international criminal court first, and then to campaign for the wide ratification of the Rome Statute.[60] At present, the Coalition counts 2500 NGOs disseminated in 15 countries around the world,[61] 'work[ing] in partnership to integrate international justice goals into existing and evolving structures of global and national governance.'[62] Via an 'action through partnership' strategy, they declaredly seek to 'bridge the traditionally separate tracks of government diplomacy and civil society advocacy to utilize official and

[56] Griffin defines accountability as 'a relationship in which an actor must explain their conduct to a forum which can question, judge and impose consequences on them'. Ibid, 48 and 54.
[57] Ibid, 62.
[58] Art 15(2) Rome Statute reads as follows: 'The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
[59] On this point, see among others Math Noortmann, 'NGOs in international law – Reconsidering personality and participation (again)' in Thomas Davies (ed), *Routledge Handbook of NGOs and International Relations*, 1st ed, (Routledge, 2019) 179-192, 187. See also Alan Boyle and Kasey McCall-Smith, 'Transparency in International Law-Making' in Bianchi and Peters (eds), *Transparency in International Law* (n 1) 419-435, 425.
[60] <Our story | Coalition for the International Criminal Court (coalitionfortheicc.org)> (last accessed 16 August 2023).
[61] Ibid.
[62] <What we do | Coalition for the International Criminal Court (coalitionfortheicc.org)> (last accessed 16 August 2023).

other strategic connections to produce more effective outcomes',[63] in a way hinting on the transparency gap that characterises international institutions.

The role of the Coalition has been of fundamental importance for the activity of the Court, as emphasised by ICC representatives on multiple occasions. One example is offered by the bi-annual ICC-NGO roundtable with international and local NGOs and the participation of NGOs of the Coalition for the ICC as observers in the sessions of the Assembly of States Parties.[64] During the recent ICC-NGO roundtable, representatives of the ICC reinvigorated the idea of a special partnership ongoing between the Court and NGOs. For instance, ICC President Piotr Hofmański noted that 'Although we are independent in our functions the relationship between the ICC and civil society is of special significance. We are partners in pursuing justice and the rule of law and seeking human rights protection.'[65] On the same occasion, ICC Prosecutor Karim Khan considered that 'Strengthening partnerships with civil society is a priority for my Office',[66] while ICC Registrar Zavala Giler has described civil society actors 'as not only the conscience of our institution, but often its loudest voice.'[67] In response, the Coalition for the ICC Head of Advocacy & Program, Virginie Amato, referred to the ICC as a partner for civil society to 'guard civic space within the Assembly and the Court's policy making', among other things.[68] In this vein, NGOs have not only been playing an important role in raising awareness about the activity of the ICC, but also in initiating programs of support to the victims of crimes, and liaising with communities in affected territories. Being capable to operate locally as well transnationally, NGOs have promoted the work of the Court across societies including, but not limited to, the dissemination of standard application forms for victims' participation in the Court's proceedings.[69] Plainly, by supporting the work of the Court, NGOs can contribute to its legitimacy[70] and support its mandate. In return, NGOs could thrive in visibility and prestige, and ultimately amplify their legitimacy within the international criminal justice field. As some scholars have aptly noted 'it may be over time [challenging] for State-driven authorities and organisations to keep transnational private regulators at bay, as private bodies may be exploiting every possible window of opportunity to emerge and increase their leverage and influence.'[71]

Problems may arise out of practices that 'institutionalise' NGOs within the ICC system or from the performance of functions that seek to influence the work of the Court under the guise of their role as

[63] Ibid.
[64] <Civil society and the ICC | International Criminal Court (icc-cpi.int)> (last accessed 29 June 2023).
[65] <(1) Int'l Criminal Court on Twitter: "ICC President Piotr Hofmański welcomes #ICC-NGO roundtable participants: "Although we are independent in our functions the relationship between the ICC & civil society is of special significance. We are partners in pursuing justice & rule of law + seeking human rights protection" https://t.co/yLHB3BFpAC" / Twitter>
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Regulation 86(1) – Participation of victims in the proceedings under rule 89: 'For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose (…). These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and non-governmental organizations, which may assist in their dissemination, as widely as possible.'
[70] Marcel Kaba, 'NGO Accountability: A Conceptual review across Engaged Disciplines' (2021) 23 *International Studies Review* 958, inter alia discussing the 'legitimizing power' of NGOs (at 960). Likewise, see Noortmann (n 59), 181.
[71] Enrico Partiti, Stephanie Bijlmakers and Panagiotis Delimatsis, 'Evolutionary dynamics of transnational private regulation' (2022) 13 *Transnational Legal Theory* 431, 434.

public interest defenders. For one, the increased involvement of NGOs in public spaces may lead to a dispersion of accountability: the more actors participate, the harder it is to trace who is accountable for what. In this context, 'institutionalise' means to provide them with a status or standing with the ICC system.[72] This does not necessarily entail a formalized legal status, but admits forms of informal recognition of their role through policy documents. An illustrative example is offered by the *Guidelines Governing the Relation between the Court and Intermediaries* ('the Guidelines'),[73] adopted in 2014. The Guidelines describe a 'model of international criminal justice' oriented towards 'common goals' through synergy and complementarity with so-called intermediaries;[74] they essentially afford all organs of the Court 'a framework with common standards and procedures in areas where it *is* possible to standardize the Court's relationship with intermediaries'.[75] The aim of this is among other things 'to provide *transparency* and clarity for third parties who may interact with the organs and units of the Court or Counsel'.[76] Interestingly, the Guidelines consider that '[intermediaries] should not be called upon to undertake core functions of the Court.'[77] This is reinforced by the principle of 'ensur[ing] that intermediaries are not a substitute for staff for the implementation of the mandate of the Court.'[78] Likewise, the Report entitled 'Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organizations'[79] has been more recently issued by the ICC in cooperation with Eurojust and civil society organizations with the aim to assist civil society organizations 'to collect and preserve information that may ultimately become admissible evidence in court.'[80] Interestingly, the Report states that 'The fight against impunity is not solely the preserve of States or international organisations. *It is a collective obligation that must benefit from the contribution of all those who seek to advance the cause of justice*. Civil society organisations are critical to this common work. Across situations globally, we have seen how civil society actors are increasingly active in documenting core international crimes and human rights violations, demonstrating an ability to make crucial contributions to accountability efforts.'[81]

[72] On the point, see eg Samantha Besson, 'The international public: A farewell to functions in international law' (2021) 115 AJIL Unbound 307, 311: 'Indeed, what is at stake with the (international) public, be it a state or another institution, is a "position," a way of "standing" (hence the term "state") and, therefore, of "in-stituting" and, by extension, of representing ourselves by law. See also Chiara Cordelli, *The Privatized State* (Princeton University Press, 2021), 11:

> 'On the one hand, "the privatized state" is a descriptive characterization of a system of government in which the distinction between public offices and private contracts fades, and where the administration of the public is widely outsourced to private actors. On the other hand, it refers to a normative condition – a state – of objectionable dependence, where the determination and enforcement of people's entitlements, and of restrictions under which they can be free to act, is made systematically dependent on private and merely unilateral exercises of power, rather than an "omnilateral", that is, genuinely public and representative, will.'

[73] <Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries (icc-cpi.int)>

[74] Ibid, p 2.

[75] Ibid, p 3 (emphasis in the original).

[76] Ibid (emphasis added).

[77] Ibid, p 2.

[78] Ibid, p 3.

[79] <Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations (europa.eu)> 21 September 2022, jointly developed by Eurojust, the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network'), and the Office of the Prosecutor of the International Criminal Court (QP-07-22-681-EN-N).

[80] Ibid, p 2.

[81] Ibid, p 2.

A closer scrutiny of both the Guidelines and the Report reveals that much of what is contained in these documents echoes the debates around delegating or outsourcing public functions of states to private entities, based on efficiency and expertise rationales. These are indeed entry points for NGOs operating in global affairs.[82] NGOs are often deemed to be better placed to express the needs of victims of international crimes, based on the experience collected, eg through reparation programs in post-conflict societies. As discussed by Martine Beijerman,

> 'NGOs are perceived as political actors contributing to the democratic principle of self-rule. They are supposed to offer the vital link between the local and the global. The fact that many NGOs are transnationally organized allows them to complement the allegedly incomplete representation of citizens by states. Being privately organized and connected to a large network and constituency, NGOs are considered especially sensitive to outcast voices, whereas states are often criticized for disregarding these minority viewpoints.'[83]

In other words, the participation of NGOs in international institutions is deemed capable to reflect a pluralist model of interests and of inclusivity of multiple perspectives,[84] which contributes to realising ideals of global democracy. Yet at least two issues require further scrutiny: first, the power that NGOs can exercise with respect to agenda- and priorities-setting as well as problem definition. Even admitting that NGOs may exert a public function, the question still stands, namely, under what conditions? This is particularly pressing for NGOs are opaque entities which themselves do not stand transparency requirements. Secondly, in adopting these documents whereby it manages matters affecting or even constituting public interests, the Court performs a global governance function in that it impacts the determination of who has the power to participate in governance,[85] and what role a private actor may play in governing public interests.

4. IMAGINING THE CONDITIONS FOR THE *INSTITUTIONALISATION* OF PRIVATE ACTORS IN PUBLIC INTERNATIONAL LAW

While the preceding sections have sought to problematise the increasingly institutionalised role of NGOs – as *private* actors – within the ICC – as a *public* institution – the present section tries to imagine how, in a reconfigured public-private institutional environment, private actors might legitimately engage with public interests to the extent of exerting forms of authority and take decisions that affect communities in their entirety. For simplicity, I will refer to this process as 'institutionalisation'. By this, reference is made for instance to situations in which private actors are formally entrusted by international law to carry out certain functions in the public interest. An example is offered by the UN Framework Convention on Climate Change (UNFCCC) affording environmental NGOs with the function to, among others, providing information,[86] or by the Kyoto Protocol granting NGOs the right to participate in

[82] See eg Bronwyn Evans-Kent and Roland Bleiker, 'Peace beyond the State? NGOs in Bosnia and Herzegovina' in Henry F Carey and Oliver P Richmond (eds) *Mitigating Conflict: The Role of NGOs* (Routledge, 2003), 103-104.
[83] Beijerman (n 33), 151.
[84] Ibid.
[85] On the concept of 'governance authority', see Janne Mende, 'Business authority in global governance: Companies beyond public and private roles' (2023) 19 *Journal of International Political Theory* 200-220.
[86] Article 7(2)(I) UNFCCC, adopted on 9 May 1992, entered into force on 21 March 1994.

meetings among state parties.[87] In addition, NGOs may also be informally recognised through the practice of public institutions (eg international courts and tribunals, states or international organizations), as having standing to represent public interests in a public forum. One such example is put forward by the annual ICC-NGOs Roundtable discussed above, as well as by the permanent vetting process for all ICC elected officers adopted by the ASP in December 2023, which affords the CICC with the power to veto candidates (eg judges and prosecutors) based on the high moral character requirement.[88] In this context, two elements are worth reminding. First, the fact that private actors be formally recognised as representing public interests does not make them ipso facto public actors. It rather attests the public value of their actions.[89] Second, and in connection with the former, the concept of public may be substance-demarcated, that is, defined on the basis of the character of interests that are advocated or represented. As mentioned earlier, the process of institutionalisation of private actors is not without pitfalls. On the contrary, the challenge of offsetting the responsibility of public institutions via-à-vis the communities that gave them public mandate in the first place has been iteratively voiced by international lawyers and philosophers alike.[90]

At the same time, alternative understandings of the relation between public and private are possible. For instance, instead of looking at the public/private divide as a zero-sum game where more authority of NGOs implies less authority of the states, one could conceive of the private as an additional locus of authority.[91] Along this line of thinking, Angelo Golia Jr and Gunther Teubner have articulated the concept of 'networked statehood'[92] to indicate a novel form of governance unfolding between states, international organizations, transnational regimes, private regulatory bodies and other types of non-state actors (called 'nodes'[93]), 'fulfilling *functions of statehood*, but in a different form than a uniform corporate-hierarchical collectivity.'[94] What they underscore as 'the most important novelty' is that the global economy, among other global functioning systems, 'have developed a new power position, which can no longer be controlled by the political system. […] As a result, the functions of the global political system can only be performed in such a way that the individual states coordinate with other states and with non-state regimes, which excludes the traditional hierarchical control of social activities from the outset.'[95] According to this view, the networked statehood is a 'compensatory institution' ensuing from

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[87] Article 13(8) Kyoto Protocol, adopted on 11 December 1997, in force on 16 February 2005. For further illustration on the role of NGOs in the context of climate change law, see Charlotte Streck, 'Strengthening the Paris Agreement by Holding Non-State Actors Accountable: Establishing Normative Links between Transnational Partnerships and Treaty Implementation' (2021) 10 *Transnational Environmental Law* 493; Evan Hamman, 'The Role of NGOs in Monitoring Compliance under the World Heritage Convention: Options for an Improved Tripartite Regime' in Christina Voigt (ed) *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press, 2019) 417-442.

[88] <Vetting for all ICC and ASP elections | Coalition for the International Criminal Court (coalitionfortheicc.org)> (last visited 16 January 2024).

[89] On the point, see Norberto Bobbio, 'La democrazia e il potere invisibile' (1980) 10 *Italian Political Science Review/Rivista Italiana di Scienza Politica* 181, 182, in which the author makes the example of private schools performing public functions that still preserve this character although performed by private actors.

[90] See eg Besson, 'Theorizing International Responsibility Law (n 31); Cordelli (n 72).

[91] Jessica F Green, *Rethinking Private Authority – Agents and Entrepreneurs in Global Environmental Governance* (Princeton University Press, 2014), 5.

[92] Angelo Golia Jr and Gunther Teubner, 'Networked statehood: an institutionalized self-contradiction in the process of globalization? (2021) 12 *Transnational Legal Theory* 7.

[93] Ibid, 13.

[94] Ibid, 8-9 (emphasis added).

[95] Ibid, 10.

the reticular – rather than hierarchical – organization of functions once performed by the state.[96] This element is worth stressing as it concedes that actors fulfilling statehood functions may escape some kind of hierarchical (public-law-like) control. This was instead the point I took issues with at the start of this contribution, insofar as what is problematic is not so much that a private actor may fulfil a function in the public interest as so delegated by the law of the state, but that it would do so without the public (be this the state or the community in whose name it is acting) exerting any form of control over it.

Needless to say, however effective private actors might be in fulfilling the voids left by public institutions, the problem of legitimate exercise of authority still stands. In fact, where private actors affect priority-setting and lead to policy options while discarding others, it is all the more important that their actions be scrutinised and therefore also contest*able*. Transparency possibly sits here as a material condition for realising legitimacy at the transnational level, and demand private actors standards of conduct analogizable to their public counterparts, eg to disclose conflicts of interest or information about the origins of their financial resource, as well as to question their choice to liaise with some partners (like in the case of the CICC) at the expense of others. In this way, private actors would renounce their '*domaine réservé*' in their process towards institutionalisation. Importantly, demands of transparency would also enable the contestation of their actions and set a standard of behaviour that may undergo sanctioning tools in case of misconduct.

Especially if the drive for change within entire fields of international law comes from private actors,[97] the question is prompted as to which mechanisms need to be in place to ensure that public-sensitive actions of NGOs conform to some public regulatory regime. The discourse on transparency shall thus be recast in the optic of securing contestation of any public-sensitive decision, be this determined by public institutions or by private ones.

5. Conclusive remarks

Transparency has been a thriving register in international law discourse, at least in the last decade. More frequently now than before, international legal instruments and institutions invoke transparency. Examples are numerous, ranging from the 2013 Rules on Transparency in Treaty-based Investor-State Arbitration, to the World Health Organization's 2016 Framework of Engagement with Non-State Actors, going through the 2020 Artemis Accords, the Council of Europe's 2023 Consolidated working draft on the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, and the ICC Prosecutor/Eurojust/Genocide Network's 2022 Guidelines for civil society on documenting international crimes and human rights violations. As such, transparency traverses legal fields, sources and institutions, spanning from international investment law to global health, to space law and international criminal law, just to name but a few. Far from being a mere buzz word, transparency is rising more importantly as a tool for governance and institutional design and reform with implications that should be adequately unpacked.

Starting off from this larger picture, this paper has zoomed in on the field of international criminal law to examine how claims to transparency have shaped the relationship between the ICC as a public

[96] Ibid, 12.
[97] Streck (n 87), 497.

institution and NGOs as private actors. In particular, constructing transparency as wider public participation resulted in opening up space for private actors without sufficiently considering the deeper implications of 'institutionalising' private actors for the international justice project, particularly in terms of legitimacy and authority. The argument advanced here is normative in that it contends that as much as transparency demands attach to public authorities, they should also attach to actors performing in areas of public interest.

Three main findings shall be highlighted. First, *at the interpretive level*, understanding transparency as wider public participation actually serves as an entry point to private actors to become more involved with areas of international (public) interest. Transparency plays out as ambivalent as a tool for governance and institutional design, especially when interpreted as demanding wider public participation, in that it shapes that dimension of 'publicness' in international law while at the same time 'privatising' public interests, in the sense of exposing them to the influence of 'institutionalised' private actors. Said differently, what appears odd in the discourse about transparency is that demands of wider public participation within the Court lead to a surge of private actors dealing with international criminal justice.

Secondly, *at an operational level*, for private actors to participate as a 'public voice' means not only to gain a standing in discussing, negotiations and decision-making process within an international public institution. It actually provides NGOs with the agency for change. The activity of public scrutiny granted to the Coalition for the ICC in 2003 by virtue of transparency demands vis-à-vis the Court, has recently become a permanent vetting process within the ASP, in which NGOs oversee *all* elected officers of the ICC. This consolidated change in the institutional set up of the ICC and ASP confirms that the process of institutionalisation of private actors in international institutions is progressively 'solidifying'.

Thirdly, *at a managerial level*, policy papers as much as utterances of several generations of ICC Presidents, Registrars and Prosecutors are infused with the transparency register. The formulation of policies dealing with transparency and hinging on the relationship with private actors, among other things, suggests that the ICC is taking up global governing functions in addition to traditional judicial ones. As an actor of global governance, the ICC is managing who ought to play a role as partner in the international justice context, what form such partnership should take, and how it shall be governed. The same finding potentially extends to other international institutions engaging in transparency policies, rendering it all the more important to critically revisiting the implications of transparency for a reconfiguration of public and private authorities.