

De facto transparency?

Investigating the practice of the International Court of Justice

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ABSTRACT

This article explores the International Court of Justice's (ICJ or the Court) use of various forms of *de facto* transparency, enacted beyond normative constraints. It focuses on three examples: the ICJ's online activities (website and social media), the Court's press releases and summaries of judicial decisions, and the speeches delivered by the judges of the Court, to understand the benefits and risks of these practices. While they may not all have originated with the explicit aim of enhancing the Court's image as a transparent institution, their consistent implementation has assumed that role. The article examines them from the perspective of transparency as 'accessibility', with its nuances of 'justification', 'explanation', and 'simplification'. Ultimately, the article highlights the importance of reflecting on transparency beyond formal rules, considering possible problems inherent to it, and understanding the ways in which it is (or is not) achieved.

KEYWORDS: International Court of Justice; transparency; communication practices

INTRODUCTION

On 6 April 2023 at 3 pm (The Hague time), the International Court of Justice ('ICJ' or 'the Court') delivered its judgment on preliminary objections in the case concerning the Arbitral Award of 3 October 1899 (*Guyana v Venezuela*).¹ A few days before the judgment was read in open court, a press release indicating the day and time of its delivery as well as a link for online streaming was issued and posted on the Court's website and its social media accounts (back then, Twitter and LinkedIn). At the time of the delivery, a banner appeared on the Court's website indicating that the reading of the judgment was going live at that moment, and a similar reminder was posted on the Court's social media accounts.² As soon as the

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¹ Case Concerning the Arbitral Award of 3 October 1899, (*Guyana v Venezuela*), Judgment of 6 April 2023, I.C.J. Reports 2023, p. 262.

² Posts are available on Twitter, now X, at <https://twitter.com/CIJ_ICJ> accessed 12 January 2024 and on LinkedIn at <<https://www.linkedin.com/company/cour-internationale-de-justice-international-court-of-justice/>> accessed 12 January 2024. In this case, as it does most of the time, the Court did not differentiate the posts, uploading exactly the same contents and links on both social media accounts.

Court's session was closed, the full text of the judgment was uploaded on the ICJ's website,³ and a link to it was posted on the Court's social media accounts. The same was done with a press release related to the judgment, which contained a reference to the summary of the case. The summary was also uploaded to a separate section of the Court's website, and a link to it was shared in a separate announcement on the Court's social media accounts. Finally, some photos of the Court session were also uploaded on the ICJ's website and social media accounts.

All the actions performed by the Court in delivering this judgment represent a practice that the Court has gradually put in place for all its cases, adapting to its evolving operational context. While, for instance, a summary of the judgments and advisory opinions has been made available since the beginning of its activities,⁴ the constant communication online about what is happening before the Court is a relatively recent introduction, connected to the availability of technology but also of new communication channels, such as social media.

Significantly, out of all the activities put in place around the rendering of the judgment, only one was imposed on the Court by its Statute and its Rules⁵: the reading in open court. Nothing required that this should have been live-streamed,⁶ that there should have been constant posting about it, before and after it happened, nor that a summary of the judgment should have been made available.⁷ Thus, the ICJ acted beyond the rules to clearly and promptly inform its audience.⁸

³ *Case Concerning the Arbitral Award of 3 October 1899* (n 1).

⁴ See the summary of the first advisory opinion ever issued by the Court: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, available at <<https://www.icj-cij.org/sites/default/files/case-related/3/1823.pdf>> accessed 12 January 2024. See also the summary of the first ever judgment issued by the Court: *Corfu Channel case (Preliminary Objection)*, available at <<https://www.icj-cij.org/sites/default/files/case-related/1/1571.pdf>> accessed 12 January 2024.

⁵ Relevant rules are art 58 of the Statute of the ICJ, available at <<https://www.icj-cij.org/statute>> accessed 12 January 2024, that states 'The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents' and art 94 of the Rules of the ICJ, available at <<https://www.icj-cij.org/rules>> accessed 12 January 2024 that provides '1. When the Court has completed its deliberations and adopted its judgment, the parties shall be notified of the date on which it will be read. 2. The judgment shall be read at a public sitting of the Court. The Court may decide, for health, security or other compelling reasons, that the judgment shall be read at a sitting of the Court accessible to the parties and the public by video link. The judgment shall become binding on the parties on the day of the reading'. Significantly, these articles refer to giving notice to the parties and not to the general public.

⁶ For instance, it is reported by Ana Koprivica Harvey, 'Public and Media Access to Courtrooms: International Courts and Tribunals' in Max Planck Encyclopaedias of International Law (2019), available at <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2604.013.2604/law-mpeipro-e2604?prd=OPIL>> accessed 12 January 2024, para 86 that 'given the considerable public interest shown in the Israeli Wall Case and the limited logistics in order to accommodate such interest, the ICJ decided to introduce the webcasting of the announcement of its judgments. By doing so, the Court responded to the growing interest of the general public in its activities (United Nations General Assembly Report of the International Court of Justice (2004) para 266)'. Notably, television broadcasting was already in place at the ICJ before. On this see Eduardo Valencia Ospina, 'Financing, Administering and Making Known the Work of the Court, in Increasing the effectiveness of the International Court of Justice: proceedings of the ICJ/UNITAR Colloquium to celebrate the 50th anniversary of the Court (1997) 225.

⁷ While art 26 of the Rules of the Court indicates that the Registrar shall 'ensure that information concerning the Court and its activities is made accessible to governments, the highest national courts of justice, professional and learned societies, legal faculties and schools of law, and public information media', the modalities of information, as well as the timing, are not imposed.

⁸ The composition of the Court's audience is diverse. While it is clear that, formally, as a judicial body tasked with resolving disputes between states or providing opinions to an international body, its primary audience might appear to be the states involved in specific cases or the international body requesting an advisory opinion, it is undeniable that the Court is also observed by other actors on the international stage. These include, for example, other states, international law experts, and international organizations more broadly. This broader audience is indirectly acknowledged by the aforementioned Article 26 of the Rules. Further evidence of this can be seen in the press release announcing the Court's launch of a Twitter account, which appears to expand its audience even further to include the general public. Press Release No.2015/28 available at <<https://www.icj-cij.org/sites/default/files/press-releases/0/18820.pdf>> accessed 12 January 2024 states: 'The account will enable embassies, the media, the academic world and civil society generally to be kept abreast of latest developments at the Court'. See also Andrea Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and Jus Cogens beyond Germany v Italy' (2013) 4 *Journal of International Dispute Settlement* 457, 467. See also Gleider Hernandez, *The International Court of Justice and the Judicial Function* (OUP 2014) 42–47 and Ospina (n 6) 215, that specifies that the audience of the Court goes well beyond what is listed in art 26 (m) of the Rules of the Court, notably including the 'general public'.

Information has been seen as the main form of transparency,⁹ and that the Court cares about its image as a transparent institution is not a novelty. This is demonstrated by the great care¹⁰ taken by the Court to comply with the provisions of its Statute, Rules, and Practice Directions relating to transparency.¹¹ Indeed, despite not explicitly mentioning the term ‘transparency’ or any of its nuances, the Court’s constitutive and regulatory documents provide several norms connected to what has by now become a fundamental value of our society. In the context of the work of a Court, this declination of transparency has often been referred to as ‘procedural transparency’.¹² It suffices to think about Article 47 of the Statute related to the minutes of hearings and their publicness; Article 46 of the Statute related to the public nature of the hearings¹³; Article 53 of the Rules related to copies of pleadings and annexed documents; Article 58 of the Statute that prescribes that judgments must be read in open court; Article 95 of the Rules that indicates the information that must be provided in the text of a judgment, including the names of the judges that voted in favour or against each claim; Practice Direction IXbis, IXter, and XII related to the publication of documents, photos, and audio-visual contents; Article 20 of the Statute related to impartiality of judges; and Article 9 of the Statute related to elections. Last but not least, Article 56 of the Statute as well as Articles 95 and 102 of the Rules impose on the Court the duty to provide reasons for its judgments and advisory opinions, which, as Judge Yusuf once wrote, represents an act that contributes to ‘greater transparency of the Court’s decision-making function’.¹⁴

Still, ‘transparency in international dispute settlement has many forms’.¹⁵ This assertion can hold true not only in relation to the fact that the different rules can refer to different moments or aspects of transparency (for instance, ‘open hearings, amicus submissions, publishing submissions, and judgments’),¹⁶ but can also assume two additional meanings. First, that transparency has different forms in the sense of different nuances, and secondly, that, among all these forms, there might be some that are not codified.

⁹ See Andrea Bianchi, ‘On Power and Illusion: The Concept of Transparency in International Law’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 1, 10–15. See also Byung-Chul Han, *Infocrazia. Le nostre vite manipolate dalla rete* (Federica Buongiorno trans, Einaudi 2021) 8–9.

¹⁰ As studies on the topic attests. See Freya Baetens, ‘Transparency Across International Courts and Tribunals. Enhancing Legitimacy or Disrupting the Adjudicative Process?’ (2022) 91 *Nordic Journal of International Law* 595, 624 where the author synthesizes her findings in a chart marking the level of transparency of the ICJ as high in 4 categories (applications, written submissions, hearings, adjudicatory decisions) out of 5. Information about compliance (5th category) is less readily available (marked, indeed, as ‘low’). In a similar manner, José M Reis, ‘Opening Up International Adjudication. Mapping Procedural Transparency in International Disputes’ in Eric De Brabandere (ed), *International Procedure in Interstate Litigation and Arbitration. A Comparative Approach* (Cambridge University Press 2021) 230 that, after conducting empirical analysis of compliance of different international courts and tribunals with statutory norms related to transparency, evaluates positively the performance of the ICJ. Both studies also significantly attests that the ICJ has set higher standards in comparison to other courts and tribunals.

¹¹ Practice Directions of the International Court of Justice, available at <<https://www.icj-cij.org/practice-directions>> accessed 12 January 2024, Statute (n 5), Rules (n 5).

¹² On the concept of procedural transparency, see Thore Neumann and Anne Peters, ‘Transparency’ in Max Planck Encyclopaedias of International Law (2019), available at <<https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2226.013.2226/law-mpeipro-e2226?rskkey=sIRG89&result=2&prd=MPIL>> accessed 12 January 2024.

¹³ Koprivica Harvey (n 6) seems to go even further and link transparency to oral hearings, stating specifically on the ICJ, at para 11, that ‘the significance of oral hearings at the International Court of Justice (“ICJ”) was acknowledged by the 1920 Advisory Committee of Jurists, who held that “both phases, written and oral, are equally necessary in the case of the Permanent Court of International Justice” and confirmed by the adoption of Article 43 (1) Statute of the ICJ (which remained unchanged to date. The importance of oral proceedings was emphasized by the ruling of the Court in the Haya de la Torre Cases, where the Court stated that “oral hearings may not be dispensed with, notwithstanding that both parties may have made a suggestion to that effect”, provided that the Court strongly feels the need for hearings’ (references omitted).

¹⁴ *Separate Opinion of Judge Yusuf, Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda), Judgment of 9 February 2022, I.C.J. Reports 2022*, 9, para.28: ‘pursuant to Article 56 of the Court’s Statute, a judgment shall state the reasons on which it is based. This obligation stems from the inherently judicial character of the Court. It contributes not only to greater transparency in the Court’s decision-making function, but also to the authority and persuasiveness that its judgments command in the field of international law’.

¹⁵ Baetens (n 10) 597.

¹⁶ *ibid* 597.

Often, indeed, when it comes to transparency-related acts, international courts and tribunals 'go above and beyond what their statute or other founding agreements require'.¹⁷ This is certainly the case of the ICJ, which has put in place a series of measures that go far 'beyond the rules', as the introductory example has shown. Acts in this direction undoubtedly include the publication on the ICJ's website of all documents related to cases that are to be decided or are already decided on by the ICJ and the sharing online of all its press releases, but also the creation of a website in itself. These acts have been defined as examples of *de facto* transparency or 'proactive transparency',¹⁸ which is a definition that well encapsulates that the Court is doing more than what it is required to do.

This contribution focuses on forms of *de facto* or 'proactive transparency' put in place by the ICJ, using empirical methods to map how the Court has done more than it 'should' to put forward a transparent image of itself and to reflect on whether these forms of *de facto* transparency have concretely helped in this regard. The article proceeds as follows. First, I analyse the different nuances of transparency, indicating those that might be relevant to better understand acts of 'proactive transparency' and their significance. The second section tackles a series of examples: some of them are born explicitly as transparency-oriented tools, while others can ultimately serve that function. The relevance of each is addressed in the respective section. In particular, I focus on the Court's website and social media accounts, summaries, and press releases, and, lastly, speeches made by judges in their official capacity. While all these practices are not performed officially by the Court, they contribute, as will be further specified, to the image of the institution and to the perception its audience might have of how transparent the Court is in its activities. In the last section, I offer conclusive remarks.

TRANSPARENCY AND ITS NUANCES

Saying that there is no agreed-upon definition of transparency is a truism. As it has been affirmed, transparency is a concept difficult to grasp not only in terms of its sources, in particular at the international law level, but also in terms of its contents.¹⁹ As a consequence, it is difficult to find contributions that provide a clear definition of transparency. Most often, transparency's meaning is taken for granted, and analysis is conducted by resting on the assumption that transparency represents common knowledge and, therefore, no further discussion is needed.²⁰ In other cases, transparency is directly problematized even before being defined. Examples of this are the numerous contributions that refer to transparency as a 'myth' or put in relation to transparency and opacity in their titles.²¹ Lastly, transparency is sometimes defined by declining it in its different forms and representations.²²

The last one constitutes the most appreciable way of unpacking the meaning of transparency as it acknowledges that transparency can assume many different connotations, purposes, and implications based on the context where it is applied. For instance, the nuances that transparency has in the context of national governments might be similar, but they are surely different compared to the nuances that the same concepts have in the context of international courts and tribunals or even between international courts and tribunals and national

¹⁷ *ibid* 625.

¹⁸ The adopted definitions and terms, which are also used throughout this article, are from Reis (n 10) 249.

¹⁹ Bianchi (n 9) 7.

²⁰ *ibid* 8.

²¹ An example is Carla Danani, 'Il mito della trasparenza' (2019) 2 *Dialoghi* 28.

²² See, for instance, Ida Koivisto, *The Transparency Paradox: Questioning an Ideal* (OUP 2022) 3–20.

ICJ's website, its social media accounts, press releases and summaries of its judgments, and speeches of its judges.

Before proceeding further, four disclaimers need to be made. First, it is important to highlight that in the creation and updating of several of these instruments, there is a high level of involvement of those who have been defined as 'unseen' actors³¹ of international adjudication.³² While acknowledging this, it is crucial to underscore that the present contribution focuses on the institutional image of the Court: an image that these activities contribute to shaping. Similarly, one could argue that judges' speeches are made by an individual, rather than by the Court as a judicial body. While personal style and background certainly influence how the speech is thought, written, and delivered, one should always bear in mind that speeches are made by judges in their official capacity on occasions where they are representing the ICJ. Thirdly, the reflection on *de facto* transparency is here focused on two levels: the first one related to single cases, the second related to the institution. While focused on a single case, the first level can help to understand something about the institution as a whole, as transparency in one case represents a small piece of a bigger puzzle that influences the Court's general image. Lastly, some of these instruments were not born or thought of as transparency-oriented tools.³³ However, the aim of this contribution is to investigate forms of *de facto* transparency. Therefore, what ultimately matters is whether these acts or tools might contribute to the perception of a transparent image (or lack thereof) of the ICJ by its audience and not how they were originally classified.

Website and social media accounts

These days, it is difficult to imagine a world where the work of the Court is not accessible from anywhere simply by using its website. And yet, there was a time when this was the case. In this regard, it is interesting to read the conversation between Eduardo Valencia-Ospina, Hugh Thirlway, and Stephen Schwebel some 25 years ago.³⁴ Reflecting on how to make the Court more widely known, Thirlway suggested that the Court should create its own website.³⁵ That suggestion, which sounds odd to read now, represented a key one. Indeed, the website is one of the most used instruments to access documents and be updated on the Court's work. It is one of the key instruments to guarantee that the efforts the Court makes to be transparent are perceived by the states, but also by its wider public.³⁶

The ICJ's website appears to be incredibly accurate and orderly and presents a plethora of different sections and information (the Court, the Registry, Cases, Basic Documents, Jurisdiction, Press Rooms, Publications, and Practical Information). The impression of accuracy and order is reinforced if one looks at specific sections related to individual cases. For each case, even those

³¹ On this, see generally Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019).

³² Unlike for what happens to their contribution to writing judgments (aspects that have been highlighted in the literature; see, for instance, Tommaso Soave, *The Everyday Makers of International Law: From Great Halls to Back Rooms* (CUP 2022)), in the case of most of these instruments, the contribution of 'unseen' actors is explicitly acknowledged, even if no names are included. See the disclaimer included in most press releases that state 'Note: The Court's press releases are prepared by its Registry for information purposes only and do not constitute official documents'. One example is the press release in the case *Maritime Delimitation in the Indian Ocean* that announces the schedule of an hearing, available at <<https://www.icj-cij.org/sites/default/files/case-related/161/161-20210309-PRE-01-00-EN.pdf>> accessed 12 January 2024.

On the history of the creation of the ICJ Information Department, see Philippe Couvreur, 'The Registrar of the International Court of Justice: Status and Functions' in Carlos Jimenez Piernes (ed), *The Legal Practice in International and European Community Law: A Spanish Perspective* (Martinus Nijhoff Publishers 2007) 5, 40–41.

³³ For instance, in the case of different judicial bodies, it is argued that some of these instruments were subsequently used by the institutions to create loyalty. On this, see Silvia Steininger, 'Creating Loyalty: Communication Practices in the European and Inter-American Human Rights Regimes' (2022) 11 *Global Constitutionalism* 161.

³⁴ Ospina (n 6) 225–31.

³⁵ *ibid* 226.

³⁶ Rosalyn Higgins, 'Respecting Sovereign States and Running a Tight Courtroom' (2001) 50 *International and Comparative Law Quarterly* 121, 124.

its outreach⁴⁴ and, consequently, the communication of, access to and understanding of its activity.⁴⁵ Recently, there has been a rise in the Court's use of social media, accompanied by an expanded diversification in the posted content, now encompassing a broader range of visuals and not restricted anymore mainly to judgment- or advisory opinion-related written material.⁴⁶

Ultimately, the ICJ's website and its social media account constitute essential resources for those who want to access the documents related to the Court's activity for academic or journalistic purposes or simply remain informed. It is not by chance that all the materials studied in this contribution are readily available on the website, as are the press releases and summaries of judgments, to which I now turn.

Press releases and summaries

The relationship between the press and the ICJ is highly valued by the Court.⁴⁷ The ICJ communicates frequently with the press, for instance, through the use of press releases, videos, and visual content. As just highlighted, there is an entire section of the Court's website called 'Press Room' where the press can find relevant materials and even indications on how to access the Court on the days of the hearings. Additionally, the Court's Information Department is at the disposal of the media for any additional information.⁴⁸

Communication in these circumstances takes the form of proactive transparency, as the Court actively shares news and information with the press.⁴⁹ In this regard, it is interesting to note how press releases have evolved over time. The first press releases did not follow a

⁴⁴ Different tools can serve to reach different audiences. See footnote n 8 in this regard.

⁴⁵ Generally on the use of social media by courts see Lorenzo Gradoni, 'They Tweet too: Sketches of International Courts' Digital Lives' (2022) *Questions of International Law*, available at <<http://www.qil-qdi.org/they-tweet-too-sketches-of-international-courts-digital-lives/>> accessed 12 January 2024. However, risks are present, especially when cases that have garnered significant public attention are under deliberation. See Juliette McIntyre and Audrey Plan, 'The ICJ goes Viral: Transparency and Sensationalism in *South Africa v Israel*, (2024) *OpinioJuris*, available at <<https://opiniojuris.org/2024/01/31/the-icj-goes-viral-transparency-and-sensationalism-in-south-africa-v-israel/>> accessed 31 January 2024.

⁴⁶ An example of this tendency is this post available on LinkedIn <https://www.linkedin.com/posts/cour-internationale-de-justice-international-court-of-justice_un-icj-un-activity-7124763601642422272-ml-/?utm_source=share&utm_medium=member_desktop> accessed 12 January 2024, where also the symbolism of that specific meeting is highlighted. Asked about the reasons behind these developments, the Information department affirmed: 'the reason is to make the most use of the social media channels we are active on to inform our stakeholders of our activities more broadly'. (Official Interview with the author, January 2024). On the relevance of using of visuals in communication practices, see, among others, Silvia Steininger, 'Swipe up for the German Federal Constitutional Court on Instagram' (2021) *VerfBlog*, available at <<https://verfassungsblog.de/the-gfcc-on-instagram/>> accessed 12 January 2024. It is also interesting to note that the Court has valued the importance of visuals since years, as the existence of a multimedia section on the website attests. This section, available at <<https://www.icj-cij.org/multimedia-cases>> accessed 12 January 2024, includes pictures from hearings. On this see Press Release No.2007/10, available at <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20070416-PRE-01-00-EN.pdf>> accessed 12 January 2024. The importance attributed to visuals is reinforced by the recent increased use of them on social media, which are even more readily accessible.

⁴⁷ See, for instance, the text transcription of the press conference of Judge Gilbert Guillaume on the occasion of his election as President of the Court on 15 February 2000, available at <<https://www.icj-cij.org/sites/default/files/press-releases/3/3003.pdf>> accessed 12 January 2024, where he stated 'International justice needs to be transparent and our meeting here does, I think, bear witness to that'.

⁴⁸ This is not only stated at the end of each press release but also concretely part and parcel of the Court's Information Department everyday activity. Significantly, the Information Department is available to answer enquiries not only from the press, but also from the general public, as the description of a usual day of their activity shows: 'the Information Department consists of four persons in total: the Head of the Department, an Information Officer, an Associate Information Officer and an Administrative Assistant. It is difficult to describe a typical day because no day is the same especially given the increasingly heavy case load of the Court. The Information Department is tasked, among other responsibilities, with the organization of sittings and general courtroom management (including AV-services management), the organization of other events and ceremonies, the organization of high-level protocol visits, the scheduling and giving of presentations on the Court to groups of visitors, external communications (replying to general information requests, media relations, web content management and social media management, production of printed and audio-visual outreach materials and memorabilia, and internal communications in part (e.g. preparing regular press reviews and announcements for internal distribution)' (Official Interview with the author, January 2024) Concretely, the Information Department goes beyond what, in general terms, is required to do by article 26 of the Rules of the Court.

⁴⁹ Interestingly, empirical studies show that the ICJ, compared to other international courts and tribunals, is quite active in issuing press releases, see on this point Reis (n 10) 257.

particular structure or layout and indicated only succinct information, probably due to the lack of technological means available. Changes have been enacted over the years to the point of arriving at the current style and forms where the ‘standard’ press release shows a recurrent notehead containing the emblem of the Court, its address and phone numbers, and links to its website, Twitter (now X), YouTube, and LinkedIn accounts. Key information is either underlined or written in bold (eg the name of the case) to provide visual clarity.⁵⁰ After substantive information related to the case, there is a standard explanation of the functions of the Court and indications on how to reach the Information Department. These changes highlight how the Court has improved its communication style over the years, trying to provide more clarity. Of particular significance is the fact that the Court decided to include at the end of each press release an explanation of its role.⁵¹ This addition represents a form of transparency as ‘explanation’, as the Court most likely does this to clarify its role to people, such as the members of the press, who might not be fully familiar with the ICJ’s activity. More generally, it is extremely important to highlight that the Court implemented changes in the style of its press releases,⁵² bearing in mind the needs of its audience and the evolving composition of its audience over time.⁵³

One specific service rendered to the press is making available summaries of judgments, orders, and advisory opinions. Summaries are classified as unofficial documents⁵⁴ and represent a simplified version of the judicial act. Originally, summaries were directly included in the text of the press release, with the expressed purpose of being prepared ‘to assist the press’.⁵⁵ Progressively, they were no longer included but mentioned in the text of the press release with a link indicating where to find them in full. The indication that the summary was prepared for the benefit of the press is no longer present. This change might indicate a significant transition. Indeed, this might be an indirect acknowledgement that these documents are consulted and used far beyond the press, such as in academic circles, but also by the general public, precisely due to their simplified nature.

To understand the importance of summaries as a form of transparency as ‘simplification’ I will now turn to the results of an empirical analysis conducted on all the summaries of

⁵⁰ For some years, among the standard practices, there was the practice of highlighting in bold and placing at the beginning of the press release the outcome of the case. This is exemplified, for instance, in the press release related to the issuance of the advisory opinion *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Press Release No 9/2019 available at < <https://www.icj-cij.org/public/files/case-related/169/169-20190225-PRE-01-00-EN.pdf> > accessed 12 January 2024. This practice was then discontinued.

⁵¹ See, for instance, the indication at the end of Press Release No.2017/16 available at < <https://www.icj-cij.org/sites/default/files/case-related/168/19420.pdf> > accessed 12 January 2024. Interesting to note that, when first introduced, the explanation was even longer, as it can be observed, for instance in the Press Release n.23/2014, available at < <https://www.icj-cij.org/sites/default/files/case-related/159/18346.pdf> > accessed 12 January 2024. On this, see Dapo Akande, ‘ICJ Press Releases Distinguish the ICJ from other International Tribunals’, EJIL:Talk!, 2011, available at < <https://www.ejiltalk.org/icj-press-releases-distinguish-the-icj-from-other-international-tribunals/> > accessed 12 January 2024.

⁵² As explained by the Information Department: ‘the Information Department prepares the press releases and they are approved by the Registrar before distribution. The social media posts are prepared and posted by the Information Department directly’ (Official interview with the author, January 2024).

⁵³ When asked why certain changes have been implemented (the layout of press releases has changed, as well as standard elements present in their texts (for instance, introduction of a closing statement on the role of the Court)), the Information Department answered: ‘our press releases aim to inform not only the media but also other stakeholders and therefore all changes introduced over the years have aimed at clarifying the role and work of the Court’. (Official Interview with the author, January 2024).

⁵⁴ On each summary of judgment, it is indicated that that document is unofficial. See, as a way of example, the summary of the judgment of the case *Maritime Dispute* available at < <https://www.icj-cij.org/sites/default/files/case-related/137/17958.pdf> > accessed 12 January 2024. The reason why these documents are nevertheless included in the analysis is that they are part of the body of documents that the Court makes available as an institution, as explained at the beginning of the present section.

⁵⁵ See, for instance, the press release related to the delivering of the judgment in the case *United States Diplomatic and Consular Staff in Tehran* available at < <https://www.icj-cij.org/sites/default/files/case-related/64/11799.pdf> > accessed 12 January 2024.

judgments issued by the Court.⁵⁶ Observations show that, over the years, the Court has introduced a series of changes that were initially implemented for the summary of a case and then consistently applied to subsequent summaries. Additionally, some evolutions can be detected.

First, the Court progressively introduced some changes in style and form. For instance, while originally no summary of dissenting and separate opinions was provided, the Court gradually introduced a summary of these documents, starting with a short paragraph,⁵⁷ then a longer summary,⁵⁸ and finally putting the summary of the opinions in an annex.⁵⁹ Over the years, headings and links to the paragraph numbers of the judgment were also introduced.⁶⁰ The introduction of this cross-reference to paragraph numbers is particularly important, as it allows the reader to follow the document more easily and return to the judgment if needed. Regarding the headings, it is important to highlight that initially, brief headings were incorporated into summaries, predating their usage in judgments. In this early stage, these headings were succinct and to the point, likely intended to enhance the readability of the summaries. As the practice of utilizing headings in judgments became more consistent, summaries adapted to this shift by aligning with the same headings used in the corresponding sections of the judgment.⁶¹ Observations can also be made about the summarization of the parties' submissions and the operative clause of the judgment. For instance, initially, the Court presented its conclusions right at the beginning (either as a summary or by directly copying the operative clause). Over time, however, the practice evolved, and the copy-pasting of the operative clause was shifted to the end of the summary, thereby replicating the structure of the judgment.⁶² Finally, maps and visuals were introduced in the text of the summary and, subsequently, in a separate annex.⁶³ Elements were also highlighted in bold or underlined as further indications of importance.

As Figure 1 shows, the number of pages of summaries increased over the years, but what is more significant is the relationship between the number of pages of judgments and the number of pages of summaries.

As Figure 2 demonstrates, especially the trendline, the relation between the number of pages of the judgments and their summary has significantly increased over time. Concretely, this shows that each page of a judgment and its summary, on average, now takes up more pages and uses more words than during the first period of activity of the Court. This tendency can, again, be linked to the idea of transparency as 'simplification' or as effective

⁵⁶ The English version of the documents was always used.

⁵⁷ Summary of the judgment in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)*, available at <<https://www.icj-cij.org/sites/default/files/case-related/50/5389.pdf>> accessed 12 January 2024.

⁵⁸ Summary of the judgment in the case *United States Diplomatic and Consular Staff in Tehran*, available at <<https://www.icj-cij.org/sites/default/files/case-related/64/6293.pdf>> accessed 12 January 2024.

⁵⁹ Summary of the judgment in the case *Oil Platforms*, available at <<https://www.icj-cij.org/sites/default/files/case-related/90/9745.pdf>>, accessed 12 January 2024.

⁶⁰ This change started with the summary in the case *North Sea Continental Shelf*, available at <<https://www.icj-cij.org/sites/default/files/case-related/52/5563.pdf>> accessed 12 January 2024. The paragraph numbering in judgments was introduced the year before, in the case *South West Africa*.

⁶¹ For an analysis of style changes in judgments of the ICJ see Irene Miano, 'Doing Things with Style: Why the Aesthetic Features of ICJ Judgments and Advisory Opinion Matter' (working paper).

⁶² See, for example, the difference between the *United States Diplomatic and Consular Staff in Tehran* (n 55) and *Maritime Dispute* (n 54). The reversal of the order between arguments and conclusions, in contrast to the conventional structure observed in judgments, is likely motivated by the aim to provide readers with even more immediate access to the Court's decision. By promptly presenting the reached conclusion, this approach offers readers, particularly members of the press, the central information they might find most relevant. Over time, as the broader utility of summaries became more recognized, adjustments in this regard have been introduced.

⁶³ See a summary of the judgment in the case *Territorial and Maritime Dispute*, available at <<https://www.icj-cij.org/sites/default/files/case-related/124/17180.pdf>> accessed 12 January 2024. If not all the maps presented in the judgments are included in summary, one could wonder what criteria were used to exclude/include certain maps.

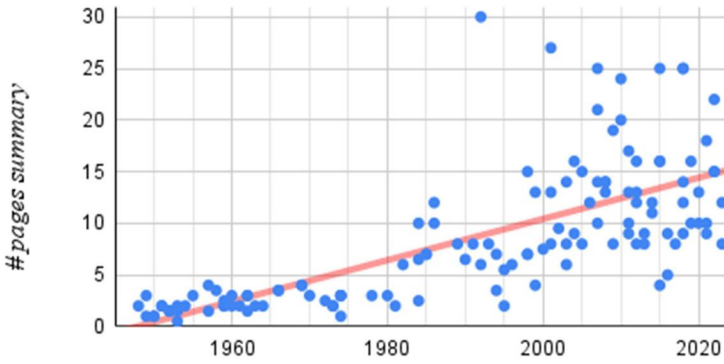


Figure 1. Number of pages of the summary increased over time (1945–2023). The figure is elaborated based on manual analysis of the ICJ’s judgments and summaries of judgments conducted by the author.

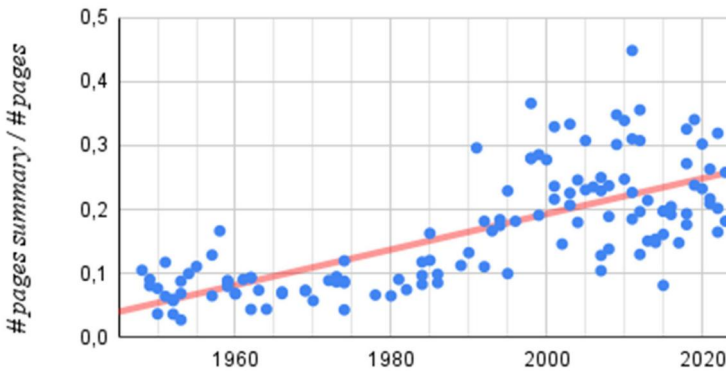


Figure 2. Correlation between the number of pages of the judgment and in the summary. Opinions of judges are excluded from the counting of pages of both documents (1945–2023).

‘explanation’, considering that the Court wanted to show greater accuracy in the way it summarizes its acts.

While accuracy might be the final goal, longer summaries of judgments do not always equate with more precision. Indeed, it is possible to observe another tendency. Over the years, there has been an increase in copying and pasting from the original judgment,⁶⁴ with some summaries being a mere cut version of the judgment rather than a more synthetic version of it. By copying and pasting, the original purpose of the summaries is put into question, as there is no simplification or easier language used (the expressions, terms, and style remain identical to those used in the judgment).

Another aspect that should be carefully considered is which arguments and elements are presented and which are completely omitted. Indeed, in certain cases, omitting or valorising

⁶⁴ The analysis in this regard has been conducted using antiplagiarism software, such as Copyleaks, that can compare texts. For instance, between the summary of the *Corfu Channel* judgment on the merits (1949) and the text of the judgment, the software detected 3.1% match (identical, paraphrased, identical phrases with some omissions) and 1.3% of identical expressions; between the summary and the judgment in the case *Dispute over the Status and the use of the waters of the Silala* (2022) the software found 39% match and 17.7% identical text.

certain arguments can completely modify the way a judgment is understood from its summary and might lead to misinterpretation.⁶⁵

It could be argued that the purpose of summaries is precisely to provide an introductory or a more concise and understandable version of the judgment, and, therefore, if all the details are provided, the very aim of these texts can be weakened. However, if key elements and arguments are missing, unmentioned, or simply copied and pasted, the summary obscures rather than enhances transparency and accessibility.

In the end, the evaluation of press releases and summaries of judgments as transparency tools presents lights and shadows. On one side, the efforts made by the Court, as an institution, certainly need to be valued. Indeed, summaries are easy to access and consult and represent a great resource for those who, for various reasons (eg time available, background), cannot consult the full text of the judgment. Additionally, over the years, the Court has tried to implement some improvements in this context, for instance by providing summaries of dissenting and separate opinions to include a more complete overview of the judgment and possible contrasting arguments. On the other side, cuts and omissions leave one wondering whether, in these circumstances, simplifying can really constitute a transparency tool at the Court's disposal.⁶⁶

Speeches and statements

If talking about summaries of judgments means mostly referring to the transparency of single cases, and only indirectly in an overall discourse, the situation is different for speeches made by judges, as they represent a turn to the transparency of the institution. Indeed, this analysis mostly unveils an attempt to explain, justify, and defend the Court's activity in general, rather than regarding single cases.

The speeches included in the present analysis are varied, ranging from those made before the General Assembly of the United Nations to those made on visits of diplomats to the Court and from those to the Security Council and those to the International Law Commission.⁶⁷ These speeches and statements were included in the present analysis on *de facto* transparency of the Court because they constitute a key occasion that the Court has to directly address its audiences through its judges acting in their official capacities.

If one looks for the word 'transparency' or its variations in the text of judges' speeches and statements available on the Court's website, the results are scarce. Indeed, the term is

⁶⁵ For instance, the summary of the case *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and Nuclear Disarmament (Marshall Islands v United Kingdom)*, available at <<https://www.icj-cij.org/sites/default/files/case-related/160/19228.pdf>> accessed 12 January 2024, provides no reference to the historical background of the case nor to the precedents on which the Court based its determination of the requirement of 'existence of a dispute' that are discussed (and contested) at length in the dissenting and separate opinions attached to the case (and summarized in the same document). Other examples are the summary of the case *Case Concerning Elettronica Sicula S.p.A. (ELSI)*, available at <<https://www.icj-cij.org/sites/default/files/case-related/76/6709.pdf>> accessed 12 January 2024, where there is no procedural explanation of the role of the Chamber and its peculiarities (while reference to article 26 of the Statute is made in the judgment), the summary of the case *Case Concerning the Barcelona Traction, Light and Power Limited (Second Phase)*, available at <<https://www.icj-cij.org/sites/default/files/case-related/50/5389.pdf>> accessed 12 January 2024, where the explanation of the origin and nature of obligations *erga omnes* is almost completely omitted.

⁶⁶ One could argue that there is a possible ulterior risk (manipulation of the function of press releases) in making all the information available using press releases, which could be the return of the so-called 'phony cases' described by Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013) 697. I thank Fuad Zarbiyev for raising this point. On more general concerns related to oversharing, see comments made by Franklin Berman in Ospina (n 6) 224 that affirms 'it seems to me that there is a danger in the assumption that all publicity is good publicity, that publicity is a good thing in itself, pointing then to the risk of unrepairable misunderstandings that openness can generate.'

⁶⁷ I have analyzed only the speeches and statements available on the ICJ's website (starting from 1992 on, the related section is available at <<https://www.icj-cij.org/statements-by-the-president>> accessed 12 January 2024. While taking into account feasibility considerations, this was also a deliberate choice. Indeed, here transparency is framed as 'accessibility' and, therefore, the decision is to focus on those speeches and statement that are easily accessible to the wider public.

rarely mentioned and always in passing.⁶⁸ However, a careful reading of speeches and statements shows that these instruments can clearly be considered as transparency-oriented tools. Indeed, there are instances in which the judge (most often the president of the Court), despite not mentioning transparency explicitly, provides some explanations or data that move in the direction of transparency as ‘justification’ or ‘explanation’.

For example, the president often aims to build a connection with the audience by presenting examples of cooperation or highlighting how the Court’s work relates to that of the addressees. This can include explaining the importance of the Court’s role in their activities, whether addressing the General Assembly, the Security Council, the International Law Commission, or a specific event organizer.⁶⁹ This rhetorical technique⁷⁰ actively engages the specific audience and brings it closer to the Court, while clearly defining the bond between them. While these circumstances are partly moulded by the institutional setting where these speeches and statements are made and the need for courtesy and to respect unwritten diplomatic rules, the modalities and terms in which these statements are framed entirely depends on the speaker’s will to project a specific image of the Court, as being in an open and close dialogue with its audience as much as possible.

Another group of statements that goes into the perspective of transparency as ‘explanation’ or ‘justification’ is the one related to the judicial activity of the Court. In this perspective, it is interesting to note that the president of the ICJ reports every year before the General Assembly on the caselaw of the Court.⁷¹ The president, in that circumstance, presents a report/summary of the cases that have been submitted to the members of the Assembly before their speech. Therefore, during the speech, the president often starts with what can be called ‘a summary of the summary’: a form of transparency as ‘simplification’.⁷² The summaries are generally dry, merely replicating what has been written in judgments rather than taking the reporting as an occasion to provide more information on the case or justification of why certain conclusions were

⁶⁸ Only five instances are counted. See, for example, the speech of H.E. Judge Joan E. Donoghue President of The International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 29 October 2021, available at <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20211029-PRE-01-00-EN.pdf>> accessed 12 January 2024 where she stated ‘The legal proceedings before the ICJ are held with transparency. Both the written proceedings and the hearings are open to the public. However, the Court must be able to deliberate with absolute confidentiality’. See, also, Speech by HE Mr Abdulqawi A. Yusuf, President of The International Court of Justice, on the Occasion of The Seventy-Fifth Session of The United Nations General Assembly, 2 November 2020, available at <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20201102-STA-01-00-EN.pdf>> accessed 12 January 2024, where he stated: ‘it is for this reason that, over the last three years, the Court has continued to review its Rules and has made amendments to some of its Rules of Procedure in 2019, as I reported last year to you, as well as at the beginning of this year. The purpose of these amendments is to modernize, update and clarify the inner workings of the Court and make our institution more efficient and transparent’.

⁶⁹ See, for instance, Statement By H.E. Judge Hisashi Owada, President of the International Court Of Justice, to the Security Council, 25 October 2011 available at <<https://www.icj-cij.org/sites/default/files/press-releases/1/16741.pdf>>, accessed 12 January 2024; Speech By H.E. Judge Hisashi Owada, President of The International Court of Justice, on the Occasion of the Visit by the President of the Republic of Slovenia, H.E. Dr. Danilo Türk, 29 November 2011, available at <<https://www.icj-cij.org/sites/default/files/press-releases/5/16845.pdf>>, accessed 12 January 2024; Speech of H.E. Mr. Abdulqawi Ahmed Yusuf, before the Royal Academy of Belgium, 12 November 2018, available at <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20181112-PRE-01-00-EN.pdf>>, accessed 12 January 2024.

⁷⁰ Chaim Perelman and Lucie Olbrechts-Tyteca, *Trattato Dell’argomentazione. La nuova retorica* (Carla Schihk, Maria Meyer and Elena Barassi trans., Einaudi (ed) 2013) 154–203 and 22–39.

⁷¹ It is interesting to highlight that the Court now publish and posts about the Report of Activities also on its social media accounts and website. Significantly the posting is done in different languages, which provides greater accessibility. For instance, available at <https://twitter.com/CIJ_ICJ/status/1718933437644480804> accessed 12 January 2024. On this is worth noting that ‘the Information Department prepares the Annual Report and it is revised and approved by both the Office of the Registrar and the President before submission to the United Nations Secretariat in accordance with Article 15 of the UN Charter. The President presents the report to the General Assembly at its annual meeting in October of each year’ (Official interview with the author, January 2024). Therefore, while there is an obligation to submit the report, the speech of the President before the Assembly constitutes a practice, as it is the posting online.

⁷² See eg Speech by H.E. Judge Shi Juyong, President of the International Court of Justice, to the General Assembly of the United Nations, 4 November 2004, available at <<https://www.icj-cij.org/sites/default/files/press-releases/1/2981.pdf>>, accessed 12 January 2024, where it asserted: ‘The Court has transmitted its annual Report to the Assembly, along with an introductory summary. As the Report is somewhat lengthy, I trust that the following résumé will provide a useful overview of its essential elements’. Here it is possible to make similar considerations to those related to summary of judgments wondering, for instance, how arguments are selected.

reached.⁷³ This can be seen as a missed opportunity, especially if one considers that the president has the chance to address what they consider to be the Court's main audience: the states.⁷⁴ Still, it is important to consider that, in these circumstances, judges might have to strike a cautious balance between confidentiality and transparency.⁷⁵

Similarly, judges often include a series of statistics, particularly on compliance with the Court's judgment.⁷⁶ While this is most likely done to shed light on the importance of the Court's role (either to gain more acceptance of its jurisdiction or funding) and to display the ICJ's efficiency and effectiveness, doubts have been cast on the utility of such types of statistics, especially in terms of transparency.⁷⁷

In some cases, speeches and statements generally address the Court's work and its position in the international arena, topics that can be seen as moving toward transparency as 'explanation'. In this case, the tone is aspirational, and the aim of providing transparency is to gain legitimacy or trust.⁷⁸ Lastly, in their speeches and statements, judges have also addressed criticisms directed at the Court.⁷⁹ This form of transparency as 'justification' demonstrates an open and constructive attitude, representing a way to communicate the message that there is no hidden agenda, but rather a set of concerns shared with the audience.⁸⁰

As in the case of summaries and press releases, speeches and statements of ICJ's judges, being considered as transparency-oriented tools, also exhibit a degree of ambivalence. Indeed, on one side, speeches and statements are useful tools to understand the type of image that the Court wants to present and to obtain insights from within. On the other side, transparency is often strategically used by the judges, on behalf of the Court, to pursue further aims. For instance, greater details, explanations, and emphasis on the Court's role are provided to advocate for more

⁷³ Few exceptions can be identified. See, for instance, Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the 59th Session of the International Law Commission, 10 July 2007, available at <<https://www.icj-cij.org/sites/default/files/press-releases/9/13919.pdf>>, accessed 12 January 2024.

⁷⁴ This is even more surprising if one considers that this practice is one of those that the ICJ put in place to face a legitimacy crisis, as highlighted by Jeffrey L Dunoff and Mark A Pollack, 'International Judicial Practices: Opening the "Black Box" of International Courts' (2018) 40 Michigan Journal of International Law 47, 67-69. On the reactions of the audience in this context, see Zuzanna Godzimirska, 'The Legitimacy of the International Court of Justice from the Vantage Point of UN Members' (2023) 26 Max Planck Yearbook of United Nations, 173-210.

⁷⁵ Couvreur (n 32).

⁷⁶ See, for instance, Statement by H.E. Judge Peter Tomka, President of the International Court of Justice, at the Plenary Session of the St. Petersburg International Legal Forum, 15 May 2013, available at <<https://www.icj-cij.org/sites/default/files/press-releases/4/17374.pdf>> accessed 12 January 2024.

⁷⁷ 'The Annual Report of the Court to the General Assembly contains many figures and numbers like those I just mentioned to you. They are, however, only figures and are not sufficient as such, to translate accurately the reality of the work of the Court. Much has been said, written and speculated about our work. More often than not, such speculations have been far away from the reality. It is true that, throughout its history, the Court has been careful to maintain a veil of discretion over its work. This is not because the Court is afraid of transparency but rather because, like every judicial institution, it has a duty to maintain its independence and the confidentiality of its deliberations. Since the parties appearing before the Court are sovereign States and the legal questions submitted to it often arise in the midst of complex political situations, it is all the more important to maintain that independence and confidentiality'. Speech of H.E. Judge Shi Juyong, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 28 October 2005, available at <<https://www.icj-cij.org/sites/default/files/press-releases/5/15815.pdf>> accessed 12 January 2024. See also Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a taboo', (2014) 51 Common Market Law Review 97, 137-138.

⁷⁸ See, for instance, Address by H. E. Judge Mohammed Bedjaoui, President of the International Court of Justice, to the General Assembly of the United Nations, 13 October 1994, available at <<https://www.icj-cij.org/sites/default/files/press-releases/7/3017.pdf>> accessed 12 January 2024.

⁷⁹ See, for instance, Speech of H.E. Judge Joan E. Donoghue, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 28 October 2022, available at <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20221028-STA-01-00-EN.pdf>> accessed 12 January 2024, 8-9.

⁸⁰ For example, see the speech of Judge Joan E. Donoghue before the Sixth Committee of the General Assembly, 25 October 2023, available at <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20231025-sta-01-00-en.pdf>> accessed 12 January 2024, where Judge Donoghue spoke about prospects of reform of the Court, focusing on lines of development arose from critiques moved to the Court) but also addressed alleged criticisms and dangers of recent practice of the Court in its case law, for instance with regard to jurisdiction *ratione materiae*, reassuring the audience that 'in the coming years, it will be important for the Court to continue to address questions of jurisdiction *ratione materiae* in a careful and disciplined manner, showing great sensitivity to the boundaries of its jurisdiction'.

funding. Consequently, doubts may arise regarding whether the ‘transparent’ information presented was shaped rhetorically in certain ways to serve those goals, rather than merely being an effort to explain or simplify.⁸¹ Moreover, the issue of selectivity comes back into the picture.⁸²

CONCLUSIVE REMARKS

This contribution has shown that the ICJ has adopted different forms of *de facto* transparency, proactively putting in place practices not imposed by its Rules, its Statute, or the general principles of international law. The forms of *de facto* transparency analysed by this article might not have been created to push forward a more transparent image of the Court in mind. However, their concrete practice has assumed that connotation, implementing the idea of transparency as ‘accessibility’ and its possible nuances of transparency as ‘justification’, ‘explanation’, and ‘simplification’. In this perspective, the Court ultimately used these instruments to portray a certain image of itself, as a judicial body that is transparent in its activity and does what it can to make itself more accessible to its audiences and the wider public.

Still, *de facto* transparency does not come without its problems or inherent risks.⁸³ Is rendering documents accessible an act that has concrete consequences? Does posting a press release on social media accounts really increase the number of people who are going to read it beyond the usual circles? Is summarizing a way to provide more clarity to those unfamiliar with the topic of a judgment? Or does summarizing come with the risk of leading the reader to misunderstandings? Is sterily stating that the Court is important and its role is key, an effective way to shed light on its activity?

While most of these questions might remain unanswered, what this contribution can ultimately attest to is that there is value in looking for transparency beyond the rules. It shows that the Court pays attention to evolving times and needs of its audience and that glimpses of transparency can be found everywhere. At the same time, when searching for transparency in the Court’s practice, one should always look at it with a critical eye, bearing in mind that transparency can never be neutral, and it is always important to acknowledge how transparency is achieved and constructed, also *de facto*.

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⁸¹ On multiple goals of the tools addressed in this contribution, see similarly, on the money saving and backlog reducing function of the website: Higgins (n 36).

⁸² Not only speeches can be selective in themselves (it is in their nature and structure to highlight certain things instead of others), but also currently summaries of speeches are provided in press releases (for instance, Press Release n. 57/2023 <<https://www.icj-cij.org/sites/default/files/press-releases/0/000-20231027-pre-01-00-en.pdf>> accessed 12 January 2024), likely showing the same risks highlighted in the section on summaries of judgments and advisory opinions.

⁸³ Anne Peters, ‘Towards Transparency as a Global Norm’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 534, 568–69: ‘is the quest for transparency misguided because it aims only at the symptoms and hides the causes? Is it a triumph of form over results? Does not striving for transparency become a distraction, diverting time and resources from substantive outcomes? Are we merely performing rituals of verification?’.