



Martin-Luther-Universität  
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# Beiträge zum Transnationalen Wirtschaftsrecht

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Philip C. Jessup's  
*Transnational Law Revisited*

- On the Occasion of the 50<sup>th</sup> Anniversary of its Publication

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Philip C. Jessup's *Transnational Law* Revisited  
On the Occasion of the 50<sup>th</sup> Anniversary of its Publication

By

Christian Tietje, Alan Brouder & Karsten Nowrot (eds.)

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## FOREWORD

In March 2002, the first issue of the “Beiträge zum Transnationalen Wirtschaftsrecht“ (Essays in Transnational Economic Law) was published. The new publication series edited by the Transnational Economic Law Research Center (TELC) and the Institute of Economic Law of the Faculty of Law, University of Halle-Wittenberg, was originally designed to provide for a publication platform for occasional research papers by the staff of both institutions. However, it soon became clear that the extensive research conducted at TELC and the Institute in the areas of European and international economic law had the potential for more numerous and substantial publications. Moreover, the editors of the Essays in Transnational Economic Law quickly realised how important and useful an internet-based publication is in the field of European and international economic law. Most of the international journals in this area have to cope with the problem that analysing problems of international economic law “is like trying to describe a landscape while looking out the window of a moving train – events tend to move faster than one can describe them“ (J.H. Jackson, *Legal Problems of International Economic Relations*, 1977, S. XV).

The 50<sup>th</sup> issue of the “Beiträge zum Transnationalen Wirtschaftsrecht” is a welcome occasion to thank all contributors and also the editing staff for their efforts in making the publication series a success. Moreover, the publication of this 50<sup>th</sup> issue also marks the 50<sup>th</sup> anniversary of the publication of “Transnational Law” by Philip C. Jessup. In his famous contribution on “Transnational Law”, Jessup essentially argued that simply referring to “international law” does not adequately respond anymore to the complex legal structures of cross-border transactions and relations. Instead, it was essential for Jessup to underline the necessity to follow an analytical approach concerning “all law which regulates actions or events that transcend national frontiers” (Jessup, *Transnational Law*, 1956, p. 2). The Transnational Economic Law Research Center, which has, at least in Germany, a unique and outstanding research profile concerning legal questions of economic relevance transcending national frontiers, closely follows Jessup’s approach. As outlined in this issue, we are convinced that a modern approach towards legal issues of international economics has to follow the analytical path of Jessup and transnational law.

It is a great pleasure for the Transnational Economic Law Research Center and the Institute of Economic Law to present this 50<sup>th</sup> issue of our publication series to the public. The publication is dedicated to the memory of the late Philip C. Jessup.

Halle, January 2006

Prof. Dr. Christian Tietje



## A. Philip C. Jessup: The Original Transnational Lawyer

*Alan Brouder*

*“No man in the world of international law aroused more universal admiration and affection than did Philip Jessup.”<sup>1</sup>*

The publication of the 50<sup>th</sup> issue of TELC’s *Beiträge zum Transnationalen Wirtschaftsrecht* presents an ideal opportunity to reflect on the origins and evolution of transnational law. Any such reflection would be incomplete without reference to *Philip C. Jessup* – the scholar, diplomat, lawyer, and judge who developed and popularised the concept of transnational law.<sup>2</sup> February 2006 also marks the 50<sup>th</sup> anniversary of the *Storrs* Lectures given by *Jessup* at the Yale Law School, where he first outlined the concept of transnational law, advocating a wider understanding of the dynamics and regulation of human relationships. The old twin pillars of public and private international law, he argued, were quickly becoming inadequate structures to regulate human encounters; classical legal approaches to relationships that transcended state borders ignored the accelerating complexity of an increasingly interdependent world. In essence, *Jessup* was attempting to start a dialogue on the processes and implications of globalisation, almost 40 years before the debate began in earnest.

### I. The ‘Enlightened Crusader’

*Jessup*’s ideas on the changing nature of the state and the increasing importance of non-state actors highlighted the key driving force behind his long life and varied career: he was passionately committed to understanding the world around him in order to help build a more harmonious human society. After *Jessup*’s death in 1986, his good friend *Manfred Lachs* summed up his character by saying: ‘[t]o me, he was typified by the wise words: “All I wish to know is to understand in common, simple words the problems that face us in the world of today.”’<sup>3</sup> In this respect, *Jessup*’s *Storrs* Lectures, and the resulting book *Transnational Law*, were as much a contribution to the fledgling discipline of International Relations (IR) as they were to international law. Like the theorists and practitioners of IR, *Jessup*’s desire to understand the world was rooted in World War I. Unlike most of those people, however, *Jessup* had actually fought in the war; he had been in the infantry, carrying a light machine gun, and had fought a number of battles in Belgium and France with the American Expeditionary Forces.

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<sup>1</sup> *Schwebel*, AJIL 80 (1986), 901.

<sup>2</sup> Although others such as *Joseph E. Johnson* and *Arthur Nussbaum* had previously used the term ‘transnational’ in a legal sense, *Jessup* is generally credited with developing the idea, and for popularising it through the publication of his book *Transnational Law*, based on his *Storrs* Lectures at Yale.

<sup>3</sup> *Lachs*, AJIL 80 (1986), 900.



*Jessup's* wartime experience triggered a life-long obsession with the pacific settlement of international disputes. Although his career varied widely, the motivating factor behind each of his efforts was a struggle 'with the problem of the establishment of peaceful and orderly relations among nations.'<sup>4</sup> He believed in the power of institutions, and continually pointed to the essential role of rules in the everyday conduct of international and global affairs. In this regard, he went against the grain of the academic and political thinking of the day, particularly in the 1950s. The failure of the League of Nations to prevent the outbreak of World War II had shattered faith in international institutions, and led to the development of the Realist school of thinking within IR, which dominated the discipline (and politics) until the end of the Cold War. Realists argued that the kind of liberal institutionalism that *Jessup* avowed was woolly-minded utopianism, infused with a moral subjectivity that neither could nor should be applied by states. They pointed to the impotence of the new United Nations system in the face of the emerging East-West divide, arguing that no international institution could change the fact that politics is governed by objective laws of human nature, and that international relations are governed by self-interest defined in terms of power.<sup>5</sup> Realists claimed to portray the world as it was, and not as we would like it to be.

In this climate, *Jessup's* beliefs, actions, and achievements are all the more impressive. He refused to accept the Machiavellian dogma propounded by Realists that cooperation by states for their mutual interest was impossible in an anarchical world system. However, having had first-hand experience of international politics, he knew that progress could be achieved only in increments and at a very slow pace. Indeed, he was sceptical of grand projects which aimed at changing the existing order. This characteristic of practical-minded action in the service of a belief in human progress led *Manfred Lachs* to describe him as an 'enlightened crusader'.<sup>6</sup> For *Jessup*, carefully negotiated rules and agreements were the basis of all human societies' ability to coexist peacefully; the legal and diplomatic worlds, then, were natural homes for such a person.

## II. Evolution of a Scholar-Statesman

While the First World War provided the impetus for the international focus of *Jessup's* career, his family history would certainly have led him down the legal path in some capacity.<sup>7</sup> His father had been a distinguished New York lawyer, having written authoritative works on estate law, and his grandfather had been a judge and chairman of the Republican Party committee that nominated *Abraham Lincoln* for the presidency in 1860. Indeed, *Jessup* had already completed a large proportion of his

<sup>4</sup> *Jessup*, The Future of International Law Making, in: M. G. Paulsen (ed.), Columbia Law School Centennial Conference Volume: Legal Institutions Today and Tomorrow, New York 1959, 208 (215), cited in: *Hyde*, AJIL 80 (1986), 903 (907).

<sup>5</sup> See *Morgenthau*, Politics Among Nations. *Morgenthau's* book was the most influential publication in International Relations for more than 30 years.

<sup>6</sup> *Lachs*, AJIL 80 (1986), 897.

<sup>7</sup> For a detailed biographical note on *Jessup*, see *Schachter*, AJIL 80 (1986), 878-895. Much of the biographical information for this article is taken from *Schachter*.

legal studies by 1917, when he interrupted them in order to fight in World War I. On his return to Hamilton College in New York, he met *Elihu Root*, a former Secretary of State, Secretary of War, President of the American Society of International Law and later Nobel Peace Prize winner.<sup>8</sup> *Root*, a scholar in residence at the school at the time *Jessup* met him, was a passionate advocate of international arbitration and judicial settlement, and made sure that *Jessup* met with *James Brown Scott*, the then editor of the *American Journal of International Law*, and *John Bassett Moore*, a Professor of International Law at Columbia University and later a judge at the Permanent Court of International Justice.

*Jessup* was deeply influenced by the optimism of these three leading international lawyers, who believed that international society was evolving to a stage where law would play the key role in preventing and resolving conflict. He studied international law at Columbia University, transferring to Yale in his third year, where he received his law degree in 1924. The following year, *Jessup* began his career as a teacher and scholar at Columbia, where he completed his doctorate on the law of territorial waters and maritime jurisdiction.<sup>9</sup> In addition to publishing his PhD thesis, he produced three other significant works in four years, including one written in French.<sup>10</sup> His interest in international affairs in the broadest sense motivated him to work not only at the law faculty, but also at the Department of Political Science,<sup>11</sup> engaging in work on international politics, diplomatic history, and national security.<sup>12</sup>

*Jessup*'s first encounter with the real world of international relations came in 1930 when he took a year's leave of absence to work as a legal adviser to the US ambassador in Cuba. The major events of the 1930s such as the Spanish Civil War, the rise of *Hitler*, and the threat of war in Europe and the Far East, led *Jessup* to take a more active role in politics, being elected chairman in 1939 of both the Institute of Pacific Relations (IPR), and its US affiliate, the American Institute of Pacific Relations (AIPR).<sup>13</sup> Through his membership of these organisations as well as the America First Committee which he joined in 1941, *Jessup* was an outspoken advocate of strict US neutrality, first in relation to the Spanish Civil War, and then during World War II, until the attacks on Pearl Harbour.<sup>14</sup>

<sup>8</sup> *Jessup* later wrote a two-volume biography of *Root*, *Elihu Root*, Vol. I & II (1938).

<sup>9</sup> *Jessup* joked that his book sold very well because bootleggers and rumrunners needed an authoritative manual to carry out their illegal activities; the book later became known as 'The Bootleggers' Guide'.

<sup>10</sup> *American Neutrality and International Police*, Boston (1928), *The United States and the World Court* (1929), and *L'Exploitation des Richesses de la Mer* (1929).

<sup>11</sup> At the time, the department was known as the Department of Public Law and Government.

<sup>12</sup> Had there been a Department of International Relations, *Jessup* would surely have been an active member. At the time, only two universities had Departments of International Relations, the first founded in 1919 at the University of Wales, Aberystwyth (called the Department of International Politics), and the second eight years later at the London School of Economics, where a Chair in International Relations had existed since 1924.

<sup>13</sup> Although the IPR and AIPR were non-governmental organisations, their political views resulted in severe attacks by Senator *McCarthy* in 1950 and 1951, alleging that prominent people in the organisations, including *Jessup*, were Communists or 'pro-Communist'.

<sup>14</sup> In the mid-1930s, *Jessup* had been heavily involved in producing a four-volume work on the issue of neutrality, co-authoring the first volume with *Francis Deák*, writing the fourth volume alone, and editing the other two volumes with *Deák*.

When the US finally entered the war, *Jessup* was appointed Associate Director of the Naval School of Military Government and Administration at Columbia and a lecturer at an army school in Virginia. Two years later he became chief of training and personnel in the Office for Foreign Relief and Rehabilitation, a State Department agency that was later absorbed into the United Nations Relief and Rehabilitation Administration (UNRRA). *Jessup* took part in the first UNRRA conference in 1943 as an assistant secretary, and in the same capacity attended the Bretton Woods Conference, which established the World Bank and International Monetary Fund. In 1945 he assisted the Solicitor General of the US and the Legal Advisor of the State Department in preparing a preliminary draft of the Statute of the International Court of Justice (ICJ). In the same year he took part at the San Francisco conference on the establishment of the United Nations, working as an adviser to the US delegation.

Following his return to Columbia in 1946 as Hamilton Fish Professor of International Law and Diplomacy, he published *A Modern Law of Nations* in 1948. The publication received widespread acclaim and is still considered his most influential book.<sup>15</sup> It was in this book that *Jessup* developed his ideas on the protection of individual human rights,<sup>16</sup> and the regulation of armed force. *Jessup* argued forcefully in the book that the interests of the international community as a whole should supersede those of individual states. It was here that he first put forward the idea of the interdependence of states, claiming that true sovereignty was neither feasible nor desirable: ‘Sovereignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand on which the foundations of traditional international law are built.’<sup>17</sup>

*Jessup*’s career as a US diplomat developed quickly in the late 1940s. By 1948 he was a representative with the US Mission to the United Nations. He represented the US at various UN bodies including the General Assembly and the Security Council. He participated in the drafting of the statute of the International Law Commission, and was appointed by President *Truman* as US ambassador-at-large from 1949 to 1953, on the recommendation of Secretary of State *Dean Acheson*. It was during this period that *Jessup* was catapulted onto the centre-stage of confrontations between the US and the Soviet Union. Of his many diplomatic achievements, it was his handling of the sensitive Soviet blockade of Berlin that has received most attention. *Jessup* is often credited with having initiated the process which ultimately resolved the impasse.<sup>18</sup> *Dean Acheson* described *Jessup*’s actions as ‘a triumph of the diplomatic art in America.’<sup>19</sup>

<sup>15</sup> *Schachter* contends that the book ‘probably received more attention in the public media than any other book on international law ever had’, *AJIL* 80 (1986), 882. One reviewer stated simply: ‘This volume is what the world needs: The application to international affairs of (1) realistic analysis; (2) balanced judgment arising out of technical competence; and (3) courageous pioneering and leadership.’, *Barber*, *The Western Political Quarterly* 1 (1948), 351.

<sup>16</sup> The book was published several months before the Universal Declaration on Human Rights was adopted.

<sup>17</sup> *Jessup*, *A Modern Law of Nations* (1948), cited in *Barber*, *The Western Political Quarterly* 1 (1948), 351.

<sup>18</sup> In 1949, *Jessup* approached the Soviet Ambassador to the UN in the bar of the United Nations building, setting in train a series of events that led to the end of the Berlin blockade. For a full recounting of the story, see *Acheson*, in: *Friedmann/Henkin/Lissitzyn* (eds.), 6 *et seq.*

<sup>19</sup> *Ibid.*, 7.

### III. Jessup vs. McCarthy

It was therefore ironic that *Jessup* was to become, after General *George Marshall*, the most prominent target of attacks by Senator *McCarthy*'s House Un-American Committee. *McCarthy*'s suspicions were not even dampened by the fact that during this period, it was *Jessup* who led the verbal attacks on the Soviet Union at the UN. *Jessup*'s former role at the IPR and AIPR were seen by *McCarthy* as a strong indication of his communist sympathies. In addition, *Jessup*'s views on China came under close scrutiny. He had been appointed by *Acheson* to the position of editor-in-chief of what was popularly called the China White Paper, a document that concluded that: 'the unfortunate but inescapable fact is that the ominous result of the civil war in China was beyond the control of the government of the United States. Nothing that this country did or could have done within the reasonable limits of its capabilities could have changed that result.'<sup>20</sup> *Acheson* stoutly defended the China White Paper and particularly *Jessup*'s role in it. He later wrote that it 'has stood up admirably for thirty years as the definitive factual history of the period. This is due to *Jessup*'s editing and supervision.'<sup>21</sup> The McCarthyites believed that China had somehow been 'lost' to the Communists because of a small group of disloyal officials in the US government. In his defence of *Jessup* and of the report, *Acheson* wrote that the conclusion of the report 'was unpalatable to believers in American omnipotence, to whom every goal unattained is explicable only by incompetence or treason.'<sup>22</sup>

*Jessup*'s memoir of his diplomatic career,<sup>23</sup> published in 1974, exposed the level of anger and frustration that the *McCarthy* accusations had inflicted. While he found the diplomatic world exhilarating and never thought of the United Nations as a boring or useless forum (unlike *Acheson*), his faith in the power of reason and good will was considerably diminished by his experiences. While the allegations against *Jessup* appear absurd in hindsight, and although his alleged disloyalty to the United States was believed by very few people even at the time, the experience cost him a nomination in 1951 as representative to the UN,<sup>24</sup> and the US government declined to support his appointment as a member of the International Law Commission in 1955.<sup>25</sup> Within a relatively short time, however, *Jessup* came to be widely admired as someone who had stood up to *McCarthy*, and he was subsequently honoured by leading international lawyers and institutions at home and overseas. He was elected as President of the American Society of International Law in 1955 and Vice President of the *Institut de Droit International* in 1959. He was particularly pleased when the American Society of

<sup>20</sup> *US Department of State*, United States Relations with China, quoted in *Acheson*, in: Friedmann/Henkin/Lissitzyn (eds.), 8.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Jessup*, *The Birth of Nations* (1974).

<sup>24</sup> The Senate committee concerned with his nomination voted three to two against *Jessup*'s approval. However, at least two of the three senators who voted against him said they had full confidence in *Jessup*'s loyalty, but that they could not support him because public confidence in him had dropped substantially as a result of *McCarthy*'s attacks. Nonetheless, the following year President *Truman* appointed *Jessup* to the General Assembly, where he served until 1953.

<sup>25</sup> Although members serve on the ILC in their individual capacity, *Jessup* declined to take up his seat because he lacked the support of his government.

International Law honoured him by naming the worldwide moot court competition after him, now simply known as ‘the Jessup’.

#### IV. Judge Jessup

For *Jessup*, most of the 1950s were spent back at Columbia University, where he continued his unusually high level of productivity – researching, writing, and attracting high-calibre students, many of whom went on to achieve great success.<sup>26</sup> It was during this period that he published *Transnational Law*, and promoted the idea of ‘parliamentary diplomacy’, his expression for the type of diplomatic negotiations that were emerging at the United Nations.<sup>27</sup> He also reflected on the future of global relations by writing about the law of outer space and Antarctica.<sup>28</sup> During this period, *Jessup* also engaged in private practice, and worked as a consultant for the Rockefeller Foundation, on whose behalf he advised the governments of newly independent states.<sup>29</sup> His colleague at the time, *James N. Hyde*, jokingly described him as ‘ambassador-at-large’ to the Third World countries undergoing decolonisation.<sup>30</sup> It might be argued that, in this capacity, *Jessup* embodied the kind of transnational situation that he espoused in his work: he was working as a legal adviser to the governments of foreign states, on international matters, while representing a private, non-governmental organisation.

In 1960, *Jessup* received perhaps his highest and most fitting honour: he was elected to serve as a judge at the International Court of Justice in the Hague. For a man who believed so passionately in the role of international institutions and international law in the maintenance of peace and orderly relations between states, there could be no better place to apply his learning and experience. Taking his seat in 1961, *Jessup* was to serve on many important cases, including the *Barcelona Traction* case<sup>31</sup>, which famously ruled that all states have certain legal obligations to the international community as a whole.<sup>32</sup> It has been argued that *Jessup*’s dissenting opinion in the earlier *South West Africa Cases* may have influenced the *Barcelona Traction* ruling. In the first phase of the cases, *Jessup* argued that: ‘[i]nternational law has long recognized that States may have legal interests in matters which do not affect

<sup>26</sup> For example, *Jessup*’s research assistant on Transnational Law was the young Swede *Hans Blix*, who would later become the head of the International Atomic Energy Agency, and the UN Monitoring, Verification, and Inspection Commission (UNMOVIC), leading the weapons inspection process in Iraq.

<sup>27</sup> *Jessup*, *Recueil des Cours* 89 (1956), 234.

<sup>28</sup> *Jessup/Taubenfeld*, *Controls for Outer Space and the Antarctic Analogy*.

<sup>29</sup> See *Hyde*, *AJIL* 80 (1986), 903 *et seq.*

<sup>30</sup> *Ibid.*, 904. The Rockefeller Brothers Fund later actually gave *Jessup* this title. Much of the work undertaken by *Jessup* in this period became the substance of his diplomatic memoir *The Birth of Nations*.

<sup>31</sup> ICJ, *Barcelona Traction, Light and Power Company Ltd.*, (Belgium v. Spain) ICJ Reports (1970) (Judgement of Feb. 5).

<sup>32</sup> See especially paragraphs 33 and 34 of the ICJ ruling (second phase) on the legal rule of obligations *erga omnes*.

their financial, economic, or other ‘material’, or say, ‘physical’ or ‘tangible’ interests.’<sup>33</sup> In one of the strongest dissenting opinions ever delivered, *Jessup* stated in the second phase of the case:

In my opinion, the Court is not legally justified in stopping at the threshold of the case, avoiding a decision on the fundamental question whether the policy and practice of apartheid in the mandated territory of South West Africa is compatible with the discharge of the “sacred trust” confided to the Republic of South Africa as Mandatory.<sup>34</sup>

Although *Jessup* was disappointed by the number of cases the Court heard during the 1960s, he remained a passionate advocate of its use, and promoted the expansion of its rules of procedure during and after his tenure.

## V. The Private Jessup

It is not surprising that those who knew *Jessup* speak endlessly of his integrity, his patience, and his irreverent wit. His passion for life in public was matched by his passion for life in private. The morals and principles that guided his work also guided his personal relationships. He turned down a Rhodes scholarship in 1921 in order to marry his wife of 65 years, *Lois*, and took a job in a bank in her home town of Utica, New York before enrolling in Columbia. *Lois* died just two days after he did. According to his son, *Philip C. Jessup Jr.*, he was an outgoing, social person who made friends easily; most of his students felt they had a close, personal relationship with him.<sup>35</sup> He loved nature and some of his happiest memories were of the time he spent with *Lois* and *Philip Jr.* in the countryside near their home town of Norfolk, Connecticut. His public service was not limited to global affairs – he made time to serve on town residents’ committees such as the Norfolk Planning and Zoning Committee. He even found time to write poetry.<sup>36</sup>

His deep humanity was reflected in his courageous actions in 1941, when, having survived a plane crash in the Brazilian rainforest, he walked through the night with a wounded passenger and a crew member, calling for help and ensuring they were taken to hospital. He then turned around, leading a search party back to the site of the wreckage, in the hope of finding more survivors; unfortunately, everyone else had died during the night. *Jessup* was presented by the Government of Brazil with a medal for bravery.

Memorials, reminiscences, and tributes are usually laden with descriptions and adjectives that very few people truly warrant. The extraordinary life and personality of *Philip C. Jessup* must surely deserve the words given to him by *Manfred Lachs*: ‘A man of great wisdom and tolerance, of great modesty and humility, a friend upon whom

<sup>33</sup> See *Jessup’s* separate opinion in ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, ICJ Reports (1962), 425-430 (Judgement of Dec. 21).

<sup>34</sup> See *Jessup’s* dissenting opinion in ICJ, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), ICJ Reports (1966), 325 (Judgement of July 18).

<sup>35</sup> *Jessup Jr.*, AJIL 80 (1986), 908 *et seq.*

<sup>36</sup> One of *Jessup’s* poems is reprinted in *ibid.*, 910-911.

one could rely, Philip Jessup enriched our generation and those to come by his outstanding work.<sup>37</sup>

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<sup>37</sup> *Lachs*, AJIL 80 (1986), 901.

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## B. Laying Conceptual Ghosts of the Past to Rest: The Rise of Philip C. Jessup's 'Transnational Law' in the Regulatory Governance of the International Economic System

*Christian Tietje and Karsten Nowrot*

### I. Introduction

*“Each generation imagines  
it is confronted with stupendous unprecedented novelties.”<sup>1</sup>*

Despite the slightly derisive undertone that one might sound out of his own statement made in the year 1964, the outstanding work of *Philip C. Jessup* as an international legal practitioner as well as scholar – and thus as “a man who embodies the ideals and the realities of international law”<sup>2</sup> – had always been shaped by his quest not only for upholding the international rule of law even in times that were challenging,<sup>3</sup> but also for identifying and evaluating the normative implications resulting from the various fundamental changes in the international system following the end of the Second World War.<sup>4</sup> Thereby, *Jessup's* approach finds itself in conformity with what for valid reasons is regarded as one of the primary tasks of international legal scholarship, to systemize and conceptualize the normative reality and its steering challenges, thereby not only attempting to identify the underlying reasons for and characteristics of the increasingly complex regulatory structure but in particular, also providing a normative scheme which can serve as a means and basis for meeting the arising concrete legal challenges by scholars as well as legal practitioners.<sup>5</sup>

Dismissing the perception of international law as being merely “a good fodder for a scholar in an ivory tower”,<sup>6</sup> the overarching pursuit of contributing to finding practically feasible solutions for the “International Problem of Governing Mankind”<sup>7</sup> in light of the dramatically changing circumstances in the international realm is

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<sup>1</sup> *Jessup*, AJIL 58 (1964), 344.

<sup>2</sup> *Kennedy*, Columbia Law Review 62 (1962), introductory page; see also, e.g., *Dillard*, Columbia Law Review 62 (1962), 1140 (“the sense of professional competence which he brought to the discipline of international law”).

<sup>3</sup> See in particular *Jessup*, AJIL 34 (1940), 505 *et seq.*; *Jessup*, AJIL 35 (1941), 329 *et seq.*

<sup>4</sup> For a similar perception see *Lachs*, AJIL 80 (1986), 897 (“Among those who sensed and believed in the imperative need for change in law as a function of changing conditions of life in changing states and a changing world, *Philip Jessup* was perhaps the leading figure.”).

<sup>5</sup> Generally on the utmost importance of these dogmatic tasks of international legal scholarship see already *Oppenheim*, AJIL 2 (1908), 314 *et seq.*; *Kunz*, AJIL 53 (1959), 379; *Verdross/Simma*, Völkerrecht, § 13; *Koskenniemi*, Gentle Civilizer of Nations, 494 *et seq.*; as well as recently *von Bogdandy*, EJIL 15 (2004), 906, who even considers the possibility of “the superiority of ‘dogmatic’ or ‘formal’ scholarship over legal and political theory as a means for resolving concrete issues”.

<sup>6</sup> *Jessup*, Nordisk Tidsskrift for International Ret og Jus Gentium 23 (1953), 33.

<sup>7</sup> For a comprehensive treatment of this issue see the respective work of 1947 *Jessup*, The International Problem of Governing Mankind, 1 *et seq.*

evidenced by *Jessup's* numerous contributions in such diverse areas of international legal concern like for example the peaceful settlement of disputes,<sup>8</sup> a possible legal regime governing the global commons,<sup>9</sup> the law of the United Nations,<sup>10</sup> the use of force,<sup>11</sup> international criminal law,<sup>12</sup> the law of treaties,<sup>13</sup> recognition of states and governments,<sup>14</sup> the concept of international legal subjectivity,<sup>15</sup> the international legal protection of foreign investments<sup>16</sup> as well as the possible normative basis and realization of community interests in international law.<sup>17</sup> This considerable analytical spectrum, which characterized his scholarly search for “the direction in which the world had to move in its enlightened self-interest”,<sup>18</sup> resulted in *Jessup* being regarded as, *inter alia*, “an artist in total control of his canvas [being] of grand proportions”.<sup>19</sup>

By now, more than sixty years after the revolutionary turning point of 1945<sup>20</sup> which exercised such a decisive influence on *Jessup's* work, the international system is again, undergoing profound, if not unprecedented changes with regard to its normative structure and the previously held and virtually unchallenged position of states therein.<sup>21</sup> This paradigmatic shift, resulting primarily from the ongoing processes of globalization,<sup>22</sup> becomes in particular visible when taking recourse to the regulatory reality of the current international economic system, i.e. the configuration of the relations and interactions of the various different supra-state, sub-state, non-state and state actors involved in transboundary economic transactions.<sup>23</sup>

<sup>8</sup> See, e.g., *Jessup*, in: *Jessup*, Use of International Law, 30 *et seq.*; *Jessup*, in: *ibid.*, 102 *et seq.*

<sup>9</sup> *Jessup/Taubenfeld*, International Organization 13 (1959), 363 *et seq.*; *Jessup/Taubenfeld*, Controls for Outer Space and the Antarctic Analogy, 1959.

<sup>10</sup> *Jessup*, RdC 129 (1970), 1 *et seq.*

<sup>11</sup> *Jessup*, A Modern Law of Nations, 157 *et seq.*; *Jessup*, RdC 99 (1960), 1 *et seq.*; *Jessup*, Columbia Journal of Transnational Law 12 (1973), 423 *et seq.*

<sup>12</sup> *Jessup*, Political Science Quarterly 62 (1947), 1 *et seq.*

<sup>13</sup> See, e.g., *Jessup*, AJIL 41 (1947), 378 *et seq.*

<sup>14</sup> *Jessup*, A Modern Law of Nations, 43 *et seq.*

<sup>15</sup> *Jessup*, Michigan Law Review 45 (1947), 383 *et seq.*; *Jessup*, A Modern Law of Nations, 15 *et seq.*

<sup>16</sup> *Jessup*, A Modern Law of Nations, 94 *et seq.*

<sup>17</sup> *Jessup*, AJIL 41 (1947), 386 *et seq.*; *Jessup*, Denver Journal of International Law and Policy 10 (1980), 10; as well as *Jessup*, A Modern Law of Nations, 133 (“there is a growing acknowledgment of a basic community interest which contrasts with the traditional strict bilateralism of law”); on the respective ideas brought forward by *Jessup* see also *Schachter*, AJIL 80 (1986), 892 *et seq.*, with further references.

<sup>18</sup> On this characterization see *Schachter*, AJIL 80 (1986), 891.

<sup>19</sup> *Gordon*, AJIL 68 (1974), 754.

<sup>20</sup> On this perception see only *Frowein*, in: *Kloepfer/Pernice* (eds.), *Entwicklungsperspektiven*, 117.

<sup>21</sup> From the numerous contributions on the discussion about the changing structure of the international system see, e.g., *Delbrück*, *Swiss Review of International and European Law* 11 (2001), 1 *et seq.*; *Higgins*, *Cambridge Law Journal* 58 (1999), 78 *et seq.*; *Slaughter*, *A New World Order*, 1 *et seq.*; *Tietje*, *DVBl.* 118 (2003), 1081 *et seq.*; *Peters*, in: *Dicke et al.* (eds.), *Liber amicorum Jost Delbrück*, 535 *et seq.*; *Hobe*, *Duquesne University Law Review* 40 (2002), 655 *et seq.*; *Walter*, *German Yearbook of International Law* 44 (2001), 170 *et seq.*; *Dörr*, *JZ* 60 (2005), 905 *et seq.*; *Nowrot*, *Global Governance*, 5 *et seq.*, each with further references.

<sup>22</sup> With regard to the various processes of globalization see only *Delbrück*, *Indiana Journal of Global Legal Studies* 1 (1993), 9 *et seq.*; *Ruffert*, *Globalisierung als Herausforderung*, 12 *et seq.*; *Dicke*, *BDGVR* 39 (2000), 13 *et seq.*; *Hingst*, *Auswirkungen der Globalisierung*, 19 *et seq.*, each with further references.

<sup>23</sup> With regard to a comprehensive evaluation of this notion of „international economic system“ see *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 1, para. 4 *et seq.*; generally on the

In the following, it is argued that in light of the fundamental changes taking place in the international economic system and its legal order, the need arises for a reconceptualized understanding of the normative structure which forms the regulatory framework for the interactions in the global trade and financial system. Against this background, this contribution is intended to provide some conceptual thoughts on the changing regulatory structure of the international economic system thereby exploring in particular the possible consequences – which so far have been little noted in the legal literature – with regard to the altering character of what to date has been described as ‘international economic law’. In this connection, it will become apparent in the course of the contribution, that it is more than appropriate not only to take in general recourse again to “the great virtue of unflinching scepticism concerning the validity and adequacy of old definitions and categories” so prominently exhibited by *Jessup*,<sup>24</sup> but also specifically to the ideas included in the superb and foresighted study<sup>25</sup> “Transnational Law” published precisely fifty years ago<sup>26</sup> by this truly “willing worker in so many causes for the advancement of international law and better international relations”.<sup>27</sup>

## II. Adapting Theory to Changing Circumstances: Reconceptualizing the Normative Governance Structure of the International Economic System

### 1. *Traditional Understandings of International Economic Law and Their Increasing Inadequateness*

The appropriate notional and dogmatic conceptualization of the regulatory mechanisms governing the interactions in the global economic system have, for a number of decades, been subject to a quite controversial debate in the legal literature.<sup>28</sup> Taking into account that even the meaning of ‘economic law’ itself is still

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underlying sociological concept of the “international system” see only *Hoffmann*, in: Knorr/Verba (eds.), *The International System*, 207 *et seq.*; *Bull*, *The Anarchical Society*, 9 *et seq.*

<sup>24</sup> *Claude*, *American Political Science Review* 51 (1957), 1118; see also the related characterization given by *Hyde*, *AJIL* 80 (1986), 903 (“he meant to emphasize the importance of [...] avoidance of the dogmas and fictions associated with traditional international law”); and *Oliver*, *Columbia Law Review* 62 (1962), 1132 (“In a field in which too many have copied too much for too long from too few, even in matters of style *Jessup* is his own master; and his way of putting things is wonderfully and uniquely his own.”); see in this connection for example *Jessup*, *Columbia Journal of Transnational Law* 3 (1964), 1 (“it is a truism that the developments which these decades are witnessing require that old concepts be constantly re-examined with a mind unfettered by blind acceptance of traditional classifications and labels”).

<sup>25</sup> On this perception see also for example *Thürer*, in: Thürer/Aubert/Müller (eds.), *Recht der internationalen Gemeinschaft*, 49; as well as for a related view already in 1957 *Claude*, *American Political Science Review* 51 (1957), 1118 (“*Jessup* throws off the fetters of old concepts and provides powerful stimulus to fresh thinking.”).

<sup>26</sup> *Jessup*, *Transnational Law*, 1956; on this work see also the respective book review provided, e.g., by *Waldock*, *British Yearbook of International Law* 33 (1957), 374 *et seq.*; *Claude*, *American Political Science Review* 51 (1957), 1117 *et seq.*; *Fenwick*, *AJIL* 51 (1957), 444 *et seq.*; *Jacobini*, *Journal of Politics* 19 (1957), 681 *et seq.*; *Honig*, *International Affairs* 34 (1958), 78 *et seq.*

<sup>27</sup> *Bishop*, *AJIL* 55 (1961), 425.

<sup>28</sup> For an overview on this debate see, e.g., *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 1, para. 1 *et seq.*; *Fischer*, *German Yearbook of International Law* 19 (1976), 143 *et seq.*; *Erler*, *Grundprobleme*, 5 *et seq.*; *Schanze*, *Investitionsverträge*, 21 *et seq.*; *Joerges*, *RabelsZ* 43 (1979), 6 *et*

disputed,<sup>29</sup> it is hardly surprising that no general agreement has been reached with regard to the scope of application of the term ‘international economic law’,<sup>30</sup> traditionally the most commonly used expression for the normative structure of the international economic system.

According to conventional understanding, the normative rules governing transboundary economic relations were more or less exclusively created by states and thus could, depending on their origin, be neatly categorized and divided as belonging either to the domestic law of an individual country or to the realm of public international law.<sup>31</sup> Furthermore, the legal literature has, for quite some time now, identified and comprehensively analyzed the phenomenon of the so-called ‘law merchant’ or *lex mercatoria*, an autonomous body of regulations created and independently enforced by private economic actors to govern their international trade and financial relations without the involvement of states.<sup>32</sup>

This still predominant conceptual thinking has led, *inter alia*, to the intensively debated issue as to whether the scope of the term ‘international economic law’ should be limited to rules of public international law dealing with transboundary economic relations. This view, which had previously most prominently been represented by *Georg Schwarzenberger*<sup>33</sup> is based for example on the argumentation that “the unity of interpretation is lost if the norms of national and public international law are treated together with regard to the problem areas”<sup>34</sup> or on the “importance that distinctions between systems of law are maintained in order to facilitate clarity, to maintain the integrity of the legal systems, and to further their respective development”.<sup>35</sup>

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*seq.*; *Herdegen*, Internationales Wirtschaftsrecht, 1 *et seq.*; *Seiffert*, in: *Gutiérrez Girardot et al.* (eds.), FS Abendroth, 159 *et seq.*; *Behrens*, *RabelsZ* 50 (1986), 483 *et seq.*, each with further references.

<sup>29</sup> On the controversy about the meaning of ‘economic law’ see for example *Schluerp*, in: *Jagmetti/Schluerp* (eds.), FS Hug, 25 *et seq.*; *Fikentscher*, *Wirtschaftsrecht*, Vol. 1, 16 *et seq.*; *Tietje*, in: *Dicke et al.* (eds.), *Liber amicorum Jost Delbrück*, 786 *et seq.*; *Amstutz*, in: *Schweizer/Burkert/Gasser* (eds.), FS *Druey*, 11 *et seq.*; *Meessen*, *Wirtschaftsrecht im Wettbewerb*, 13 *et seq.*; *Schmidt-Rimpler*, in: *von Beckerath et al.* (eds.), *Handwörterbuch der Sozialwissenschaften*, Vol. 12, 690 *et seq.*; *Rittner*, *Wirtschaftsrecht*, 10 *et seq.*

<sup>30</sup> See *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 1, para. 1; *Jackson*, in: *Bernhardt* (ed.), *E.P.I.L.*, Vol. II, 20 *et seq.*; *Herdegen*, *Internationales Wirtschaftsrecht*, 2 *et seq.*; *Schanze*, *Investitionsverträge*, 22.

<sup>31</sup> See thereto, e.g., *Langen*, *Studien zum internationalen Wirtschaftsrecht*, 2; *Fischer*, *German Yearbook of International Law* 19 (1976), 145 *et seq.*; *Meng*, *BDGVR* 41 (2005), 3; *Mistelis*, in: *Fletcher/Mistelis/Cremona* (eds.), *Foundations*, 15; *Schanze*, *Investitionsverträge*, 34 *et seq.*, with further references.

<sup>32</sup> From the numerous literature on this phenomenon see only *Stein*, *Lex Mercatoria*, 1 *et seq.*; *Mertens*, in: *Teubner* (ed.), *Global Law*, 31 *et seq.*; *De Ly*, in: *Appelbaum/Felstiner/Gessner* (eds.), *Rules and Networks*, 159 *et seq.*; *Cordes*, in: *Piergiovanni* (ed.), *From lex mercatoria to Commercial Law*, 53 *et seq.*; *Bonell*, *RabelsZ* 42 (1978), 485 *et seq.*

<sup>33</sup> *Schwarzenberger*, *RdC* 117 (1966), 7 *et seq.*; *Schwarzenberger*, *International Law Quarterly* 2 (1948), 405 *et seq.*; for a related view see also for example *VerLoren van Themaat*, *International Economic Law*, 9 *et seq.*; *Seidl-Hohenveldern*, *International Economic Law*, 1; *Weil*, in: *Société Française pour le Droit International* (ed.), *Aspects*, 29 *et seq.*; *Mestmäcker*, in: *Holl/Klinke* (eds.), *Internationales Privatrecht*, 27.

<sup>34</sup> *VerLoren van Themaat*, *International Economic Law*, 11; see also *VerLoren van Themaat*, *RabelsZ* 43 (1979), 637.

<sup>35</sup> *Qureshi*, *International Economic Law*, 8; for a related view see also, e.g., *Seidl-Hohenveldern*, *International Economic Law*, 1 (“Such a claim may be useful as a plea to increase the number of

Despite the fact that this perception is still adhered to even in a number of recent publications,<sup>36</sup> it had been in particular – and considerably earlier than in other areas of law – with regard to the notional and dogmatic conceptualization of the normative structure governing the international economic system also argued that such a schematic classification of legal norms depending on their origin based on the tradition of the so-called “juristic method” being developed in the second half of the 19th century,<sup>37</sup> has to be qualified as an inadequate approach for the dogmatic description of international economic law. Rather, it has already frequently been stressed that the normative order of the international economic system is characterized by an interconnection of various different areas of regulations that transcends the traditional differentiations between international and domestic as well as public and private law.<sup>38</sup> The emergence of this considerably broader understanding of international economic law is closely connected to *Georg Erler* who was among the first to develop this view in his outstanding and still very influential work “Grundprobleme des Internationalen Wirtschaftsrechts” published in 1956.<sup>39</sup> Based on the in-depth study provided by *Erler*, the predominant view in the legal literature considers the scope of the term ‘international economic law’ not to be limited to the applicable rules of public international law but rather also covering the respective body of domestic public and private law norms of individual states having a regulatory effect on the actors and transactions in the international economic system.<sup>40</sup>

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academic posts in the field of international law, yet, in our opinion, international economic law is so closely embedded in the discipline of public international law that the latter would be crippled by such a separation.”); and *Abi-Saab*, in: Snyder/Sathirathai (eds.), *Third World Attitudes*, 555 (“it is not sufficient to say that the unity of problems governed by these rules implies the unity of the legal system to which they belong”).

<sup>36</sup> See only *Booyen*, *Principles*, 9; *Qureshi*, *International Economic Law*, 8; *Atik*, *American University International Law Review* 15 (2000), 1234; *Schneider*, in: Menzel/Pierlings/Hoffmann (eds.), *Völkerrechtsprechung*, 685.

<sup>37</sup> For a detailed evaluation of the historical development and implications of the “juristic method” see generally *Tietje*, *Internationalisiertes Verwaltungshandeln*, 86 *et seq.*; *Stolleis*, *Geschichte des öffentlichen Rechts*, Vol. 2, 330 *et seq.*; *Pauly*, *Der Methodenwandel*, 1 *et seq.*, 140 *et seq.*; *Leibholz*, *Blätter für Deutsche Philosophie* 5 (1931/32), 175 *et seq.*; with regard to the emerging understanding of a strict separation between private international law and public international law as a result of this approach see recently *Mills*, *International and Comparative Law Quarterly* 55 (2006), 1 *et seq.*; the term “juristische Methode” itself has been coined by *Rudolph von Ihering* in 1857, see *von Ihering*, *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1 (1857), 21.

<sup>38</sup> On this perception see, e.g., *Herdegen*, *Internationales Wirtschaftsrecht*, 3; *Paschke*, in: Schmidt (ed.), *Vielfalt des Rechts*, 162; *Wildhaber*, *BDGVR* 18 (1978), 37 *et seq.*

<sup>39</sup> *Erler*, *Grundprobleme*, 5 *et seq.*; see also in this connection subsequently *Erler*, in: Strupp/Schlochauer (eds.), *Wörterbuch des Völkerrechts*, Vol. 3, 862 *et seq.*; as well as already in 1954 *Erler*, in: *Der Göttinger Arbeitskreis* (ed.), *FS Kraus*, 44.

<sup>40</sup> See, e.g., *Fischer*, in: Hummer (ed.), *Paradigmenwechsel*, 212 *et seq.*; *Fischer*, in: Neuhold/Hummer/Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts*, Vol. 1, 468; *Fikentscher*, *Wirtschaftsrecht*, Vol. 1, 49 *et seq.*; *Meessen*, *AöR* 110 (1985), 402 *et seq.*; *Schmidt*, in: *Die Verwaltung*, Beiheft 2, 165; *Herdegen*, *Internationales Wirtschaftsrecht*, 2 *et seq.*; *Dolzer*, in: Hailbronner *et al.* (eds.), *FS Doehring*, 144; *Behrens*, *RabelsZ* 50 (1986), 483 *et seq.*; *Hübner*, *Methodische Entwicklung*, 26 *et seq.*; *Georgiadou*, *Regulation*, 5; *Seiffert*, in: Gutierrez Girardot *et al.* (eds.), *FS Abendroth*, 159 *et seq.*; *Schanze*, *Investitionsverträge*, 21 *et seq.*

However, in light of the profoundly changing mechanisms of law-making and law-realization,<sup>41</sup> which increasingly shape the current normative structure of the international financial markets as well as the international economic system as a whole, it becomes more and more obvious that neither the traditional three-sided distinction between public international law, domestic law and the *lex mercatoria* nor the currently predominant, broader understanding of international economic law can be regarded as a conceptual approach to adequately describe the characteristics of the normative rules governing transboundary economic relations.<sup>42</sup> The regulatory structure of the international economic system – in the same way as the international system as a whole<sup>43</sup> – not only indicates the evolution of a functional unity between international law and domestic law.<sup>44</sup> Rather it is also characterized by an interconnected plurality of various subjects and sources of law. Thereby, the former distinction between so-called ‘hard law’ and non-binding regulatory instruments is increasingly blurred.<sup>45</sup> In addition, the legal rules that are relevant for economic transactions that transcend national frontiers are created in law-making processes and are implemented by law-realization mechanisms in which a wide range of different public, intermediate as well as private actors take part. Transboundary economic relations, irrespectively of whether they are of a more public or exclusively private nature, are in a normative sense thus increasingly determined by what can most appropriately be described as a network of various different kinds of legal norms resulting from a cooperative effort of, *inter alia*, governmental and non-state entities.<sup>46</sup>

These kinds of increasingly complex regulatory regimes have evolved, for example, in relation to the regulatory structure of international financial markets. Regulations in such areas as the supervision of so-called “hedging funds” and the development of international accounting standards are to a growing extent created by means of a concerted effort by various different actors, among them states and international organizations in the classical sense, like the International Monetary Fund (IMF) and the World Bank, but also intermediate or ‘hybrid’ organizations, such as the Basle Committee on Banking Supervision, consisting of national supervisory authorities, and private institutions like the International Accounting Standards Board (IASB), formerly known as the International Accounting Standards Committee (IASC). Some of the regulations developed by these institutions are in themselves legally binding,

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<sup>41</sup> Generally on the notion of ‘law-realization’ as being distinct from the considerably narrower term ‘law-enforcement’ see *Tietje*, Normative Grundstrukturen, 132 *et seq.*

<sup>42</sup> See thereto already *Tietje*, ZVglRWiss 101 (2002), 404 *et seq.*; as well as for an overview on this perception also *Tietje/Nowrot*, European Business Organization Law Review 5 (2004), 341 *et seq.*

<sup>43</sup> See in particular *Thürer*, Swiss Review of International and European Law 9 (1999), 217 *et seq.*; *Tietje*, Internationalisiertes Verwaltungshandeln, 640 *et seq.*; as well as for related perceptions recently *Thürer*, in: *Thürer*, Kosmopolitisches Staatsrecht, 35 *et seq.*; *Thürer*, in: *Weber/Wimmer* (eds.), FS Perenthaler, 410; *Peters*, in: *Dicke et al.* (eds.), Liber amicorum Jost Delbrück, 541 *et seq.*

<sup>44</sup> *Tietje*, Current Developments, 5 *et seq.*; *Tietje*, in: *Prieß/Berrisch* (eds.), WTO-Handbuch, Chapter A.II., paras. 28 *et seq.*

<sup>45</sup> See generally thereto *Tietje*, Internationalisiertes Verwaltungshandeln, 255; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/3, 517; *Shelton*, in: *Evans* (ed.), International Law, 168; *Koh*, Yale Law Journal 106 (1997), 2630; *Orrego-Vicuña*, in: *Bröhmer et al.* (eds.), FS Ress, 200; as well as *Abbott/Snidal*, International Organization 54 (2000), 421 *et seq.*

<sup>46</sup> *Tietje*, ZVglRWiss 101 (2002), 407 *et seq.*; see also, e.g., *Vesting*, in: *Ladeur* (ed.), Public Governance, 252 *et seq.*; *Berman*, Columbia Journal of Transnational Law 43 (2005), 492 *et seq.*

while others, like the results of the standard-setting activities of the Basle Committee, are not directly legally binding but are nevertheless almost universally adhered to and thus not devoid of normative value.<sup>47</sup>

In addition, international judicial institutions like the Appellate Body of the World Trade Organization, in establishing the law to be applied by them, are increasingly taking recourse to international declarations of soft law-character, especially the ones adopted at the so-called “world order conferences” such as the 1992 Rio Conference on Environment and Development.<sup>48</sup> Non-binding “codes of conduct” such as the ones adopted by international organizations like the “OECD Guidelines for Multinational Enterprises”<sup>49</sup> or the International Labour Organization’s “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”<sup>50</sup> as well as the respective codes adopted by individual transnational enterprises,<sup>51</sup> sometimes intentionally being made subject to monitoring by NGOs, exercise considerable regulatory force.<sup>52</sup> Furthermore, the evolving private and intermediate self-regulatory mechanisms in the international economic system increasingly no longer rely on states for securing compliance but have instead developed their own judicial and non-judicial enforcement instruments. Aside from the well-established practice with regard to private and mixed business transactions that by now for example in the field of investment protection show a growing shift from *ad hoc* tribunals to the establishment of more institutionalized investor-state arbitration proceedings,<sup>53</sup> other notable examples are the various private and intermediate instruments for the resolution of domain-name-disputes<sup>54</sup> as well as the creation of effective institutionalized regulatory mechanisms by NGOs, business associations, transnational enterprises and trade unions like the Forest Stewardship Council (FSC)<sup>55</sup> and the Marine Stewardship Council (MSC)<sup>56</sup> without the

<sup>47</sup> For a more detailed analysis of the various regulations and standards governing the international financial markets and the diverse kind of governmental, intermediate and private actors involved in their creation, see, e.g., *Tietje*, ZVglRWiss 101 (2002), 407 *et seq.*; *Levit*, Yale Journal of International Law 30 (2005), 125 *et seq.*; *Schreiber*, International Standards, 15 *et seq.*; *Speyer*, in: Schuppert (ed.), Governance-Forschung, 302 *et seq.*; *Zaring*, Texas International Law Journal 33 (1998), 281 *et seq.*; *Eichengreen*, in: Kahler/Lake (eds.), Governance in a Global Economy, 168 *et seq.*

<sup>48</sup> See only WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, para. 168; *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, Report of the Appellate Body of 22 October 2001, WT/DS58/AB/R, para. 124; see thereto also *Tietje*, in: Delbrück (ed.), International Law of Cooperation, 61 *et seq.*

<sup>49</sup> The most recent version of this code of conduct is reprinted in: I.L.M. 40 (2001), 237 *et seq.*

<sup>50</sup> The revised version is reprinted in: I.L.M. 41 (2002), 186 *et seq.*

<sup>51</sup> On these self-regulatory regimes see only *Haufler*, A Public Role, 8 *et seq.*; *Simons*, Relations Industrielles/Industrial Relations 59 (2004), 101 *et seq.*

<sup>52</sup> With regard to a discussion of the various possible legal effects of these codes of conduct see, e.g., *Kinley/Tadaki*, Virginia Journal of International Law 44 (2004), 952 *et seq.*

<sup>53</sup> On this perception see also *Tietje*, Grundstrukturen, 8; *Legum*, Arbitration International 19 (2003), 143 *et seq.*; *Weil*, in: Schlemmer-Schulte/Tung (eds.), Liber Amicorum Shihata, 849 *et seq.*

<sup>54</sup> See only *Smith*, RdC 288 (2000), 292 *et seq.*; *von Bernstorff*, in: Joerges/Sand/Teubner (eds.), Transnational Governance, 270 *et seq.*

<sup>55</sup> For details on the organizational structure and activities of this organization see the information on the Internet under: <[www.fsc.org/en/](http://www.fsc.org/en/)> (visited 17 January 2006); as well as, e.g., *Domask*, in: Doh/Teegen (eds.), Globalization and NGOs, 168 *et seq.*



involvement of state actors. With regard to the sub-state level, it becomes increasingly obvious that states are, contrary to the previously dominant perception,<sup>57</sup> often no longer acting as solid units in international relations. Rather, for example territorial sub-state entities such as regions are interacting with each other in transboundary cooperative regimes;<sup>58</sup> administrative units below the level of government are, together with non-state actors, participating in international regulatory regimes such as the above mentioned standardization organizations,<sup>59</sup> thereby contributing to what has been described in recent legal literature as the evolving phenomenon of the so called “disaggregated state”.<sup>60</sup>

Finally, it should be emphasised that the increasingly complex regulatory structure of the international economic system is also visible to a certain extent in the WTO legal order itself. Non-state actors such as NGOs, business organizations and private enterprises already play an important, albeit mostly still informal role in the WTO decision-making processes as well as its dispute settlement system.<sup>61</sup> Furthermore, this finding is especially supported by those WTO Agreements that provide for the legal incorporation into the treaty regime of international standards developed by private and intermediate institutions, which are creating regulatory mechanisms that are becoming more and more important in relation to highly complex technical issues.<sup>62</sup> In this connection, Article 2 (4) of the Agreement on Technical Barriers to Trade (TBT Agreement) provides that WTO members shall use appropriate technical norms as set up by international standardization organizations as a basis for their technical regulations. This refers to such standardization organizations as for example the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), both of them being non-state entities.<sup>63</sup> The far reaching effect of the obligations of WTO members under Article 2 (4) TBT Agreement were in practice made clear by the Panel and the Appellate Body in the *Sardines* case.<sup>64</sup> A similar, even more far-reaching provision is contained in Article 3

<sup>56</sup> See thereto the information under: <www.msc.org/> (visited 17 January 2006); and for example *Fowler/Heap*, in: Bendell (ed.), *Terms for Endearment*, 135 *et seq.*

<sup>57</sup> On the previous understanding of foreign policy as an exclusive prerogative of the government as the head of the executive branch see, e.g., *Tietje*, *Internationalisiertes Verwaltungshandeln*, 182 *et seq.*; *Cottier/Hertig*, *Max Planck Yearbook of United Nations Law* 7 (2003), 265 *et seq.*

<sup>58</sup> See only *Brand*, in: Cremer *et al.* (eds.), *FS Steinberger*, 667 *et seq.*

<sup>59</sup> Concerning the transnational cooperation of administrative units see *Tietje*, *Internationalisiertes Verwaltungshandeln*, 288 *et seq.*

<sup>60</sup> On this perception see especially *Slaughter*, *A New World Order*, 8 *et seq.*; *Slaughter*, in: Held/Koenig-Archibugi (eds.), *Global Governance*, 35 *et seq.*

<sup>61</sup> From the numerous literature on this issue see only *Tietje/Nowrot*, *European Business Organization Law Review* 5 (2004), 330 *et seq.*, with further references.

<sup>62</sup> On this relatively new characteristic of governance structures in modern treaty-based international regimes, see generally *Tietje*, *German Yearbook of International Law* 42 (1999), 40 *et seq.*; *Tomuschat*, *RdC* 241 (1993), 348 *et seq.*; *von Bogdandy*, *Max Planck Yearbook of United Nations Law* 5 (2001), 633 *et seq.*

<sup>63</sup> See only *Tietje*, *Zeitschrift für Rechtssoziologie* 24 (2003), 37; specifically with regard to the organizational structure and standardization activities of ISO see also *Hallström*, *Organizing International Standards*, 52 *et seq.*

<sup>64</sup> WTO, *European Communities – Trade Description of Sardines*, Report of the Panel of 29 May 2002, WT/DS231/R, paras. 7.48 *et seq.*; Report of the Appellate Body of 26 September 2002,

(2) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which provides that “[s]anitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994”.<sup>65</sup> The international standards referred to in this provision are, *inter alia*, those being created by the Codex Alimentarius Commission, an institution jointly set up in the year 1962 by the UN’s Food and Agriculture Organization (FAO) and the World Health Organization (WHO),<sup>66</sup> which is also closely cooperating with non-state actors. In the course of these standard-setting activities, considerable influence is exerted especially by private economic actors like business associations and transnational corporations.<sup>67</sup> All of the international standards developed by the above mentioned and numerous other organizations, which are merely recommendations and are thus of a voluntary nature, acquire a considerable amount of legally binding force through their incorporation in the respective treaty regime, despite the fact that the WTO members themselves often only have a rather limited influence on their actual content.<sup>68</sup> The consequence is a clear deviation<sup>69</sup> from the traditional etatistic principle of international law according to which the contracting parties of an international agreement are and remain the so-called “masters of the treaty”.<sup>70</sup>

To summarize, these and many other characteristics of the regulatory reality in the current international economic system demonstrate the profound changes in its normative structure which have led to the evolution of a multidimensional regulatory concept of networks and transnational legal as well as political processes that do not substitute the nation-state, but require us to broaden our understanding of international economic relations and call for an analysis of the possible conceptual implications for what has so far been labelled “international economic law”.

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WT/DS231/AB/R, paras. 196 *et seq.*; see also *Tietje*, in: Prieß/Berrisch (eds.), WTO-Handbuch, Chapter B.I.5., paras. 95 *et seq.*

<sup>65</sup> On the content of this provision and its legal effects, see also WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body of 16 January 1998, WT/DS48/AB/R, paras. 157 *et seq.*; as well as from the legal literature *Victor*, New York University Journal of International Law and Politics 32 (2000), 865 *et seq.*

<sup>66</sup> Annex A, para. 3 (a) of the SPS Agreement; generally on the composition and activities of this institution see also *Tietje*, *Internationalisiertes Verwaltungshandeln*, 309 *et seq.*; *Edeson*, in: Wolfrum/Röben (eds.), *Developments*, 64 *et seq.*; *Stewart/Johanson*, *Syracuse Journal of International Law and Commerce* 26 (1998), 40 *et seq.*

<sup>67</sup> See, e.g., *Hilf*, *BDGVR* 40 (2003), 268; *von Bogdandy*, *Max Planck Yearbook of United Nations Law* 5 (2001), 637; *Möllers*, *Gewaltengliederung*, 323; *Trebilcock/Howse*, *Regulation of International Trade*, 228; *Wallach*, *University of Kansas Law Review* 50 (2002), 836 *et seq.*; *Makatsch*, *Gesundheitsschutz*, 230 *et seq.*; *Sander*, *ZEuS* 3 (2000), 345 *et seq.*

<sup>68</sup> See also *Joerges/Godt*, in: Leibfried/Zürn (eds.), *Transformations of the State?*, 99 *et seq.*; *Krajewski*, *Journal of World Trade* 35 (2001), 176; *Stoll/Schorkopf*, WTO, para. 317; *Hilf/Reuß*, *Zeitschrift für das gesamte Lebensmittelrecht* 24 (1997), 297.

<sup>69</sup> See already, e.g., *Tietje*, *German Yearbook of International Law* 42 (1999), 41; *Hingst*, *Auswirkungen der Globalisierung*, 174.

<sup>70</sup> On the respective traditional perception see for example in the context of the European Union the judgment of the Federal Constitutional Court of Germany in: BVerfGE 89, 190 (“Herren der Verträge”).

## 2. *Taking Recourse to Jessup: The Emerging Concept of Transnational Economic Law*

In light of the paradigmatic changes in the international economic system and its legal order, the need arises for a reconceptualized understanding of the normative structure which forms the regulatory framework for the interactions taking place in the global trade and financial system. In the course of this undertaking, it is – as recently being highlighted by *Alex Mills* – necessary to “confront the false dichotomy of the international and the national, and [to] provide a method of ordering of the international system as an alternative or complement to the State-based approach of public international law”.<sup>71</sup> Thereby, adequately describing and conceptualizing the currently evolving normative structure thus requires “that old concepts be constantly re-examined with a mind unfettered by blind acceptance of traditional classifications and labels”.<sup>72</sup> In this connection, it is submitted that recourse can and indeed should be taken to ideas developed by *Philip C. Jessup* and presented fifty years ago in his *Storrs Lectures* held at Yale Law School.

Thus, taking into account the above-mentioned differentiation between public international law and domestic law still mainly connected with the traditional term “international economic law”, as well as the inadequacy of such an approach as a way of properly describing the specific characteristics of the increasingly dominant regulatory processes that are forming the normative structure of the international economic system, the currently visible interconnected plurality or network of law-making entities and sources of law can most accurately be characterised as the evolutionary development of a “transnational economic law”.<sup>73</sup>

### a) *Jessup’s Understanding of Transnational Law*

As already pointed out, the choice of the concept of transnational economic law is deeply inspired by *Jessup’s* work “Transnational Law” published in 1956. Thereby, it has to be acknowledged, that contrary to a view sporadically expressed in the literature,<sup>74</sup> *Jessup* – as also recognized by himself – did not invent the term ‘transnational law’.<sup>75</sup> It had already been applied occasionally in the legal literature prior to *Jessup’s* study,<sup>76</sup> with a considerable number of legal scholars<sup>77</sup> regarding the

<sup>71</sup> *Mills*, International and Comparative Law Quarterly 55 (2006), 47.

<sup>72</sup> *Jessup*, Columbia Journal of Transnational Law 3 (1964), 1.

<sup>73</sup> On this concept of transnational economic law see especially already *Tietje*, ZVglRWiss 101 (2002), 404 *et seq.*; as well as, e.g., *Tietje/Nowrot*, European Business Organization Law Review 5 (2004), 341 *et seq.*; for a first positive reception of this new conceptual understanding in the legal literature see for example *Vesting*, VVDStRL 63 (2004), 55 Fn. 48; *Schwartzmann*, Private im Wirtschaftsvölkerrecht, 16.

<sup>74</sup> See, e.g., *Janis*, AJIL 78 (1984), 416 Fn. 69.

<sup>75</sup> See in retrospective *Jessup*, in: Bos (ed.), Present State, 339 (“the term was not new – it was not an original creation of the author’s”).

<sup>76</sup> See for example *von der Heydte*, Juristische Blätter 62 (1933), 33; *Walker*, Internationales Privatrecht, 13; *Rabel*, Conflict of Laws, Vol. 1, 39; as well as the references given by *Jessup*, Transnational Law, 2 Fn. 3.

<sup>77</sup> See only *Langen*, Transnationales Recht, 13; *Weise*, Lex Mercatoria, 72; *Meyer*, Bona fides, 123 Fn. 62; *Bamodu*, International Arbitration Law Journal 4 (2001), 7.

Swiss law professor *Max Gutzwiller* to be the first one to use this terminology in two contributions published in the year 1931.<sup>78</sup>

However, all of these earlier applications of ‘transnational law’ were not accompanied by giving the term any concrete meaning. Rather, general agreement exists among international legal scholars that it was *Jessup* who actually coined it<sup>79</sup> in his “delightful little volume”<sup>80</sup> bearing the same title. In his search for “the law applicable to the complex interrelated world community”, he emphasized that “there is really much more to international legal relations than merely public international law”<sup>81</sup> and consequently rejected the name ‘international law’ as being “misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)”.<sup>82</sup> Although as of today, the majority of international legal scholars consider the term ‘international law’ as not being exclusively applicable to relations between states but covering the totality of the normative framework for the in principle unlimited number of different kinds of international legal subjects,<sup>83</sup> *Jessup*’s reasoning is in full conformity with the understanding expressed by the inventor of the name ‘international law’, *Jeremy Bentham*,<sup>84</sup> whose intention to replace the former term ‘law of nations’ was guided precisely by the effort to reserve this branch of law to “mutual transactions between sovereigns as such”.<sup>85</sup> Furthermore, it corresponds with the traditional perception of international law which dominated jurisprudence and international legal scholarship – with the notable exception of scholars like for example *Georges Scelle*<sup>86</sup> and *Wilhelm Kaufmann*<sup>87</sup> – well beyond the first half of the twentieth century.<sup>88</sup>

<sup>78</sup> *Gutzwiller*, in: *Stammler* (ed.), *Das gesamte Deutsche Recht*, Vol. I, 1548; *Gutzwiller*, *Internationales Jahrbuch für Schiedsgerichtswesen in Zivil- und Handelssachen* 3 (1931), 128, 131 and 132.

<sup>79</sup> See, e.g., *Tietje*, in: *Renzikowski* (ed.), *Die EMRK*, 180; *Bamodu*, *International Arbitration Law Journal* 4 (2001), 6 *et seq.*; *Kaiser*, *International Organization* 15 (1971), 801 Fn. 28; *Goode*, *International and Comparative Law Quarterly* 46 (1997), 2; *Abi-Saab*, in: *Snyder/Sathirathai* (eds.), *Third World Attitudes*, 554; *Oliver*, *Columbia Law Review* 62 (1962), 1134 *et seq.*; *Callies*, *Zeitschrift für Rechtssoziologie* 23 (2002), 186; *Piciotto*, in: *Piciotto/Mayne* (eds.), *Regulating International Business*, 14; *Cardinale*, *The Holy See*, 96; *Roht-Arriaza*, *Yearbook of International Environmental Law* 6 (1995), 139 Fn. 131; in principle also *Horn*, *Recht der internationalen Anleihen*, 513; *Horn*, in: *Berger* (ed.), *Practice of Transnational Law*, 67; *Schachter*, *AJIL* 80 (1986), 893; *Scheuner*, in: *Strupp/Schlochauer* (eds.), *Wörterbuch des Völkerrechts*, Vol. 3, 751; *Waldock*, *British Yearbook of International Law* 33 (1957), 374 *et seq.*; *Zemanek*, *RdC* 266 (1997), 46; *Boister*, *EJIL* 14 (2003), 954 *et seq.*; *Schanze*, *Investitionsverträge*, 28; *Weise*, *Lex Mercatoria*, 72.

<sup>80</sup> *Fenwick*, *AJIL* 51 (1957), 444.

<sup>81</sup> See the respective characterization in the book review by *Jacobini*, *Journal of Politics* 19 (1957), 681.

<sup>82</sup> *Jessup*, *Transnational Law*, 1.

<sup>83</sup> See only *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 21 *et seq.*; *Hobe/Kimminich*, *Völkerrecht*, 8.

<sup>84</sup> See *Bentham*, *An Introduction to the Principles*, Vol. II, 260 *et seq.*

<sup>85</sup> *Ibid.*, 261; see thereto also *Janis*, *AJIL* 78 (1984), 408 *et seq.*

<sup>86</sup> See, e.g., *Scelle*, *Précis de Droit de Gens*, Vol. 1, 42 (“Les individus seuls sont sujets de droit en droit international public.”); *Scelle*, *RdC* 46 (1933), 366 *et seq.*

<sup>87</sup> *Kaufmann*, *Zeitschrift für Völkerrecht und Bundesstaatsrecht* 2 (1908), 419 (437); *Kaufmann*, *Welt-Zuckerindustrie*, 559 *et seq.*

<sup>88</sup> On this characterization of the traditional understanding of international law *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 23; with regard to telling examples see, e.g., *PCIJ*, *The Case of the S.S. „Lotus“* (France v. Turkey), Judgment of 7 September 1927, P.C.I.J. Ser. A, No. 10, 18 („In-

Contrary to this former restrictive view, the “world community” is, according to *Jessup*, increasingly shaped by the appearance of “transnational situations” that involves a considerable diversity of actors such as “individuals, corporations, states, organizations of states, or other groups”.<sup>89</sup> In conformity with this broader approach to transboundary interactions, *Jessup* defines the term ‘transnational law’ – being the respective normative framework governing these situations – “to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as well as other rules which do not wholly fit into such standard categories”.<sup>90</sup>

#### b) *Structural Features of Transnational Economic Law*

Taking recourse to *Jessup*’s understanding of ‘transnational law’, the regulatory reality in the international economic system as outlined above can be conceptualized in the form of four main structural features of what is suggested here to be qualified as an evolving transnational economic legal order.<sup>91</sup>

The increasing deterritorialization of legal regulations can be regarded as the first central characteristic of transnational economic law. While the – with the exception of the realm of public international law – necessary and exclusive allocation of normative regulations to a defined territory has been one of the most fundamental propositions of legal scholarship since the emergence of the modern nation-state,<sup>92</sup> this underlying assumption, despite its validity in an historical perspective, is no longer reflected in the normative structure of the current international economic system.<sup>93</sup> Thereby, it is not argued that legal regulations today are devoid of any territorial ordering functions. Rather, the regulatory reality in the evolving transnational economic legal order is characterized by the emergence of a network consisting of territorially focused as well as deterritorialized normative structures and contributing to the increasingly complex forms of steering mechanisms in the international economic system.<sup>94</sup>

The second structural feature of transnational economic law is the already above mentioned more and more vanishing distinction between traditional legally binding norms on the one hand and rules that are in the strict sense non-legally binding on the

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international Law governs relations between independent States.”); *Jellinek*, System der subjektiven öffentlichen Rechte, 324; *Triepel*, ZaöRV 9 (1939/40), 6; *Geffcken*, Das Gesamtinteresse, 39.

<sup>89</sup> *Jessup*, Transnational Law, 3.

<sup>90</sup> *Ibid.*, 2.

<sup>91</sup> See thereto already *Tietje*, ZVglRWiss 101 (2002), 415 *et seq.*

<sup>92</sup> On the exclusive territorial allocation as a central feature of the traditional understanding of legal regulations see only *von Savigny*, System des heutigen Römischen Rechts, Vol. 8, 16 *et seq.*; *Tietje*, Internationalisiertes Verwaltungshandeln, 174 *et seq.* with further references.

<sup>93</sup> Generally on the deterritorialization of law as one of the main characteristics of the current international system see also, e.g., *Delbrück*, Das Staatsbild, 16 *et seq.*; *Di Fabio*, Recht offener Staaten, 97 *et seq.*; *Tietje*, Internationalisiertes Verwaltungshandeln, 174 *et seq.*; *Vesting*, in: Ladeur (ed.), Public Governance, 247 *et seq.*

<sup>94</sup> *Tietje*, ZVglRWiss 101 (2002), 416; for a related perception see also, e.g., recently *Kobrin*, in: Chandler/Mazlish (eds.), Leviathans, 219 (“Globalization is a transition from a world ordered geographically, in which the basis for economic and political organization was sovereign territoriality, to an aterritorial, networked mode of organization whose present and evolving form is not yet clear.”).

other. The changing normative framework in the international economic system is thus characterized by a mixed composition of “hard”, “semi-hard” and “soft” regulations. The combination of these provides a rather effective normative structure for the commercial interactions and therefore an appropriate substitute for the previously unchallenged but now considerably diminished steering capacity of states.<sup>95</sup>

Thirdly, the evolving transnational economic legal order is shaped by an obvious expansion of different entities actively involved in the law-making and law-realization processes. The function of creating, modifying, adapting and enforcing the transnational legal rules in the global economic system, formerly nearly exclusively exercised by states, are now increasingly also fulfilled by intermediate institutions and non-state actors.<sup>96</sup>

Finally and closely connected with the aforementioned structural feature, the fourth characteristic of transnational economic law is the paradigmatic shift in the direction of the law-making processes from the traditional state-centred “top-down” approach to the evolution of a “bottom-up” system in which the regulatory mechanisms are created in cooperative efforts between various kinds of actors below the state level.<sup>97</sup>

To summarize, it is submitted that the concept of transnational economic law as outlined here with its four main characteristic features, most adequately describes and systemizes the regulatory reality in current global economic relations and can thus be regarded as an appropriate approach to the necessary reconceptualized understanding of the international economic system’s profoundly changing normative structure.

### c) *The Use of the Term ‘Transnational Economic Law’: Responding to Critics*

Although quite strong criticism has occasionally been voiced against the use of the phrases ‘transnational law’, ‘transnational commercial law’ and ‘transnational economic law’ respectively,<sup>98</sup> it is submitted that this adequacy also extends to the suggested terminology itself.

<sup>95</sup> Tietje, ZVglRWiss 101 (2002), 417; see also in this connection Tietje/Nowrot, European Business Organization Law Review 5 (2004), 342 *et seq.*; as well as recently Levit, Yale Journal of International Law 30 (2005), 125 *et seq.*; generally on the currently intensively debated issue of the reduced steering capacity of states as consequence of the processes of globalization see only Delbrück, in: Jickeli/Kreutz/Reuter (eds.), Gedächtnisschrift Sonnenschein, 796 *et seq.*; Jennings, in: Kreijen (ed.), International Governance, 33 *et seq.*; Scholz, in: Hilterhaus/Scholz (eds.), Rechtsstaat-Finanzverfassung-Globalisierung, 17 *et seq.*; Bauer, in: Bauer *et al.* (eds.), Umwelt, Wirtschaft und Recht, 71 *et seq.*; Malanczuk, in: Weiss *et al.* (eds.), International Economic Law, 54 *et seq.*

<sup>96</sup> Tietje, ZVglRWiss 101 (2002), 417; Tietje, in: Renzikowski (ed.), Die EMRK, 181; Tietje/Nowrot, European Business Organization Law Review 5 (2004), 346 *et seq.*; for a quite similar perception see also, e.g., Beviglia Zampetti, Journal of World Trade 37 (2003), 121 Fn. 68; Wälde, *RechtsZ* 42 (1978), 29 Fn. 2.

<sup>97</sup> Tietje, ZVglRWiss 101 (2002), 404 (417 *et seq.*); see also Vesting, in: Ladeur (ed.), Public Governance, 247 *et seq.*; Levit, Yale Journal of International Law 30 (2005), 125 *et seq.*

<sup>98</sup> See for example Dasser, Internationale Schiedsgerichte, 64 *et seq.*; Stein, *Lex Mercatoria*, 2; Kropholler, Internationales Einheitsrecht, 7; Weise, *Lex Mercatoria*, 75; Jennings, in: Bernhardt (ed.), E.P.I.L., Vol. II, 1159 (1163); *Abi-Saab*, in: Snyder/Sathirathai (eds.), Third World Attitudes, 555 and 557.

The disapproval sometimes expressed in the legal literature is primarily based on concerns about a possible dilution and blurring of the term's meaning, resulting from the variety of different contexts in which the phrase has been and is in fact still applied by scholars.<sup>99</sup> Admittedly, one can not but agree to a certain extent with the critics in their perception that the term "transnational (economic) law" is also currently used to describe a considerable number of diverse normative phenomena.<sup>100</sup> In addition to characterizing, for example, the direct effect of legal acts adopted by the European Communities and the internal law-making power of organs of international organizations,<sup>101</sup> or the "union of rules taken from many legal systems",<sup>102</sup> the phrases 'transnational economic law' and 'transnational commercial law' are sometimes applied in the legal literature as synonyms for the autonomous body of trade law, which is commonly known as the *lex mercatoria*.<sup>103</sup>

However, this account does not necessarily lead to the conclusion that the term 'transnational economic law' has to be regarded as an inappropriate phrase to characterize the changing normative structure of the international economic system. Rather, it is argued that especially the interchangeable application of *lex mercatoria* and transnational economic law does not at all live up to *Jessup's* infinitely more complex understanding of 'transnational law'.<sup>104</sup> Furthermore, because of its apparent suitability and in conformity with *Jessup's* thinking, the term 'transnational economic law' should – in contrast to the considerably narrower meaning of *lex mercatoria* – be

<sup>99</sup> With regard to examples for such an argumentation see only *Weise*, *Lex Mercatoria*, 75; *Dasser*, *Internationale Schiedsgerichte*, 65; *Beitzke*, *Zeitschrift für Rechtsvergleichung* 16 (1975), 68; *Kropholler*, *Internationales Einheitsrecht*, 7; *Stein*, *Lex Mercatoria*, 2 *et seq.*

<sup>100</sup> An overview on the various different meanings ascribed to this term in the legal literature is given for example by *Kassis*, *Théorie Générale*, 543 *et seq.*; *Siehr*, in: *Holl/Klinke* (eds.), *Internationales Privatrecht*, 108 *et seq.*; *Weise*, *Lex Mercatoria*, 72 *et seq.*; *Spickhoff*, *RabelsZ* 56 (1992), 121 *et seq.*; *Blaurock*, *ZEuP* 1 (1993), 259 *et seq.*

<sup>101</sup> On the application of the term 'transnational law' in these connections see in particular *Erler*, *VVDStRL* 18 (1960), 22 *et seq.*

<sup>102</sup> See *Gopalan*, *American University International Law Review* 18 (2003), 809; for a related view see also *Goode*, *International and Comparative Law Quarterly* 46 (1997), 3.

<sup>103</sup> See, e.g., *Berger*, in: *Berger* (ed.), *Practice of Transnational Law*, 1 *et seq.*; *Berger*, *Formalisierte oder „schleichende“ Kodifizierung*, 1 *et seq.*; *Zumbansen*, *RabelsZ* 67 (2003), 677; *Meessen*, *Economic Law*, 323; *Meessen*, in: *Reimann* (ed.), *Weltkultur*, 245 *et seq.*; *Mertens*, *RabelsZ* 56 (1992), 226 *et seq.*; *Latty*, in: *Daillier/de La Pradelle/Ghérari* (eds.), *Droit de l'Économie Internationale*, 109 *et seq.*; *Schmitthoff*, in: *Horn/Schmitthoff* (eds.), *Transnational Law*, 20 *et seq.*; *Bucher*, in: *Schwind* (ed.), *Aktuelle Fragen*, 13; for a critical account of this interchangeable application see *Tietje*, *ZVglRWiss* 101 (2002), 407; *Stein*, *Lex Mercatoria*, 2; *Siehr*, in: *Holl/Klinke* (eds.), *Internationales Privatrecht*, 112; *Gessner*, in: *Gessner/Budak* (eds.), *Emerging Legal Certainty*, 434.

<sup>104</sup> *Tietje*, *ZVglRWiss* 101 (2002), 407; *Tietje/Nowrot*, *European Business Organization Law Review* 5 (2004), 346; *Goode*, *International and Comparative Law Quarterly* 46 (1997), 2; *Bamodu*, *International Arbitration Law Journal* 4 (2001), 16; see also in this connection *Horn*, in: *Berger* (ed.), *Practice of Transnational Law*, 67 and Fn. 1; as well as generally on the perception that *Jessup's* understanding of 'transnational law' is considerably broader than the normative phenomena commonly associated with the term *lex mercatoria* see, e.g., *Anders*, in: *Dekker/Werner* (eds.), *Governance*, 51 ("Transnational law includes conventional public international law, human rights law, environmental regulation, economic law and *lex mercatoria*."); *Friedmann*, *Changing Structure*, 230; *Ehrenzweig*, *RdC* 124 (1968), 255 *et seq.*; *McGrew*, in: *Gessner/Budak* (eds.), *Emerging Legal Certainty*, 335; and recently *Wai*, *Harvard International Law Journal* 46 (2005), 471 *et seq.* and Fn. 2; *Goode*, *International and Comparative Law Quarterly* 54 (2005), 547.

reserved to describe the multifaceted network of various kinds of regulations that are created cooperatively by a multitude of states, supra-state, sub-state and non-state actors, thereby avoiding the danger of a possible blurring of the term's meaning and thus to a considerable extent also relativizing the criticism previously been voiced against the application of this phrase.

### III. Outlook

In his book review of *Jessup's* work "Transnational Law", *F. Honig*, although characterizing the "authors approach [as] original and stimulating",<sup>105</sup> predicted in 1958 that "[m]any ghosts will have to be laid before Professor Jessup's ideas on this as on other preconceived notions are likely to secure general acceptance".<sup>106</sup>

As its title already indicates, this contribution was intended to illustrate that in particular with regard to the task of providing a normative scheme for understanding the changing regulatory structure of the international economic system, the time has finally come to lay the respective conceptual ghosts of the past to rest. The ideas presented by *Jessup* in his "Transnational Law" – as previously argued in the legal literature – no longer refer only to "very particular and unusual cases".<sup>107</sup> Rather, the concept of transnational economic law as outlined above most appropriately characterizes the interconnected plurality or network of law-making actors and various sources of law that increasingly determines the regulatory reality in the global trade and financial system.

Therefore, in taking up the ongoing challenges of finding solutions for the "International Problem of Governing Mankind" in light of the multitude of diverse novelties and difficulties facing the current international economic system and its legal order, it appears more than ever advisable to take renewed recourse to what can be regarded as the underlying driving force of all of *Philip C. Jessup's* scholarly and practical work – so vividly put into words by *Baron Frederik M. van Asbeck* in his farewell lecture at Leiden University and qualified by *Jessup* himself as "the inspiring vision for the study of international law":<sup>108</sup>

"[...] to assist in the building, stone upon stone, in storm and rain, of a transnational legal order for States and peoples and men."<sup>109</sup>

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<sup>105</sup> *Honig*, *International Affairs* 34 (1958), 78.

<sup>106</sup> *Ibid.*, 79.

<sup>107</sup> See *Kunz*, *AJIL* 56 (1962), 497.

<sup>108</sup> *Jessup*, *Columbia Journal of Transnational Law* 3 (1964), 1.

<sup>109</sup> *van Asbeck*, *International and Comparative Law Quarterly* 11 (1962), 1072.



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## C. Transnational Law

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### I. The universality of the human problems

The subject to which these chapters are addressed is the law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called “family of nations” or “society of states.” Human society in its development since the end of the feudal period has placed special emphasis on the national states, and we have not yet reached the stage of a world state. These facts must be taken into account, but the state, in whatever form, is not the only group with which we are concerned. The problems to be examined are in large part those which are usually called international, and the law to be examined consists of the rules applicable to these problems. But the term “international” is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states).

Part of the difficulty in analyzing the problem of the world community and the law regulating them is the lack of an appropriate word or term for the rules we are discussing. Just as the word “international” is inadequate to describe the problem, so the term “international law” will not do. Georges Scelle seeks to meet the difficulty by using the term *droit des gens*, “not taken exclusively in its Latin etymology, which still implies the notion of a collectivity, but [p. 2] in its common and current meaning of individuals, considered simply as such and collectively as members of political societies.”<sup>1</sup> I find no satisfactory English equivalent along these lines. Professor Alf Ross of the University of Copenhagen, speaking of the term “private international law,” has wisely said: “Normally it is both hopeless and inadvisable to try to alter a generally accepted terminology, but in this case linguistic usage is so misleading that it seems to me right to make the attempt.”<sup>2</sup> Ross’s own experiment in word-coining - “interlegal law” for “private international law” - is not encouraging to me. My choice of terminology will no doubt be equally unsatisfactory to others. Nevertheless I shall use, instead of “international law,” the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into

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<sup>1</sup> Georges Scelle, *Précis de droit des gens* (Paris, Recueil Sirey, 1932), pt. I, p. vii.

<sup>2</sup> Alf Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), p. 73.

such standard categories.<sup>3</sup> [p. 3] The concept is similar to but not identical with Scelle's monistic theory of *un Droit insocial unifié*.<sup>4</sup> One is dealing, as he says, with "human relationships transcending the limits of the various states."<sup>5</sup> But while I agree with him that states are not the only subjects of international law,<sup>6</sup> I do not go to the other extreme and say with Scelle that individuals are the only subjects. Corporate bodies, whether political or nonpolitical, have certainly been treated in orthodox theory as fictions, but their essential reality as entities is now well accepted and law deals with them as such.<sup>7</sup> Scelle agrees that states have characteristic features distinguishing them from other organizations, but for him these features are not of a legal order but *historico-politique*,<sup>8</sup> a distinction which is not drawn here.

Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups. A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. So does an American oil company doing business in Venezuela; or the New York lawyer who retains French [p. 4] counsel to advise on the settlement of his client's estate in France; or the United States Government when negotiating with the Soviet Union regarding the unification of Germany. So does the United Nations when shipping milk for UNICEF or sending a mediator to Palestine. Equally one could mention the International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations. One is sufficiently aware of the transnational activities of individuals, corporations, and states. When one considers that there are also in existence more than 140 intergovernmental organizations and over 1,100 nongovernmental organizations commonly described as international, one realizes the almost infinite variety of the transnational situation which may arise.<sup>9</sup>

There are rules, or there is law, bearing upon each of these situations. There may be a number of applicable legal rules and they may conflict with each other. When this is the case still other rules may determine which law prevails. In certain types of situations we may say this is a question of "choice of law" which is to be determined

<sup>3</sup> Myres McDougal has familiarized us with the use of the adjective "transnational" to describe groups whose composition or activities transcend national frontiers, but he does not apply the term to law in the sense in which it is used here. Joseph E. Johnson suggested more broadly the utility of the word "transnational" in place of "international" in his address of June 15, 1955, at the annual meeting of the Harvard Foundation and Law School Alumni. Occasional use of the word has also been made by Percy Elwood Corbett, *The Study of International Law* (Garden City, N.Y., Doubleday, 1955), p. 50, and by Arthur Nussbaum, *A Concise History of the Law of Nations* (rev. ed., New York, Macmillan, 1954).

<sup>4</sup> Scelle, pp. 32ff.

<sup>5</sup> *Ibid.*, p. 51, as paraphrased by Walter Schiffer, *The Legal Community of Mankind* (New York, Columbia University Press, 1954), p. 259.

<sup>6</sup> Having argued in 1948 that this was a desirable position (*A Modern Law of Nations*, New York, Macmillan, 1948, ch. 2), I am prepared to say it is now established.

<sup>7</sup> Henry E. Foley, "Incorporation, Multiple Incorporation, and the Conflict of Laws," *42 Harvard Law Review* 516, 517-19 (1929).

<sup>8</sup> Scelle, p. 83.

<sup>9</sup> *Yearbook of International Organizations, 1954-55* (Brussels, Union of International Associations, 1954).

by the rules of “Conflict of Laws” or “Private International Law.” The choice usually referred to here is between rules of different national laws; and the choice, we assume, is to be made by a national court. In other types of situations the choice may be between a rule of national law and a rule of “Public International Law,” and the choice may be made by an inter- [p. 5] national tribunal or by some nonjudicial decision maker.

In Scelle’s monistic conception: “When the legislator of a state, or when national jurisdictions establish rules governing conflicts of laws or conflicts of jurisdiction, they lay down *rules of international law*.... When a national judge delivers a judgment in a case between nationals and foreigners or between foreigners, he ceases to be a *national judge* and becomes an *international judge*.”<sup>10</sup> Another pattern of thought insists that “the only law in force in the sovereign state is its own law” and that the state’s own law determines whether in certain instances some other rule from some other jurisdiction will be applied, which is made part of its law for the purpose.<sup>11</sup> This does not prevent the foreign law from being treated, for purposes of proof, as a “fact.”<sup>12</sup> Similarly, the Permanent Court of International Justice has said: “From the standpoint of International Law and the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”<sup>13</sup> In the United States and in other states international law is declared to be “part of our law” and therefore [p. 6] can be applied directly by the courts. “Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.”<sup>14</sup> To envisage the applicability of transnational law it is necessary to avoid thinking solely in terms of any particular forum, since it is quite possible, as we shall see, to have a tribunal which does not have as its own law either a body of national law or the corpus of international law.

A problem may also be resolved not by the application of law (although equally not in violation of law) but by a process of adjustment - an extralegal or metajudicial means. Thus certain heirs may renounce their rights in an estate, or their conflicting claims may be compromised without resort to litigation. The unification of Germany might be brought about without reference to the Potsdam Agreements by a negotiated settlement acceptable to all concerned. But the results may have legal effect and be in legal form. In other words, the solution arrived at without utilizing law may itself provide the law of the case, just as in a commercial arbitration where the arbitrators are authorized to make a fair compromise. One notes that the problem of extracting and refining oil in Iran may involve - as it has - Iranian law, English law, and public international law. Procedurally it may involve - as it has - diplomatic negotiations, proceedings in the International Court of Justice and in the Security Council, business negotiations with and among oil companies, and action in the Iranian Majlis. [p. 7]

<sup>10</sup> Scelle, p. 56.

<sup>11</sup> See American Law Institute, *Restatement of the Law of Conflict of Laws* (St. Paul, American Law Institute Publishers, 1934), ch. I, Topic I, sec. I(I) and comment on sec. 5.

<sup>12</sup> Joseph H. Beale, *A Treatise on the Conflict of Laws* (New York, Baker, Voorhis, 1935), secs. 621.4-621.6. Cf Arthur Nussbaum, “Proving the Law of Foreign Countries,” 3 *American Journal of Comparative Law* 60 (1954).

<sup>13</sup> Case concerning certain German interests in Polish Upper Silesia (The Merits), P.C.I.J., ser. A, no. 7 (1926), p. 19.

<sup>14</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Scotia*, 14 Wall. 170, 188 (1871).



Perhaps it is some innate instinct for orderliness which leads the human mind endlessly to establish and to discuss classifications and definitions and to evolve theories to justify them. In international law one may be a monist or a dualist; a positivist, a naturalist, or an eclectic. The intellectual process is essential but it involves dangers. The more wedded we become to a particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which hampers progress toward the ever needed new solutions of problems whether old or new. Conflicts and laws are made by man. So are the theories which pronounce, for example, that international law cannot confer rights or impose duties directly on an individual because, says Theory, the individual is not a subject but an object of international law. It is not inappropriate here to invoke again the high authority of an earlier Storrs lecturer and to say with Cardozo: "Law and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities."<sup>15</sup>

As Lord Justice Denning of the Court of Appeal has said, some lawyers find solutions for every difficulty while other lawyers find difficulties for every solution. The solution suggested here is that, for the time being at least, we avoid further classification of transnational problems and further definitions of transnational law. You will not need to be a [p. 8] lawyer to find the difficulties for this solution; they will be only too apparent.

What, then, is the general problem? This planet is peopled with human beings whose lives are affected by rules. This is true whether one considers the people who live in New Haven among all the complexities and refinements of civilization or the people who live in the unimproved jungle recesses of New Guinea. *Ubi societas, ibi ius*. People form groups which we call families, clans, tribes, corporations, towns, states, international organizations, or by other names. "History is, among other things, the record of groupings of human beings which for some strange reason stay together."<sup>16</sup> Individual interrelationships continue, but to these are added the relationships of the individual to the groups and those among the groups themselves. As Max Radin points out: "Any one grouping cuts through and across other groupings, a fact which makes all social study so difficult."<sup>17</sup>

As man has developed his needs and his facilities for meeting his needs, the rules become more numerous and more complicated. History, geography, preferences, convenience, and necessity have dictated dispersion of the authority to make the rules men live by. Some rules are made by the head of the family, whether it be father or mother, such as "Wash your hands before supper." Some rules are made by [p. 9] ecclesiastical authorities as in specifying times and manners of fasting. Some are made by corporations regulating their sales agencies, as recently publicized in the hearings of the Senate Judiciary Antitrust and Monopoly Subcommittee on the practices of General Motors. Other rules are made by secret societies, by towns, cities, states. Still others are made by international organizations such as the Coal and Steel

<sup>15</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921), p. 127.

<sup>16</sup> Adolf A. Berle, *The 20<sup>th</sup> Century Capitalist Revolution* (New York, Harcourt, Brace, 1954), p. 21

<sup>17</sup> Max Radin, *Law as Logic and Experience* (New Haven, Yale University Press, 1940), p. 126.

Community, the International Monetary Fund, or the OEEC. Much of interest is to be learned from the study of the rules of procedure of such a body as the General Assembly of the United Nations - rules which are applied by a person clothed with official authority and which often determine conclusively the fate of a proposal to which a sovereign state attaches the greatest importance.

Nowadays it is nether novel nor heretical to call all of these rules "law." In any case, there is no law forbidding a scholar to choose his own definition - or requiring him to formulate one, for that matter. In the exercise of this scholarly freedom (and scholarly freedom needs exercise at all times lest it become atrophied) I rest for the time being on this broad description of the sense in which I speak of law in general and of transnational law in particular.

What is the role of the scholar in treating international or transnational law? Surely not to hedge himself round with the adverbial and adjectival qualifications so characteristic of the language of diplomacy; or to resort to such circumlocutions as are illustrated by Burton Marshall's story of the English diplomat who was embarrassed by casual inquiries about his father, who, as a matter of fact, [p. 10] had died on the gallows. The diplomat learned to frame a truthful answer to such inquiries by saying: "The old gentleman suffered a lamentable death in consequence of injuries sustained in a fall caused by the collapse of the floor of a platform during a public function in which he had an important part." If what the scholar says is not subject to criticism, it might as well be left unsaid.<sup>18</sup> Without disparaging the contribution of pure reason he need not take the position of Grotius, who wrote in the Prolegomena of his *De Jure Belli ac Pacis*: "If anyone thinks that I have had in view any controversies of our own times, either those that have arisen or those which can be foreseen as likely to arise, he will do me an injustice. With all truthfulness I aver that, just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact."<sup>19</sup> I have not tried to emulate Grotius in this respect; to the contrary, I agree with Max Radin: "It is essential that no complete detachment ever takes place."<sup>20</sup> "Grotius was a scholar, and his only authority was that of a scholar."<sup>21</sup> Yet Grotius was not ignorant of statecraft, and he and succeeding scholars have not been without their influence on developments in international [p. 11] politics, despite the reaction of practical people like the judges of the High Court of Admiralty in 1778. When that court was asked to declare the length of time a prize must be held *infra praesidia* in order to divest title, it said: "Grotius might as well have laid down, for a rule, twelve hours, as twenty-four; or forty-eight, as twelve. A pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him."<sup>22</sup> But who will contradict the teaching that "understanding is the beginning of wisdom"

<sup>18</sup> Cf. Myres S. McDougal, "International Law, Power, and Policy: A Contemporary Conception," *The Hague Academy of International Law, 82 Recueil des Cours* 140 (1953, I).

<sup>19</sup> Hugo Grotius, *De Jure Belli ac Pacis*, vol. 2, translated in Publications of the Carnegie Endowment for International Peace, "The Classics of International Law" (Oxford, Clarendon Press, 1927), Bk. I, pp. 29-30.

<sup>20</sup> Radin, p. ix.

<sup>21</sup> Walter Schiffer, *The Legal Community of Mankind*, p. 38.

<sup>22</sup> *The Renard* (1778), 1 Eng. P.C. 17, 18; Hay and Marriott 222, 224; 165 Eng. Rep. 51, 52 (Adm.).

or assert that wisdom is not a useful quality in a statesman? To the understanding of transnational legal problems we may then address ourselves.

The problems in general arise from conflicts of interest or desire, real or imagined. In the customary method of the study of international relations and international law, the stress is on the state or nation factor. If the matter does not involve the government of one state in its relations with another government or other governments, the matter is said to be “domestic.” By and large, the orthodox approach precluded international consideration of a problem until it at least had transnational dimensions. Allow me now the liberty of this generalization, holding in reserve such questions as human rights and the older interests based on treaties for the protection of minorities. Thus a local riot not involving aliens, or agitation by citizens for the reform of their government, was not an international question. But when a dissident group inside a state was strong enough and [p. 12] resorted to arms, international law began to take an interest. The group might be recognized by other governments as insurgents or belligerents. The reason for the conflict would not have changed, the parties would be essentially the same, except that one internal group had now attained a certain degree of power. If the group was crushed the concern of traditional international law again subsided, although the causes of the conflict still remained unchanged. One might conclude that all this is because international law realistically takes account of power; and if power and jurisdiction are equated, then the dissident group reaches a point where it has jurisdiction to affect persons and the property of persons who belong to another group, i.e. citizens of another state. But this is not quite true, because there are different kinds of power. Power, like love, is “a many splendored thing.” “A nation’s power can no longer be measured in terms of Francis Bacon’s catalogue of ‘walled towns, stored arsenals and armories, goodly race of horses, chariots of war, elephants, ordnance and artillery.’”<sup>23</sup> The Democratic party by the elections of 1954 acquired great power in the United States through the control of both Houses of Congress; but international law (though not international politics)<sup>24</sup> ignored the very existence of the Democratic party. On the other hand, when the Chinese Communist party in 1949 acquired by force of arms the control of the Chinese mainland, international law was ready to say here is a de facto government [p. 13] to which rules of international law apply. The result is of course convenient, because in the one case the Democratic party chose to operate through the organs of government already established and under President Eisenhower, while in the other case the Communist party chose to operate through its own organs and to deny even the governmental existence of Nationalist China and Generalissimo Chiang Kai-shek. Thus too, as Marek points out, if there is a truly indigenous revolution which is successful, the identity and continuity of the state do not change; whereas if the revolution is a “fake” engineered and supported from outside, the ensuing puppet government, if successful, may constitute a new state, depending on whether it lives

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<sup>23</sup> Sol M. Linowitz, “War for Men’s Minds: The Fight We Must Not Lose,” 41 *American Bar Association Journal* 810 (1955).

<sup>24</sup> Cf. McDougal, p. 238.

long enough to rely on the maxim *ex factis ius oritur* prevailing over the antinomic maxim *ex iniuria ius non oritur*.<sup>25</sup>

The point at which one passes from the archaic domains of one branch of law to another may be traced also in transnational economic relations. The “most successful experiment in economic world government thus far achieved in the twentieth century” according to Berle<sup>26</sup> was the Achnacarry or “As-Is” Agreement between the heads of Standard Oil of New Jersey, Shell, and Anglo-Persian. This was a “private” or nongovernmental agreement to end and avoid economic war, but there is direct governmental interest in Anglo-Persian to the extent that the British Government [p. 14] owns 52.5 per cent of the voting stock.<sup>27</sup> In current terminology it was not an international agreement, but it was a transnational one. In the 1940s American oil companies reached an agreement for distribution of profits with the Venezuelan Government on a fifty-fifty basis;<sup>28</sup> this too would not be called international. According to the argument of the British Government before the International Court of Justice, the oil concession agreement of April 29, 1933, between the Anglo-Persian Oil Company and the Iranian Government had “a double character, the character of being at once a concessionary contract between the Iranian Government and the Company and a treaty between the Iranian Government and the two Governments.”<sup>29</sup> When the same problem reached a settlement in 1954 the parties were, of the first part, the Imperial Government of Iran and the National Iranian Oil Company, and of the second part a Pennsylvania corporation, a New York corporation, a New Jersey corporation, two Delaware corporations, and a British, a Dutch, and a French corporation. Article 46 of the agreement provides: “In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such [p. 15] common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals.”<sup>30</sup>

In the Union of International Transport by Rail, disputes are settled by an arbitral tribunal before which no distinction is made between the governmental and nongovernmental administrations, both of which are members.<sup>31</sup>

Obviously there is a delicate shading between the situations to which international law traditionally applies and those to which it does not. “Lawyers,” writes Sigmund Timberg, “...have adhered to rigidly compartmentalized national legal systems, which

<sup>25</sup> Krystyna Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie E. Droz, 1954), pp. 64ff., 564ff.

<sup>26</sup> *The 20<sup>th</sup> Century Capitalist Revolution*, p. 147.

<sup>27</sup> John A. Loftus, “Middle East Oil,” 2 *Middle East Journal* 17, 18 (1948).

<sup>28</sup> See Joseph E. Pogue, *Oil in Venezuela* (Petroleum Department, Chase National Bank of the City of New York, 1949).

<sup>29</sup> Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22<sup>nd</sup>, 1952: I.C.J. Reports 1952, p. 93 at p. 112.

<sup>30</sup> The Iranian Consortium, *Government Agreement and Related Documents* (1954), p. 71.

<sup>31</sup> Manley O. Hudson and Louis B. Sohn, “Fifty Years of Arbitration in the Union of International Transport by Rail,” 37 *American Journal of International Law* 597, 600 (1943).

are unable to cope with an economic order of international dimensions.”<sup>32</sup> The use of transnational law would supply a larger storehouse of rules on which to draw, and it would be unnecessary to worry whether public or private law applies in certain cases.<sup>33</sup> We may find that some of the problems that we have considered essentially international, inevitably productive of stress and conflict between governments and peoples of two different countries, are after all merely human problems which might arise at an level of human society - individual, corporate, [p. 16] interregional, or international. [...]

[End of section]

## II. The choice of law governing the problems

[...] [p. 106] Transnational law then includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private. There is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from all of these bodies of law the rule considered to be most in conformity with reason and justice for the solution of any particular controversy. The choice need not be determined by territoriality, personality, nationality, domicile, jurisdiction, sovereignty, or any other rubric save as these labels are reasonable reflections of human [p. 107] experience with the absolute and relative convenience of the law and of the forum - *lex conveniens* and *forum conveniens*.

But, it will be objected, one purpose of law is certainty. Individual persons, corporations, states, and international organizations must know the rules by which they should govern their conduct from day to day; such certainty cannot exist if decisions are to be rendered according to the whim of the judge who in his travels may have become fascinated by the tribal customs of Papua. The old customary law of Burma provided that if I entertain a guest at dinner who drinks well but not too wisely, and who on his way home is beaten by robbers or clawed by a tiger or bitten by a cobra, I am liable.<sup>74</sup> But we do not consider it reasonable to impose such liability on the exurbanite host whose homeward-bound guest is injured through one of the hazards of the environs of New York City. Clearly the law must be specified. By whom? By the authority which has the power to control the decisions of those who will sit in judgment. Such authority may be found in the Connecticut Legislature, in the Congress of the United States, or in the joint will of several states expressed through treaties or resolutions of the UN General Assembly. It may also be found in the courts themselves as when they rely on a Restatement of the American Law Institute to guide their choice of law where the controlling legislature has not prescribed the rule they must follow. The courts should have, in Judge Wyzanski's phrase, “the robust common sense to avoid writing opinions [p. 108] and entering

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<sup>32</sup> “International Combines and National Sovereigns,” 95 *University of Pennsylvania Law Review* 575, 577 (1947).

<sup>33</sup> See pp. 84ff, 106-7 (Chapter 3 of text).

<sup>74</sup> E. Maung, *The Expansion of Burmese Law* (1951), p. 56.

decrees adapted with academic nicety to the vagaries of forty-eight States,”<sup>75</sup> or, we may add here, of seventy-eight nations.

We are here dealing of course only with transnational situations. Much existing law has developed or has been enacted with an eye merely to the local or internal problem. Modern communications and contacts have made the transnational situations much more frequent and familiar; and actually a great deal of law has been created with the specific purpose of regulating such situations - rules regarding the enforcement of foreign judgments, arrangements for extradition, statutes and treaties governing acts on the high seas or in the air, regulation of double taxation, provisions determining inheritance by alien heirs, protection of trade marks and copyrights, and a multitude of other matters.

Where the law-making authority is national, the procedural problem of making new rules better suited to the regulation of transnational situations, that is, the creation of new transnational law, presents no difficulty. The difficulty lies - as the UNESCO Charter says of wars - in the minds of men. The minds of men are trained, or so we fondly believe, in our schools and universities. If those who are trained, particularly in our law schools and graduate schools of political science, are nourished on the pap of old dogmas and fictions, it is not to be expected that they will later approach the solution of transnational problems with open-minded [p. 109] intelligence instead of open-mouthed surprise. Within the local or national framework education has made great strides in seeking to convey an appreciation of the economic, social, and political problems which the sciences of law and government seek to adjust. In the international or, more broadly, the transnational area there are occasional beacons which burn brightly but there are few well-lighted avenues.

The problem of developing transnational law is not actually so difficult as it is sometimes made to appear. Unquestionably much remains to be done in arousing an interest and creating an understanding of the nature and importance of transnational problems before much action will be taken by those having authority to provide wise rules for their solutions. It may well be that a reevaluation of the problem, for example, of “international combines and national sovereigns” would result, as Timberg suggests in his stimulating analysis, “in increased recourse to private municipal law as a method of irrigating the arid interstices that characterize so much of the potentially fertile acres of international commercial law.”<sup>76</sup>

There are helpful precedents to guide the general process, especially from the development of maritime law which has been predominantly transnational since the days of the Phoenicians in the 14th century B.C. The law of general average, for example, which is traced at least to the Rhodian sea law of the 7th century B.C., has been codified by voluntary action of shipping interests through a process which [p. 110] received its initiative largely from the underwriters in 1860. A general nongovernmental maritime conference was convened to bring about uniformity in the various national applications of the law of general average. At first it was contemplated that uniformity should be obtained by the drafting of a bill which might be enacted into law in the legislatures of all maritime countries. This approach was superseded by

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<sup>75</sup> *National Fruit Product Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499, 504 (D. Mass. 1942).

<sup>76</sup> Timberg, “International Combines and National Sovereigns,” p. 609.

the device of voluntary private agreement. Repeated nongovernmental maritime conferences, at which all interests and many countries were represented, finally agreed upon the York-Antwerp Rules which are today in common use throughout the world by virtue of the voluntary insertion in bills of lading and charter parties of a clause providing that all claims for general average are to be settled in conformity with the York-Antwerp Rules.<sup>77</sup>

On the other hand, the rules of the road at sea have become uniform through the adoption of identical legislation in many similar maritime states. The British took the lead, and their Merchant Shipping Amendment Act of 1862 “was accompanied by a set of ‘Regulations for preventing collisions at sea,’ which were adopted by the United States in 1864 and, in less than ten years, were accepted as obligatory by more than thirty of the maritime States of the world.”<sup>78</sup> [p. 111] A third method, namely the negotiation of international conventions, has also been used by the international maritime community, as for example in the Brussels conventions of 1910 “for the unification of certain rules of law in regard to collisions” and “for the unification of certain rules of law respecting assistance and salvage at sea.”<sup>79</sup>

The maritime community was not satisfied with the rule of criminal jurisdiction laid down in 1927 by the Permanent Court of International Justice in *The Lotus* case. That decision upheld the right of Turkey to bring to trial in Turkey the commanding officer of a French ship which negligently collided with a Turkish ship on the high seas, resulting in the loss of Turkish lives. The League of Nations, the ILO, the International Maritime Committee, and others were induced to address themselves to the problem, with the result that an international convention was signed at Brussels in 1952 incorporating the rule that in such cases only the flag state would have jurisdiction in disciplinary or criminal proceedings.<sup>80</sup> The convention has not yet been generally ratified, but it affords a good example of the international parallel to national situations in which Congress is induced to enact new law when the old law, as interpreted by the Supreme Court, does not reflect the interests and desires of that part of the community particularly affected.

In the United States it has not been very difficult to secure action in the interests of uniformity with respect to mari- [p. 112] time law, because the Constitution extends the federal judicial power “to all cases of admiralty and maritime jurisdiction.” It may be hard to imagine that the United States would play a leading role in bringing about in broader fields agreement on rules of transnational law which would be applied in our forty-nine judicial jurisdictions. Long before Mr. Bricker became the eponym of a new term for political and constitutional provincialism, the United States Government declined to become a party to any of the general treaties of private international law by which so many states of the world are bound. A good omen is the strongly supported proposal for the establishment by Congress of a Commission and

<sup>77</sup> See *Lowndes & Rudolf's Law of General Average and the York-Antwerp Rules* (8<sup>th</sup> ed. by Donaldson and Ellis, London, Stevens & Sons, 1955), pt. 2 for the history of the development.

<sup>78</sup> C. John Colombos, *The International Law of the Sea* (3<sup>rd</sup> rev. ed., London, Longmans, Green, 1954), p. 253. Cf. *The Scotia*, 14 Wall. 170 (1871).

<sup>79</sup> Colombos, p. 258.

<sup>80</sup> Philip C. Jessup, “The Growth of the Law,” 29 *American Journal of International Law* 495 (1935); Colombos, pp. 228-32.

Advisory Committee on International Rules of Judicial Procedure which is to “investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements.”<sup>81</sup> The facilities and resources of the United Nations could be utilized for this purpose to great advantage. Governments have been accustomed to use international or transnational organizations for the solution of transnational problems. The experience is now of respectable age in dealing with postal communications, telecommunications, health, narcotics, fisheries, railways, aviation, shipping, raw materials, labor, and many others. [p. 113] They were not ready to accept the International Trade Organization under the Havana Charter, but a new attempt in the same field is being made through the United Nations Ad Hoc Committee on Restrictive Business Practices.<sup>82</sup> The State Department, however, opposed the adoption of the Committee’s recommendations.<sup>83</sup> NATO has still to find an acceptable program for fulfilling the potentialities of Article 2 of the North Atlantic Treaty, but on a more restricted regional basis the European Coal and Steel Community has blazed a trail for supranational authorities.

Nevertheless, if there be any virtue in developing transnational law, much more exploration and analysis would need to precede the ponderous tread of governmental action. In the words of Mr. Justice Holmes: “The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote.”<sup>84</sup> So must the headlong scholar supply the proverbial characterization to himself where the foreign offices, the legislatures, and the courts still fear to tread. Seeing they themselves are wise, they may suffer the scholar gladly.

**[End of book]**

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<sup>81</sup> The Attorney General’s support for such legislation and other reasons advanced for its passage are contained in H.R. Report no. 1361, 84<sup>th</sup> Congress, 1<sup>st</sup> Session, July 25, 1955, to accompany H. R. 7500. See Harry L. Jones, “A Commission and Advisory Committee on International Rules of Judicial Procedure,” 49 *American Journal of International Law* 379 (1955).

<sup>82</sup> Cf. Dean Rostow’s endorsement of such an international solution in his dissenting opinion (supported by Wendell Berge) in Report of the Attorney General’s National Committee to Study the Antitrust Laws (1955), pp. 99, 102.

<sup>83</sup> 32 *Department of State Bulletin* 665 (April 18, 1955).

<sup>84</sup> Oliver Wendell Holmes, “The Path of the Law,” *Collected Legal Papers* (New York, Harcourt, Brace, 1921), p. 201.



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