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Revisiting Jessup and the imperial origins of transnational law

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Abstract

Philip Jessup's 1956 Storrs Lectures, *Transnational Law*, developed a case for theorizing law beyond the state which continues to shape understandings of transnational law. Yet while transnational law has assumed increasing importance with globalization, it remains beset by conceptual difficulties. This article suggests that such difficulties are at least partly attributable to misreadings of *Transnational Law* primarily as proposing a more pragmatic concept to drive law's progression. Contextualizing the Lectures within Jessup's involvement in the US's postwar worldmaking project and the contrasting project pursued by Third World states, and through close textual study, it contends that *Transnational Law* is better understood as geared to undermining the legal foundations of key efforts to counter Western dominance. It further shows how this reading can aid in clarifying misunderstandings of Jessup's Lectures that still inform transnational law scholarship and in considering how law's capacity to sustain inequality and exploitation may be challenged.

Keywords: international law; Jessup; permanent sovereignty over natural resources; transnational law

1. Introduction

In 1956, Philip C. Jessup delivered the Storrs Lectures, published as *Transnational Law*,[1] in which he articulated his formative case for transnational law. The enduring import of those Lectures, credited with having 'launched the field of transnational legal studies',[2] is evident in the fact that they remain 'a common starting point' for those grappling with the meaning and significance of transnational law.[3] In theorizing law beyond the state, Jessup laid fertile ground for conceptualizing and developing law in ways that have helped both facilitate and secure the systems, structures, and relations that underpin globalization.[4] Thus, while by 1973 Jessup may

*The views expressed in this article are his own.

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[1]P. C. Jessup, *Transnational Law* (1956).

[2]S. Minas, 'Jessup at the United Nations: International Legacy, Transnational Possibilities', in P. Zumbansen (ed.), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (2020), 57, at 57.

[3]C. Scott, '"Transnational Law" as Proto-Concept: Three Conceptions', (2009) 10 *German Law Journal* 859; see also sources cited in Section 2, *infra*.

[4]R. Michaels, 'Globalisation and Law: Law Beyond the State', in R. Banakar and M. Travers (eds.), *Law and Society Theory* (2013), 287.

not have identified the 'marked substantive changes along the lines' he had envisaged,[5] various iterations of transnational law are now understood to be forming 'transnational legal orders' governing everything from taxation to food safety,[6] to provide the process by which compliance with international law may be ensured,[7] and to be enmeshed with many of the world's great challenges, such as climate change and securing human rights.[8]

Yet while the importance of transnational law is widely seen to have increased with globalization, scholarship's progress in theorizing and advancing the concept has not been matched by efforts to enhance its doctrinal and conceptual coherence.[9] The possibility that this failure may be traced to *Transnational Law*, and in particular its misreading, was recently brought into relief by a collection of essays commemorating the Lectures' sixty-year anniversary, entitled *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal*.[10] The collection's introductory chapter acknowledges the ongoing absence of an agreed definition of transnational law and that thus '[m]ore than what transnational law means, the authors here illustrate what the concept means *to them*'.[11] A similar lack of shared understanding is apparent in the authors' reading of the Lectures themselves. The collection includes a contribution by Singh that situates *Transnational Law* as part of an effort 'to puncture the sovereignty of newly decolonized states and to protect the properties accrued through colonialism',[12] while other contributions are largely inclined to praise Jessup for, in particular, his pragmatism and the prescience of his analysis.

This article benefits from the analysis of Singh and other scholars, in particular Anghie[13] and Sornarajah,[14] who resist the conventional notion that the Lectures were merely in search of a more pragmatic concept to drive law's progression, and contend instead that the main function of *Transnational Law* was to help undercut Third World states' sovereignty.[15] That scholarship addresses *Transnational Law* in its historical context, situating it within early contests over the postwar order and, in particular, the role of transnational law's emergence in facilitating the continued dominance of Western states and companies.

Similar emphasis is placed here on a historicized reading. However, the argument developed charts a somewhat different course. Through attention to Jessup's career and scholarship, it seeks not only to offer a 'sense of historical motion and political, even personal struggle' to the study of the text,[16] but to counter the innocence often attributed to him when considering transnational

[5]P. C. Jessup, 'The Present State of Transnational Law', in M. Bos (ed.), *The Present State of International Law and Other Essays* (1973), 340. He was not discouraged, however, noting 'a multiplicity of cases, situations and juridical activities which provide new and additional examples of matters touched on'.

[6]T. C. Halliday and G. Shaffer (eds.), *Transnational Legal Orders* (2015). This is far from an exhaustive list; see also, for example, H. H. Koh, 'Why Transnational Law Matters', (2006) 24(4) *Penn State International Law Review* 745; P. Zumbansen, 'The Parallel Worlds of Corporate Governance and Labor Law', (2006) 13(1) *Indiana Journal of Global Legal Studies* 261; T. Gammeltoft-Hansen and T. Aalberts, 'The Politics of Transnational Law', (2019) *iCourts Working Paper Series No. 152*, available at ssrn.com/abstract = 3320393.

[7]H. H. Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181.

[8]R. Cotterrell, 'What is Transnational Law?', (2012) 37(2) *Law & Social Inquiry* 500, at 502; N. Affolder, 'Transnational Climate Law', in P. Zumbansen (ed.) *Oxford Handbook of Transnational Law* (2021), 247.

[9]See Cotterrell, ibid; V. Kanwar, 'Difficulties for Every Solution: Defining Transnational Law at the Edge of Transdisciplinarity', in Zumbansen, *supra* note 2, 461.

[10]See Zumbansen, ibid. For more on Jessup's enduring influence see L. Knöpfel and F. Lüth, 'Bringing the "Human Problem" Back into Transnational Law – The Example of Corporate (Ir)Responsibility' and the contributions that they summarize as part of a symposium of the same name, published in (2021) 12(2) *Transnational Legal Theory*.

[11]P. Zumbansen, 'Transnational Law, With and Beyond Jessup', in Zumbansen, ibid., at 42 (emphasis in original).

[12]P. Singh, 'The Private Life of Transnational law: Reading Jessup from the Post-Colony', in Zumbansen, ibid., at 440.

[13]A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

[14]M. Sornarajah, 'The Climate of International Arbitration', (1991) 8 *J. of Int'l Arbitration* 47.

[15]This article's use of 'Third World' follows the understanding of the term articulated in V. Prashad, *The Darker Nations: A People's History of the Third World* (2008).

[16]M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2004), 2.

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law's association with the empowerment of economic actors.[17] It then examines the sequence of analytical steps undertaken in *Transnational Law* to arrive at the conclusion that transnational law offers a promising path forward, which steps I argue were geared to strip away the legal foundations of key efforts by Third World states to counter Western dominance at the time. This reading of Jessup, as I develop, can aid not only in clarifying what I contend are mischaracterizations of *Transnational Law* that continue to inform transnational law scholarship, but in thinking about how law's capacity to sustain exploitation and inequality may be contested.

The article proceeds as follows. Section 2 considers the prevailing interpretations of *Transnational Law* and the concerns informing it. It identifies tensions evident within and amongst those interpretations, and contends that they misunderstand Jessup's analysis, which was instead animated by, and primarily directed at, the rising power of the Third World. Section 3 situates this concern historically and considers what may be gleaned from Jessup's career and writing about his orientation vis-à-vis that rise. It thus sets up the case made in the following two sections that *Transnational Law* is best read as using law to respond to developments that jeopardized the imperial worldmaking project of which Jessup was a part.

Section 4 examines how Third World states sought to advance their cause through efforts to make concrete their claims for sovereignty over natural resources. Permanent Sovereignty over Natural Resources initiatives, which rested on Third World states' ability to shape understandings of law and sovereignty, were brought to the world stage via the United Nations during Jessup's time there as a US representative. In broad terms, these initiatives sought to forge more tightly the relationship between and amongst the concepts of sovereignty, jurisdiction, and territorially delimited power and, thereby, to link political independence with economic independence.

Section 5 considers *Transnational Law* in more detail, examining, in particular, the ways in which Jessup sought to attenuate those relationships such that the power of Third World states to determine the questions of who authorizes the law, and how, was transferred to (or remained with) Western states and their business enterprises. As Pahuja and McVeigh have argued, those questions were a central postwar controversy between Western and Third World states,[18] and as I will show, they are also precisely the questions Jessup sought to answer in *Transnational Law*. Section 6 concludes by reflecting on potential implications of understanding *Transnational Law* in the manner contended for here.

2. The centrality of Third World 'problems' to *Transnational Law*

Jessup's enduring influence means that it is still common for scholarship not just to refer to his definition(s) of 'transnational law',[19] but to ascribe particular qualities and/or objectives to his argument for its conceptualization and development. These qualities and objectives have come to shape the dominant understanding of Jessup's Storrs Lectures and continue to inform that of transnational law. However, when considered in the round, it is apparent that many of these qualities and objectives are in tension, prompting reflection as to whether they capture accurately what was being done in the Lectures.

To make an initial case for revisiting *Transnational Law*, this section thus begins by briefly describing four such tensions. The first arises from Jessup's supposed normative orientation,

[17]See, e.g., F. Grisel, 'Transnational Law in Context: The Relevance of Jessup's Analysis for the Study of "International" Arbitration', in Zumbasen, *supra* note 2, at 192; P. Zumbansen, 'The Continuing Search for Law in a Globally Interconnected World: Engaging and Contextualizing Jessup's "Transnational Law"', *TLI THINK!PAPER 7/2019*, available at ssrn.com/abstract = 3320108, at 14, published in modified form as Zumbansen, 'With and Beyond Jessup', *supra* note 11.

[18]S. Mcveigh and S. Pahuja, 'Rival Jurisdictions: The promise and loss of Sovereignty', in C. Barbour and G. Pavlich (eds.), *After Sovereignty: On the Question of Political Beginnings* (2009), 97.

[19]G. Shaffer and T. Halliday, 'With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering', in Zumbansen, *supra* note 8, 987.

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described as 'sid[ing] with the weak',[20] and transnational law's persistent association with 'the law of [the] transnational elite'.[21] Difficulties in reconciling this tension have led several scholars to conclude that Jessup, otherwise commended for his foresight, may simply have missed the significance of power asymmetries and their exploitation, a contention that, as we shall see, is implausible given Jessup's prior scholarship and career.[22]

The second tension lies in the development of a concept that continues to cause considerable confusion by an approach notable, it is said, for its functionality. Thus, on one hand, Jessup's work is associated with terms such as 'pragmatic',[23] 'empirically grounded',[24] 'engaging in actualities',[25] and based on a 'practice-informed'[26] and 'functional perspective';[27] on the other, the concept the Lectures were central to developing has engendered a body of scholarship embroiled in ontological debate[28] as to the meaning of 'something extraordinarily fuzzy called "transnational law"'.[29]

The third tension, related to the second, concerns the classificatory function of *Transnational Law*. *Transnational Law* has come to stand at least partly for its creation of a category, the development of the 'functional and practical' concept that is transnational law.[30] Indeed, credited with having launched transnational law as a field of study, one of *Transnational Law*'s most important impacts has been to define, however roughly, the contours of a concept distinct from existing categories. Yet Jessup has also been commended for the 'genius move' of failing to specify what rules the concept actually encompassed,[31] thereby rendering transnational law particularly fluid and difficult to pin down as a concept.

The final tension arises from the divergent ambitions that *Transnational Law* is seen to reflect. *Transnational Law* has been regarded as comparatively modest in aim, focusing on the law 'of the "in between"'[32] and primarily concerned to identify 'gaps in both public and private international law'[33] and 'fill the "gaps" in knowledge'.[34] In contrast to such views, however, *Transnational Law* is also said to have been inspired by a more ambitious project of 'problem solving during the Cold War when international law and public international institutions had withered',[35] and 'should be read as a *plaidoyer* [plea or argument] for international cooperation and multilateralism'.[36]

[20]D. Lustig, *Veiled Power: International Law and the Private Corporation, 1885-1981* (2020), 146.

[21]R. Michaels, 'After the Backlash: A New PRIDE for Transnational Law', in Zumbansen, *supra* note 2, at 451; P. Zumbansen, 'Transnational Law as Socio-Legal Theory and Critique: Prospects for "Law and Society" in a Divided World', (2019) 67 *Buffalo Law Review* 909.

[22]A. C. Cutler, 'Locating Private Transnational Authority in the Global Political Economy', in Zumbansen, *supra* note 2, at 328; see Grisel, *supra* note 17, at 192; Zumbansen, 'The Continuing Search', *supra* note 17, at 14.

[23]See Lustig, *supra* note 20, at 174; Minas, *supra* note 2, at 70.

[24]See Zumbansen, 'The Continuing Search', *supra* note 17, at 17.

[25]N. Affolder, 'Transnational Law as Unseen Law', in Zumbansen, *supra* note 2, at 367.

[26]Ibid.

[27]C. A. Whytock, 'The Concept of a Global Legal System', in Zumbansen, ibid., at 81.

[28]See Cotterrell, *supra* note 8; Kanwar, *supra* note 9.

[29]See Scott, *supra* note 3, at 876; G. Calliess, 'Law, Transnational', *Comparative Research in Law & Political Economy. Research Paper No*. 35/2010, available at digitalcommons.osgoode.yorku.ca/clpe/102, at 3.

[30]G. Shaffer, 'Transnational Legal Process and State Change', (2012) 37(2) *Law & Social Inquiry* 229, at 233. See also C. Tietje and K. Nowrot, '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', in C. Tietje (ed.), *Philip C. Jessup's Transnational Law Revisited: On the Occasion of the 50th Anniversary of its Publication* (2006), 27, crediting Jessup with giving the term 'transnational law' 'concrete meaning'.

[31]See Affolder, *supra* note 25, at 367.

[32]L. C. Backer, 'The *Cri de Jessup* Sixty Years Later: Transnational Law's Intangible Objects and Abstracted Frameworks Beyond Nation, Enterprise, and Law', in Zumbansen, *supra* note 2, at 389.

[33]See Zumbansen, 'With and Beyond Jessup', *supra* note 11, at 12.

[34]See Affolder, *supra* note 25, at 367.

[35]G. Shaffer and C. Coye, 'From International Law to Jessup's *Transnational Law*, from Transnational Law to *Transnational Legal Orders*', in Zumbansen, *supra* note 2, at 126; see also Calliess *supra* note 29, at 4, writing that 'Jessup's approach must be understood in the light of the 1950s world-order', and specifically a 'bipolar world order [that] seemed to be set in stone'.

[36]See Zumbansen, 'With and Beyond Jessup', *supra* note 11, at 11.

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Not all of these tensions are necessarily irreconcilable, but they do suggest that a closer inspection of Jessup's proposal is warranted. On such inspection, I suggest, the predominant characterizations offer a largely unconvincing reading of *Transnational Law*. Unpacking the qualities and objectives that exist in tension helps show how this is so.

First, Jessup's normative orientation was not tilted in any meaningful respect toward the weak, but rather aligned with the interests of the powerful; the case for this conclusion is taken up in the following sections. Second, on closer inspection, *Transnational Law*'s analysis does not appear to reflect either serious empirical grounding or particular attentiveness to 'actualities'. It is true that it ostensibly builds up from particular real or hypothetical problems, beginning with a lecture on 'human problems' that sets the stage for its analysis through 'dramas' comprising two 'scenes', used to show commonalities between domestic and international situations. But that Lecture exhibits neither care to study carefully those problems, nor a serious attempt to comprehend their complexities. Consider, for example, its diagnosis of the independence movement of Morocco from France as being one of 'many human situations where those who are bound together, even for a long time, decide that they want to separate';[37] or its reframing the problem of poverty as relative, and thus 'characterized by some bitterness and by attitudes on the part of the have-nots which the haves consider quite unreasonable'.[38] While such analysis may be sufficient to invoke engagement with 'human problems', its characterization as in any meaningful sense empirical or engaged in actualities seems unwarranted.

The same may be said of his proposed solutions. Transnational law, according to the Lectures, would permit the allocation of power to deal with problems in a way that would be 'most conducive to the needs and convenience of all members of the international community',[39] and the application of law that would best reflect 'reason and justice'.[40] These may appear desirable functions of law, but absent concrete proposals as to how they can be achieved, it is difficult to see how they are functional or pragmatic. And *Transnational Law* offers very little in the way of such proposals: it leaves the allocation of jurisdictional power to be determined by a procedure 'amicably arranged among the nations of the world' and the choice of law necessary to materialize 'reason and justice' largely to 'common sense'.[41]

Third, it is doubtful that *Transnational Law*'s principal aim was definitional in the sense of creating a new classification for law. The description of transnational law for which the Lectures are often quoted is 'all law which regulates actions or events that transcend national frontiers'.[42] Frequently too, it is noted that *Transnational Law* included 'public and private international law', as well as 'other rules which do not wholly fit into such standard categories'.[43] If that conceptualization appears superficially distinct as a category or field, it becomes less so when considering Jessup's other, even more capacious, definitions of transnational law as 'both civil and criminal aspects ... what we know as public and private international law, and ... national law, both public and private',[44] and 'rules men live by'.[45]

In fact, the vision advanced in *Transnational Law* is one in which traditionally distinct spheres are increasingly traversed and lines blurred. It is exemplified, for instance, by the 'invasion' of corporate privacy through protection of minority stockholder rights or of the domestic realm by human rights[46] and the jurisdictional separation of criminal and civil matters.[47] Such boundaries,

[37]See Jessup, *supra* note 1, at 23–4.
[38]Ibid., at 32.
[39]Ibid., at 71.
[40]Ibid., at 106.
[41]Ibid., at 71, 107–8; see Section 5.3, *infra* for more on 'amicable arrangements'.
[42]Ibid., at 2; see, e.g., Whytock, *supra* note 27, at 73.
[43]See Jessup, *supra* note 1, at 2; see, e.g., Scott, *supra* note 3; see Zumbansen, 'With and Beyond Jessup', *supra* note 11, at 3–4.
[44]See Jessup, ibid., at 106.
[45]Ibid., at 8–9.
[46]Ibid., at 27–8.
[47]See Gammeltoft-Hansen and Aalberts, *supra* note 6.

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according to *Transnational Law*, were 'legal fictions' engendering intellectual confusion, and thus transnational law was necessary not to create another fiction, but to move away from seemingly neat and bordered legal classifications.[48] The more committed we are to a particular classification, the Lectures contended, 'the more our thinking tends to become frozen'.[49] Indeed, as he would later explain, Jessup foresaw a world in which much of law was 'submerged in an ocean of "transnational law"'.[50]

Fourth, *Transnational Law* was not concerned simply, or even primarily, with 'filling gaps', nor was it envisioning a law of the 'in-between'. That is evident from its expansive definitions of transnational law; its methodology, which was to show not that existing law failed to address transnational problems, but that existing distinctions within the law were untenable; and from its call not for law *capable* of regulating such problems, but law that was 'better suited' to that task.[51] In fact, the notion of a 'gap' in the law is seldom raised, and then in reference to international institutions.[52]

Finally, it is not apparent from *Transnational Law* that international law and public international institutions were at risk of withering in the face of the Cold War, and to the extent that it advocates international multilateralism, it is of a particular kind. For example, *Transnational Law* cites the proliferation of intergovernmental organizations as evidence of 'the almost infinite variety of the transnational situations which may arise'.[53] And the Soviet Union rarely featured in any of the three Lectures, and, when it did, it was not treated as a threat to world order, but instead as one of the sources of pressure that may stand in for the 'governmental instrumentality whose fiat is law'.[54] It was not the conflict between great powers that concerned Jessup, who believed that '[w]hen the action is taken by the haves it is normally legal action', but the conflict with the 'have-nots',[55] who may resort not just to the UN's General Assembly but 'to domestic violence, or to international war'.[56]

Rather, as the latter passage suggests, what most concerned Jessup were the demands of the 'have-nots'. The centrality to *Transnational Law*'s analysis of the 'problems' posed by anticolonialism and the growing power of the Third World is evident from the first of the Lectures, in which Jessup makes the case for transnational law through reference to the sort of problems it could help solve. The 'problem of extracting and refining oil' of the Third World is one of the situations said to exemplify the transnational.[57] All three 'dramas' deployed to draw parallels between domestic and international problems involve the Third World, including the 'pall[ing]' of the 'protected life' Morocco supposedly enjoyed under France,[58] indebted Eastern nations that 'tended to fasten the blame on the wealthy countries of the West',[59] and a UN General Assembly resolution asserting the Assembly's right to determine whether a territory had ceased to be non-self-governing. Reference to similar 'problems', such as the breakup of the German colonial empire after the First World War, the freeing of Italian colonies in North Africa after the

[48]See Jessup, *supra* note 1, at 70.

[49]Ibid., at 7.

[50]P. C. Jessup, 'The Use of International Law', *The Thomas C. Cooley Lectures, Eighth Series* (1958), 63.

[51]See Jessup, *supra* note 1, at 108.

[52]Of these, one 'flatly rejected the possibility of a judgment *non liquet* on the theory of the existence of a "gap" in the law' (ibid., at 89), another was a dissenting judgment (ibid., at 90–1), and the third concerned the Italian Court of Cassation noting how gaps in the substantive law of the International Institute of Agriculture may be filled (ibid., at 101).

[53]Ibid., at 4.

[54]Ibid., at 34; it is also referenced in relation to protective jurisdiction (ibid., at 50–1), and to a public international law study (ibid., at 62).

[55]A similar view was expressed by Jessup in P. C. Jessup, *A Modern Law of Nations: An Introduction* (1948), 31.

[56]See Jessup, *supra* note 1, at 32.

[57]Ibid., at 6.

[58]Ibid., at 17.

[59]Ibid., at 19.

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Second World War,[60] challenges to the administration of colonies,[61] and poverty framed as a problem pitting 'haves' against 'have-nots', consume much of the rest of the Lecture.

It is true that these are not the only problems identified by Jessup, but they predominate. Moreover, Jessup emphasized that his case for transnational law had political ends, the significance of which has often been overlooked. At the outset of his Lectures, Jessup not only distanced himself from Grotius's claim that anyone who thought he 'had in view any controversies of our own times ... will do me an injustice', but observed approvingly that 'scholars have not been without their influence on developments in international politics'.[62] In this respect, Jessup followed his earlier rejection of notions that there might be a dichotomy between law and diplomacy (and indeed delivered the Lectures as a Professor of International Law and Diplomacy).[63] Reading *Transnational Law* as a response to the 'controversies of [his] own times', and in particular the supposed problems posed by the Third World in a way that would preserve the domination of the 'have-nots' by the 'haves', takes Jessup's statements of intent on this point seriously.

3. Jessup and *Transnational Law* in historical context

Jessup's Storrs Lectures were delivered at a historical juncture when the idea that anticolonialism might augur a radical transformation of the international order in ways that challenged Western powers' dominance was gaining prominence. As Getachew has argued, while the decolonization process is conventionally treated as the progressive globalization of the nation-state, anticolonial nationalism represented a project of worldmaking.[64] To this end, anticolonial critics and nationalists 'reinvented self-determination reaching beyond its association with the nation to insist that the achievement of this ideal required juridical, political, and economic institutions in the international realm that would secure non-domination'.[65]

The decolonization project's potential attained powerful expression on the world stage in 1955, the year prior to Jessup's Lectures, in the form of the Bandung Conference. Named after the Indonesian city in which it was held, the conference brought together leaders of African and Asian countries whose populations collectively comprised roughly two-thirds of the world's people.[66] Held on home soil rather than in an imperial capital, it affirmed on the part of Third World states 'an ability to interpret, localise, formulate and strengthen the rules of international order'.[67] Such is evident in its final communiqué, which affirmed 'that the subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights' and declared 'that colonialism in all its manifestations is an evil which should speedily be brought to an end'; that '[t]he right of self-determination must be enjoyed by all peoples'; and that 'all nations should have the right freely to choose their own political and economic systems, and their own way of life'.[68] While its enduring influence remains the subject of debate,[69] its ambition was

[60]Ibid., at 23–4.

[61]Ibid., at 27–31.

[62]Ibid., at 10–11.

[63]See Jessup, *supra* note 55, at 3.

[64]A. Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (2019), 16.

[65]Ibid., at 2.

[66]L. Eslava, M. Fakhri and V. Nesiah, 'The Spirit of Bandung', in L. Eslava, M. Fakhri and V. Nesiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2016), 3, at 4.

[67]A. Acharya, 'Studying the Bandung Conference from a Global IR Perspective', (2016) 70(4) *Australian Journal of International Affairs* 342, at 353–4.

[68]*Final Communiqué of the Asian-African Conference of Bandung*, Ministry of Foreign Affairs, Republic of Indonesia, 24 April 1955.

[69]For more on that debate see Eslava, Fakhri and Nesiah, *supra* note 66.

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considerable, seeking not simply to further decolonization, but to establish that 'through a politics of anti-imperial solidarity, these new states would change the world order'.[70]

The Bandung Conference caused consternation amongst Western powers, particularly the US, which sought to influence it from the outside.[71] For these powers, the Conference was also understood to have juridical, as well as geopolitical, implications, as international law confronted the challenge of integrating states that did not necessarily accept its fundamental precepts and insisted on the need for it to accommodate alternative interests and legal and cultural traditions.[72]

That Jessup regarded these developments with concern requires little excavation. *Transnational Law*'s second 'drama' contains two 'scenes', pitting 'West v. East', the second of which begins as follows:

> In the 1940's and 1950's the newly independent nations of the East lived on an agricultural and raw-material producing economy. These Easterners had little capital and few industries. The ships which carried their products to the market were owned by Western business interests in New York, London, The Hague. Their national debts were owed to Western governments and their individual debts to local merchants and moneylenders who seemed equally remote from their interests. They were perplexed and looked eagerly about for something with which to find fault. They tended to fasten blame on the wealthy countries of the West, identified as the "colonial powers." They united politically as in the Asian-Arab-African bloc. They negotiated overseas with underdeveloped countries in Latin America. Their blocs were "anti-colonial" and they were "reform" movements ... They operated under slogans like "self-determination." To get a hearing they resorted to sensational charges and denunciations ....[73]

As might be inferred from his condescending characterization of these efforts and those pursuing them, Jessup was not a neutral observer of anticolonial movements. He had returned to academia three years earlier after a series of positions, detailed below, that placed him at the forefront of developing and implementing the US's own imperial worldmaking project. And along with representing the most powerful of those Western governments to whom national debts were owed, he had provided (and would continue to provide) his services to Western firms with interests in the Third World.[74]

Jessup's career has long been cited as an important influence in his scholarship.[75] Often, however, few details are offered beyond brief references to its mixture of legal practice, academia, and diplomacy to support the identification of a practical orientation in his scholarship.[76] Yet these experiences not only afforded Jessup an opportunity to study law's practical application, they placed him at the heart of constructing a postwar order that was to secure US dominance.

Jessup entered the legal profession at the tail end of a period in which international lawyers played a particularly influential role in American international relations.[77] After receiving his law degree in 1924 from Yale, he became assistant to the Solicitor of the State Department, before

[70]Ibid., at 26; see Acharya, *supra* note 67, at 353.

[71]See Acharya, ibid., at 342–57; Prashad, *supra* note 15, at 48.

[72]S. Pahuja, 'Letters from Bandung: Encounters with Another International Law', in Eslava, Fakhri and Nesiah, *supra* note 66, at 552; Anghie, *supra* note 13, at 201–3.

[73]See Jessup, *supra* note 1, at 19–20.

[74]See notes 80 and 174, *infra*.

[75]C. Fairman, 'Book Review: *A Modern Law of Nations*', (1949) 1(3) *Stanford Law Review* 581, at 585; see Minas, *supra* note 2, at 59; Zumbansen, 'With and Beyond Jessup', *supra* note 11, at 5; A. Browder, 'Philip C. Jessup: The Original Transnational Lawyer', in Tietje, *supra* note 30.

[76]See, e.g., Zumbansen, 'With and Beyond Jessup', *supra* note 11; see Affolder, *supra* note 25. For an exception see note 78, *infra*.

[77]See Koskenniemi, *supra* note 16, at 465–6.

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beginning the following year a Ph.D. and teaching role at Columbia University; he combined this academic work with practice at the New York law firm of Parker & Duryea, of which he remained a member from 1927 to 1943.[78] In 1930, he took a year's leave to serve as a legal advisor to America's Ambassador to Cuba.[79] Following his return, Jessup was hired by US companies seeking to influence the renegotiation of a reciprocity treaty with Cuba.[80] Along with prolific scholarly output, he stayed active in the international relations field, including through the Institute of Pacific Relations, an international body for co-operative research into 'Far Eastern problems', and its American affiliate, replacing a former US Secretary of War as their respective chairman in 1939.[81]

After the US's entry into the Second World War, Jessup, who had supported neutrality prior to Pearl Harbour,[82] assumed roles in institution-building for the postwar order. In 1943, he was named chief of training and personnel of the State Department's Office for Foreign Relief and Rehabilitation, which was absorbed into the United Nations Relief and Rehabilitation Administration.[83] He was then appointed Assistant Secretary-General for the Bretton Woods Conference the following year,[84] and in 1945 served as an adviser to the US delegation at the San Francisco Conference at which the UN was founded.[85]

Following San Francisco, Jessup returned for a brief stint to Columbia, leading to the publication in 1948 of the widely acclaimed *A Modern Law of Nations*, which developed Jessup's ideas on the future of international law.[86] That same year began a series of appointments that placed him at the leading edge of US foreign policy. From 1948 to 1949, he served as an alternate delegate to the UN Security Council with ambassadorial rank. Between 1949 and 1953, he assumed the role of America's ambassador-at-large,[87] while continuing as a US representative at the UN, leaving in 1953 to return to teaching at Columbia, where he would remain until being appointed to the International Court of Justice in 1961.[88]

Jessup's 1956 Storrs Lectures thus followed shortly on a series of positions that placed him 'close to the center of the stage'[89] for the construction of a postwar order in which the US assumed, as Jessup put it, its 'world-rôle as the nation most capable of determining the world's future'.[90] For a time Secretary of State Dean Acheson's 'key troubleshooter with foreign powers',[91] Jessup was an important executor of US foreign policy in various critical incidents, including in relation to the

[78]O. Schacter, 'Philip Jessup's Life and Ideas', (1986) 80(4) *American Journal of International Law* 878, at 880; E. Pace, 'Philip C. Jessup Dies; Helped End Berlin Blockade', *New York Times*, 1 February 1986.

[79]Schachter, ibid.

[80]M. Fakhri, 'The 1937 International Sugar Agreement: Neo-Colonial Cuba and Economic Aspects of the League of Nations', (2011) 24 *Leiden Journal of International Law* 899, 917.

[81]See Schachter, *supra* note 78, at 881.

[82]Ibid., at 881–2.

[83]Ibid., at 882.

[84]A. Lazarowitz, 'Philip Caryl Jessup', in C. J. Nolan (ed.), *Notable U.S. Ambassadors Since 1775* (1997), 195.

[85]See Schachter, *supra* note 78, at 882.

[86]See Jessup, *supra* note 55.

[87]See Lazarowitz, *supra* note 84, at 196; Minas, *supra* note 2, at 59. This period also saw Jessup come under attack by Senator McCarthy on allegations of pro-Soviet conspiracies and Communist associations, citing amongst other things earlier advocacy of non-intervention and of lifting an embargo placed on Republican Spain, and testimony as a character witness at the trial of Alger Hiss. In reflecting on why *Transnational Law* has avoided more critical scrutiny, it could be worth returning to Jessup's contemporary association with such positions and resulting attacks and how it may have shaped, in particular, earlier interpretations of his work. Jessup successfully refuted the allegations partly through reference to his work at the UN, where he had helped prevent Communist China's recognition, and an investigation by the Loyalty Board of the State Department cleared him of the charges, a finding confirmed by a Senate committee (see Lazarowitz, ibid., at 197; Schachter, *supra* note 78, at 886–7).

[88]See Lazarowitz, ibid., at 198.

[89]See Schachter, *supra* note 78, at 884; see also L. H. Burke, *Ambassador At Large: Diplomat Extraordinary* (1972), at 20–50.

[90]P. C. Jessup, 'Reviewed Work: Realities of American Foreign Policy', (1955) 70(1) *Political Science Quarterly* 131, at 133.

[91]R. Beisner, *Dean Acheson: A Life in the Cold War* (2006), 559.

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breakup of Europe's colonial empires,[92] and a prominent negotiator with Soviet representatives regarding the postwar settlement.[93] He served as editor-in-chief of the controversial White Paper, published in 1949, on US relations with China,[94] played an important role in the organization of NATO,[95] and participated in deliberations leading the US into the Korean War in 1950, for which he helped to formulate strategy.[96]

These experiences afforded Jessup intimate familiarity with the workings of imperialism, its nexus with law, and challenges to the dominant order posed by Third World states' independence.[97] Cuba's relationship to the US during Jessup's service there, described by Fakhri as neo-colonial, was one of economic exploitation and limited independence, subject to a US right of intervention secured through the Platt Amendment.[98] The Bretton Woods and San Francisco conferences established international frameworks through which Western, especially US, power was to be projected. The former, carefully orchestrated by the US, inaugurated a system of international economic governance that institutionalized US pre-eminence.[99] And while subsequent developments (expanded on below) reoriented the UN's early course, its form and structure reflected its origins as 'conceived and created by the great powers',[100] amongst which the US was ascendant.[101]

These institutional developments were in keeping with Jessup's view, expressed shortly after San Francisco in *A Modern Law of Nations*, that '[g]reat powers have power because they are great'.[102] Jessup's 1974 book, *The Birth of Nations*, recalling his role at the UN and as ambassador-at-large in the coming into being of newly recognized states, suggests that his subsequent diplomatic experiences only fortified his faith in that greatness.[103] While claiming 'a strong personal predilection for the aspirations' of those seeking independence, independence struggles rarely merit more than passing mention.[104] Rather, Jessup, the US, and/or the UN all at points assume the role of 'midwife',[105] a metaphor whose nurturing connotation accompanies its infantilization of the Third World, wherein, for example, Libya was 'put in the incubator', Vietnam's 'birth' may have resulted in a 'miscarriage', and Eritrea's disposition was 'a stillbirth'.[106]

Similarly suggestive of Jessup's perspective on the independence of racialized peoples, and the role that he and the US in particular performed in it, is the non-obstetrical evocation he thought may be achieved in entitling the book *The Birth of Nations*. It could bring to mind, he wrote, *The Birth of a Nation*,[107] D. W. Griffith's 1915 film in which the Ku Klux Klan is depicted as

[92]See Lazarowitz, *supra* note 84, at 199.

[93]See Schachter, *supra* note 78, at 883.

[94]See Lazarowitz, *supra* note 84, at 196.

[95]D. Acheson, 'Philip C. Jessup, Diplomatist', in W. Friedmann, L. Henkin and O. Lissitzen (eds.), *Transnational Law in A Changing Society: Essays in Honor of Philip C. Jessup* (1972), 3, at 9–10.

[96]See Lazarowitz, *supra* note 84, at 197–8.

[97]As noted below, the relationship between power and law was one he explored in some detail in an address delivered the year before his Storrs Lectures (P. C. Jessup, 'Power, Facts and Law', (1955) 49 *Proceedings of the American Society of International Law at Its Annual Meeting 1921-1969* 1.

[98]See Fakhri, *supra* note 79, at 911.

[99]See generally, S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), 14–15; R. Peet, *Unholy Trinity: The IMF, World Bank and WTO* (2009).

[100]E. Luard, *A History of the United Nations, Volume 1: The Years of Western Domination, 1945-1955* (1984), 68. See also M. Mazower, *No Enchanted Place: The End of Empire and the Ideological Origins of the United Nations* (2013), 68–9, arguing that it constituted 'the effort by anxious elites to shore up a liberal world order that would be compatible with empire and Anglo-American hegemony for decades to come'.

[101]P. C. Jessup, *The Birth of Nations* (1974), 13.

[102]See Jessup, *supra* note 55, at 30.

[103]See Jessup, *supra* note 101.

[104]Ibid., at 134. Anticolonialism, in the sense of breaking up European empires, was of course not inconsistent with the US's own imperial ambitions (see, e.g., Pahuja, *supra* note 99, at 60; Mazower, *supra* note 100).

[105]Ibid., at 41, 90.

[106]Ibid., at 154, 211, 236.

[107]Ibid., at 19.

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restoring order in the face of violence and lawlessness supposedly posed by emancipation in the US's post-Civil War South.[108] The film was campaigned against by the NAACP on its release, highlighting its racism; on its fiftieth anniversary, the NAACP's president publicly noted the endurance of 'the vicious image' of Black people 'etched by the Griffith racial epic'.[109] Nine years after that anniversary, Jessup would consider it 'a good title for a good picture and it suits the theme of this book'.[110]

Sustaining imbalances of power in the face of independence struggles required more than geopolitical 'midwifery', however. It also required legal adaptation in response to challenges to the dominant order.

4. The Third World drive for permanent sovereignty over natural resources

A core such challenge posed by Third World states following the Second World War concerned control of their natural resources. In classical international law terms, according to Brownlie, territorial possession of such resources did not in itself confer power on states, as the principle of consent and doctrines like alienability resulted in the transfer of their ownership and control to foreign interests.[111] Efforts to maintain or regain control over those resources by Third World states had proved largely unsuccessful, thwarted by, amongst other things, military force or the threat thereof, and international tribunals that consistently favoured foreign capital.[112] Not long into the postwar dispensation, however, a new front for this contest was opened through Third World states' assertion of permanent sovereignty over natural resources (PSNR).[113] Its initial development, which is of relevance for understanding *Transnational Law*, was pursued in 1952 through two initiatives that sought to use the UN as a forum to place the principle on secure footing.[114] One took the form of a draft resolution submitted by Uruguay to the UN General Assembly, the other a proposal by Chile for inclusion in the draft human rights covenants then before the Commission on Human Rights.

Just four brief paragraphs in total, Uruguay's draft resolution began '[b]earing in mind the need for protecting economically weak nations which are tending to utilize and exploit their own natural resources' and concluded by recommending, consistent with Article 1(2) of the UN Charter,[115] 'that Member States should recognize the right of each country to nationalize and freely exploit its natural wealth, as an essential factor of economic independence'.[116] Chile's proposal expressly conceived of PSNR as part of self-determination:

> The right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.[117]

[108]L. E. Ambrosius, 'Woodrow Wilson and The Birth of a Nation: American Democracy and International Relations', (2007) 18(4) *American Democracy and International Relations, Diplomacy and Statecraft* 689.

[109]Roy Wilkins, as quoted in S. Weinberger, '*The Birth of a Nation* and the Making of the NAACP', (2011) 45(1) *Journal* of American Studies 77, at 77.

[110]See Jessup, *supra* note 101, at 19.

[111]I. Brownlie, *Legal Status of Natural Resources In International Law (Some Aspects)* (1980), 253.

[112]K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013); see Sornarajah, *supra* note 14; J. T. Gathii, 'War's Legacy in International Investment Law', (2009) 11 *International Community Law Review* 353.

[113]N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997).

[114]One of the sources of debate was whether the initiative was necessary, with states such as Mexico and Haiti opposing Uruguay's draft resolution on the basis that it was not for the UN to pass judgment on an issue of 'unquestionable validity', which could in fact weaken states' sovereignty (UN Doc. A/C.2/SR.231 (6 December 1952), at 254, paras. 14, 24).

[115]This article stipulates as being amongst the purposes of the UN Charter '[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

[116]UN Doc. A/C.2/L.165 (5 November 1952).

[117]UN Doc. E/CN.4/L.24 (16 April 1952).

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Two threads run prominently through the arguments made in favour of these early PSNR initiatives. One is a conception of sovereignty that links political to economic independence, with the latter resting on jurisdiction constituted through a territorially delimited power, in particular over natural resources. Thus, Uruguay explained that 'if the economic and political liberation of peoples was sought, measures would have to be taken to enable them to exploit their natural resources themselves and for their own benefit'.[118] Similarly, Chile contended that 'under Latin American law sovereignty was fundamentally linked to economic conditions since the Latin American countries were fighting for political as well as economic sovereignty'.[119]

The second thread was the explicit juxtaposition of the interests of domestic communities with those of foreign capital. Uruguay, for example, emphasized that while 'private capital, the basis of modern society, should be respected … it was also necessary to protect the interests of the community'.[120] Iran linked Uruguay's draft resolution to its struggle with the UK for control over the Iranian oil industry, which had been in the hands of the British Anglo-Iranian Oil Company until Iran nationalized the industry in 1951. Noting that company's interference in Iran's domestic affairs,[121] Iran expressed concern more generally as to the power of the oil trusts, which could count on their governments, amongst other things, 'to impose their will on the countries in which they exercised or had exercised concession rights'.[122] And Chile explained that its proposal was designed 'to end the existing paradoxical situation in which the under-developed countries had to appeal desperately to the more advanced countries for hard currency while private investors from the latter were draining the under-developed countries' natural resources'.[123]

Predictably, Western states objected to these initiatives. Colonialism's end and the assertion of sovereignty by Third World states jeopardized access to raw materials which Western states were determined to maintain.[124] They articulated their objections in large part by picking up on, and responding to, the terms on which the initiatives were advanced. Thus, rejecting the inseparability of sovereignty, economic independence and jurisdiction constituted through territorially based power over natural resources – at least as it pertained to Third World states – they insisted that such resources belonged to the 'international community' and should be exploited as such, which necessarily meant a far more compromised notion of sovereignty. France's arguments against the Chilean proposal encapsulated this response, refusing to 'accept a conception of sovereignty which would legalize the autarchic practices of certain States which had a virtual monopoly of the raw materials indispensable to the international community' and defining the ultimate aim as being 'the rational exploitation of natural resources, [which meant that] some sovereignty would have to be surrendered'.[125]

The threat to private capital was similarly strongly felt, including by the US, which opposed the initiative. Its representative explained the US's vote against a revised draft submitted by Bolivia and Uruguay on the basis that 'it failed to recognize any reciprocal responsibility towards private investors whose property was expropriated as a result of nationalization'.[126] The representative later explained that the redrafted 'resolution may be interpreted by private investors all over the world as a warning to think twice before placing their capital in underdeveloped countries'.[127]

Despite this opposition, early momentum carried the initiative forward. In 1954, the Commission on Human Rights recommended that the General Assembly, under the aegis of the Economic and Social Council, establish a Commission to conduct a full survey of the right of

[118]UN Doc. A/C.2/SR.231 (6 December 1952), at 255, para. 10.
[119]UN Doc. E/CN.4/SR.260 (6 May 1952), at 11.
[120]UN Doc. A/C.2/SR.231 (6 December 1952), at 254, para. 9.
[121]Ibid., at 256, para. 37.
[122]Ibid., at 257, para. 39.
[123]UN Doc. E/CN.4/SR.260 (6 May 1952), at 6.
[124]See Sornarajah, *supra* note 14, at 51.
[125]UN Doc. E/CN.4/SR.260 (6 May 1952), at 9.
[126]UN Doc. A/C.s/SR.237 (11 December 1952), para. 41.
[127]UN Doc. A/PV.411 (VII) (21 December 1952), at 496, para. 176.

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peoples and nations to 'permanent sovereignty over their natural wealth and resources', which it termed a 'basic constituent of the right to self-determination'.[128] Though its conceptualization and emphases would change over time,[129] that momentum was maintained through to the 1970s, leading to the UN Declaration on Permanent Sovereignty over Natural Resources in 1962,[130] and the principle's inclusion in the New International Economic Order of 1974.[131]

By the time of Jessup's Lectures then, the relationship of Third World states to the international order could be understood to have coalesced in important respects, for the purposes of international law, around two themes. They involved an insistence on prizing open space for other legal traditions and customs rooted in the Third World and affirmation that sovereignty would manifest not merely formal equality, but the necessary means by which to achieve greater economic equality, including through its guarantee of power over one's own resources; that is, the jurisdiction to decide how, in whose interests, and to what extent, they would be used.[132]

5. *Transnational Law* as a response to Third World states' independence

Jessup's time at the UN overlapped with the launch of the PSNR initiative. By the time of the Storrs Lectures, the arguments advanced in its support had begun to crystalize. As explained, they rested on the knitting together of sovereignty, jurisdiction, and territorially defined power over natural resources. These are precisely the relationships that *Transnational Law* seeks to unravel. For Jessup, it would be power, understood neither as territorially delimited nor as legally constituted through sovereignty, that ought to dictate both the decision-maker and the rules applied. If the international legal order was to be transformed, it would be to accommodate laws not originating from the Third World, but from those whom the PSNR initiative sought particularly to constrain: private actors with the power to generate them.

In what follows, I show how *Transnational Law* achieved this result through three steps. The first was to transform 'human problems' into problems in search of a legal solution, thus shifting them from the politically contestable realm into that of regulatory governance. The second was to uncouple jurisdiction from both sovereignty and territorially delimited power, and reconstitute it as simply the power to 'deal with problems', its limits set by the established 'balance of power', and the problems resolved by law determined by the authority with 'the power to control the decisions of those who sit in judgment'.[133] The third was to legitimize the role of private, especially economically powerful, actors in the creation of law, placing them on an effectively equal footing with the states seeking to constrain them.

5.1 Human problems in search of a legal solution

Though claims framed in terms of law formed an important component, Third World states' efforts to reshape the international order and its law relied primarily on the projection of collective solidarity and political agency.[134] The Bandung Conference demonstrated the potential of both,

[128]UN Doc. E/2573/CN.4/705 (April 1954), at 37.

[129]See Schrijver, *supra* note 113, at 149; J. Linarelli, M. E. Salomon and M. Sornarajah, *The Misery of International Law Confrontations with Injustice in the Global Economy* (2018).

[130]General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent Dovereignty over Natural Resources'.

[131]The Resolution on the Establishment of a New International Economic Order was passed at the Sixth Special Session of the General Assembly on 1 May 1974. Declaration on the Establishment of a New International Economic Order, A/Res/5-6/3201 (1 May 1974).

[132]See Anghie, *supra* note 13, at 211.

[133]See Jessup, *supra* note 1, at 107.

[134]For more on the limits of international law as a means to constrain imperial power during this period see S. Pahuja and C. Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited', in J. Crawford et al. (eds.), *The International Legal Order: Current Needs and Possible Responses, Essays in Honour of Djamchid Momtaz* (2017), 53.

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and the rise of those excluded from international law's development had rapidly transformed the General Assembly into a 'triumph of politics over law'.[135] It is significant, therefore, that *Transnational Law* begins by making the case for law as the means of resolving 'human problems'.

It has been suggested that certain 'scenes' invoked in the first Lecture to draw parallels between domestic and international problems involve 'doctrinally challenging, legal conflicts'.[136] Yet beyond perhaps a shareholder's attempts to participate in a company's decision-making, what is arguably most notable about the problems that *Transnational Law* identified with its 'dramas' is that they were *not* framed in legal terms nor clearly resolvable through law. Along with the aforementioned scenes, they include a woman's desire to separate from her dominant husband and efforts by less powerful states to exert influence at international fora or institutions. The same may be said of other problems raised in the first Lecture, such as poverty and colonial administration. These problems arise in each case from the exercise, and often abuse, of asymmetries of power, involve claims not merely to legal rights but to extralegal norms such as fairness, and are essentially political in the broad sense of the term.

It is, therefore, significant that while the first Lecture is on *human* problems, Jessup quickly shifts the frame, asserting that it is '[t]o the understanding of transnational *legal* problems we may then address ourselves'.[137] It is this elision, whereby human problems are in search of legal solutions, that allows Jessup to transform problems into 'relationships that call for regulation'[138] and thus shift them into the realm of governance.[139] Once there, he can begin the work of (re) articulating the rules of that realm.

5.2 Uncoupling sovereignty, jurisdiction, and territorially delimited power

The final two Lectures address, respectively, the questions of jurisdiction and choice of law. The second takes as its starting point the traditional intertwining of jurisdiction with sovereignty, opening with the Permanent Court of International Justice's *dictum* in *The Lotus* case that 'all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'.[140] Shortly thereafter, Jessup turns to the US domestic decision of Justice Holmes in *Banana Co.* v. *United Fruit Co.*[141] that similarly links sovereignty to jurisdiction, while making explicit their nexus to territorially delimited power. It involved, Jessup observes, 'the only too familiar game of influencing the political action of the local foreign governments, in this case Colombia, Panama, and Costa Rica'.[142] As the acts complained of by Banana Company occurred in Central America, Justice Holmes found them to be outside US jurisdiction. The decision exemplified for Jessup 'the territorial point of view which was long dominant in Anglo-American legal thought',[143] and informed Justice Holmes' assertion that '[j]urisdiction is power'.[144]

Having thus set up the linkages amongst sovereignty, jurisdiction and territorially delimited power, Jessup sets out to uncouple them. He explains that in equating jurisdiction to power, Holmes was not referring to actual power, for 'if jurisdiction is power', then 'it is perfectly clear

[135]See Mazower, *supra* note 100, at 26.

[136]P. Zumbansen, 'Transnational Law', *Comparative Research in Law & Political Economy Research Paper No. 9/2008*, available at digitalcommons.osgoode.yorku.ca/clpe/181/, at 739.

[137]Ibid., at 11 (emphasis added).

[138]C. G. Fenwick, '*Transnational Law* Review', (1957) 51(2) *American Journal of International Law* 444, at 444.

[139]See Scott, *supra* note 3, at 859.

[140]See Jessup, *supra* note 1, at 35; *SS Lotus case (France v. Turkey),* PCIJ Rep Series A No 10, at 19.

[141]*American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

[142]See Jessup, *supra* note 1, at 40.

[143]Ibid., at 39–40.

[144]Ibid., at 39.

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that in those days the United States had as much power in Costa Rica as it had in West Virginia'.[145] Thus, Justice Holmes was referring to a particular conception of power, one that was determined by and exercised through sovereignty, because he said that Costa Rica acted 'by virtue of its sovereign power' and '[t]he very meaning of sovereignty is that the decree of the sovereign makes law'.[146]

But, Jessup reasons, while Holmes might have repeated the principle that 'the sovereign makes law only within its own territory where ... its jurisdiction is "necessarily exclusive and absolute"', the current state of affairs was such that 'the sovereign's power is neither exclusive nor absolute within its own territory, and that is true whether one is talking in terms of legal or extralegal power. Nor is its power (jurisdiction) confined to its territory'.[147] Rather, following an exposition of the ways in which traditional jurisdictional bases represent little more than legal fictions that are 'a syphilis which runs in every vein and carries into every part of the system the principle of rottenness',[148] Jessup concludes that the 'power element in jurisdiction amounts only to this, namely the possibility that the state's action will be effective'.[149] Yet even 'effectiveness is not a universal criterion of jurisdiction', as evidenced by trials *in absentia* and governments in exile.[150] Ultimately, therefore, the limits on jurisdictional power derive not from 'territoriality or personality or nationality or interest, *per se*', but may be found in 'a balance of power, which it has been found appropriate and convenient to establish among the states of the world'.[151]

The knitting together of jurisdiction, sovereignty and territorially delimited power has thus been unwound. Transnational law's function, in Jessup's telling, is then to deal out that jurisdiction, starting not 'with sovereignty or power but from the premise that jurisdiction is essentially a matter of procedure that could be amicably arranged among the nations of the world'.[152] Of course, in dismissing power as a starting point, he is not denying but redefining its relevance – the Lecture's title is, after all, 'The Power to Deal with the Problems' – as he has already indicated that balances of power set jurisdictional bounds.

Here then is a resolution to the PSNR question, one that gives effect to the Western powers' insistence that Third World states' sovereignty give way to an 'international community' interest in the exploitation of their resources. Sovereignty does not endow states with jurisdiction over their natural resources such that they may decide if or how those resources would be exploited; nor does territoriality. Rather, that decision is ultimately to be determined within the confines of the 'balance of power' that will in turn shape the procedure 'amicably arranged' amongst nations, a point which is developed further in Section 5.3 below.

Just as jurisdiction becomes uncoupled from sovereignty, so too in the final Lecture does law itself. Jessup begins the task by considering the *forum non conveniens* principle to show that in some cases, courts may have, yet choose not to exercise, jurisdiction, while noting certain instances where international or transnational complications may arise. He identifies two such complications, which are again illustrative of the concerns animating his analysis. One is where

[145] Ibid., at 40.

[146] Ibid., at 40–1.

[147] Ibid., at 41.

[148] Ibid., at 70, quoting Bentham as quoted in P. C. Jessup, 'International Law in the Post-War World', (1942) 36 *Proceedings of the American Society of Int'l L.* 46, at 48, 50.

[149] See Jessup, *supra* note 1, at 59.

[150] Ibid., at 62.

[151] Ibid., at 61. Jessup later explains, in terms that again are difficult to divorce from questions of power, politically conceived:

> The fundamental question is to determine which national authorities may deal effectively with which transnational situations – effectively in the sense that authorities of other states will recognize that the exercise of authority is reasonable and will therefore give effect to judgments rendered or refrain from protests through the diplomatic channel. The old traditional bases of territoriality, nationality, and the like were well grounded historically but have developed beyond the boundaries of their historic justifications largely through the use of legal fictions. (Ibid., at 70)

[152] Ibid., at 71.

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there are 'deep substantive cleavages separat[ing] national views', such as regarding international cartels and combines, leaving business managers uncertain as to under whose jurisdiction they fall;[153] the other arises from 'certain ingrained notions of sovereignty or territoriality and certain suspicions and fears about the courts of other countries'.[154] In such instances, Jessup concludes, 'a more rational approach to the problem of choice of law could be adopted'.[155]

For this, Jessup turns to international tribunals, 'where jurisdiction is not an issue, but where there is a problem of choice of law in the broad, nontechnical sense of that term'.[156] Jessup's lens, ranging across various international tribunals, focuses particularly on the decision of Lord Asquith in an arbitration concerning an oil concession in Abu Dhabi. The passages that Jessup highlights acknowledged that the contract, 'made ... and wholly to be performed in' Abu Dhabi, would normally be subject to the law of that state. However, the quoted excerpt continued, because 'it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments', the contract 'prescribe[s] the application of principles rooted in the good sense and common practice of the generality of civilized nations – a sort of "modern law of nature"'.[157] These, it turned out, included 'some of the rules of English law' because they were 'so firmly grounded in reason'.[158]

Anghie notes that this decision is 'now regarded with a certain embarrassment' in the field of arbitration,[159] but from it Jessup derived the principle that he proposed for governing choice of law, that of '*lex conveniens*'.[160] Jessup makes little effort to reconcile how such a principle might be employed in the domestic context, asserting simply that while '[j]udges in national courts do not have the same freedom in determining what law to apply ... their process of making new case law is not fundamentally very different from the international judge's resort to the general principles of law', as they are known to use, for instance, the 'wisdom of the founding fathers', or the 'rule of reason'.[161] Thus, Jessup may conclude:

> There is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from [public and private international and national law] the rule considered to be the most in conformity with reason and justice for the solution of any particular controversy. The choice should not be determined by territoriality, personality, nationality, domicile, jurisdiction, sovereignty, or any other rubric save as these labels are reasonable reflections of human experience with the absolute and relative convenience of the law and of the forum – *lex conveniens* and *forum conveniens*.[162]

The objection Jessup then considers is not the legitimacy of law chosen by these means, but is rather that 'one purpose of law is certainty'.[163] Lest decisions 'be rendered according to the whim of the judge who in his travels may have become fascinated by the tribal customs of Papua', Jessup concludes that the law must be specified '[b]y the authority which has the power to control the decisions of those who will sit in judgment'.[164] This authority may be found in legislatures, the

[153]Ibid., at 76.
[154]Ibid.
[155]Ibid.
[156]Ibid.
[157]Ibid., at 81.
[158]Ibid., at 81–2.
[159]See Anghie, *supra* note 13, at 226.
[160]See Jessup, *supra* note 1, at 81.
[161]Ibid., at 96.
[162]Ibid., at 106–7.
[163]Ibid., at 107.
[164]Ibid.

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joint will of states, resolutions of the UN General Assembly, or the courts themselves.[165] He acknowledges, however, that it will mean reliance on the 'robust common sense' of judges,[166] a turn of phrase reminiscent of Lord Asquith's use of 'good sense and common practice' to arrive at a *lex conveniens* that leaves no room for the law (if counted as such) of 'primitive' regions.

Jessup's acceptance that the law must be specified by 'the authority which has the power to control the decisions' begs the question of how different this really is from how law was already being specified. Indeed, the statement seems little more than a re-articulation of the claim that jurisdiction is power. Yet, whereas Justice Holmes' reference to power grounded it in sovereignty, Jessup's does not, defining it instead as simply control over decisions, limits to which he has established are to be determined by balances of power.

5.3 Elevating private interests

As noted, it has been suggested that Jessup was insufficiently alive in *Transnational Law* to the importance of power asymmetries and the role transnational law would play in empowering private interests.[167] That suggestion, as I have sought to show, is implausible in light of his prior work. It is also inconsistent with what I argue here was Jessup's third step in *Transnational Law*, namely to empower private interests, achieved through two complementary maneuvers. The first was to elevate economic actors as sources of (transnational) law; the second was to centre professionals as legal drivers.

It is true that economic interests are not the sole focus of *Transnational Law*. At the outset, Jessup notes that transnational situations may involve a range of actors, including individuals, corporations, (organizations of) states and other groups,[168] as may the generation of rules that could amount to law.[169] Moreover, in using maritime law as a 'helpful precedent' to guide the process of developing transnational law, *Transnational Law* did not elevate the commercial initiatives above those involving states, and cites a range of actors, including the ILO and League of Nations, as contributing to the field's development.[170] Indeed, Jessup suggests methods for developing transnational law could include negotiation of international conventions and the adoption of identical legislation, as well as private agreements, and observes that various international and transnational organizations are accustomed to solving transnational problems.[171]

Yet Jessup was cognizant that in extending the capacity to generate transnational law to non-state actors, some would be better placed to take advantage of ensuring that such law was 'better suited' to their interests.[172] As he put it when envisioning international law's trajectory in *A Modern Law of Nations*, while all subjects of the law, extending beyond the state, 'would be guaranteed equal protection of the law ... equal capacity for rights would still differ with factual criteria'.[173] That earlier work also indicates that he appreciated the power imbalances enjoyed by powerful economic interests – which he had assisted and would continue to assist[174] – observing

[165]Ibid.

[166]Ibid., at 107–8, quoting from *National Fruit Product Co. v. Dwinnel-Wright Co.*, 47 F. Supp. 499, at 504 (D. Mass. 1942).

[167]See sources cited at note 22, *supra*.

[168]See Jessup, *supra* note 1, at 3.

[169]Ibid., at 8–9.

[170]Ibid., at 109–11.

[171]Ibid., at 110–12.

[172]Jessup does not explain precisely what he means by 'better suited' to transnational situations, though he does cite efforts to reverse the rule of jurisdiction set in *The Lotus* case as a good example of new law created when 'the old law ... does not reflect the interests and desires of that part of the community particularly affected' (ibid., at 111). Jessup's approach clearly begs the questions of how it is determined which community is 'particularly affected' and how their interests and desires are represented, which are difficult to answer absent considerations of power and influence.

[173]See Jessup, *supra* note 55, at 31.

[174]These included Texaco in its influential arbitral challenge to Libya's nationalization of its oil industry (see Grisel, *supra* note 17, at 195). Jessup was also amongst the US international lawyers whose 1958 report on behalf of the American Branch of the International Law Association supported foreign investment protection (American Branch of the International Law

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instances in which 'the private corporation may even be factually in a more advantageous position than the government with which it deals'.[175]

Moreover, the 'amicable arrangements' – which, as noted, Jessup regarded as a preferable means by which to determine jurisdiction – involving powerful economic actors are frequently held up as exemplary by *Transnational Law*. Such arrangements are not, for instance, those of the 'the Asian-Arab-African bloc [that] negotiated overseas with underdeveloped countries of Latin America',[176] which ultimately demonstrated the problem of 'antagonisms' with Western powers.[177] They do, however, include commercial agreements addressing 'the problem of extracting and refining [the] oil' of the Third World,[178] such as the 1928 'As-Is' agreement reached by leaders of Western corporations. A US Senate Subcommittee had found that this formed both the basis of the 'international cartel agreement ... to forestall competition' and, with similar agreements that followed, 'an integral part of the pattern of concentrated big-company control over world oil resources and trade';[179] *Transnational Law*, quoting Berle, cites it as the 'most successful experiment in economic world government thus far achieved in the twentieth century'.[180] They also included the 1954 agreement to which the Imperial Government of Iran was a party, parceling out Iran's oil amongst US and European corporations, which according to *Transnational Law* represented the 'settlement', after a UK- and US-backed coup in 1953, of the 'problem' arising from Iran's nationalization of its oil industry.[181] While *Transnational Law* does not therefore propose any one mechanism by which the procedure governing jurisdiction is to be 'amicably arranged', it does foreground the interests that one might expect to have influential seats at the table.

Finally, powerful economic actors were to be advantaged through the prominence of legal professionals in advancing the cause of transnational law, which for Jessup was not simply the inevitable consequence of an expanded role for law, but necessary to ensure that political impediments did not stand in the way.[182] Acknowledging that the prospects of advancing his proposal through political means were bleak given the 'ponderous tread of governmental action', Jessup urged that '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'.[183] The way forward depended on 'the minds of men' – and not just any men, but 'those who are trained, particularly in our law schools and graduate schools of political science'.[184] With such professionals, whose services have long been integral to securing the interests of powerful economic actors, to do the lifting,[185] broader political backing would be rendered unnecessary, as transnational law's subsequent development has in many respects borne out.[186]

Association, 'Response to the Questionnaire of the International Committee on Nationalization, 1958', in *Society to Advance the Protection of Foreign Investment*, Publication No. 3 (1960), 81–96; for more on the significance of this report see N. M. Perrone, *Investment Treaties & the Legal Imagination: How Foreign Investors Play by Their Own Rules* (2021)).

[175]See Jessup, *supra* note 55, at 33.

[176]See Jessup, *supra* note 1, at 19–20.

[177]Ibid., at 19, 24.

[178]Ibid., at 6.

[179]United States Congress, Senate, Select Committee On Small Business, Subcommittee on Monopoly, The International Petroleum Cartel: Staff Report to the Federal Trade Commission, 82nd Congress, 2nd session, Washington, DC: U.S. Government Printing Office (1952), at 197.

[180]See Jessup, *supra* note 1, at 13–14, citing A. A. Berle, *The 20th Century Capitalist Revolution* (1954), 147.

[181]See Jessup, ibid., at 14.

[182]Positioning scholars and practitioners to be driving forces of law's development is a consistent theme in Jessup's writing: P. C. Jessup, 'The Reality of International Law', (1940) *Foreign Affairs*; and 'International Court of Justice and Legal Matters', (1947–1948) 42 *Illinois Law Review* 273; see also Singh, *supra* note 12. One function served by *Transnational Law* was to counter the risks of undue 'political and constitutional provincialism' on the part of the US (see Jessup, *supra* note 1, at 112).

[183]See Jessup, *supra* note 1, at 113.

[184]Ibid., at 108.

[185]K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

[186]S. Quack, 'Legal Professionals and Transnational Law-Making: A Case of Distributed Agency', (2007) 14(4) *Organization* 643; see Perrone, *supra* note 174.

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6. Conclusion

Reading *Transnational Law* as contended for here helps to explain some of the tensions in the scholarship noted in Section 2. That transnational law is commonly associated with the 'institutional formations of globalized business interests' is not at odds with Jessup's normative orientation, but consonant with it.[187] *Transnational Law*'s transformation of human problems into legal problems, and hence ones of ostensibly depoliticized governance, lends itself to a discourse of 'practicality' that deals in 'empiricism' and 'actualities', even if the analysis itself lacks those qualities.[188] And of course, in dissociating law from its grounding in sovereignty, Jessup raised questions as to what 'law' itself means.[189] Moreover, while the turn to technocratic governance has meant that transnational law's advance is often pursued by identifying regulatory or governance 'gaps' that must be 'filled' by some new regime and/or actor(s),[190] encouraging that advance did reflect grand ambitions, only they were geared to the threat that a rising Third World posed to the dominant order, not East-West hostilities.

More than just aiding understanding of his work and how it has helped shape transnational law, revisiting Jessup may also inform efforts to challenge the imperial worldmaking project of which he was a part, including those seeking to put transnational law to more progressive ends.[191] For instance, while transnational law tends to inspire a juxtaposition of public and private authority,[192] *Transnational Law* encourages alertness to how they function in tandem to achieve particular objectives. As noted, Jessup advocated beginning with particular problems to be solved, and then considering how law may serve that end, dispensing with strict boundaries in the process.[193] Just as Third World states' assertions of sovereignty and efforts to construct a more equal international order challenged the dominance of both Western states and corporations, effectively undercutting them involved the combined efforts of those states and corporations.[194] A world awash in de-territorialized law was long envisaged as a means to facilitate private power even as its construction and maintenance depended on states,[195] and it was what Jessup foresaw for transnational law.[196] *Transnational Law* thus prompts reflection on not just how private and public authority interact, but the functions served by their disarticulation.

Further, revisiting *Transnational Law* indicates the importance of understanding law as a politically contestable sphere that is constituted by, and (re)constitutes, social relations and power,[197] and in which the matter of *who* decides questions is often as important as – indeed, often determines – *how* those questions are decided. Jessup's ability to frame law's development and implementation as the task of supposedly technocratic governance and 'common sense' facilitated *Transnational Law*'s enduring stature and anticipated modern understandings that have obscured

[187]P. Zumbansen, 'Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method', in E. Christodoulidis, R. Dukes and M. Goldoni (eds.), *Research Handbook On Critical International Theory* (2019), 473, at 473.

[188]L. Mchugh-Russell, 'International Labor Law and Its Others: Governance by Norm versus Governance by Knowledge', (2019) 113 *American Society of International Law* 402, at 406.

[189]See Zumbansen, 'With and Beyond Jessup', *supra* note 11, at 12–13; Scott, *supra* note 3.

[190]R. Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization', (2002) 40(2) *Columbia Journal of Transnational Law* 209.

[191]See, e.g., *Nevsun Resources Ltd v. Araya*, 2020 SCC 5; U. Baxi, '*Nevsun*: A Ray of Hope in a Darkening Landscape?', (2020) 5(2) *Business and Human Rights Journal* 241.

[192]See Zumbansen, *supra* note 187.

[193]See Knöpfel and Lüth, *supra* note 10.

[194]K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (1965); see Linarelli, Salomon and Sornarajah, *supra* note 129.

[195]See Pistor, *supra* note 185; Perrone, *supra* note 174. As Slobodian notes, Jessup expressly drew on the work on an early proponent of neoliberalism, Philip Cortney, in Jessup, *supra* note 55, at 79 (Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018), 135).

[196]See Jessup, *supra* note 50, at 63.

[197]See, e.g., Pistor, *supra* note 185; B. Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (2018).

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the formative role that power plays; such apparent depoliticization may also have helped insulate the Lectures from more critical scrutiny.[198] Yet *Transnational Law* was not only expressly addressed to the question of who decides, but animated by an appreciation that answering that question would be integral to determining the balance of power and constituting relations within the postwar order.

Indeed, a common thread in Jessup's work is an attentiveness to the nexus between law and power. In considering the equation of jurisdiction with power in his second Lecture, Jessup referenced an address that he had delivered the year prior exploring that relationship.[199] In it, Jessup contended that law tempers power's worst, most violent expressions while laying the foundation, through inducing consent, for 'over-all political power'.[200] Law is, he explained, 'a pliable maiden yielding to the demands of ardent pursuers'.[201] The boundaries on those demands may be set by 'facts',[202] but even these offer only a partial constraint, for '[a]fter we corral them we can try to tame them with legal rules'.[203]

As I have argued, *Transnational Law* was such an effort, aiming to 'tame' problems posed by the Third World for the imperial foundations of an international order that would assure the preponderant power of Western states, particularly the US, and private capital. Considering Jessup's formative and sustained influence, appreciating how it pursued its aim can help in understanding the ways in which (transnational) law continues to serve elements of that order, and in thinking about how its ability to do so may be effectively undone.

[198]G. C. Shaffer and M. A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', (2010) 96 *Minnesota Law Review* 706, at 728–9; A. A. Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism', (2000) 41 *Harvard International Law Journal* 419, at 439; J. Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis', (2020) 129 *Yale Law Journal* 1784. It was also observed in an early review of *Transnational Law* that although the Lectures' implications were far-reaching, their presentation was 'so moderate, so craftsmanlike, such a skillful blend of old and new, that one hopes even the most timid and myopic may be beguiled into inching forward' (N. B. Katzenbach, '*Transnational Law* Review', (1957) 24(2) *University of Chicago Law Review* 413, at 417).

[199]See Jessup, *supra* note 1, at 39, fn. 10.

[200]See Jessup, *supra* note 97; see also Jessup, *supra* note 55, at 2.

[201]See Jessup, *supra* note 97, at 7.

[202]Ibid.

[203]Ibid.

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