SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2017-02

From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders

Chapter IN: The Many Lives of Transnational Law: Critical Engagements With Jessup's Bold Proposal. Peer Zumbansen, editor, Cambridge University Press, 2020, Forthcoming

Gregory Shaffer

gshaffer@law.uci.edu

University of California, Irvine ~ School of Law

Carlos Coye

ccoye@lawnet.uci.edu

J.D. Candidate, University of California, Irvine ~ School of Law

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From International Law to Jessup's *Transnational Law*, From Transnational Law to *Transnational Legal Orders*

By Gregory Shaffer and Carlos Coye¹

A. INTRODUCTION

In his path breaking 1956 Storrs Lectures, Judge Philip Jessup shifted attention from international law, as governing relations between states, to transnational law, as governing transnational activities. He famously defined transnational law as “all law which regulates actions or events that transcend national frontiers,” which includes public international law, private international law, and “other rules which do not wholly fit into such standard categories.”² Much recent scholarship on transnational law has focused on that residual category of “other rules” and their “private” character.³ There has, however, been a parallel revolution in public international law since Jessup’s lectures, which needs to be theorized in transnational terms. It is best done through shifting attention from the concept of *transnational law* to the concepts of *transnational legal ordering* and *transnational legal orders*.

Jessup wrote of the concept of transnational law as problem solving during the Cold War when hope in public international law and public international institutions had withered. Jessup had served on the United States delegation to both the 1943 Bretton Woods conference that led to the creation of the International Monetary Fund and World Bank, and the 1945 San Francisco charter conference that created the United Nations. By 1956, however, the prospect of international institutions and international law as problem-solvers had collapsed. Jessup himself had been investigated and attacked as a communist sympathizer by U.S. Senator Joseph McCarthy, undermining Jessup’s reputation and explaining the Senate’s refusal to approve him as the U.S. representative to the United Nations.⁴ Jessup turned to analyze other means of fostering international problem solving through the concept of transnational law that incorporated, but went beyond public international law. Jessup’s lectures focused primarily on private international law. As reflected in his three lectures’ titles (“The Universality of Human Problems,” “The Power to Deal with the Problems,” and “The Choice of Law Governing the Problems”), Jessup was drawn to private international law’s functional ability to resolve individual transnational “problems” (lecture 1) through its decentralized system of allocating jurisdictional “power” among national courts (lecture 2), which, in turn, use “choice of law” techniques to decide on the applicable law (lecture 3).

¹ Gregory Shaffer is Chancellor’s Professor of Law, University of California, Irvine School of Law; Carlos Coye is a labor attorney at the law firm Rothner, Segall & Greenstone and a graduate of the University of California, Irvine School of Law.

² PHILIP JESSUP, *TRANSNATIONAL LAW* (Yale University Press, 1956).

³ Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 *ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE* 231 (2016).

⁴ Oscar Schachter, *Philip Jessup’s Life and Ideas*, 80:4 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 879, 885-889 (1986).

This article has two main targets for its audience: first, it responds to theorists who conceive of transnational law either exclusively or predominately as a private lawmaking phenomenon, and second, it addresses the relation of public international law to the concepts of transnational legal ordering and transnational legal orders. The article's thesis is two-fold. First, the scope of public international law has exploded since Jessup's time, arguably more than the other two prongs of his conceptualization.⁵ Second, we should shift our conceptual analysis from *transnational law* as a body of law addressing transnational problems, to transnational legal ordering and transnational legal orders, so as to capture these processes' deeper political, social, and legal implications. The term *transnational legal ordering* refers to the transnational construction, flow, settlement, and unsettlement of legal norms in particular domains.⁶ By *transnational legal orders*, we mean "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions" in these domains.⁷ These developments in public international law and their implications have catalyzed a populist backlash, which could, at least in the near term, lead to a renewed turn toward the other two prongs of Jessup's concept, private international law and private rulemaking (Part E).

This article shows how public international law has become a much more central component of transnational law and transnational legal ordering since Jessup wrote, and now increasingly permeates state boundaries. Formally, international law does so when it has direct effect in national legal systems, when it is enacted by state legislatures in statutes or adopted by state regulators as administrative regulations, and when it shapes national courts' interpretation of national law.⁸ Informally, public international law also has significant effects through iterative processes engaging international organizations, soft law norms, indicators, information-sharing, expert consultation, peer review, and other technologies of governance that facilitate social interaction and produce and diffuse knowledge, norms, and practices that transnationally shape law and legal ordering. Private actors are central in driving the development and application of international law, as when they participate in norm-making that is eventually incorporated into international law, when they bring claims before national courts derived from international law, and through their practices that apply and interpret these norms.

The result is much deeper implications of international law than ad hoc problem solving applied to transnational situations as theorized by Jessup. International law deeply implicates what the state does (in relation to the market and social ordering), states' institutional architecture (by affecting the allocation of authority among executives, legislatures, courts, administrative bodies,

⁵ To recall, the three prongs are public international law, private international law, and other rules.

⁶ Gregory Shaffer, *Transnational Legal Ordering and State Change*, in: Gregory Shaffer (ed.), *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE* (Cambridge University Press, 2013), 1, 5-9.

⁷ Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in: Terence C. Halliday & Gregory Shaffer (eds.), *TRANSNATIONAL LEGAL ORDERS* (Cambridge University Press, 2015), 3, 5 (elaborating the concept); Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in: Halliday & Shaffer, *TRANSNATIONAL LEGAL ORDERS*, 475.

⁸ Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 514 (2015); Pierre-Hugues Verdier & Mila Versteeg, *Modes of Domestic Incorporation of International Law*, in: Wayne Sandholtz & Christopher A. Whytock (eds.) *RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW* (Edward Elgar Publishing, 2017), 149 (comparing national judicial systems regarding "how treaties and custom are received and interpreted, and their status vis-à-vis other sources of domestic law"). For highly cited cases regarding the doctrine of avoiding non-compliance with international law through statutory construction, see *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (in the U.S. legal system); *Case C-61/94 Commission v. Germany* 1996 E.C.R. I-3989, ¶ 52 (in the E.U. legal system).

and central and federal institutions), the role of professions and private parties in governance (creating new professional stakes), mechanisms of accountability (including to international bodies and transnational networks of public officials and private stakeholders), and social identities.⁹

This article follows Jessup in asserting that real-world problems should be the starting point for analysis. However, it problematizes the conceptualization of problems as involving human agency, so that the problems themselves should be viewed as social and political constructs that, in turn, shape legal responses. With Jessup, we also contend that public international law is a part of the study of transnational law. Yet we build from his analysis by focusing on international law's permeation of national legal systems and local practices so that international law is not viewed on a separate plain, as conventionally viewed in the international relations/international law scholarship, but rather as part of a recursive transnational legal process.¹⁰ While a major prong of transnational legal theorizing rightly focuses on private law and private lawmaking (which are important and critical areas of study), public law components of transnational law also remain central and critically important.¹¹

B. THE CONCEPTUAL TURN FROM TRANSNATIONAL LAW TO TRANSNATIONAL LEGAL ORDERS: TWO EXAMPLES

Once we turn from assessing transnational law as law applied to transnational problems to assessing processes of transnational legal ordering and the development of transnational legal orders, we cannot start with a stipulated problem, but must ask how that problem was framed. Problems are not natural since issues can exist for long periods before they are conceptualized as problems, much less as “transnational problems.” That conceptualization reflects shifting ideologies and interests over time.¹² Law responds to such conceptualizations, and thus the very definition of a problem shapes the ensuing legal response to it. This section illustrates our thesis with two examples, one involving powerful actors and the other marginalized groups, and both engaging a combination of bottom-up, top-down, and recursive processes. The first involves intellectual property law norms advanced by powerful countries and private actors. The second involves indigenous rights norms advanced by marginalized groups, including against powerful states and commercial interests.

I. Intellectual Property as a Transnational Legal Order

Take first the example of intellectual property, which for a long time was a relatively sleepy, self-contained regime, including at the time Jessup wrote. Under the 1889 Paris Convention for the Protection of Industrial Property, countries were given great discretion regarding the content of

⁹ Gregory Shaffer (ed.), *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE* (Cambridge University Press, 2012); Gregory Shaffer, *How the World Trade Organization Shapes Regulatory Governance*, 9:1 REGULATION AND GOVERNANCE 1 (2015); Harold Hongju Koh, *Transnational Legal Process*, 75:1 NEBRASKA LAW REVIEW 181 (1996).

¹⁰ Halliday & Shaffer, *TRANSNATIONAL LEGAL ORDERS*, 5, 18-21, 37-42; Koh, *Transnational Legal Process*, 183-86.

¹¹ Shaffer, *Theorizing Transnational Legal Ordering*, 231 (providing a critical literature review of different modes of theorizing the transnational).

¹² Halliday & Shaffer, *TRANSNATIONAL LEGAL ORDERS*, 7-11. For an example, see Gregory Shaffer, Nathaniel H. Nesbitt & Spencer W. Waller, *Criminalizing Cartels: A Global Trend?*, in: John Duns, Arlen Duke & Brendan Sweeney (eds.), *COMPARATIVE COMPETITION LAW* (Edward Elgar Publishing, 2015), 301-344 (noting the shift in the conceptualization of cartels as evil).

patent law as long as they applied it on a non-discriminatory basis.¹³ In the 1980s, however, a group of private entrepreneurs in the United States formed a national association and then a transnational network of private stakeholders to enroll the United States to press other countries to link intellectual property law to trade agreements.¹⁴ The movement successfully prompted the U.S. government to amend its national trade regulation (Section 301 of the 1974 Trade Act) to authorize U.S. unilateral sanctions against countries that did not protect U.S. intellectual property rights. The United States then used this leverage to press countries to agree to common public international trade law rules to protect intellectual property, such as patents, in return for the United States not acting unilaterally as prosecutor, judge, and executioner of trade law. The movement successfully gave rise to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO) in 1995. Encountering resistance at the level of implementation in many countries, the United States continues to press for new requirements and review mechanisms through bilateral and plurilateral agreements and mechanisms.

The TRIPS Agreement is transnational law, in Jessup's definition, in that it resolves a transnational problem—that of a conflict between U.S. industrial and commercial interests and developing countries regarding the recognition of intellectual property and the payment of royalties. Yet, the TRIPS Agreement is also transnational in a deeper sense as reflected in the socio-legal concepts of “transnational legal ordering” and “transnational legal orders.” These concepts help unpack how the problem was framed (as a private property right implicating trade), by whom (by U.S. and European private parties and their governments), and where the legal response derived (from norms developed in U.S. and European law). And it shows the immense transnational implications of the change in international law—including the creation of new institutions to monitor enforcement at the multilateral level, giving rise to new transnational accountability mechanisms under a particular normative frame; the creation of new institutions within states to ensure compliance with TRIPS obligations (such as patent examining agencies and administrative bodies and courts to hear and enforce patent claims); and the rise and empowerment of new professions of patent examiners and intellectual property lawyers who have a professional stake in the application of these legal norms. These developments, moreover, are dynamic, involving interactions with domestic institutions, professions, commercial interests, and social movements over time.

To give one example of domestic transformations, China did not recognize the concept of intellectual property until recent decades, yet today it has created and expanded intellectual property institutions, trained judges and administrators in these issues, and intellectual property is now an important part of curricula in its law schools. Between 1997 and 2011, patent filings in China increased 3,245 percent. China increased the number of patent examiners in its State Intellectual Property Office, rising from 2,700 patent examiners in 2007 to 6,000 in 2011.¹⁵ By

¹³ Laurence Helfer, *Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines*, in: Halliday & Shaffer, *TRANSNATIONAL LEGAL ORDERS*, 311; Gregory Shaffer & Susan K. Sell, *Transnational Legal Ordering and Access to Medicines*, in: Ruth L. Okediji & Margo A. Bagley (eds.), *PATENT LAW IN GLOBAL PERSPECTIVE* (Oxford University Press, 2014), 97-126.

¹⁴ JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (Cambridge University Press, 2000), 203-204.

¹⁵ Shaffer, *How the World Trade Organization Shapes Regulatory Governance*, 1. Regarding similar processes in India, see Gregory Shaffer, James Nedumpara & Aseema Sinha, *State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering*, 49:3 *LAW AND SOCIETY REVIEW* 595 (2015).

2016, the numbers increased to over 9,000 patent inspectors in China,¹⁶ who received 6,058,575 applications for recognition of Chinese patents (based on inventions), and who granted 1,464,115 patents.¹⁷ China is now the largest issuer of patents in the world, surpassing the United States.¹⁸ In 2017, it ranked second in terms of international patent applications and third in terms of international trademark registrations.¹⁹

At the judicial level, China created specialized intellectual property divisions within courts and, in 2014, specialist intellectual property courts in Beijing, Shanghai, and Guangzhou.²⁰ These courts have directly applied the TRIPS Agreement in dozens of private disputes.²¹ In 2015 alone, these specialist courts concluded 9,872 cases.²² In 2018, China decided to establish a specialized intellectual property court of appeal at the national level in order to foster uniform jurisprudence in intellectual property law.²³ Housed in the Supreme People's Court and headed by its Vice-President, the new court will hear all appeals against patent-related decisions from lower courts from January 1 2019.²⁴ In three years, it is expected that appeals on other intellectual property cases, such as copyright and trade secrets, also will be made to the new court.²⁵ Paradoxically, China "has emerged as the world's most litigious country in the intellectual property area," with 16,010 new patent cases, 37,946 new trademark cases, and 137,267 new copyright cases reportedly filed in 2017.²⁶ These developments are remarkable and involve much more than "transnational problem solving."

These developments in China are not simply foreign "transplants." From a top-down vantage, the government created its own domestic "indigenous innovation" policies to the consternation of the United States and Europe.²⁷ From a bottom-up perspective, Chinese

¹⁶ 中华人民共和国国家知识产权局 (STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C.), 年度报告 (ANNUAL REPORT) (2016), 43, available at <http://www.sipo.gov.cn/gk/ndbg/2016/201705/P020170505541250020396.pdf>.

¹⁷ STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., ANNUAL REPORT, Distribution of Inventions (Table 1) and Distribution of Grants (Table 4) (2016), available at <http://english.sipo.gov.cn/statistics/2016/12/>.

¹⁸ World Intellectual Property Organization, *Who Filed the Most PCT Patent Applications in 2017?*

¹⁹ *Who Filed the Most Madrid Trademark Applications in 2017?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_madrid_2017.pdf; *Who Filed the Most PCT Patent Applications in 2017?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_pct_2017.pdf.

²⁰ Kristie Thomas, *ASSESSING INTELLECTUAL PROPERTY COMPLIANCE IN CONTEMPORARY CHINA* (Palgrave Macmillan, 2017), 143 (on specialized courts).

²¹ Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110:2 AMERICAN JOURNAL OF INTERNATIONAL LAW 269, 286-287 (2016).

²² Thomas, *ASSESSING INTELLECTUAL PROPERTY COMPLIANCE*, 144.

²³ People's Court News Media Corporation, *The Supreme People's Court Issued the 'Regulations on Certain Issues of the Intellectual Property Tribunal*, SUPREME PEOPLE'S COURT, Dec. 28, 2018, <http://www.court.gov.cn/zixun-xiangqing-137461.html>.

²⁴ The Beijing News, *The Supreme Law Intellectual Property Court Unveiled the Relevant Cases in Accordance with the Law*, TENCENT, Jan. 1, 2019, <https://new.qq.com/omn/20190101/20190101A0FHFB.html>.

²⁵ Guo Liqin, *SPC establishes IP Court, Paving the Road for a Uniform National Appeal Court*, YICAI, Oct. 23, 2018, <https://www.yicai.com/news/100045081.html>.

²⁶ Supreme People's Court of the People's Republic of China, *The Status of Judicial Protection of Intellectual Property Rights in Chinese Courts 2* (2017-2018), <https://chinaipr2.files.wordpress.com/2018/06/2017e799bde79aace4b9a6-2018041.docx>; Peter Yu, *Building Intellectual Property Infrastructure Along China's Belt and Road*, 14 UNIVERSITY OF PENNSYLVANIA ASIAN LAW REVIEW 8 (Forthcoming 2019).

²⁷ Office of the United States Trade Representative, *Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act*

individuals invested in new professional careers focused on intellectual property and Chinese companies hired and worked with them. In parallel, domestic constituencies that embraced intellectual property protection and became rights holders engaged in information campaigns and enforcement actions.²⁸ They worked to shape public awareness and attitudes towards intellectual property, including among new generations of Chinese. In addition, as the Chinese became wealthier, consumers became more interested in consumer protection, such as against trademark fraud.

In other words, new public international law supported the dynamic development of a *transnational legal order* for the governance of intellectual property that shaped state institutions and professions which, in turn, interacted with new constituent demands.²⁹ Once one turns from the concept of transnational law (and the more formalist connotation that concept conveys) to those of transnational legal ordering and transnational legal order, one shifts one's focus to the deeper processes through which legal norms are constructed, framed, propagated, resisted, adapted, settled, and unsettled.

II. Indigenous Rights as an Emerging Transnational Legal Order

The indigenous rights movement provides an example of how traditionally marginalized groups within states also have been able to harness public international law to develop and transform legal norms and accountability mechanisms within states. We illustrate these processes in a small developing country in Central America (Belize) and a highly industrialized country in East Asia (Japan). In these cases, indigenous groups (the Maya and Ainu respectively) have been able to use evolving public international law to advance their aims through transnational processes.

1. The Maya in Belize. In 2007, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous People (UNDRIP).³⁰ UNDRIP, in combination with regional instruments and regional and international organizations, played a major role in catalyzing the Belizean state's recognition of the communal property rights of the Maya of Southern Belize. The Maya of Southern Belize, namely the Ke'kchi and Mopan Maya, have been practicing traditional land use and occupation since pre-colonial times, giving rise to claims of customary land rights. The Belizean government, however, refused to recognize these claims, and began granting logging concessions and oil exploration licenses in the mid-1990s.³¹

In the 2000s, the Maya found allies for the recognition of their land rights in regional institutions and Belizean courts by making claims under international law. Because of the initial judicial inertia in Belize, and with the hope that an international body's finding in their favor would jumpstart domestic courts handling their claims, leaders of the Maya rights movement petitioned the Inter-American Commission on Human Rights of the Organization of American States (OAS)

of 1974, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Mar. 22, 2018, <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF> [USTR Section 301 Report], 16.

²⁸ Thomas, *ASSESSING INTELLECTUAL PROPERTY COMPLIANCE*, 139.

²⁹ Helfer, *Pharmaceutical Patents and the Human Right to Health*, 322-324; Shaffer & Sell, *Transnational Legal Ordering and Access to Medicines*, 103-115.

³⁰ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

³¹ Aurelio Cal et al. v. Attorney General of Belize, Claims Nos. 171 and 172 (Supreme Court of Belize, Judgment of 18 October 2007), ¶ 18, *available at* http://www.belizejudiciary.org/web/supreme_court/judgements/2007/Claims%20Nos.%20171%20and%20172%20of%202007%20%28Consolidated%29%20re%20Maya%20land%20ri ghts.pdf.

in August 1998.³² They requested that the Commission find that Belize was violating the human rights of the Maya under the 1948 American Declaration of the Rights and Duties of Man, and to make recommendations to resolve and prevent any future violations.³³ The Inter-American Commission investigated and issued a merits report, delivered in October 2004, finding that the government of Belize had violated the Maya's communal property rights under Article XXIII of the American Declaration. It maintained, "the right of property has an autonomous meaning in international human rights law," which include "indigenous communal property . . . grounded in indigenous custom and tradition."³⁴ It also found that the Mopan and Ke'kechi Maya people demonstrated communal property rights to the lands they inhabit in the Toledo district, and Belize's government violated these rights by failing to demarcate the Maya's lands and by granting, without first consulting the Maya, logging and oil concessions that could lie within these lands.³⁵ The report cited case law of the Inter-American Court of Human Rights, opinions of the UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, and the Inter-American Commission, and provisions of international human rights law.

Unsatisfied with the government's response, the Maya continued litigation before the Belize Supreme Court. In 2007, Chief Justice Conteh of the Supreme Court recognized that the Commission report was not binding, but found it "persuasive" for his determinations,³⁶ and "fortified" his conclusions.³⁷ In his decision, the Chief Justice dedicated an entire section to the Belizean government's obligations under international law, which the government had violated. He observed that Belize is a party to, and bound by, a series of international treaties that require the recognition and respect for indigenous peoples' property rights, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Charter of the OAS.³⁸ He cited determinations of UN human rights bodies on these issues, including the UN Committee on the Elimination of All Forms of Racial Discrimination, which found that non-recognition of indigenous people's rights violates CERD's prohibition against discrimination.³⁹ He noted "that both customary international law and

³² Christina Coc, Director and Co-Founder of the Julian Cho Society, *Address at Native American Law Students Association at University of California, Irvine School of Law Symposium: Blood Quantum, Sovereignty, and Identity: Contemporary Legal Battles in Indigenous Communities* (Mar. 24, 2017).

³³ *Maya Indigenous Communities and Their Members v. Belize*, Case 12.053, Admissibility Report No. 78/100, ¶ 6 (2000), available at <http://cidh.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm>.

³⁴ *Maya Indigenous Communities and Their Members v. Belize*, Case 12.053, Merits Report No. 40/04, ¶ 117 (2004), available at <http://cidh.org/annualrep/2004eng/Belize.12053eng.htm>.

³⁵ *Id.* at ¶¶ 127, 153. The Commission also found violations of Article II of the American Declaration regarding equal protection of the law, and Article XXVIII regarding failure to provide judicial protection on account of undue delay. *Id.* at ¶¶ 171, 186, 192-196.

³⁶ *Aurelio Cal et al. v. Attorney General of Belize*, Claims Nos. 171 and 172 (Supreme Court of Belize, Judgment of 18 October 2007), ¶ 22, available at http://www.belizejudiciary.org/web/supreme_court/judgements/2007./Claims%20Nos.%20171%20and%20172%20of%202007%20%28Consolidated%29%20re%20Maya%20land%20rights.pdf.

³⁷ *Id.* at ¶ 100.

³⁸ *Id.* at ¶¶ 118-134. He wrote: "I conclude therefore, that the defendants are bound, in both domestic law in virtue of the Constitutional provisions that have been canvassed in this case, and international law, arising from Belize's obligation thereunder, to respect the rights to and interests of the claimants as members of the indigenous Maya community, to their lands and resources which are the subject of this case." *Id.* at ¶ 134.

³⁹ *Id.* at ¶ 123 (referencing General Recommendation XXIII: Rights of Indigenous Peoples, ¶ 5, U.N. Doc. A/52/18 annex V (Aug. 18, 1997)); *Id.* at ¶ 126 ("These considerations, engaging as they do Belize's international obligation towards indigenous peoples, therefore weighed heavily with me in this case in interpreting the fundamental human

general principles of international law would require that Belize respect the rights of its indigenous people to their lands and resources,” including as reflected in the 2007 UN General Assembly Declaration 61/295 on the Rights of Indigenous Peoples (UNDRIP).⁴⁰ He recognized that UNDRIP, as a General Assembly resolution, was non-binding, but concluded that, as it contains general international law principles and was adopted by over 143 states at the time, including Belize, it had special “resonance and relevance in the context of [the] case,”⁴¹ and the Government of Belize could not disregard it.⁴²

The Maya continued to press their legal claims before the Belize courts and the Caribbean Court of Justice (CCJ),⁴³ the final court of appeal in Belize, referencing international law. In 2014, in a claim challenging the Belize government’s granting of a permit for road construction and oil drilling in a national park, the Belize Supreme Court enjoined the government from proceeding until it consulted and obtained the prior consent of the Maya in relation to their property claims. It held that “it is incumbent on the Government of Belize to put in place the legal mechanisms necessary to recognize and to give effect to those rights belonging to the Maya which have already been recognized by . . . the International Commission of Human Rights” under the American Declaration.⁴⁴ It further held that “Belize, as a member state of the United Nations which voted in favor of the [UNDRIP] is clearly bound to uphold the general principles of international law contained therein” regarding consultation and prior informed consent.⁴⁵

In 2015, just before the Caribbean Court of Justice began hearing the final appeal, the Belize government entered a settlement in which it committed “to create an effective mechanism to identify and protect the property and other rights arising from Maya customary land tenure, in accordance with Maya customary laws and land tenure practices.”⁴⁶ As a representative of the Maya people told us, it was the condemnation before international bodies and domestic courts that created the pressure on the government to settle before the CCJ decided. In her words “while the government looks down on us domestically, when we are in the international front, it is hard for them to ignore us. And so we have used the international mechanisms strategically We are using a tool that does not belong to us to prove to the rest of the world that we exist and deserve full protection of the laws for our lands.”⁴⁷

Because of the settlement agreement, the CCJ only decided whether the government violated the Maya’s rights under the Belize Constitution and owed damages. In interpreting the

rights provisions of the Constitution agitated by the cluster of issues raised, particularly, the rights to property, life, security of the person, the protection of the law and the right not to be discriminated against.”).

⁴⁰ *Id.* at ¶ 127.

⁴¹ *Id.* at ¶ 131.

⁴² *Id.* at ¶ 132 (where the CJ references Article 26 of UNDRIP. According to Article 26, “States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”).

⁴³ The CCJ is Belize’s final court of appeal since 2010 when Belize amended its constitution to abolish appeals to the Judicial Committee of the Privy Council in London.

⁴⁴ *Sarstoon Temash Institute for Indigenous Management et al. v. Attorney of Belize*, Claim No. 394 (Supreme Court of Belize, Judgment of 3 April 2013), ¶ 13, *available at* <http://www.belizejudiciary.org/web/wp-content/uploads/2014/01/Supreme-Court-Claim-No-394-of-2013-Sarstoon-Temash-Institute-for-Indigenous-Management-et-al-v-The-Attorney-General-of-Belize-et-al-.pdf>.

⁴⁵ *Id.* at ¶ 13.

⁴⁶ *Maya Leaders Alliance et al. v. Attorney General of Belize*, CCJ Appeal No BZCV2014/002 (Caribbean Court of Justice, Judgment of 30 October 2015), ¶¶ 9-10, *available at* <http://www.caribbeancourtofjustice.org/wp-content/uploads/2015/10/2015-CCJ-15AJ.pdf>.

⁴⁷ *Coc, Address at Native American Law Students Association.*

Belize Constitution, the CCJ stressed that it was “aware of and accord[ed] great significance to relevant international law jurisprudence, particularly the 2004 Report of Inter-American Commission on Human Rights (the IACHR) which made findings on the application of Articles II and XXIII of the American Declaration on the Rights and Duties of Man (the American Declaration) to the claim by the Maya people to protection of their customary land rights (the *Maya Communities case*).”⁴⁸ It referenced rulings of the Inter-American Court of Human Rights, together with the Universal Declaration of Human Rights and the 2007 UNDRIP.⁴⁹ In the end, it found that the Belize Government had violated the Maya’s constitutional rights, and ordered the government “to establish a fund of BZ\$300,000.00 as a first step towards compliance with its undertaking” in its 2015 settlement with the Maya.⁵⁰ International law, in other words, provided tools that helped shift the balance of power between the Belizean state and indigenous groups through its penetration into the Belizean legal system, backed by oversight by regional and international institutions to which Belize is accountable.

Implementation was contested. After the CCJ’s decision, the Belizean government delayed, for several years, taking meaningful steps to pass legislation to effectuate the terms of the parties’ consent decree.⁵¹ The Belizean government continued to issue logging and oil exploration permits without first consulting with or receiving consent from the Maya. As a result, the Maya returned to the CCJ for further help in compelling the Belizean government to implement the consent decree and a dispute resolution framework.⁵² Because of the Belizean government’s foot-dragging in developing the legislative and administrative structure to demarcate, recognize, and protect Maya land rights, the Maya continue to utilize procedures before international bodies to pressure the Belizean government to adhere to its domestic, regional, and international legal obligations.⁵³ In light of the Maya’s persistence before the CCJ and international bodies, the parties are making progress in realizing the terms of the consent decree and the CCJ’s decisions.⁵⁴

2. The Ainu in Japan. Indigenous communities have mobilized throughout the world, including in countries that were not subject to colonial occupation and thus did not view themselves as constrained by indigenous rights law. For example, the Japanese government long viewed itself as a homogenous society, and refused to recognize the existence of the Ainu, an indigenous group on the island of Hokkaido, as a minority group, much less as one protected by indigenous rights. Indeed, so powerful were the government’s assimilationist policies that the Ainu

⁴⁸ *Maya Leaders Alliance et al. v. Attorney General of Belize*, CCJ Appeal No BZCV2014/002, ¶ 8.

⁴⁹ *Id.* at ¶¶ 54, 59.

⁵⁰ *Id.* at ¶ 79.

⁵¹ *Belize: Hearing at International Courts Demonstrates Belize’s Noncompliance in Landmark Maya Land Rights Case*, CULTURAL SURVIVAL, Oct. 26, 2017, <https://www.culturalsurvival.org/news/belize-hearing-international-courts-demonstrates-belizes-noncompliance-landmark-maya-land>.

⁵² Glenn Tillett, *Caribbean Court Justice “Exasperated” with GOB’s Delay in Implementing Maya Court Order*, AMANDALA, Feb. 24, 2018, <http://amandala.com.bz/news/caribbean-court-justice-exasperated-gobs-delay-implementing-maya-court-order/>; Micah Goodin, *CCJ Orders Barrow Administration to Get Serious About Respecting Maya Rights*, AMANDALA, Nov. 1, 2017, <http://amandala.com.bz/news/ccj-orders-barrow-administration-respecting-maya-rights/>.

⁵³ *Maya Leaders Alliance Advocates at United Nations Urging Respect for Rule of Law Belize*, CULTURAL SURVIVAL, May 8, 2018, <https://www.culturalsurvival.org/news/maya-leaders-alliance-advocates-united-nations-urging-respect-rule-law-belize>.

⁵⁴ *Progress in Maya Land Tenure Policy*, CHANNEL 5, Mar. 15, 2019, <http://edition.channel5belize.com/archives/182042>.

dropped the word Ainu from their association's name in 1961 because of the word's derogatory implications at the time.⁵⁵

In 1979, the Japanese government ratified both the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which required the Japanese government to report to these treaties' respective monitoring bodies.⁵⁶ The government also served on UN human rights committees, which placed it under more scrutiny from international human rights groups and bodies.⁵⁷ In 1980, when the government was required to submit its first mandatory report to the Human Rights Committee regarding minority rights protected under ICCPR Article 27, it brazenly claimed that "minorities of the kind mentioned in the Covenant do not exist in Japan."⁵⁸ In the meantime, the Ainu had visited and formed linkages with indigenous groups in North America and Scandinavia. These encounters helped catalyze and invigorate a greater sense of pride in their indigenous identity.⁵⁹ Japan's claim prompted the Ainu to organize a response. In 1986, with the assistance of an international non-governmental organization, the Ainu initiated a procedure before the new UN Human Rights Committee to report Japan's violations of the group's rights.⁶⁰

International human rights law helped transform the Ainu movement's sense of "actorhood" and empowered and opened new opportunities for it.⁶¹ In 1987, the Japanese government first acknowledged the Ainu as a distinct group.⁶² In 1992, it acknowledged that Ainu "may be called minorities under (Article 27)" of the ICCPR in its third report to the Human Rights Committee. In 1997, Japan enacted an Ainu Cultural Promotion Law.⁶³ By 2008, the year after UNDRIP's adoption, fearful of embarrassment at Japan's Universal Periodical Review before the UN Human Rights Council and from potential protests at the Hokkaido G-8 Summit, the Japanese Diet passed a unanimous resolution that acknowledged the Ainu as an indigenous group.⁶⁴ A year later, the Hokkaido Utari Association changed its name back to the Hokkaido Ainu Association out of a sense of pride and strengthened identity.⁶⁵ The Ainu's engagement, in turn, reciprocally helped consolidate indigenous rights norms and diffuse them for use by other indigenous groups in Asia.⁶⁶

Human rights activists and attorneys often use international institutions, such as the Inter-American Commission on Human Rights, the UN Human Rights Council, and the UN Human Rights Committee as leverage to bring countries to the table, including when they formally lose their human rights law claims in domestic courts. These bodies can be fruitful in affecting change

⁵⁵ Kiyoteru Tsutsui, *Human Rights and Minority Activism in Japan: Transformation of Movement Actorhood and Local-Global Feedback Loop*, 122:4 AMERICAN JOURNAL OF SOCIOLOGY 1050 (2017); KIYOTERU TSUTSUI, RIGHTS MAKE MIGHT: GLOBAL HUMAN RIGHTS AND MINORITY SOCIAL MOVEMENTS IN JAPAN (Oxford University Press, 2018).

⁵⁶ Tsutsui, *Human Rights and Minority Activism in Japan*, 1059.

⁵⁷ *Id.* at 1063.

⁵⁸ *Id.* at 1066.

⁵⁹ In his detailed empirical study, Kiyoteru Tsutsui concludes, "[i]f not for Ainu's encounter with international indigenous rights activities, it is highly unlikely that *movement initiation* would have happened for Ainu, especially as an indigenous rights movement." Tsutsui, *Human Rights and Minority Activism in Japan*, 1070.

⁶⁰ *Id.* at 1066-1067.

⁶¹ *Id.* at 1066-1069.

⁶² *Id.* at 1067.

⁶³ *Id.* at 1068.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1069.

⁶⁶ *Id.* at 1083.

and in obtaining favorable settlements for their clients.⁶⁷ As these case studies illustrate, by turning our conceptual focus to that of transnational legal ordering and transnational legal orders, we see how norms penetrate and shape law, legal practice, and social identity within states. International law, in sum, is not simply a technology that exists to solve discrete transnational problems; it shapes state law, institutions, professions, and social identity. It does so dynamically and recursively, often in response to considerable resistance.⁶⁸

C. PUBLIC INTERNATIONAL LAW'S BROADER SCOPE AND DEEPER IMPACT COMPARED TO JESSUP'S TIME

We started with concrete examples in two discrete subject areas of the broader and deeper implications of public international law today for law, institutions, professions, social identity, and accountability within states. Quantitative data illustrates the broader implications of public international law across most areas of social life since Jessup's time. International law has expanded far beyond inter-state relations, as then understood.⁶⁹ It is now a key component in transnational legal ordering and the creation of transnational legal orders.

In recent years, with the relative decline of U.S. and European economic power, the rise of emerging economies, and the turn to security concerns since the destruction of the World Trade Center in New York on September 11, 2001, some have posited a stagnation and decline of traditional modes of public international law. For example, in a 2014 article, Pauwelyn, Wessel, and Wouters argue, "formal international law is stagnating in terms both of quantity and quality."⁷⁰ They point to the decline in the number of new multilateral treaties deposited with the UN

⁶⁷ James L. Cavallaro, *Toward Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil*, 3:2 CHINA JOURNAL OF INTERNATIONAL LAW 481, 486-487 (2002) ("After eight years of litigation in which the Brazilian state consistently and repeatedly missed deadlines and failed to engage the system seriously, the Commission prepared a final report condemning the state of Brazil for violations of the American Declaration and the American Convention on Human Rights. Shortly before that report was in its final phase of consideration for publication, the Brazilian government expressed its interest in reaching a friendly solution."); James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102:4 AMERICAN JOURNAL OF INTERNATIONAL LAW 768, 787-788; 793 (2008); James L. Cavallaro & Emily J. Schaffer, *Less As More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS LAW JOURNAL 217, 238-239 (2004) ("In varying degrees, states in the Americas (and in the rest of the world) legitimate themselves through their insertion in international organizations, structures and discourse. This internal legitimization process can empower actors—whether social movements, NGOs, or lawyers—to the extent they are able to tap into the strength of international networks and intergovernmental oversight bodies . . . [T]he force of oversight bodies goes far beyond their legal powers, which are rarely, if ever, what matters most within the country whose abuses are subject to adjudication. It is the fact of international rebuke or condemnation that is of greatest import to those seeking to challenge state abuses within a given country.").

⁶⁸ Gregory Shaffer, *Transnational Recursivity Theory: A Review Essay of Halliday & Carruthers' Bankrupt*, 9:71 SOCIOECONOMIC REVIEW 371 (2011); Halliday & Shaffer, *Researching Transnational Legal Orders*, in: Halliday & Shaffer, TRANSNATIONAL LEGAL ORDERS, 500-503, 513-516. See *infra* Part E.

⁶⁹ Jessup, TRANSNATIONAL LAW, 1 (preferring the term transnational law because "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).").

⁷⁰ Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25:3 EUROPEAN JOURNAL OF INTERNATIONAL LAW 733, 733-734 (2014). In 2014, AJIL Unbound likewise organized a special Agora on "The End of Treaties?." Humberto Cantú-Rivera, *The Expansion of International Law Beyond Treaties*, AMERICAN JOURNAL OF INTERNATIONAL LAW UNBOUND, May 9, 2014, available at <https://www.asil.org/blogs/expansion-international-law-beyond-treaties-agera-end-treaties>.

Secretary General from an average of thirty-five treaties per decade between 1950 and 2000, to twenty from 2000 to 2010.⁷¹ They cite to parallel decreases in bilateral treaties, which dropped from 12,566 in the 1990s to 9,484 in the 2000s, treaties transmitted to the U.S. Senate, and international agreements reported to the U.S. Congress.⁷² Overall, they highlight a turn toward informal lawmaking through non-binding soft law.

These numbers, however, reflect neither a decline of public international law, nor in the ongoing role of treaties and (more broadly) other forms of international agreements. First, the number of new treaties is still significant. Second, the aggregate number of treaties continues to grow. The comparison with the number of treaties in Jessup's time is striking. In 1959, there were 7,779 treaties on deposit with the U.N. Secretary General, with 105 of them being multilateral treaties.⁷³ As of 2014, around 56,500 treaties were on deposit with the U.N. Secretary General,⁷⁴ with over 560 being multilateral treaties.⁷⁵ Third, Pauwelyn et al. did not include amendments, protocols, and annexes to treaties in their calculations.⁷⁶

Decline in the annual growth rate of new treaties also does not capture trends in state ratification of treaties across issue areas. In trade law, the original membership of General Agreement on Tariffs and Trade (GATT) was 23 countries when it was created in 1948; by the end of 2018, the WTO had 164 members.⁷⁷ In parallel, plurilateral and bilateral trade agreements proliferated. In 1956, there were only two preferential trade agreements notified to the GATT,⁷⁸ but by 2016, 419 were in force, and 625 had been notified.⁷⁹ For commercial arbitration, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards had only 25 parties on December 31, 1958, the year it went into effect, but 153 countries are parties today.⁸⁰ Ratification of the six core human rights treaties likewise increased significantly, rising by over 50% from 927 ratifications in 2000 to 1,586 ratifications by 2012. That number increases by about another 50% to approximately 2,000 ratifications if one includes the treaties' optional protocols.⁸¹

Likewise, there were no bilateral investment treaties (BITs) signed at the time of Jessup's lecture in 1956, as the first was signed between the Federal Republic of Germany and Pakistan in

⁷¹ Pauwelyn et al., *When Structures Become Shackles*, 734.

⁷² *Id.* at 735.

⁷³ Adolf Sprudz, *Status of Multilateral Treaties—Researcher's Mystery, Mess or Muddle?*, 66:2 AMERICAN JOURNAL OF INTERNATIONAL LAW 365, 365 (1962) (noting that these are just treaties on deposit at the U.N.).

⁷⁴ Introduction to Christian J. Tams, Antonios Tzanakopoulos & Andreas Zimmerman with Athene E. Richford (eds.), RESEARCH HANDBOOK ON THE LAW OF TREATIES x (Edward Elgar, 2014).

⁷⁵ Overview, UNITED NATIONS TREATY COLLECTION, available at https://treaties.un.org/Pages/Overview.aspx?path=overview/overview/page1_en.xml (last visited Apr. 2, 2019).

⁷⁶ Pauwelyn, et al., *When Structures Become Shackles*, 734.

⁷⁷ Understanding the WTO: The Organization, WORLD TRADE ORGANIZATION, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 2, 2019).

⁷⁸ World Trade Organization, *WTO Analytical Index* 88 (2012).

⁷⁹ Regional Trade Agreements, WORLD TRADE ORGANIZATION, available at https://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Apr. 2, 2019).

⁸⁰ Paolo Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8:3 AMERICAN JOURNAL OF COMPARATIVE LAW 283, 291 (1959); *Status of Treaties: Chapter XXII: Commercial Arbitration*, UNITED NATIONS TREATY COLLECTION, available at <https://treaties.un.org/pages>

[/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en](#) (last visited Apr. 2, 2019).

⁸¹ Navnethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System* 17 (2012), <http://www2.ohchr.org/english/bodies/HRTD/docs/HCTReportTBStrengthening.pdf> (last visited Apr. 2, 2019).

1959.⁸² Since then, the number soared to almost 2,500 by the end of 2005,⁸³ and then rose more slowly (as the number of remaining pairings decreased) to 2,860 BITs by mid-2013.⁸⁴ Overall, the international investment regime consists of more than 3,300 agreements, which includes over 2,900 BITs and over 350 other treaties with such investment provisions. Litigation has soared under them: In 1987, there was no recorded litigation under bilateral investment treaties, but by the 2018 the number had climbed to over 900, rising rapidly.⁸⁵

Ratifications of these treaties are not about ad hoc problem solving; rather, the aim is to reach deep within state law, institutions, and practices. Take human rights treaties, which is the subject of considerable empirical research. Elkins, Ginsburg and Simmons show their impact on national constitutions. After the passage of the Universal Declaration of Human Rights (UDHR) and the ICCPR, the number of rights found in national constitutions almost doubled.⁸⁶ The inclusion of a right in the UDHR correlates with its inclusion in a national constitution by as much as fifty percent.⁸⁷ After a country ratified the ICCPR, the similarity of the rights included in the constitution to those in the ICCPR increased by almost ten points, controlling for other factors.⁸⁸ In terms of state practice, Simmons shows that for states in a period of democratic transition, human rights treaties have significant effects by shaping executive agendas, supporting activist groups litigating before domestic courts, and mobilizing domestic support.⁸⁹ As regards the European Convention of Human Rights, Madsen shows its significant impacts within Europe.⁹⁰ Litigation before the European Court of Human Rights, for example, transformed the unwritten constitution of United Kingdom (U.K.).⁹¹ The U.K. “domesticated” treaty responsibility by

⁸² UNCTAD, *BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING*, (2007), 1, available at http://unctad.org/en/docs/iteiia20065_en.pdf. During this time, there were some commercial treaties, such as the U.S. signature of treaties of friendship, navigation and commerce, but they were not of the same nature in terms of the depth and breadth of commitments, and in terms of giving rights to private investors to directly bring claims against host states.

⁸³ *Id.*

⁸⁴ UNITED NATIONS, *INTERNATIONAL INVESTMENT POLICYMAKING IN TRANSITION: CHALLENGES AND OPPORTUNITIES OF TREATY RENEWAL*, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf.

⁸⁵ Since many cases are kept confidential, the number is higher in reality. For statistics, see UNCTAD, Investment Policy Hub, at <https://investmentpolicyhub.unctad.org/ISDS?status=1000>.

⁸⁶ Zachery Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54:1 HARVARD INTERNATIONAL LAW JOURNAL 63, 76-80 (2013) (while “nine constitutions written in 1947 contain an average of 17.6 rights, . . . the six written in 1949 contain an average of 31 rights”).

⁸⁷ *Id.* at 80.

⁸⁸ *Id.* at 87-88 (such as “controlling for the era and a country’s prior constitutional tradition vis-a-vis the ICCPR”).

⁸⁹ BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 112-155 (Cambridge University Press, 2009); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 22-25 (2012).

⁹⁰ Mikael Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW AND CONTEMPORARY PROBLEMS 141, 166-167 (2016) (“Institutionally, the ECtHR became a de facto constitutional court for most member states because the Convention—although in most dualist countries only having the status of statutory law—effectively governed human rights at a transnational constitutional level.”).

⁹¹ Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1:1 GLOBAL CONSTITUTIONALISM 53, 71-72 (2012) (“Under the UK Human Rights Act (2000), individuals may challenge all acts, including Parliamentary legislation; if a Parliamentary statute is found to be incompatible with the ECHR, the high courts are obligated to issue a ruling of incompatibility – but they may not set aside the offending legislative

shifting authority for it from the Foreign Office to the Home Office. The treaty also catalyzed the development of a new profession in the U.K., that of “specialized human rights lawyers,” which since spread to other European states.⁹²

Environmental law shows similar trends. The modern period of major international environmental agreements began in 1972 with the Stockholm Conference on the Human Environment.⁹³ Since then, the growth of international environmental law instruments increased steadily, with the number of multilateral environmental agreements more than doubling over the twenty years leading up to the 1992 UN Conference on Environment and Development in Rio de Janeiro.⁹⁴ As of July 2013, the International Environmental Agreements Database Project reports over 1,190 multilateral environmental agreements, 1,550 bilateral environmental agreements, and 250 other environmental agreements on deposit at the UN,⁹⁵ including nine new multilateral environmental agreements since 2012.⁹⁶ In contrast, no multilateral environmental agreements were in force at the time of Jessup’s lectures.⁹⁷

In addition, a decrease in the rate of new treaties does not indicate a decline in treaties’ role. The number of new amendments to the U.S. Constitution is non-existent, yet no one would suggest the end of U.S. constitutional law. Analogously, international courts and analogous bodies have proliferated, and they interpret and apply treaties to new contexts. According to Alter, if we exclude the GATT’s non-compulsory dispute system, only two operative permanent international courts existed in 1956 — the International Court of Justice (ICJ) and the European Court of Justice (ECJ).⁹⁸ By 1956, these two courts together had issued only twenty-two binding judgments.⁹⁹ In 1989, at the tail end of the Cold War, the number of permanent international courts increased to six.¹⁰⁰ Alter reports that by 2013 there were at least twenty-four permanent international courts that collectively issued 37,000 binding legal judgment.¹⁰¹ And over one hundred other international bodies interpret international rules, complementing these courts.¹⁰² In sum,

provisions. Declarations of incompatibility are addressed to the Parliament, which must indicate what remedial legislation, if any, will be proposed.”).

⁹² Madsen, *The Challenging Authority of the European Court of Human Rights*, 157.

⁹³ Daniel Bodansky, Jutta Brunnée & Ellen Hey, *International Environmental Law: Mapping the Field*, in: Daniel Bodansky, Jutta Brunnée & Ellen Hey (eds.), *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* (Oxford University Press, 2007), 1, 3.

⁹⁴ Peter H. Sand, *Evolution of International Environmental Law*, in: Bodansky, Brunnée & Hey, *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW*, 29, 35.

⁹⁵ *Data from Ronald B. Mitchell. 2002-2016, INTERNATIONAL ENVIRONMENTAL AGREEMENTS (IEA) DATABASE PROJECTS*, available at <http://iea.uoregon.edu/page.php?file=home.htm&query=static> (last visited Apr. 2, 2019) (Note that they started recording MEAs from 1950).

⁹⁶ *Id.*

⁹⁷ *Relationship between WTO and MEA Rules*, WORLD TRADE ORGANIZATION, available at https://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm (last visited Apr. 2, 2019).

⁹⁸ Karen J. Alter, *The Evolving International Judiciary*, 7 *ANNUAL REVIEW OF LAW AND SOCIAL SCIENCES* 387, 388 (2011);

E-mail from Karen J. Alter, Professor, Department of Policy Science, Northwestern University, to Gregory Shaffer, Chancellor’s Professor of Law, UC Irvine School of Law (Aug. 18, 2016) (on file with author).

⁹⁹ *Id.* The ICJ issued ten and the ECJ issued twelve. Even if we include the GATT’s sixteen decisions by 1956, these three adjudicatory bodies collectively only issued thirty-eight binding judgment by the time of Jessup’s lectures.

¹⁰⁰ Alter, *The Evolving International Judiciary*, 388.

¹⁰¹ KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (Princeton University Press, 2014), 4.

¹⁰² Alter, *The Evolving International Judiciary*, 388.

amendments, protocols, and annexes, coupled with treaty interpretation and application, show that international treaties continue to be used to respond to an expanding scope of contexts.

The work of Pauwelyn and others, moreover, posits not a move away from international public lawmaking, but rather a move to soft law and informal means of advancing transnational legal ordering. The institutional architecture for international lawmaking has broadened and deepened, giving rise to secondary lawmaking, and in particular involving soft law and informal modes of reporting and peer review to oversee implementation of these norms.¹⁰³ These developments have enhanced the scope and depth of international law across almost all areas of social life. In 1956, the year of Jessup's lectures, the UIA Yearbook of International Organizations reported there were 132 intergovernmental organizations (IGOs) and 985 international non-governmental organizations (INGOs).¹⁰⁴ By 2018, the numbers skyrocketed to at least 7,726 IGOs and 62,621 INGOs.¹⁰⁵ Even more importantly, early IGOs were much more constrained in their power and area of coverage.¹⁰⁶ IGOs now play a much more significant role in establishing norms, procedures, peer review mechanisms, dispute settlement, and other forms of intergovernmental interaction, coordinating resources and expertise.¹⁰⁷

The development of international institutions has empowered INGOs, who are their frequent interlocutors and partners. Intergovernmental organizations grant INGOs "observer or consultative status, access to documents, and even on occasion, other forms of institutional voice such as the power to distribute compromise legal texts during a treaty negotiation or to file amicus briefs in institutionalized dispute settlement forums."¹⁰⁸ INGOs, in turn, reciprocally help intergovernmental organizations by diffusing international hard and soft law norms through INGO networks within states, helping bring the norms home. They serve as intermediary norm conveyors.

These international organizations have been active in creating soft law, which aims to shape national law and practice. Such soft law affects governance of areas traditionally seen as strictly domestic, such as "financial regulation, consumer protection, and law enforcement."¹⁰⁹ Accurately measuring the amount of soft law is impossible, but there is general consensus that it has been on the rise for some time, with some arguing that it has become more important than hard

¹⁰³ Gregory Shaffer & Mark Pollack, *Hard and Soft Law: What have We Learned?*, in: Jeffrey L. Dunoff & Mark A. Pollack (eds.), *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: INSIGHTS FROM INTERDISCIPLINARY SCHOLARSHIP* (Cambridge University Press, 2012).

¹⁰⁴ *UIA Yearbook of International Organizations 2015-2016*, UNION OF INTERNATIONAL ASSOCIATIONS, available at http://www.uia.org/allpubs?combine=&field_pub_year_value=&items_per_page=20&page=8&order=field_uia_publication_nr_&sort=asc (last visited Apr. 2, 2019).

¹⁰⁵ *UIA Yearbook of International Organizations 2018-2019*, UNION OF INTERNATIONAL ASSOCIATIONS, available at https://uia.org/sites/uia.org/files/misc_pdfs/pubs/yb_2018_vol2_lookinside.pdf (last visited Apr. 2, 2019) (reports data collected in 2017). The UIA Yearbook defines an intergovernmental organization as one "composed primarily of sovereign states, or of other intergovernmental organizations." The Yearbook counts self-identified IGOs as IGOs. *Ibid.*, § 1.3.

¹⁰⁶ Esref Ertürk, *Intergovernmental Organizations (IGOs) and Their Roles and Activities in Security, Economy, Health, and Environment*, 8:37 JOURNAL OF INTERNATIONAL SOCIETY RESEARCH 333, 334 (2015) (as an example of an early IGO, the Central Commission for the Navigation of the Rhine established in 1815).

¹⁰⁷ JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (Oxford University Press, 2005), 589-619.

¹⁰⁸ Jose E. Alvarez, *Governing the World: International Organizations as Lawmakers*, 31:3 SUFFOLK TRANSNATIONAL LAW REVIEW 591, 597 (2008).

¹⁰⁹ Jean Galbraith & David T. Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL LAW REVIEW 735, 747 (2014).

law.¹¹⁰ The proliferation of transnational legal orders comes not just from formal public international (hard) law, but arguably even more from the explosion of soft law and the increased scope that soft law instruments and mechanisms provide for creating, expanding, and deepening transnational legal orders.

To view how a soft law process works, take the example of bankruptcy law. The UN Commission on International Trade Law (UNCITRAL) has created principles and model codes for bankruptcy law for all U.N. members. Those who participate most actively in the UNCITRAL process are only a handful of members, such as the U.S. and European Union (E.U.), complemented by professional associations, such as INSOL International (a global federation of national associations of insolvency accountants and lawyers) and specialized sections of the International Bar Association and the American Bar Association.¹¹¹ These actors help define the problems that need to be addressed, and set the legal norms to resolve them. Some of the problems are of a “transnational nature,” as contemplated by Jessup, in that some bankruptcies are multi-jurisdictional. Some of the impetus is also “transnational” because of broader concerns regarding economic spillovers if financial crises are not contained through improved national bankruptcy law. In all cases, however, the intended impact is much deeper than resolving discrete transnational problems, as with private law. Rather, the impact is to reach deep within the institutional architecture of the state, affecting the power of different state institutions, including executives, legislatures, courts, independent agencies, and professions regarding corporate bankruptcy law.¹¹²

D. THE INTERACTION OF PUBLIC INTERNATIONAL LAW WITH PRIVATE INTERNATIONAL LAW AND OTHER RULES IN TRANSNATIONAL LEGAL ORDERING

The concepts of transnational legal ordering and transnational legal orders do not examine public international law in isolation from Jessup’s other two components of transnational law: private international law and “other rules.” Public international law interacts with them as part of broader processes of transnational legal ordering, giving rise to the settlement and unsettlement of legal norms in transnational legal orders defined by functional as opposed to territorial logics.¹¹³ These transnational legal orders may be constituted by a mix of public international law, private international law, and private ordering. Some transnational legal orders rest on configurations that rely more on public international law and others less so. Empirical research is needed to assess variations and their relative importance for the institutionalization of legal norms in response to different types of social problems.

At times, public international law and institutions operate as orchestrators by delegating authority to and monitoring private legal ordering initiatives. Abbott, Snidal, and their collaborators trace such orchestration processes in the fields of international health, environmental,

¹¹⁰ Pauwelyn et al., *When Structures Become Shackles*, 738-744; Timothy Meyer, *Collective Decision-making in International Governance*, AMERICAN JOURNAL INTERNATIONAL LAW UNBOUND, Apr. 28, 2014, available at <https://www.asil.org/blogs/collective-decision-making-international-governance-agma-end-treaties>.

¹¹¹ Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm-Making and National Law-making in the Globalization of Corporate Insolvency Regimes*, 112 AMERICAN JOURNAL OF SOCIOLOGY 1135 (2007).

¹¹² Terence C. Halliday, *Architects of the State: International Organizations and the Reconstruction of States in East Asia*, in: Shaffer, TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE, 89, 89-120.

¹¹³ POUL KJAER, CONSTITUTIONALISM IN THE GLOBAL REALM: A SOCIOLOGICAL APPROACH (Routledge, 2014).

finance, telecommunications, and labor law.¹¹⁴ Reciprocally, private actors orchestrate public international law and institutions, as exemplified by the role of private actors behind the adoption of the TRIPS Agreement,¹¹⁵ in drafting legal texts such as for bankruptcy law,¹¹⁶ and in driving interpretation through directly bringing claims, such as under indigenous rights law and investment-state dispute settlement, or doing the legal work for states to bring claims such as in trade law.¹¹⁷ Public and private actors endorse and borrow from each other's texts to advance their goals. The WTO agreement on Technical Barriers to Trade, for example, incorporates the standards of the International Organization for Standardization (ISO); international investment tribunals reference the International Bar Association's guidelines for conflicts of interest and rules for taking evidence;¹¹⁸ and the International Tropical Timber Organization has endorsed the Forest Stewardship Council's standards.¹¹⁹ Reciprocally, GLOBALG.A.P, a private organization that certifies agricultural products, incorporates the Hazard Analysis and Critical Control Points (HACCP) guidelines published by the UN Food and Agricultural (FAO).¹²⁰

Public international law also interacts with private international law. It authorizes the privatization of dispute settlement through arbitration that displaces national courts. The 1958 Convention on the Recognition and Enforcement of Arbitral Awards recognizes, facilitates, and legitimizes these privatized processes.¹²¹ International treaties also govern some choice of law norms, whether regionally (in Europe and to a lesser extent Latin America) or functionally (in family law, with some developments in commercial law).¹²² Public international law, private international law, and private legal ordering are not simply alternative forms of transnational legal ordering. They shape, complement, and support each other.

E. RESISTANCE: THE RISE AND FALL OF TRANSNATIONAL LEGAL ORDERING

Transnational legal orders are not inexorable. They settle and unsettle; they rise and fall. They often, if not typically, encounter strong resistance.¹²³ Such resistance arises because of transnational legal ordering's deep implications within states, especially when involving public

¹¹⁴ KENNETH W. ABBOTT, PHILIPP GENSCHER, DUNCAN SNIDAL & BERNHARD ZANGL, *INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS* (Cambridge University Press, 2015).

¹¹⁵ BRAITHWAITE & DRAHOS, *GLOBAL BUSINESS REGULATION*, 87.

¹¹⁶ Halliday & Carruthers, *The Recursivity of Law*, 1148-1155.

¹¹⁷ GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (Brookings Institution Press, 2003) (on the private interests behind WTO claims); Sergio Puig, *Tobacco Litigation in International Courts*, 57:2 *HARVARD INTERNATIONAL LAW JOURNAL* 383 (2016); Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 *CONNECTICUT LAW REVIEW* 149 (2009).

¹¹⁸ See Pauwelyn et al., *When Structures Become Shackles*, 761.

¹¹⁹ Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113:2 *AMERICAN JOURNAL OF SOCIOLOGY* 297 (2007).

¹²⁰ Errol Meidinger, *Private Import Safety Regulation and Transnational New Governance*, in: Cary Coglianese, Adam M. Finkel & David Zaring (eds.), *IMPORT SAFETY: REGULATORY GOVERNANCE IN THE GLOBAL ECONOMY* (University of Pennsylvania Press, 2009), 233.

¹²¹ Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, 12 *BUSINESS AND POLITICS* 1 (2010); Gregory Shaffer & Terence Halliday, *With, Within and Beyond the State: The Promise and Limits of Transnational Legal Ordering*, in: Peer Zumbansen (ed.), *OXFORD HANDBOOK OF TRANSNATIONAL LAW* (Oxford University Press, forthcoming 2017).

¹²² Christopher A. Whytock, *Conflict of Laws, Global Governance, and Transnational Legal Order*, *UCI JOURNAL OF INTERNATIONAL, TRANSNATIONAL, AND COMPARATIVE LAW* (forthcoming).

¹²³ Halliday & Shaffer, *Researching Transnational Legal Orders*, 500-503.

law. Those marginalized from centers of power resist, as do powerful countries when they feel constrained. Resistance can come from any direction, locally, nationally, and transnationally, including through the engagement of other international organizations. Local actors may develop legal doctrines or extra-legal strategies to foil transnational powers.¹²⁴ Non-governmental groups may work to develop counter-norms at the international level, as done in the struggle to ensure access to medicines to thwart internationally required patent protection through pressing for responses from the World Health Organization and United Nations human rights committees.¹²⁵

Contests arise because of a transnational legal order's successes. Its institutionalization raises awareness that the stakes are high. The increased scope of public international law and its penetration into domestic legal systems can catalyze populist, nationalist responses, as illustrated in the United States and Europe, punctuated by the election of President Donald Trump in the United States, the vote in the United Kingdom to leave the European Union, and the rise of nationalist/populist parties and leaders in a number of E.U. countries, such as Hungary and Poland.¹²⁶ Ironically, the United States and Europe were the architects of much of the transnational legal ordering that has catalyzed such popular resistance.

Within national legal systems, legislatures and courts have raised screens to the legal effects of public international law. Verdier and Versteeg code domestic legal system's reception of international law, and find "that while domestic rules generally give the national executive the leading role in negotiating and concluding treaties, this power is increasingly constrained by legislative approval requirements, constitutional review of treaties, and other procedures that allocate authority—and sometimes veto power—to legislatures, courts and other domestic actors."¹²⁷ In the United States, the Supreme Court has created a presumption that international treaties do not create rights of action before domestic courts, and tightened doctrine regarding the direct effect of treaties in U.S. law without Congressional implementation.¹²⁸ The Court has signaled that constitutional allocations of power to sub-federal states could also limit U.S. domestic application of treaties,¹²⁹ and appellate court judges have signaled a narrowing of existing doctrine

¹²⁴ *Ibid.*

¹²⁵ Helfer, *Pharmaceutical Patents and the Human Right to Health*, 325-334; Shaffer & Sell, *Transnational Legal Ordering and Access to Medicines*, 116-126.

¹²⁶ Gregor Aisch, Adam Pearce, & Bryant Rosseau, *How Far Is Europe Swinging to the Right?*, NEW YORK TIMES, Mar. 20, 2017, <https://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html>; JAMES KIRCHICK, *THE END OF EUROPE: DICTATORS, DEMAGOGUES, AND THE COMING DARK AGE* (Yale University Press, 2017), 5 ("authoritarian populist parties (of both the left and right) hold almost 20 percent of the seats in European national parliaments, nearly twice as many as they did thirty years ago, and they sit in a third of Europe's governments") (citing Andreas Johansson Heinö, *Timbro Authoritarian Populism Index 2016*, TIMBRO, June 29, 2016, <https://timbro.se/allmant/timbro-authoritarian-populism-index-2016/>).

¹²⁷ Verdier & Versteeg *Modes of Domestic Incorporation of International Law*, 150 (coding the systems of one hundred one national judicial systems regarding "how treaties and custom are received and interpreted, and their status vis-à-vis other sources of domestic law."); Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109:3 AMERICAN JOURNAL OF INTERNATIONAL LAW 514, 522 (2015) (pointing out that "the nascent trend towards cumulating ex ante and ex post legislative intervention may be seen as a corrective to the insufficient coverage of ex post implementation alone.").

¹²⁸ *Medellin v. Texas*, 552 U.S. 491, 506-520 (2008); Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 540, 540 (2008).

¹²⁹ *Bond v. United States*, 134 S. Ct. 2077, 2102 (2014) (Scalia, J. concurring in judgment) ("All this to leave in place an ill-considered *ipse dixit* that enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power. We should not have shirked our duty and distorted the law to preserve that assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.")

that takes account of treaties in interpreting domestic statutes.¹³⁰ Within Europe, national Supreme Courts have become more resistant to accepting judgments of the European Court of Justice and the European Court of Human Rights.¹³¹ In December 2016, for example, the Danish Supreme Court frontally defied the ECJ by refusing to apply the ECJ's judgment in the AJOS case (concerning the application of an EU directive on age discrimination) in light of existing Danish law.¹³²

Nonetheless, where policymakers and stakeholders continue to view problems in transnational terms, they often turn to law to address them. Given public international law's deep implications within states, there may be a turn to less formal, stealthier means of transnational legal ordering, including greater relative use of soft law, private international law, and private legal ordering to address transnational problems. The secular trend, we contend, will involve more than ad hoc problem solving, and will continue to entail deeper processes of legal ordering that transcend national borders to permeate legal practice within states.

F. CONCLUSION

Public international law remains central to the concept of transnational law, both empirically and normatively. It is even more central than when Jessup wrote his seminal lectures and included public international law within his broader concept. Public international law is a critical part of the concept today because of its deep implications for transnational legal ordering and the creation of transnational legal orders. Empirically, international law has critical implications for the role of markets (and thus what the state does), the allocation of power among state institutions, the creation and role of professions, and the development of transnational accountability mechanisms operating under particular normative frameworks.

This chapter stresses the bottom-up, top-down, and recursive nature of transnational legal processes that give rise to transnational legal orders. It shows how the development of public

¹³⁰ *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) ("In other words, because non-self-executing treaties have no legal status in American courts, there seems to be little justification for a court to put a thumb on the scale in favor of a non-self-executing treaty when interpreting a statute."). In 2018, Judge Kavanaugh was appointed to the United States Supreme Court.

¹³¹ R. Daniel Kelemen, *The Court of the European Union in the Twenty-First Century*, 79:1 LAW AND CONTEMPORARY PROBLEMS 117, 133-137 (2016); Nico Krisch, *The Backlash Against International Courts*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL, Dec. 16, 2014, available at <http://verfassungsblog.de/backlash-international-courts-2/>; Madsen, *The Challenging Authority of the European Court of Human Rights*, 144 ("With the Court increasingly overburdened and backlogged—yet still progressively expanding the scope of the Convention—a number of member states launched, for the first time since the Court's creation in 1959, a systematic critique of both the Court's power over national law and politics and the quality of the Court's judges and their judgments. This discontent climaxed with the 2012 Brighton Declaration, adopted by all forty-seven member states, which began an institutionalized process that aimed to limit the ECtHR's power."). *Ibid.*, 174 ("In the legal field, highly critical voices speak out in every single European state. Even presidents of national supreme courts are openly voicing their opposition to the ECtHR—most recently, the Supreme Court Presidents from the United Kingdom, Belgium, and Finland. Although bashing the ECtHR is not new, the generalization of the discourse across Europe and its application to very different human rights situations is quite novel.").

¹³² Højesteret (Supreme Court) case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A (2016) (Den.), available at <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>. For discussion, see Mikael Rask Madsen, Henrik Palmer Osen & Urska Sadl, *Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL, Jan. 30, 2017, available at <http://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/> (highlighting that "*Ajos* is illustrative of a turn towards a greater national patrolling of the limited mandate given to the EU, including its judicial organ.").

international law is a place where domestic problems and domestic struggles—whether over human rights, commercial law, or regulatory reform—get played out in international arenas alongside domestic ones. States and private actors seek to “upload” domestic legal norms to advance policies as well as to “download” and institutionalize them within and across domestic jurisdictions. These processes are dynamic and recursive.

Public international law should not be viewed in isolation of private international law, national law, and private legal ordering. Rather, much of public international law consists of the uploading and export of national and privately developed legal norms, whether from powerful states, professions, or other private actors. The resulting public international law norms interact with private legal ordering and private international law, from arbitration to private standard setting, from trade to human rights. Together, they give rise to transnational legal orders governing different legal domains.

Normatively, the problems (and thus the issues at stake) are socially and politically constructed, involving contests among actors. Public international law, as law more generally, tends to have a slant in favor of the privileged. It accordingly must be subject to empirically grounded, normative critique. At the same time, law is needed for ordering and the institutional alternatives for ordering involve tradeoffs. Law constrains power as well as reflects power, and power is needed to accomplish social ends. It is important to retain a public law element to transnational legal ordering because otherwise, the concept of transnational law, as conceived by Jessup, risks becoming disconnected from the public sphere. Public international law and institutions are needed to address transnational problems, in complement with private international law and private norm making. A critical role for transnational scholars is both to reveal the place and roles of international law and institutions while critiquing their processes. An essential way of proceeding is to evaluate transnational legal ordering through which legal norms are constructed, conveyed, resisted, implemented, and have effects. Only then might we participate effectively in improving the way things are.