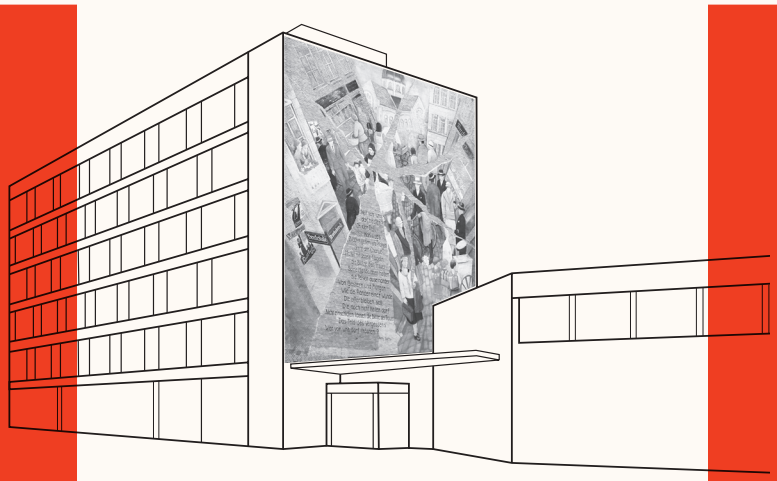

Karsten Nowrot

Aiding and Abetting in Theorizing the Increasing Softification of the International Normative Order - A Darker Legacy of Jessup's *Transnational Law*?

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

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A. Soft Becomes Beautiful: On the Changing Structure of the International Normative Order*

"The only thing that is constant is change." And indeed, the truth of this ancient saying frequently attributed to Heraclitus of Ephesus is also confirmed by the evolution of the international normative order being currently – once again – in a phase of undergoing quite substantial changes. This time, however, these developments do not seem to support a kind of linear narration of progress;[1] at least when viewed and assessed from the perspective of traditional public international law. Unlike in some previous periods, the respective processes of reformation do not find their manifestation in an ever-expanding legal regime extending its mandatory scope of application to areas that were formerly thought to be in the exclusive competence of individual states.[2] Almost to the contrary, international law in the narrow sense of the meaning is by now frequently considered as having more recently, in particular since the beginning of the 21st century, entered a phase first and foremost characterized by stagnation.[3] Not only has for example, with regard to the institutional dimension of the international normative order, the creation of new international organizations considerably slowed down in recent years.[4] The same applies, from a substantive perspective, to the processes of formal law-making that are at present in the international system frequently replaced or at least supplemented by the adoption of steering instruments that are not directly legally binding but nevertheless often quite rigorously adhered to by the respective actors and thus most certainly not entirely devoid of normative value and effectiveness.[5]

* The contribution is based on a presentation given by the author at the Transnational Law Institute Signature Conference 2016 "Jessup's Bold Proposal: Engagements with 'Transnational Law' after Sixty Years" at King's College London on 1/2 July 2016.

1 Generally on the prominence of progress narratives in public international law see, e.g., *Altwicker/Diggelmann*, European Journal of International Law 25 (2014), 425 *et seq*.; *Kennedy*, Leiden Journal of International Law 12 (1999), 9 (91); *Skouteris*, in: Orford/Hoffmann/Clark (eds.), The Oxford Handbook of the Theory of International Law, 939 *et seq*.; *Windsor*, Leiden Journal of International Law 28 (2015), 743 (748 *et seq.*); *Nowrot/Sipiorski*, Archiv des Völkerrechts 55 (2017), 265 (274 *et seq.*); *Koller*, European Journal of International Law 23 (2012), 97 (99 *et seq.*). With regard to the modern origins of this trend see *Rech*, in: Koskenniemi/Rech/Jiménez Fonseca (eds.), International Law and Empire – Historical Explorations, 57 (58) ("The narrative of progress established itself as a defining component of international legal argument around the mid-nineteenth century, […]."). On the underlying motives and intentions as well as the effects of these progress narratives see, e.g., *Diggelmann*, in: Fassbender/Peters (eds.), The Oxford Handbook of the History of International Law, 997 (1009) (emphasizing the wish to "immunize the discipline to some extent against challenges of its relevance: they have a consolidating effect"); *Kahn*, The Cultural Study of Law, 109 ("Belief in international law as a normative ideal to be progressively realized in the conduct of foreign relations is virtually a necessary condition for international-law scholarship. Those who do not share this belief study international relations, a subfield within political science."); *Fassbender/Peters*, Introduction: Towards a Global History of International Law, in: Fassbender/Peters (eds.), The Oxford Handbook of the History of International Law, 1 (2) ("That history of progress in the name of humanity certainly has its beauty. It provides the history of international law with a clear underlying purpose and direction, and thus gives it a comprehensible structure."); *Skouteris,* The Notion of Progress in International Law Discourse, 222 *et seq.* ("Progress Narratives as Politics").

2 On this previous perception see for example *Delbrück*, Indiana Law Journal 68 (1993), 705 (706 *et seq.*); *Tomuschat*, Recueil des Cours 281 (1999), 9 (63 *et seq.*); *Nowrot*, Global Governance and International Law, 15.

3 See, e.g., *Pauwelyn/Wessel/Wouters*, European Journal of International Law 25 (2014), 733 (734) ("Formal international law is stagnating in terms of both quantity and quality."); *Meyer*, European Journal of International Law 27 (2016), 161.

4 *Abbott/Green/Keohane*, Organizational Ecology and Institutional Change in Global Governance, 3; *Pauwelyn/Wessel/Wouters*, European Journal of International Law 25 (2014), 733 (736).

5 See, e.g., *Meyer*, European Journal of International Law 27 (2016), 161; *Pauwelyn/Wessel/Wouters*, European Journal of International Law 25 (2014), 733 (734 *et seq.*); *Shelton*, American Journal of International Law 100 (2006), 291 (319 *et seq.*); *Pronto*, Vanderbilt Journal of Transnational Law 48 (2015), 941 (945). See also *Calliess/Zumbansen*, Rough Consensus and Running Code, 271 ("deeper trend towards a *deformalisation* of international law") (emphasis in the original).

As a consequence of this current rise of informal rule-making in the international system, the normative expectations of how actors ought to behave on the global plane are presently in many areas of international social life – more than ever[6] – based on and determined by what might appropriately be described as a mixture or network of various different types of legally binding as well as non-binding steering mechanisms resulting from cooperative efforts of governmental, supra-governmental, intermediate and non-governmental entities.[7] These developments have already for a number of years not only given rise to the perception that the distinction between so-called "hard law" and non-binding regulatory instruments is now more and more blurred.[8] In addition and taken together, they have also – from the viewpoint of traditional public international law – resulted in an overall increasing and probably unprecedented softification of the international normative order as a whole.[9]

In the ongoing discourses on how to understand and systemize the implications of what is not infrequently perceived as paradigmatic changes in the international system,[10] its ever more diverse multi-actorship and its legal structure, a growing number of scholars has advanced the view that the respective conceptualizations cannot take recourse to classical state-centered models developed in the context of domestic law or traditional public international law. Rather – precisely in order to overcome the "perseverance of the 'touch of stateness'"[11] – this task necessitates employing new terms and the development of equally unprecedented analytical concepts.[12] In a sense their argumentation thereby finds itself in line with an advice given by *Philip C. Jessup* in the 1960s, namely that adequately describing and conceptualizing the evolving normative structures beyond the state "require that old concepts be constantly re-examined with a mind unfettered by blind acceptance of traditional classifications and labels".[13] However, this is most certainly not the only connection to be drawn between the rise of informal rule-making on the one hand and the question as to the current importance of "*Jessup's* bold proposal" on the occasion of the 60th anniversary of his work "Transnational Law" on the other hand. Rather, an even more notable feature linking these two subjects is indicated by the observation that prominently among the terms and concepts suggested in the literature to

6 It seems appropriate to recall at this point that the normatively relevant steering processes in the international system have in principle always also comprised governance mechanisms of a non-legal character. On this perception see for example *Delbrück*, in: Nerlich/Rendtorff (eds.), Nukleare Abschreckung – Politische und ethische Interpretationen einer neuen Realität, 353 (358 *et seq.*); *Tietje*, Zeitschrift für Rechtssoziologie 24 (2003), 27 (31 *et seq.*).

7 From the truly numerous contributions on this issue see, e.g., *Berman*, Columbia Journal of Transnational Law 43 (2005), 485 (492 *et seq*.); *Nowrot*, Global Governance and International Law, 5 *et seq.*, each with further references.

8 On this perception see, e.g., *Orrego-Vicuña*, in: Bröhmer *et al.* (eds.), Internationale Gemeinschaft und Menschenrechte – Festschrift für Georg Ress, 191 (200) ("The classical distinction between lex lata and lex ferenda thus also becomes increasingly blurred."); *Shelton*, in: Shelton (ed.), Commitment and Compliance, 1 (10) ("The line between law and not-law may appear blurred."); *Koh*, Yale Law Journal 106 (1997), 2599 (2630 *et seq.*) ("International law now comprises of a complex blend of customary, positive, declarative, and 'soft' law, which seeks not simply to ratify existing practice, but to elevate it."); *Möllers*, in: Schuppert/Zürn (eds.), Governance in einer sich wandelnden Welt, 238 (242); *Tietje*, Internationalisiertes Verwaltungshandeln, 255 and 263; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/3, 517; *Zumbansen*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 67 (2003), 637 (658); *Verdross/Simma*, Universelles Völkerrecht, § 657; *Graf Vitzthum*, in: Graf Vitzthum/Proelß (eds.), Völkerrecht, 1 (10).

9 On this view see also for example *Meyer*, European Journal of International Law 27 (2016), 161 (162) ("In short, we are living in an age in which soft law – non-binding rules that have legal consequences – is assuming an increasingly important place in international governance.").

10 *Klein*, in: Biaggini/Diggelmann/Kaufmann (eds.), Polis und Kosmopolis – Festschrift für Daniel Thürer, 409 (419) ("International law making has entered a new phase.").

11 *Shaw/Wiener*, in: Cowles/Smith (eds.), The State of the European Union, Vol. 5, 64 (65 *et seq.*).

12 On this "sui generis approach" see, e.g., *Nowrot*, in: Dilling/Herberg/Winter (eds.), Transnational Administrative Rule-Making: Performance, Legal Effects, and Legitimacy, 255 (258 *et seq.*); *Nowrot*, in: Fenwick/Van Uytsel/Wrbka (eds.), Network Governance, Transnational Business and the Law, 231 (238 *et seq.*); *Nowrot*, in: Neuwahl/Haack (eds.), Unresolved Issues of the Constitution for Europe, 107 (124 *et seq.*).

13 *Jessup*, Columbia Journal of Transnational Law 3 (1964), 1.

describe the phenomenon of what is referred to here as an increasing softification of the international normative order stands the idea and approach of an emerging transnational law, either applied to the normative structures of transboundary relations as a whole or, in particular, to an ever-growing number of their legal sub-systems.[14]

Against this background, the present contribution intends to assess, and to present some thoughts on, this terminological and conceptual trend, thereby also attempting to make a small contribution to a more nuanced understanding of transnational law and the appropriateness of this ordering idea in the ongoing debates on an adequate characterization of the international system and its changing legal structure. For the present purposes, I intend to approach this research topic in three main steps. The first part presents and describes the more recent emergence of different areas of "transnational (…) law" as an important strand in the scholarly discussions on the concept of transnational law (B.). Based on the findings made in this section, the subsequent second part will be devoted to the question whether this trend and its underlying conceptual approach can rightly be regarded as a notable legacy of *Jessup*'s work (C.). Finally, the third and main section of this contribution will be devoted to an assessment whether this terminological and conceptual trend to theorize the softification of the international normative order on the basis of emerging areas of "transnational (…) law" – first and foremost perceived to be characterized by an increasing blurring of the boundaries between hard law and non-binding steering instruments – can legitimately be regarded as, first, an approach adequately reflecting the normative realities in the present international system, and, second, as a desirable guiding idea for the future evolution of transboundary steering regimes (D.).

B. Conceptualizing the Beauty of Softness: From the Scientific Discovery of Informal Steering Instruments to the Rise of "Transnational (…) Law"

Commenting on the so-called "republican revival" among scholars in the late 1970s, the American historian *Joyce Appleby* remarked in 1985: "The recent discovery of republicanism as the reigning social theory of eighteenth-century America has produced a reaction among historians akin of the response of chemists to a new element. Once having been identified, it can be found everywhere."[15] To a certain extent, the same could be said of the more recent "transnational law revival". Admittedly, this claim also warrants some qualification. First, recourse to this term and concept in the literature as well as an explicit reference to *Jessup* in this connection is not entirely new but can occasionally be found also already for example in scholarly works published in the 1960s.[16]

Second, surely not all – past and contemporary – uses of the phrase "transnational law" are directly related to the present context of describing an emerging mixture of legally binding and

14 See also, e.g., *Cotterrell*, Law & Social Inquiry 37 (2012), 500 *et seq*. ("For many scholars, a new term has seemed necessary to indicate new legal relations, influences, controls, regimes, doctrines, and systems that are not those of nation-state (municipal) law but, equally, are not fully grasped by extended definitions of the scope of international law. The new term is 'transnational law', widely invoked but rarely defined with much precision."); *Menkel-Meadow*, UC Irvine Law Review 1 (2011), 97 (117) ("The recent turn to the term 'transnational', rather than international, law connotes a conceptual change in how we look at what we are studying in law […].").

15 *Appleby*, American Quarterly 37 (1985), 461.

16 See, e.g., *Erler*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 18 (1960), 7 (22 *et seq*.); *Goldman*, Archives de Philosophie du Droit 9 (1964), 177 *et seq*.

non-binding steering mechanisms. In addition to characterizing, for example, the direct effect of legal acts adopted by the European Union and the internal law-making competences of organs of international organizations[17] or the "union of rules taken from many legal systems",[18] it is well-known that this term is not infrequently applied by legal scholars as a synonym for the autonomous body of trade law, which is commonly known as the *lex mercatoria*,[19] thereby excluding in particular traditional public international law from its scope of application.[20] Furthermore, the notions of transnational public law litigation in general as well as of transnational human rights law in particular (or the combined concept of transnational human rights litigation)[21] are taken recourse to by *Harold Hongju Koh* and other scholars to describe, among others, the relations between domestic and international human rights regimes, the processes of applying international human rights law within state boundaries, the "consolidated corpus of international and domestic human rights"[22] and thus only the interactions between the respective transboundary and national "hard law" instruments.[23] Moreover, to mention but one further example, the concept of transnational legal orders as more recently advanced by *Terence C. Halliday* and *Gregory Shaffer* also involves normative processes initiated by private actors and, more generally, takes into account hard law as well as soft law instruments. Nevertheless, these categories of steering mechanisms are not considered as "equals" since informal norm-generation processes are only regarded as relevant under this (consequently more narrow) approach in so far as the respective actors "aim to catalyze through these instruments the adoption, recognition, and enforcement of binding authoritative legal norms in nation-states".[24]

That said, for a considerable and currently ever-increasing number of legal scholars invoking the idea of an emerging transnational law "is to suggest that law has new sources, locations, and bases of authority"[25] with one of the typical elements of these new normative frameworks and their assessment being the above mentioned "relativization of the law versus non-law distinction".[26] Although occasionally also applied in a manner transcending specific

17 *Erler*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 18 (1960), 7 (22 *et seq*.).

18 *Gopalan*, American University International Law Review 18 (2003), 803 (809). For a rather distinctive understand of transnational law see also, e.g., *Friedman*, Stanford Journal of International Law 32 (1996), 65 (66) ("I will describe a regime as 'transnational' only if it has the force of law, or the force of force, behind it.").

19 See for example *Berger*, in: Berger (ed.), The Practice of Transnational Law, 1 *et seq.*; *Schmitthoff*, in: Horn/Schmitthoff (eds.), The Transnational Law of International Commercial Transactions, 19 (20 *et seq.*); see thereto also, e.g., *Tietje/Nowrot*, in: Tietje/Brouder/Nowrot (eds.), Philip C. Jessup's *Transnational Law* Revisited – On the Occasion of the 50th Anniversary of its Publication, 17 (30) with further references.

20 See also, e.g., *Calliess*, in: Anheier/Juergensmeyer (eds.), Encyclopedia of Global Studies, Vol. 3, 1035 (1036) ("This, however, implies a definition of transnational law that is much narrower and much more specific than the one Jessup suggested. The transnational law of cross-border commerce is thus conceptualized as a third category of law besides national law and international law."). To the contrary, the term is also occasionally – and narrowly – taken recourse to as a synonym for public international law itself, see, e.g., *Engle Merry*, Law & Social Inquiry 31 (2006), 975 *et seq.*

21 See thereto for example *Joseph*, Corporations and Transnational Human Rights Litigation, 2004.

22 *Besson*, in: Cruft/Liao/Renzo (eds.), Philosophical Foundations of Human Rights, 279 (297).

23 See, e.g., *Hessler*, Journal of Political Philosophy 13 (2005), 29 (37) ("I will use the phrase 'transnational human rights law' to refer to international human rights law as it applies within state boundaries."); as well as more generally *Koh*, Yale Law Journal 100 (1991), 2347 *et seq*.; *Koh*, Penn State International Law Review 24 (2006), 745 *et seq*.

24 *Halliday/Shaffer*, in: Halliday/Shaffer (eds.), Transnational Legal Orders, 3 (11 *et seq.*).

25 *Cotterrell*, Law & Social Inquiry 37 (2012), 500 (502); see also, e.g., *Scott*, German Law Journal 10 (2009), 859 (873 *et seq*.).

26 *Zumbansen*, Transnational Law & Contemporary Problems 21 (2012), 305 (309); see also, e.g., *Calliess/Maurer*, in: Calliess (ed.), Transnationales Recht, 1 (24); *Menkel-Meadow*, UC Irvine Law Review 1 (2011), 97 (113) ("a hybrid of hard and soft law"); *Klabbers*, International Law, 351 ("the norms of an emerging 'transnational law'; rules and standards, whether hard or soft, public or private, […]"); *Zumbansen*, Law and Contemporary Problems 76 (2013), 117 (132); *Calliess/Zumbansen*, Rough Consensus and Running Code, 20 *et seq*., 274 *et seq*. and *passim*; *Calliess*, in: Anheier/Juergensmeyer (eds.), Encyclopedia of Global Studies, Vol. 3, 1035 ("Transnational law […] is structured as a plurality of functionally specialized transnational law regimes, which in a pragmatic approach combine different governance mechanisms of private (norms, alternative dispute resolution, social sanctions) and public (laws, courts, enforcement) origin, […].").

legal areas of the international system such as the ordering idea of a transnational community of responsibility,[27] the perception that steering regimes beyond the state are increasingly characterized by a linkage of hard and soft law seems to be particularly prominent in more recent conceptual analyses on an ever-growing number of individual legal sub-systems of the international normative order, thereby giving rise to what might be labelled as the emergence of various different areas of "transnational (…) law". A vivid example is the notion of an emerging transnational economic law adhered to by *Christian Tietje* and a number of other scholars whose structural features include not only, for example, an increasing number of different categories of governmental, supra-state, intermediate and non-state actors actively involved in the law-making and law-realization processes but, albeit closely related to this characteristic, first and foremost also a "more and more vanishing distinction between traditional legally binding norms on the one hand and rules that are in a strict sense non-legally binding on the other" with the normative framework in the transnational economic system thus "characterized by a mixed composition of 'hard', 'semi-hard' and 'soft' regulations".[28] A related perception can also be found specifically with regard to a transnational company law comprising, according to *Peer Zumbansen*, "the law governing the global business corporation through a multilevel and multipolar legal regime of hard and soft law, statutes and recommendations, command-and-control structures of mandatory rules as opposed to an ever expanding body of self-regulatory rules".[29] The same applies to the concept of a transnational labor law, understood for example by *Ulrich Mückenberger* as a global hybrid labor law in the sense of a new transnational type of law whose hybrid character finds its manifestation in linkages between hard and soft labor law.[30]

However, these conceptual approaches are not only confined to the realm of economic and business law as well as the normative framework on industrial and employment relations. *Radu Mares*, for example, has more recently advanced the idea of a transnational human rights law in the present sense of the meaning by highlighting the "emergence of a transnational regulatory regime that, by mobilizing new sources of public and private authority, creates a new regulatory dynamic that augments the traditional state-centered and territory-based protection of human rights".[31] At its core lies the realization that "[c]onceptual treatments of human rights in a less state-centered global order do not seek mistakenly to reinforce distinctions such as those between hard and soft law, between legal and nonlegal, private and public, territorial and extraterritorial, but to transcend such distinctions with a decisive focus on root causes and a search for new regulatory arrangements to tackle them".[32] Equally of more recent origin is the notion of an emerging transnational environmental law; a regime that is according to *Olaf Dilling* and *Till Markus* characterized, among others, by the fact that no clear boundaries exist between legally binding and non-binding steering instruments.[33] Finally, another notable example is the transnational legal approach towards international humanitarian law as advocated

27 See thereto *Nowrot/Wardin*, Liberalisierung der Wasserversorgung in der WTO-Rechtsordnung, 48 *et seq*.; *Nowrot*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 57 (97 *et seq*.); as well as, e.g., *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 261; *Frey*, Globale Energieversorgungssicherheit, 26 *et seq*., 171 *et seq*.; *Tietje*, in: Tietje (ed.), Internationales Wirtschaftsrecht, 1 (65 *et seq*.).

28 *Tietje/Nowrot*, in: Tietje/Brouder/Nowrot (eds.), Philip C. Jessup's *Transnational Law* Revisited – On the Occasion of the 50th Anniversary of its Publication, 17 (28 *et seq*.); see also, e.g., *Tietje*, Zeitschrift für Vergleichende Rechtswissenschaft 101 (2002), 404 (417); *Tietje*, in: Calliess (ed.), Transnationales Recht, 239 (253 *et seq*.); *Tietje/Nowrot*, European Business Organization Law Review 5 (2004), 321 (341 *et seq*.); *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 650 *et seq*.; *Rost*, Die Herausbildung transnationalen Wirtschaftsrechts auf dem Gebiet der internationalen Finanz- und Kapitalmärkte, 68 *et seq.*

29 *Zumbansen*, in: Smits (ed.), Elgar Encyclopedia of Comparative Law, 898 (906).

30 *Mückenberger*, in: Calliess (ed.), Transnationales Recht, 457 *et seq.*

31 *Mares*, Indiana Journal of Global Legal Studies 23 (2016), 171 (174).

32 *Mares*, Indiana Journal of Global Legal Studies 23 (2016), 171 (195).

33 *Dilling/Markus*, Zeitschrift für Umweltrecht 27 (2016), 3 *et seq.*

by *Math Noortmann* and *Ioannis Chapsos* in particular with a view to incorporate private military and security companies into this area of the international normative order. Arguing that the "development of bottom-up transnational social responsibilities within the business sector"[34] on the basis of non-binding steering instruments like the International Code of Conduct for Security Service Providers of 9 November 2010[35] or the Sarajevo Code of Conduct for Private Security Companies of September 2006[36] "constitutes a robust and workable alternative to the concept of legal accountability",[37] the authors ultimately envision and support the rise of a kind of transnational humanitarian law characterized by a normative framework that increasingly blurs the distinction between traditional hard law and more informal regulatory mechanisms.

C. Did *Jessup* Already Consider Soft as Beautiful?: On Attribution

These more or less randomly chosen examples serve as an illustration that the understanding of transnational law as an approach to theorize the increasing leveling of binding and non-binding steering instruments and thus the evolving softification of the international normative order has more recently undoubtedly become an important, albeit not necessarily dominant,[38] strand in the more general debate on the concept of transnational law. Already in light of the fact that most of the above mentioned and other respective authors explicitly take recourse to *Jessup*'s Storrs Lectures on Jurisprudence of 1956, the question arises whether this understanding is indeed attributable to *Jessup* in the sense that it could be legitimately argued that his work "Transnational Law" has objectively aided and abetted the above mentioned attempts aimed at theorizing the increasing softification of the international normative order. In other words, can this conceptual approach rightly be regarded as a notable legacy of *Jessup* sixty years after the publication of his ideas?

It is by now comparatively well-known and recognized that, although *Jessup* – as for example also acknowledged by himself[39] – did not invent the term "transnational law", it was him who actually coined and introduced it to a larger scholarly public on the basis of his "delightful little volume"[40] bearing the same title.[41] In his search for the "law applicable to the complex interrelated world community", he highlighted that "there is really much more to international legal relations than merely public international law"[42] and, as a consequence, rejected the name

34 *Noortmann/Chapsos*, in: von Arnauld/Matz-Lück/Odendahl (eds.), 100 Years of Peace Through Law: Past and Future, 257 (259).

35 The code is available under: <http://www.icoca.ch/en/the_icoc> accessed on 31 January 2018.

36 Available on the internet under: <http://www.seesac.org/res/files/publication/544.pdf> accessed on 31 January 2018.

37 *Noortmann/Chapsos*, in: von Arnauld/Matz-Lück/Odendahl (eds.), 100 Years of Peace Through Law: Past and Future, 257 (259); see also in this regard for example *Moyakine*, Pacific McGeorge Global Business and Development Law Journal 28 (2015), 209 *et seq.*

38 On the widely and rightly held perception that there is currently neither consensus on, nor at least a dominant approach to, the concept of transnational law in the scholarly literature see for example *Calliess/Zumbansen*, Rough Consensus and Running Code, 79; *Maurer*, Lex Maritima, 13 *et seq*. See in this connection also the observation by *Shaffer*, Law & Social Inquiry 37 (2012), 229 (233) ("Although the term transnational law is increasingly used, authors are not always careful in specifying what they mean by it.").

39 See in retrospective *Jessup*, in: Bos (ed.), The Present State of International Law and Other Essays, 339 ("the term was not new – it was not an original creation of the author's").

40 *Fenwick*, American Journal of International Law 51 (1957), 444.

41 On this perception see, e.g., *Koh*, Nebraska Law Review 75 (1996), 181 (186); *Zumbansen*, in: Smits (ed.), Elgar Encyclopedia of Comparative Law, 898 ("locus classicus"); *Patterson*, in: Kammerhofer/D'Aspremont (eds.), International Legal Positivism in a Post-Modern World, 401 (414).

42 See the respective characterization in the book review by *Jacobini*, Journal of Politics 19 (1957), 681.

"international law" as being "misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)".[43] This "world community" is, according to *Jessup*, increasingly shaped by the emergence of "transnational situations" that involve a considerable diversity of actors such as "individuals, corporations, states, organizations of states, or other groups".[44] In light of this necessarily broader and more inclusive approach to transboundary interactions, he famously describes the term "transnational law" – being the normative framework governing these situations – "to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories".[45]

Nevertheless, what is today equally well-known and acknowledged among legal scholars is the absence of a more in-depth systematic conceptualization and theorization of transnational law in *Jessup*'s work who – at least "for the time being" – explicitly "avoid[s] further classification of transnational problems and further definition of transnational law".[46] This finding first and foremost also holds true with regard to his understanding of the character of "other rules which do not wholly fit into such standard categories", and thus the type of transnational norms that is not only, but most certainly also, of particular relevance in the present context.[47] In order to find a substantiated answer to the question whether the residual class of "other rules" also encompasses non-binding steering instruments and thus whether the conceptual approach to "transnational (…) law" as discussed here can indeed be attributed to *Jessup*'s Storrs Lectures, it seems useful to follow *Peer Zumbansen*'s advice "to re-read the slim but nevertheless immensely rich volume"[48] as a whole. And indeed, despite the fact that *Jessup* has not explicitly elaborated on the scope of what he labelled "other rules", an assessment of his writings reveals some notable indications as to his understanding of "rules" or "law" for the purposes of "Transnational Law". Although some of his statements may also legitimately be interpreted as expressing a more narrow understanding of transnational law in the sense of only comprising domestic and international hard law,[49] it is submitted that there are in particular two paragraphs in the first section of his work in which he makes sufficiently – and almost beyond reasonable doubt – clear that his treatment of transnational law is in fact based on a more encompassing idea of "rules" and "law" very much in line with the approaches to what is referred to here as "transnational (…) law" introduced above.

Jessup highlights that "[a]s man has developed his needs and his facilities for meeting his needs, the rules become more numerous and more complicated. History, geography, preferences, convenience, and necessity have dictated dispersion of the authority to make the rules men live by. Some rules are made by the head of the family, whether it be father or mother, such as 'Wash your hands before supper'. Some rules are made by ecclesiastical authorities as in specific times and manners of fasting.

43 *Jessup*, Transnational Law, 1. For an assessment of this perception see, e.g., *Tietje/Nowrot*, in: Tietje/Brouder/Nowrot (eds.), Philip C. Jessup's *Transnational Law* Revisited – On the Occasion of the 50th Anniversary of its Publication, 17 (27) with additional references.

44 *Jessup*, Transnational Law, 3.

45 *Jessup*, Transnational Law, 2.

46 *Jessup*, Transnational Law, 7. See thereto also already *Noortmann*, in: Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 57 *et seq*.; *Scott*, German Law Journal 10 (2009), 859 *et seq.*

47 See generally also *Noortmann*, in: Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 57 (59) ("The ultimate question is not, whether transnational legal scholars can overcome the traditional split of the international legal realm into a public and private one, but whether they can envisage, identify and formulate 'other rules which do not wholly fit into such standard categories'."); *Scott*, German Law Journal 10 (2009), 859 (873); *Viellechner*, Transnationalisierung des Rechts, 168.

48 *Zumbansen*, in: Smits (ed.), Elgar Encyclopedia of Comparative Law, 898 (900).

49 See for example *Jessup*, Transnational Law, 106 ("Transnational law then includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private.").

Some are made by corporations regulating their sales agencies, […]. Other rules are made by secret societies, by towns, cities, states. Still others are made by international organizations such as the Coal and Steel Community, the International Monetary Fund, or the OEEC."[50] Against the background of this exemplary list of binding as well as non-binding, societal steering instruments, he continues by recalling that "[n]owadays it is neither novel nor heretical to call all of these rules 'law'" and, moreover, declares that he also – in the exercise of "scholarly freedom" – "rest[s] for the time being on this broad description of the sense in which I speak of law in general and of transnational law in particular".[51] It can validly be inferred from this proposition that *Jessup*'s understanding of "all law which regulates actions or events that transcend national frontiers" encompasses binding legal rules as well as other steering mechanisms[52] and is thus rightly taken recourse to by modern authors in their approaches aimed at conceptualizing the increasing softification of the international normative order.

D. Is Soft Really Beautiful?: It (Again) Seems to Depend …

In light of these findings, the third and final step of my analysis will address the questions whether this terminological and conceptual trend, rightly considered as a notable legacy of *Jessup*'s work, to theorize the softification of the international normative order on the basis of emerging areas of "transnational (…) law" – first and foremost perceived to be characterized by an increasing blurring of the boundaries between hard law and non-binding steering instruments – can legitimately be regarded as, first, an approach appropriately reflecting the normative realities in the present international system, and, second, as a desirable guiding idea for the future evolution of transboundary steering regimes.

Before doing so, however, some brief remarks on two preliminary and underlying issues seem to be in order. First, although being mindful of the well-known difficulties we also as of today still face when trying to identify and agree upon a precise understanding of what exactly law is,[53] the present analysis is based on the assumption that it is nevertheless in principle possible – and already in order to maintain law's autonomy vis-à-vis the realms of politics and morality[54] also conceptually important as well as at least occasionally desirable – to clearly

50 *Jessup*, Transnational Law, 8 *et seq.*

51 *Jessup*, Transnational Law, 9.

52 Generally on this perception see also, e.g., *Zumbansen*, in: Smits (ed.), Elgar Encyclopedia of Comparative Law, 898 (900 *et seq*.); *Zumbansen*, in: Veitch (ed.), Law and Politics of Reconciliation, 129 (132 *et seq*.); *Maurer*, Lex Maritima, 16.

53 The famous finding by *Immanuel Kant* in his "Critique of Pure Reason" that jurists are still searching for a definition of their concept of law thus still appears to be valid, see *Kant*, Critique of Pure Reason, 639. See also for example more recently *Hart*, The Concept of Law, 1 ("Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'.").

54 On the autonomy of law in this regard see already, e.g., *Fastenrath*, in: Fastenrath/Geiger/Khan *et al.* (eds.), From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma, 58 (61 *et seq*.); *Pauwelyn*, in: Pauwelyn/Wessel/Wouters (eds.), Informal International Lawmaking, 125 (130); *Weil*, American Journal of International Law 77 (1983), 413 (417) ("the specific nature of the legal phenomenon"); as well as from the realm of international judicial practice for example International Court of Justice, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase), I.C.J. Reports 1966, 6 (34) („The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only

distinguish also with regard to the numerous different steering instruments in the international system between legally binding stipulations on the one hand and non-law on the other hand,[55] without denying the possibility, and indeed actuality, of attributing legally relevant effects also to this later class of non-binding rules of behavior. Second, despite adhering to this binary distinction between law and other steering instruments as being in principle separable and at least not always equal, I do not intend to bother the reader with some kind of broad positive critique of non-binding norms in general and soft law in particular because, first, already quite a lot of ink has been spilled on this topic in particular since the beginning of the 1980s[56] and, second as well as at least equally important, I do not share this criticism in its entirety, in particular in so far as it results in qualifications of soft law as for example an in principle and thoroughly undesirable phenomenon with regard to all areas of international law.[57]

Rather, I would like to give a typical lawyer's answer to the questions raised above concerning the appropriateness and desirability of theorizing the softification of the international normative order on basis of emerging areas of "transnational […] law": It depends. This might sound to many readers as a cliché, but one has to bear in mind that not all clichés are always false and that this particular cliché answer seems rather fitting also in the present context since it first and foremost implies the need for a differentiated assessment. It is submitted here that the more recently advanced "transnational […] law" approaches are not equally suitable for all branches of the international normative order.

In order to illustrate this proposition, I would like to start by drawing attention to two areas of public international law that have proven themselves to be quite immune to tendencies of softification and thus to processes of transnationalization in the present sense of the meaning. The first one concerns the field of international criminal law, understood as the branch of the global normative order that deals with the direct criminal responsibility of individuals.[58] The label 'transnational criminal law' itself or variations thereof are surely not without precedents in the respective legal discourses.[59] However, I'm not aware of anybody using this term in the sense of indicating a relativization of the law versus non-law distinction. And this situation is not the result of a kind of deplorable willful neglect of an important conceptual issue. Rather, it merely reflects the regulatory reality that individual criminal responsibility is simply not

through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.").

55 See thereto, also from the perspective of state practice, *Shelton*, in: Evans (ed.), International Law, 137 (161); *Weil*, American Journal of International Law 77 (1983), 413 (415 *et seq*.); *Pauwelyn*, in: Pauwelyn/Wessel/Wouters (eds.), Informal International Lawmaking, 125 (127 *et seq*.); *Klabbers*, Nordic Journal of International Law 65 (1996), 167 *et seq*.; for a quite different perception see already famously *Baxter*, International and Comparative Law Quarterly 29 (1980), 549 (564) (" […] I hope, [I] have persuaded the reader that it is excessively simplistic to divide the written norms into those that are binding and those that are not.").

56 From the almost countless contributions on this topic see, in addition to the publications already cited in the footnotes above, also for example *Chinkin*, International and Comparative Law Quarterly 38 (1989), 850; *Shaffer/Pollack*, Minnesota Law Review 94 (2010), 706; *Thürer*, Soft Law (March 2009), in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> accessed on 31 January 2018; *Boyle*, International and Comparative Law Quarterly 48 (1999), 901; *Weiß*, Archiv des Völkerrechts 53 (2015), 220 (239 *et seq*.); *Di Robilant*, American Journal of Comparative Law 54 (2006), 499; *Hillgenberg*, European Journal of International Law 10 (1999), 499, each with further references.

57 See in particular *Klabbers*, Nordic Journal of International Law 67 (1998), 381 *et seq*.; see in this connection also for example *Weil*, American Journal of International Law 77 (1983), 413 (415 *et seq*.); *Blutman*, International and Comparative Law Quarterly 59 (2010), 605 (623 *et seq*.).

58 On this definition of international criminal law as well as alternative or more encompassing understandings of this branch of public international law see, e.g., *Cryer*, in: Evans (ed.), International Law, 752; *Krajewski*, Völkerrecht, 258 *et seq.*; *von Arnauld*, Völkerrecht, 575 *et seq.*; *Shaw*, International Law, 288 *et seq.*

59 See thereto for example *Boister*, European Journal of International Law 14 (2003), 953 (955) who suggests the (restrictive) use of this term in order to describe "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects". For additional meanings and references see also *Jeßberger*, in: Calliess (ed.), Transnationales Recht, 527 (528).

determined on the basis of a mélange of hard law and softer steering mechanisms;[60] and rightly so in light of our cherished rule of law in general as well as the principle of legality in particular, since nobody wants and expects to be criminally indicted for, *inter alia*, not complying with the rules of behavior laid down in a code of conduct.

The second example for an area of the international normative order that has not been affected by processes of transnationalization is the *ius ad bellum*, the transboundary regime governing recourse to force. In this regard, already from the perspective of terminology the present author is not even aware of any voices in the literature advocating for a 'transnational law on the use of force' or related terms and concepts. This finding does not imply that this field of law comprises of clear and unambiguous rules whose interpretation is based on a broad global consensus and where soft steering mechanisms are virtually nonexistent. Quite to the contrary, it hardly needs to be recalled that the precise scope of the international hard law stipulations on the use of force is frequently highly contested[61] and that soft law instruments do at times exercise quite notable legal effects in the processes of creating and concretizing these provisions.[62] In addition, it has been emphasized – and rightly criticized – that the application of the *ius ad bellum* is in particular more recently suffering from the problematic challenge of a visible rise of what might be referred to as "twilight zone" arguments, submitting that certain uses of force may for example be "illegal but justifiable";[63] thereby ultimately attempting to overcome the distinction between legality and illegality.[64] Nevertheless, and although these and other current challenges have the potential to result in an increased legal uncertainty in the regime governing recourse to force, the incontrovertible fact remains that the question whether the use of force presents itself as lawful in individual cases has so far always been answered in light of the applicable hard law and most certainly not with a view to 'relevant' soft law instruments alone.

When trying to generalize these findings with the aim of applying them to other areas of international law, it appears potentially quite promising to inquire why the distinction between hard law and non-binding steering instruments is not blurred but in fact still very much present and alive in some branches of the international normative order. Among these underlying reasons one can initially identify certain individual, sector-specific aspects that appear – at least at first sight – not transferable to other fields of international law. In the realm of international criminal law, to mention but one example, the principle of legality, given that the human rights of suspects are at issue, excludes recourse to any other source of punishment than hard law, in force at the time when the crime was committed (*nullum crimen sine lege*) and, *inter alia*, sufficiently precise as well as accessible to the alleged perpetrator.[65]

60 On the inappropriateness to speak of a 'transnational criminal law' in the present sense of the meaning see also already, e.g., *Calliess/Maurer*, in: Calliess (ed.), Transnationales Recht, 1 (27); *Zerbes*, in: Calliess (ed.), Transnationales Recht, 539.

61 On this perception see also, e.g., *Tams/Tzanakopoulos*, in: Kammerhofer/D'Aspremont (eds.), International Legal Positivism in a Post-Modern World, 498; *Gray*, in: Evans (ed.), International Law, 618; *Kammerhofer*, Leiden Journal of International Law 29 (2016), 13; *Dörr*, Use of Force, Prohibition of (September 2015), para. 2, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> accessed on 31 January 2018 ("repeatedly the subject of controversy").

62 This is evident, for example, in a number of judgments of the International Court of Justice where the Court referred to UN General Assembly resolutions as evidence of state practice for the formation of customary international law. See, e.g., International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) (Merits), I.C.J. Reports 1986, 14 (99 *et seq*.); International Court of Justice, *Armed Activities on the Territory of the Congo* (Congo v. Uganda), I.C.J. Reports 2005, 168 (226 *et seq*.).

63 *Franck*, Recourse to Force, 174 *et seq.*

64 For a critical account of these approaches see *Tams/Tzanakopoulos*, in: Kammerhofer/D'Aspremont (eds.), International Legal Positivism in a Post-Modern World, 498 (516 *et seq*.).

65 Thereto as well as generally on the central role played by the principle of legality in the normative design of international

However, viewed from an overarching structural perspective and thus transcending these more sector-related aspects, it is submitted that the above mentioned examples also serve as indications for the potential suitability of a rather novel binary distinction to be applied to the international normative order as a whole between what might be labeled as *consequential and formalistic* areas of international law on the one hand and more *flexible and encompassing* fields of international law on the other hand.

The characterization as consequential for those branches of the international normative order like international criminal law and the legal regime on the use of force, which have proven themselves to be quite immune to tendencies of softification and transnationalization, seems appropriate because it rightly draws attention to the fact that it is in particular the frequently rather severe consequences that these steering regimes and especially their violations have for individuals (with regard to international criminal law and the regime governing recourse to force) as well as for political communities as a whole (like in the case of the use of force) and ultimately also for the violator and its population themselves (being for example subject to measures taken in exercise of the right of self-defense), that can be regarded as a primary reason why these legal regimes do not comprise of a mélange of hard law and softer steering instruments being on an equal normative footing. The emphasis on the consequences for individuals either considered for themselves or as members of a political community seems warranted, based, in particular, on the increased recognition of natural persons as legally relevant actors in the international system and its normative order; a development that has already given rise to the perception of public international law being in process of continued "individualization".[66] The additional qualification of the respective fields of the global normative order as formalistic is thereby intended to convey the message that their design and progressive development is strongly guided by an insistence on certain formalities and their observance such as the capacity, authority and intent of the involved international actors to create binding international normative rules.

Against this background, the question obviously arises whether there are also other branches of the international normative order, aside from the already mentioned fields of international criminal law and the legal regime governing the use of force, that deserve to be characterized as consequential and formalistic areas of public international law. In this regard, an argument could validly be made that for example – and contrary to more recently advanced views by a number of international legal scholars as outlined above[67] – the normative realms of international human rights law as well as international humanitarian law are way too consequential to the lives of individuals to legitimately consider their design and normative ordering structures as being shaped by a mélange of hard law and softer steering instruments being on an equal normative level. And indeed, to confine myself to but one example, the distinction between law and non-binding rules of behavior seems to be quite influential and even appears to lie at the heart of the in principle old and currently again highly polarized debate on the extent to which corporations, first and foremost those being transnational or multinational in character, should also contribute to the promotion of global community interests like

criminal law *Jacobs*, in: Kammerhofer/D'Aspremont (eds.), International Legal Positivism in a Post-Modern World, 451 *et seq*.; *Cassese/Gaeta/Baig et al.*, Cassese's International Criminal Law, 22 *et seq*., each with further references. On the special position enjoyed by this area of law in realm of transboundary rules see also, e.g., *Peters*, in: Bekker/Dolzer/Waibel (eds.), Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts, 154 (166) ("interstate law needs quite a lot of flexibility, whereas criminal law, quite to the contrary, requires very detailed, clear and unambiguous rules, given that the fundamental rights of suspects are at stake").

66 For a general and comprehensive discussion see *Anne Peters*, Beyond Human Rights – The Status of the Individual in International Law, 2016. In addition see also, e.g., *Dörr*, JuristenZeitung 60 (2005), 905 *et seq*.

67 See *supra* under B.

the protection of human rights and, in particular, whether the fulfilment of such expectations should be secured also on the basis of respective legal obligations. All of the various relevant state, supra-state and non-state actors clearly differentiate – explicitly or at least implicitly – between hard law obligations on the one hand and more or less voluntary commitments on the other hand in their discourses on this issue.[68] This is for example evidenced as early as in the middle of the 1970s by the controversial debates prior to the adoption of the – ultimately voluntary – OECD Guidelines for Multinational Enterprises that were originally envisioned by some OECD countries, among them Canada, the Netherlands and Scandinavian States, to become a legally binding steering instrument.[69] More recently, the same applies to the quite polarized discussions in connection with the activities of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, established in June 2014 by the UN Human Rights Council[70] and entrusted with the mandate "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises".[71]

Although consequential and formalistic branches of the international normative order also seem to be beneficial, in addition to a number of advantages already referred to above, by allowing a precise identification of existing legal gaps and thereby enabling a more focused discussion of whether and, in the affirmative, how to fill them,[72] it is by now increasingly recognized – and indeed beyond reasonable doubt – that the normatively relevant steering practice in current international relations also rightly and legitimately provides room as well as evidence for the existence of more *flexible and encompassing* fields of international law. The labeling as flexible thereby indicates a reduced emphasis on the observance of otherwise indispensable formalities in the processes of creating international steering instruments, thus also including for example normative rules of behavior developed by non-state actors lacking the authority to adopt public international hard law. Closely related by being a more or less direct result of this first aspect, the term 'encompassing' captures the consequently more inclusive character

68 On this observation see also already, e.g., *Nowrot*, The Relationship between National Legal Regulations and CSR Instruments, 10 *et seq*. with further references.

69 See thereto, e.g., *Muchlinski*, Multinational Enterprises and the Law, 659; *Huarte Melgar/Nowrot/Wang*, The 2011 Update of the OECD Guidelines for Multinational Enterprises: Balanced Outcome or an Opportunity Missed?, 9 *et seq*.

70 Generally on the composition and activities of the UN Human Rights Council see for example *Higgins/Webb/Akande/Sivakumaran/Sloan*, Oppenheim's International Law, United Nations, Vol. II, 755 *et seq*., with further references.

71 UN Human Rights Council, Resolution 26/9, UN Doc. A/HRC/RES/26/9 of 14 July 2014, para. 1. On the activities of this working group see also, e.g., Human Rights Council, Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an Internationally Legally Binding Instrument, UN Doc. A/HRC/31/50 of 5 February 2016; Human Rights Council, Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/34/47 of 4 January 2017; as well as more recently Draft Report on the Third Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, 23 - 27 October 2017, available under: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx> accessed on 31 January 2018. See also the first draft document published in this regard in September 2017: Elements for the Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights of 29 September 2017, available under: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed on 31 January 2018. For a preliminary assessment of this ongoing process see for example *Thielbörger/Ackermann*, Indiana Journal of Global Legal Studies 24 (2017), 43 *et seq.*; *Simons*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 48 *et seq.*; *Catá Backer*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 105 *et seq.*; *Deva*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 154 *et seq.*

72 On this perception see also already *Bothe*, Netherlands Yearbook of International Law 11 (1980), 65 (94) ("Their danger [of non-legal norms] lies in the fact that they enable the salutary difficulties involved in the *law*-making process to be circumvented, and that law is thereby not created where it could and should be.") (emphasis in the original).

of these areas of international law that are with regard to their normative structures and the implementation in practice first and foremost characterized by notable relativisation of the law versus non-law distinction and due to this strong linkages of hard and soft law thus rightly considered as emerging branches of "transnational (…) law". Compared to the consequential and formalistic fields of public international law, these flexible and encompassing sub-systems are overall not less important for the international system and its normative order as a whole. However, for example due to their often quite technical character as well as the generally less direct, less fundamental, and less elementary effects of these steering regimes – as well as of respective violations of the rules of behavior stipulated by them – for natural persons, they can be considered as ultimately less consequential for individuals and political communities. Arguably, this description applies, *inter alia*, to the normative regime governing transboundary economic relations and a number of its sub-systems like the legal framework dealing with global business corporations that are thus rightly and legitimately captured by the notions of an emerging transnational economic law or an evolving transnational company law respectively.[73]

In sum, it is submitted that the differentiated approach towards the identification of emerging areas of "transnational (…) law" suggested here is, compared to wider generalizing claims recently advanced in the legal literature, not only more accurately reflecting the normative realities in the international system but in particular also a considerably more appropriate guiding vision for the future development of transboundary steering regimes rightly regarded as being first and foremost also instrumental in realizing a continued individualization of public international law as a whole to the benefit of humankind.

E. Concluding Observations

In the hope that the findings made in this contribution so far have at least the potential to appear at least to some readers at least *prima facie* not entirely unconvincing, I finally intend, in evaluating some facets of the current importance of "*Jessup's* bold proposal" on the occasion of the 60th anniversary of his work "Transnational Law", to briefly turn to the question whether this eminent legal scholar is quasi to 'blame' for the currently often comparatively undifferentiated recourse to a purportedly widespread rise of "transnational (…) law". Could this trend somehow be considered as a kind of 'darker legacy' of his "delightful little volume"[74]? Has he – figuratively speaking – aided and abetted in opening the 'floodgates' for the respective approaches aimed at theorizing the increasing softification of the international normative order? I would like to conclude with providing my answer to these issues by addressing three sub-questions.

First, is this tendency in parts of the legal literature attributable to *Jessup*'s understanding of transnational law? The answer is yes, because – as already indicated above[75] – it can be directly traced back to his quite broad and intentionally undertheorized[76] description as well as application of this term and concept in *Transnational Law*.

73 On these perceptions see already *supra* under B.

74 *Fenwick*, American Journal of International Law 51 (1957), 444.

75 See *supra* under C.

76 On this view see also already, e.g., *Noortmann*, in: Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 57 *et seq.*; *Scott*, German Law Journal 10 (2009), 859 *et seq.*

Second, could he have known or at least anticipated in his times that a more differentiated and thus less encompassing understanding of transnational law might have been more appropriately reflecting the current state and desirable future evolution of the international normative order? The answer is again yes, since although the process of "individualization" of public international law was surely still in its infancy in the first half of the 1950s, in particular the proclamation of the Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948 as well as, *inter alia*, the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms by the members of the Council of Europe in November 1950 and the signing of the four Geneva Conventions in August 1949 codifying and progressively developing international humanitarian law already served as clear indications for an emerging trend in this direction. In addition, the development of international criminal law, further evidencing an increased individual-orientation of the transboundary legal order and being one of the natural reference fields for consequential and formalistic branches of public international law, had clearly made a 'great leap forward' at the time of writing *Transnational Law* as a result of the creation of the international war crimes tribunals of Nuremberg and Tokyo in the second half of the 1940s. It hardly needs to be recalled that the same applies to the international legal regime on the use of force based on the respective stipulations enshrined in the Charter of the United Nations signed on 26 June 1945 in San Francisco.

Third, finally and more generally, should *Jessup*, being a lawyer, have known that aiming at a nuanced understanding of transnational law would have been at least a suitable path worth exploring on the way to an adequate development of this concept? Once more, and thus one last time, the answer is yes, because it rightly used to be and still is common knowledge among lawyers that "it depends", indicating the appropriateness of a differentiated approach, has always been the best answer to most legal questions, most certainly including the ones related to a proper perception of the role and functions of transnational law in the global normative order.

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