

The Peter A. Allard School of Law

## Allard Research Commons

---

Faculty Publications

Allard Faculty Publications

---

2019

### Transnational Law as Unseen Law

Natasha Affolder

*Allard School of Law at the University of British Columbia*, [affolder@allard.ubc.ca](mailto:affolder@allard.ubc.ca)

Follow this and additional works at: [https://commons.allard.ubc.ca/fac\\_pubs](https://commons.allard.ubc.ca/fac_pubs)



Part of the [Transnational Law Commons](#)

---

#### Citation Details

Natasha Affolder, "Transnational Law as Unseen Law" in Peer Zumbansen, ed, *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge: Cambridge University Press [forthcoming in 2020]).

This Working Paper is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

# TRANSNATIONAL LAW AS UNSEEN LAW

NATASHA AFFOLDER\*

- A. Introduction: Thirteen Words That Changed the World
- B. Transnational Law as a Holding Pen: Jessup's "Larger Storehouse of Rules"
- C. What is a Practice-Enriched Perspective?
- D. Accessing Transnational Environmental Law's "Secret Archives"
  - I. The Partial Knowledge Base of Arbitration
  - II. Tracing Transplants
  - III. Judges and the Project of Environmental Law
  - IV. The Private Lives of Contractual Texts
- E. Conclusion: From Seen/Unseen to Known/Unknowable

## A. INTRODUCTION: THIRTEEN WORDS THAT CHANGED THE WORLD

With thirteen words in the Storrs Lecture in 1956, Philip Jessup created an incurable itch for legal scholars.<sup>1</sup> This itch emerges from a conception of Transnational Law that was at once clarifying and obscuring in its specification that "public and private international law are included *as are other rules which do not wholly fit into such standard categories.*"<sup>2</sup> With these words, Jessup expressed discontent with the inadequacy of existing terminology and approaches to conceptualizing border-crossing law. He flagged the profound misalignment between a solely state-mediated view of law underlying much international legal theory and his own experience of law in the world. In so doing, he created space to acknowledge law's *other* sources, legal rules and sources of knowledge about law that matter in practice but ill-fit standard categories. Usefully, Jessup did not offer a restrictive list of what these misfits might be. The concept of Transnational Law he advanced was therefore not so much a singular and fully embellished *fait accompli* as it was the refreshing creation of a new intellectual holding pen for ideas about law and its border-crossing movements.

Part of the allure of Jessup's description of transnational law lies in its promise of capturing something beyond the *visible* bodies of public and private international law –

---

\* I am grateful to the organizers and participants of "Jessup's Bold Proposal: Engagements with 'Transnational Law' after Sixty Years" for stimulating these ideas and ongoing conversations. I also thank Nicholas Healey for his excellent research assistance.

<sup>1</sup> Philip C. Jessup, TRANSNATIONAL LAW (Yale University Press, 1956) [Jessup].

<sup>2</sup> *Id.*, at 2.

in its invocation to uncover unseen law, other law, law that is important in practice but neglected in scholarship. There have been many recent attempts to frame and name this unseen law: through raising awareness of informal international law-making,<sup>3</sup> in identifying the turn to stealthier means of transnational legal ordering,<sup>4</sup> by revealing the “hidden world” of WTO governance,<sup>5</sup> by disclosing the “hidden tools” that populate international investment law,<sup>6</sup> and in unveiling the obscured interactions of private international law on public international law.<sup>7</sup> Such contributions emerge in studies variously described as international, transnational, comparative, and global. Yet they invoke a Jessup-inspired approach to transnational law in the sense that they draw on “a larger storehouse of rules to apply” and fail to “worry whether public or private law applies in certain cases.”<sup>8</sup>

Vocabularies of visibility and invisibility continue to permeate transnational law discourse. Jessup’s project of “*illuminating* a transnational space”<sup>9</sup> addresses “the *empty space* left by the existing doctrinal perspectives”.<sup>10</sup> Transnational law is “*a lens*” through which particular relationships between national laws become *visible*.<sup>11</sup> Bringing transnational law “*into view*” demands seeing transnational law as a whole, if not, “then many of its features will be *lost to sight*, the programmatic development of the system will be *obscured*, and the systematic absence of concern for legality and human rights will be *hidden*.”<sup>12</sup> In such a way, transnational law, whether viewed predominantly as a

---

<sup>3</sup> J. Pauwelyn, R. A. Wessel & J. Wouters, *INFORMAL INTERNATIONAL LAWMAKING* (Oxford University Press, 2012).

<sup>4</sup> G. Shaffer & C. Coye, *From International Law to Jessup’s Transnational Law, From Transnational Law to Transnational Legal Orders*, UC IRVINE SCHOOL OF LAW RESEARCH PAPER NO. 2017-02. (cross-reference to Shaffer’s chapter if it is included in this volume at p. 17).

<sup>5</sup> A. Lang & J. Scott, *The Hidden World of WTO Governance*, 20:3 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 575–614 (2009).

<sup>6</sup> P. Fox & C. Rosenberg, *The Hidden Tool in a Foreign Investor’s Toolbox: The Trade Preference Program as a ‘Carrot and Stick’ to Secure Compliance with International Law Obligations*, 34 *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS* 53–80 (2013).

<sup>7</sup> A. Mills, *Rediscovering the Public Dimension of Private International Law*, 24 *HAGUE YEARBOOK OF INTERNATIONAL LAW* 11–23 (2011); A. Mills, *Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law*, in: H. Muir Watt and D. Fernández Arroyo (eds.), *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (Oxford University Press, 2014), 245–261.

<sup>8</sup> Jessup, *supra* note 1, at 15.

<sup>9</sup> B. Bowling and J. Sheptycki, *Global Policing and Transnational Rule with Law*, 6:1 *TRANSNATIONAL LEGAL THEORY* (2015) 141-173, 146.

<sup>10</sup> G-P. Calliess and P. Zumbansen, *ROUGH CONSENSUS AND RUNNING CODE* (Cambridge University Press, 2010) at 11.

<sup>11</sup> P. Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism* 21 *TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS* (2012) 305, at 307.

<sup>12</sup> Neil Boister, *Further Reflections on the Concept of Transnational Criminal Law*, 6:1 *TRANSNATIONAL LEGAL THEORY* (2015) 9-30, at 30.

body of substantive law or as a methodology, implicates an enlarging of law's vision field.

Despite the appetite for viewing border-crossing law in expansive ways, the task of making visible the actualities of law *and practice* comprising transnational law involves slippery methodological questions that legal scholars seem particularly skilled at sidestepping. Jessup himself invoked the need to more fully capture an expansive view of the sources of international law, and suggested some unconventional methods for elucidating these sources.<sup>13</sup> Neither Jessup nor the scholars who have individually taken up the task of revealing hidden aspects of transnational law, though, have squarely tackled the question of how best to address not only the *unseen* aspects of transnational law but also the disparity between the *known* and the *unknowable*.

This short chapter takes some first steps towards filling this gap. First, the chapter examines the intellectual holding pen created by Jessup for *other* rules and sources of law, his "larger storehouse of rules". While this initiative was firmly aimed at expanding the view of law to see beyond *the state* and to center *practice* in its vision field, the tools and methods for studying and elucidating such a vision of law remain unclear. Second, the chapter interrogates the meaning of the practice-enriched perspective that transnational law claims to deliver, arguing that those who invoke *practice* in fact mean many different things. Finally, the chapter grounds its somewhat abstract reflections on visibility and invisibility in an examination of the difference such issues make to transnational environmental law research. By identifying four "black boxes" that limit access to knowledge, the challenge of discovering unseen law becomes more apparent. Jessup himself acknowledged the partiality of the peek-a-boo views of transnational processes that populate scholarship.<sup>14</sup> Emerging from an awareness that the transnational law "lens" delivers but a selective view, and that forms and manifestations of legal knowledge continue to elude us, are tantalizing possibilities for future research.

---

<sup>13</sup> Jessup offered methodological suggestions as to how transnational law could be mapped by scholars, drawing on "useful precedents" from maritime law including usages, codes, conferences, practices "codified by the voluntary action of shipping interests", inclusion of rules in bills of lading, and the adoption of identical domestic legislation in maritime states: Jessup, *supra* note 1, at 109–110.

<sup>14</sup> Jessup, for example, noted the challenges in accessing "secret archives" and the barriers on new knowledge imposed by "unfamiliar scientific terminology" and "official security classifications.": P.C. Jessup & H.J. Taubenfeld, *Outer Space, Antarctica, and the United Nations*, 13:3 INTERNATIONAL ORGANIZATION 363–379, 363 (1959) [Jessup & Taubenfeld].

## B. TRANSNATIONAL LAW AS AN INTELLECTUAL HOLDING PEN: JESSUP'S "LARGER STOREHOUSE OF RULES"

In the sixty years that have passed since the Storrs Lecture, scholars have flocked to Jessup's definition of transnational law as a safe haven – a place for exploring the multiple sites and manifestations of transnational legality that comprise “all law which regulates actions or events that transcend national frontiers”.<sup>15</sup> Transnational Law has become a form of intellectual shorthand, a terminology that unites scholars who share a dissatisfaction with versions of public international law that are too limited in their vision, too erasing of people, places, sites of law-making, and sources of knowledge about law. Transnational Law equally provides respite from a view of private international law that is too blind to its public facing and political dimensions. Not surprisingly, much of the intellectual energy that has emerged in transnational law scholarship is based on critique (both explicit and implicit) of what non-transnational law misses.

The resulting shared project of mapping and understanding the interactions between private and public, and the intermeshing of state and non-state actors in law-making, has worked to advance Jessup's aspiration of engaging with actualities, and to fill the “gaps” in knowledge that Jessup's concept of transnational law hinted at but failed to definitively diagnose. These compulsions are expressed not only in scholarship that self-identifies with a transnational law label, but can be seen in recent public international law and private international law literatures that aim to better elucidate how international law “works in practice”.<sup>16</sup>

Jessup's unwillingness to define and restrict the “larger storehouse of rules” he evoked in defining transnational law was a genius move. It effectively secured transnational law's enduring appeal by hinting at this term's ongoing capacity to capture a wider vision field. Transnational law has secured its place in legal thought by serving, given this flexibility, as a much-needed placeholder for contemporary anxieties. It has created space for scholars yearning to better reflect the important, diverse, and intermeshed roles of the state and non-state in law-making, to reject compartmentalized views of public and private international law, to take practice seriously as a source of both norms and legal

---

<sup>15</sup> Jessup, *supra* note 1, at 2.

<sup>16</sup> See e.g. Gráinne de Búrca, *Human Rights Experimentalism*, 111:2 AMERICAN JOURNAL OF INTERNATIONAL LAW 277–316 (2017). This compulsion can also be traced through scholarship on global legal pluralism, global administrative law, transnational legal process, transnational legal orders, trans-governmental regulatory networks, international organizations as lawmakers, and new legal realism and international law.

knowledge, and to embrace a plurality of legal sources in capturing the “larger storehouse of legal rules”.<sup>17</sup>

But framing an inquiry as “transnational” does not only reveal previous blind spots. It also provides an opportunity to reintroduce or perpetuate partial visions of law. A transnational law framing will emphasize certain ideas, inquiries, and actors at the expense of others. While it is easy to applaud the task of more expansively covering law “as it is experienced in the world”, it is harder to soberly measure how well scholars are achieving this goal. It is, however, evident that there is a scholarly appetite for seeking to make *visible* obscured dimensions of law’s function and features as it crosses borders. An example of this is a recent study of commercial lawmaking within the United Nations that describes itself in this way:

We focus on the *least visible* of lawmaking institutions: international organizations that function more like legislatures... As an empirical investigation, this book penetrates the *zones of invisibility* that cloud the production of legal norms that govern international commerce and trade.<sup>18</sup>

Feminist scholarship provides a useful reminder to those contemplating transnational law’s selective gaze of the potentially problematic nature of *both* visibility and invisibility. Marginalized groups are often shown to occupy positions of hyper-visibility<sup>19</sup> while the experiences of dominant communities enjoy a claim to universality as the hegemonic norm that conceals their domination.<sup>20</sup> In other situations, feminists describe invisibility as a situation of marginalization<sup>21</sup> from which women, and particularly certain groups of women, are deprived of political agency. A central occupation for many feminist scholars is *identifying* the unknown, and in response, making known what is hidden by legal processes.<sup>22</sup> Feminist theory thus offers an ever-present reminder that

---

<sup>17</sup> Jessup, *supra* note 1 at 15.

<sup>18</sup> S Block-Lieb and TC Halliday, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS* (Cambridge University Press, 2017) at 23 (emphasis mine).

<sup>19</sup> S. Arat-Koç, *Invisibilized, Individualized, and Culturalized: Paradoxical Invisibility and Hyper-Visibility of Gender in Policy Making and Policy Discourse in Neoliberal Canada*, 29:3 *CANADIAN WOMAN STUDIES* 6–18 (2012).

<sup>20</sup> R. Simpson & P. Lewis, *An Investigation of Silence and a Scrutiny of Transparency: Re-examining Gender in Organization Literature through the Concepts of Voice and Visibility*, 58:10 *HUMAN RELATIONS* 1253–1275, 1263–1264 (2005).

<sup>21</sup> M. Yamada, *Invisibility is an Unnatural Disaster: Reflections of an Asian American Woman*, in: C. Moraga & G. Anzaldúa (eds.), *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (SUNY Press, 1981), 35.

<sup>22</sup> See R. Ahlers & M. Zwartveen, *The Water Question in Feminism: Water Control and Gender Inequities in a Neo-Liberal Era*, 16:4 *GENDER PLACE AND CULTURE* 409–426, 414–416 (2009) (exposing the practices of water resource management through which neo-liberal discourse renders unseen the

facts, events, vocabularies, outcomes, processes and people can all be erased by methodological choices and starting points.

Mariana Valverde's *Chronotopes of Law* identifies how a scale shift in feminist legal thought to embrace the transnational has, perhaps unintentionally, relegated certain feminist critiques to the background. These include feminist critiques of marriage and unpaid housework.<sup>23</sup> A shift in scale to the transnational tends to focus attention on 'flows, networks and governance assemblages'<sup>24</sup> and divert attention away from the individual people who comprise these processes.<sup>25</sup> This work is a powerful reminder that a scale shift, such as that to the transnational in studying law, does not only lead to productive new fields of vision, it also implies abandoning other sights and sites of legal activity. Feminist critiques of "the male gaze" highlight the stakes that are implicated in the very act of *seeing*.<sup>26</sup>

### C. WHAT IS A PRACTICE-ENRICHED PERSPECTIVE?

Practice is a single word that denotes many things. It is invoked so often and in so many different ways that it is worth spending some time thinking about why and how scholars use 'practice' and 'practices' to illuminate law and legal processes. Jessup's own appeal to the *practical* was not singular. He invokes practice in multiple ways, including 1) through focusing on *problems* applicable to the 'complex interrelated world community'<sup>27</sup> (the lived reality of law) 2) by appealing to practitioner knowledge (what lawyers know), 3) by drawing on his own diplomatic and government experience (personal experience of international diplomacy), 2) by clarifying that law's problems transcend legal sub-disciplines (highlighting the practical need for intra-disciplinary problem-solving) 4) with alertness to the extra-legal (arguing that law includes processes that go beyond adjudication such as business negotiations and re-negotiations),<sup>28</sup> 5)

---

political nature of decision-making); F. Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELBOURNE UNIVERSITY LAW REVIEW 893–923, 917–919 (1994) (employing feminist critiques of the public/private divide and jurisdictional doctrines to reveal how transnational corporations hide their damaging exploitation of women's labour).

<sup>23</sup> M. Valverde, *CHRONOTOPES OF LAW: JURISDICTION, SCALE AND GOVERNANCE* (Routledge, 2015), 106 [Valverde].

<sup>24</sup> *Id.*

<sup>25</sup> N Affolder, *Transnational Environmental Law's 'Missing People'*, 8 TRANSNATIONAL ENVIRONMENTAL LAW (2019) (forthcoming).

<sup>26</sup> Valverde, *supra* note 23 at 58.

<sup>27</sup> Jessup, *supra* note 1 at 1.

<sup>28</sup> Jessup, *supra* note 1 at 6. ("One notes that the problem of extracting and refining oil in Iran may involve - as it has - Iranian law, English law, and public international law. Procedurally it may involve - as it has - diplomatic negotiations, proceedings in the International Court of Justice and in the Security Council, business negotiations with and among oil companies, and action in the Iranian Majlis.")

employing an explicit attempt to align legal concepts and their definition with ‘realities’ (law in action),<sup>29</sup> and 6) by applauding those scholars and judges whose work has a practical real-world impact on international politics.<sup>30</sup>

These multiple uses of *practice* can all be seen in the Storrs Lecture. In that lecture, Jessup explicitly distinguishes his own approach to law from that of Grotius who detached himself from “every particular fact”, agreeing with a characterization of Grotius as “a scholar, and his only authority was that of a scholar.”<sup>31</sup> While Jessup, like many others, implies that “practice” gives one “authority” beyond that of a scholar, the nature of that authority and the qualification threshold for claiming it, remain underspecified.

Beyond invoking the value of legal practice and citing diplomatic experience as informing real world knowledge, Jessup suggests that rules emanate from “practices” as diverse as those of General Motors, secret societies, towns, cities, states.<sup>32</sup> Jessup did not himself include the word “practices” in his own definition of Transnational Law in the Storrs Lecture. Yet subsequent scholars have made such an insertion, claiming that “‘Law’ for Jessup is composed of all rules *and practices* which regulate actions and events”.<sup>33</sup>

In the sixty years since Jessup’s Storrs’ lecture, appeals to practice in legal scholarship appear to have multiplied. The common vocabulary of *practice*, and *practices*, circulating through this scholarship may hide the fact that quite different things are being invoked: ‘law in action’ as opposed to ‘law on the books’, an understanding of law common to law’s practitioners as opposed to “detached” scholars, the real world of international politics and diplomacy, social practices of institutions and groups of non-state actors. Indeed, as legal scholarship exhibits a growing comfort with sociolegal and ethnographic methodologies that seek to understand law through social practices, it remains difficult to elucidate whether the ‘practices’ being referred to are indeed seen as social practices, legal practices, or something else entirely. Unfortunately, the language of practice seems to be invoked somewhat more often than effort is put into articulating what is indicated by it. And at times, invoking “practical relevance” is simply an undisguised critique of

---

<sup>29</sup> Jessup, *supra* note 1 at 7. He thus approvingly quotes Justice Cardozo’s own Storrs Lecture: “Law and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities.”

<sup>30</sup> Jessup, *supra* note 1 at 10-11, acknowledging that Grotius “and succeeding scholars have not been without their influence on developments in international politics”.

<sup>31</sup> Jessup, *supra* note 1 at 10 (quoting Max Rodin).

<sup>32</sup> Jessup, *supra* note 1 at 9.

<sup>33</sup> N. de B. Katzenbach, *Transnational Law* (Review) 24 UNIVERSITY OF CHICAGO LAW REVIEW (1957) 413-417, at 413 (emphasis mine).



the lack of utility of theory. Such uses accompany calls to redirect legal scholars to the mission of serving “the profession”, invoking past glory days when law professors were:

strictly at the service of the practical profession – the judges and practicing lawyers. Law professors aspired to Utility rather than Truth. Their demeanor and attire were professional, worldly (as were their incomes), in comparison to the mild bohemianism by which the true don proclaimed (and proclaims) his independence from the quotidian.<sup>34</sup>

Simply put, legal scholarship seems to have sidestepped the detailed methodological debates that have marked the “practice turns” in other disciplines such as international relations or history.<sup>35</sup> The consequence is that *legal* practice tends to be invoked as some non-contentious and non-political body of common knowledge without being subjected to the usual questions of legitimacy given to sources of law, and sources of knowledge about law. Practice, in such a way, acquires an assumed, rather than an up-for-debate, rationality. The reason that the methods for studying, or revealing, practice matter, in particular, to a collection of essays exploring Jessup’s legacy, is that a practice-informed perspective was so central to Jessup’s vision of transnational law. The value of studying practices to reveal *unconscious* knowledges that might be taken for granted or obscured, and *unseen* dynamics of socialization,<sup>36</sup> remain no less relevant to current transnational law scholarship.

The fact that the meaning, and particular authority, resident in law’s practice-claims remains little explored suggests that there is room for more explicit scholarly discussion about how lawyers and legal scholars, *and which ones*, get to access and represent legal practice in producing those more complete/accurate/true to life visions and versions of law that “practice-informed perspectives” claim, at least implicitly, to provide. Who gets to draw on the experience of their own lives with a sense that their experience of practice is of more than anecdotal value? As legal scholars, do we unwittingly reproduce very selective “practice-informed perspectives” by our unspoken assumptions as to whose practice and whose perspective on that practice is worth capturing in text? Do we need to adopt more deliberate, and different, methodologies to ensure that varied, diverse, and thus widely representative “practice-informed perspectives” are shared? And what is it

---

<sup>34</sup> RA. Posner, *Legal Scholarship Today* 45 STANFORD LAW REVIEW 1647, at 1648 (1993).

<sup>35</sup> J. Kustermans, *Parsing the Practice Turn: Practice, Practical Knowledge, Practices*, 44:2 MILLENNIUM JOURNAL OF INTERNATIONAL STUDIES 175–196 (2016).

<sup>36</sup> T Schatzki, *Introduction: Practice Theory* in T Schatzki, K Cetina, and E von Savigny, eds, *THE PRACTICE TURN IN CONTEMPORARY THEORY* (Routledge, 2001) 10 at 13; M Polyakov, *Practice Theories: The Latest Turn in Historiography?* (2012) 6 J Phil Hist 218 at 218-219.

exactly that a practice-informed perspective is seeking to offer – a fuller, wider, or just different, vision of law, or a more ‘true to life’ vision, and if so true to whose life?

Many of these anxieties trace to the fact that legal scholarship can be marked by methodological timidity, and sometimes even an aversion to saying much at all about methodological choices. Fleur Johns’ *Non-Legality in International Law* is a wonderful example of a book shaped and coloured by Johns’ experience in range of practice settings, including corporate practice in New York. By referencing her own prior experience in legal practice as a research methodology, she uses the term ‘quasi-ethnography’, a term coined by social scientists seeking to note the limits of their ethnographic studies.<sup>37</sup> By being explicit about the practice base upon which she personally draws, Johns’ references to practice take on greater meaning and clarity. Other scholars find ways to clarify their conceptions of practice and practices, by defining practices by what they are not. For example, human rights scholars differentiate *practices* of human rights from human rights *discourses*, taking care to note that the two are mutually constitutive.<sup>38</sup>

Ethnographic work has illuminated the difference a practice-informed perspective makes in the sense of revealing law through its “lived practices and techniques”.<sup>39</sup> Such work, for example, allows scholars to adjust where they direct their gaze in understand global supply chains, revealing the importance of detailed scrutiny of practices that occur not only in but around the chain.<sup>40</sup> Studying legal knowledge in this way can involve looking at quite diverse sites of practice, including viewing law as the product of specialized elites,<sup>41</sup> or analyzing law as the product of automation and routinized practices.<sup>42</sup> As transnational sites of knowledge production increasingly attract the interest of legal scholars, law’s visual field is adjusted by a willingness to examine how legal knowledge is formed through material practices.

---

<sup>37</sup> F. Johns, *NON-LEGALITY IN INTERNATIONAL LAW* (Cambridge, 2013) 22; See B. Owen, *IN THE MIX: STRUGGLE AND SURVIVAL IN A WOMEN’S PRISON* (SUNY Press, 1998).

<sup>38</sup> M Goodale, *Locating Rights, Envisioning Law Between the Global and the Local* in M. Goodale and SE Merry eds, *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* (Cambridge, 2007) 1-38, at 18. This chapter title again draws on the language of visibility in its exercise of *envisioning* law.

<sup>39</sup> See SE Merry, *New Legal Realism and the Ethnography of Transnational Law* 31:4 *LAW & SOCIAL INQUIRY* (2006) 975-995.

<sup>40</sup> See B Reinke and P Zumbansen, *Transnational Liability Regimes in Contract, Tort, and Comparative Law: Comparative Observations on ‘Global Supply Chain Liability’* in S Schiller (ed.) *LE DEVOIR DE LA VIGILANCE* (Lexis Nexis 2019).

<sup>41</sup> Y. Dezalay and BG Garth, *THE INTERNATIONALIZATION OF PALACE WARS* (University of Chicago Press, 2002).

<sup>42</sup> See e.g. A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Market* (2011) 230; Johns, *supra* note 37 at 64.

Many of the scholars writing practice-inspired accounts of international law and transnational regulation do so after a career-long engagement with practice and draw on their own lives in creating practice-informed perspectives. Martti Koskenniemi, for example, has explicitly drawn attention to the importance of his long career practicing international law with the Finnish Ministry of Foreign Affairs in shaping the starting points for *From Apology to Utopia*.<sup>43</sup> David Kennedy, a scholar whose own writing is animated by deep suspicions about expert rule and its tendency to marginalize opportunities for contestation, writes in an anecdote-rich way that reveals the depth of his expertise, his networks, and his experience in professional practice.<sup>44</sup>

While personal experience-rich accounts such as Kennedy's, and monumental interview-based and practice-reflecting texts like John Braithwaite and Peter Drahos' *Global Business Regulation*, provide models of practice-informed scholarly writing, they are exceptional examples of such work. Kennedy provides a rich view of the "field" from social and professional interactions without the interruptions of footnotes denoting interview numbers and ethics approvals, but, in reality, produced based on unparalleled access to both grassroots and elite military, economic, and humanitarian actors. Braithwaite and Drahos document a decade-long process of interviewing 500 "international leaders in business and government".<sup>45</sup> They explain the purpose of undertaking such a monumental number of interviews as revealing "what the formal language of international intellectual property agreements does not: *the informal dynamic of power* that determines the choice of words, their meaning, and subsequent utilization."<sup>46</sup>

Jessup's conception of transnational law presents us with the challenge of creating "practice informed" perspectives of law. Such a task demands being explicit about how we are creating these accounts. What methodological safeguards might ensure that the visions of practice that do inform accounts of transnational law do not unwittingly reproduce the very patterns of privilege and marginalization of sources of knowledge that

---

<sup>43</sup> M. Koskenniemi, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Cambridge University Press, 2005), 562.

<sup>44</sup> D. Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 *EUROPEAN HUMAN RIGHTS LAW REVIEW* 463–497 (2001); D. Kennedy, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (Princeton University Press, 2016), p. 2; D. Kennedy, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (Princeton University Press, 2004), xvi.

<sup>45</sup> J. Braithwaite & P. Drahos, *GLOBAL BUSINESS REGULATION* (Cambridge University Press, 2000).

<sup>46</sup> P. Drahos & J. Braithwaite, *INFORMATION FEUDALISM: WHO OWNS THE INFORMATION ECONOMY?* (Oxford University Press, 2002), preface.

they seek to address? Acknowledging that there are “black boxes” of knowledge about law, the task of the next section, might be one first step.

#### **D. ACCESSING TRANSNATIONAL ENVIRONMENTAL LAW’S “SECRET ARCHIVES”**

The next section of the chapter looks to some concrete challenges in realizing the Jessup-inspired ideal, a version of practice-informed, problem-addressing transnational law. Jessup did not hesitate to acknowledge the gaps in public and private international law, nor the impediments to accessing information contained in “secret archives”.<sup>47</sup> He was not explicit about what those “secret archives” were but cited scientific knowledge and official security classifications as examples.<sup>48</sup> Applying the idea of “secret archives” to the research context of the contemporary transnational environmental law scholar, I explore below four examples of “black boxes” that limit access to knowledge. They are far from an exhaustive list of problem areas for accessing rich and full views of transnational legal problems. A more complete list might more comprehensively target the geographic imbalances of the available data of “global” environmental law, the consequences of language barriers (and English-language defaults), search engine biases (and online-research defaults), the obscuring of environmental issues most pressing to women, the ways in which environmental terminology is complicated by disparate meanings, and the absence of indigenous law in accounts of global environmental law processes.

Indeed, transnational environmental law presents a particularly rich venue for observing such tensions up close. For scholars interested in environmental problems, accessing the specialized knowledge of different regimes (trade, investment, intellectual property, international criminal law) requires confronting immediate challenges. Fragmentation, and the resulting limits of “insider knowledge”, make it harder to know what scholars fail to see, and what sources are “hidden from view”.<sup>49</sup> The challenges of classifying various aspects of “global background law”<sup>50</sup> or “fuzzy law”<sup>51</sup> that populate environmental law *practice* explain the allure of Jessup’s transnational law terminology as a “catch-all”.

---

<sup>47</sup> Jessup & Taubenfeld, *supra* note 14, at 363.

<sup>48</sup> *Id.*

<sup>49</sup> See N. Affolder, *Looking for Law in Unusual Places: Cross-Border Diffusion of Environmental Norms*, 7:3 TRANSNATIONAL ENVIRONMENTAL LAW 425–449 (2018) [Affolder].

<sup>50</sup> R. Michaels, *The UNIDROIT Principles as Global Background Law*, 19:4 UNIFORM LAW REVIEW 643–668 (2014).

<sup>51</sup> O. Perez, *Fuzzy Law: A Theory of Quasi-Legality*, in: P. Glenn & L. Smith (eds.), *LAW AND THE NEW LOGICS* (Cambridge University Press, 2017), 236.

## I. The Partial Knowledge Base of Arbitration

In transnational law scholarship, international arbitration (both investment arbitration and international commercial arbitration) has occupied a privileged place as providing precisely that “larger storehouse of rules” that Jessup invoked. International arbitration is a familiar area of study for those explicitly adopting a transnational law lens in their work, and well fits the practice-informed, problem-addressing, public/private divide jumping context set out by Jessup as transnational law’s domain. Transnational environmental law scholars eager to capture the influence of these legal rules on environmental problems, though, remain stymied by the limits on access to information from and about arbitral processes.

Many scholarly works on arbitration treat transparency as a normative issue,<sup>52</sup> rather than focusing descriptively on what information is available, and what remains off-limits to the public and interested researchers. Scholars thus argue that while “arbitral decision-making of yesteryear occurred in a virtual black box” ... “[t]oday the situation is quite different.”<sup>53</sup> This comment seems to include both international commercial arbitration and investor-state arbitration in its scope while the transparency issues at stake in each form of arbitration differ.<sup>54</sup> The cited improvements in the transparency of arbitral processes most often relate to reforms making “the rules that regulate decision-making” more readily available to interested parties, and to the growing number of voluntary and involuntary disclosures.<sup>55</sup> While these reforms may go some way to disclosing information on challenges to arbitrators and creating clearer guidance on arbitrator standards of conduct, they do little to increase the disclosure to interested scholars of what disputes are reaching arbitration.

At the same time as scholars are reporting that more arbitral awards are being voluntarily published,<sup>56</sup> it is impossible to know what “tip of the iceberg” these awards represent.

---

<sup>52</sup> This scholarship traces back to the detailed case for the publication of arbitration awards made in J.D.M. Lew, *The Case for the Publication of Arbitration Awards*, in: J.C. Schultz & J. van den Berg (eds.), *THE ART OF ARBITRATION* (Springer, 1982), 22–42; and T.E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23:3 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 579–614 (1985).

<sup>53</sup> C.A. Rogers, *Transparency in International Commercial Arbitration* 54 UNIVERSITY OF KANSAS LAW REVIEW 1301–1338, 1312–1313 (2006).

<sup>54</sup> Rogers usefully canvasses the multiple possible means of transparency. *Id.*

<sup>55</sup> *Id.*, at 1313.

<sup>56</sup> See D.M. Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41:3 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 923–964, 959 (2003) (“Today, several arbitral institutions, as well as independent publishers, have started to regularly publish arbitral awards.”)

Ginsburg notes that the subset of awards that are published represents “an explicitly biased sample” as the International Chamber of Commerce, for example, seeks to publish “particularly interesting or unusual awards.”<sup>57</sup> But for non-experts it may be the “uninteresting” and “usual” awards that equally illuminate. It is easy to calculate that there is a large disparity between the sparse number of published awards and the documented caseload of arbitral institutions which shows thousands of arbitrations taking place each year.<sup>58</sup>

For environmental law research, this offers many dead ends. While the attractiveness of arbitration as a venue for resolving environmental disputes is widely advertised,<sup>59</sup> it is challenging to discover how often arbitration clauses are used, how many environmental disputes (or commercial disputes that include environmental issues) ever reach an arbitral panel, and if so with what results. This limits an awareness of how partial, or how representative, discussions of arbitral practices are when they draw on a small sample of reported cases. Further, as still little is known about the composition of the “invisible college” of arbitrators,<sup>60</sup> the extent to which arbitrators possess, or are open to, specialized environmental and scientific knowledge remains unknown.

An added challenge emerges from the patterns of redaction common to arbitral reporting that complicate searching environmental content, reducing carbon trading to “services” and environmental goods to “products”. In practice, the much-applauded reforms to disclosure that are in the interests of parties and voluntarily introduced might not be the same sort of reforms needed to produce more informed and robust knowledge. Interview-based studies help elucidate hidden aspects of arbitral practice, yet they run into some of the same problems of “trust me” default visions of expertise described above. The challenge then is not simply that knowledge about arbitration remains out of reach, but that it is difficult to know how little one knows.

---

<sup>57</sup> T. Ginsburg, *The Culture of Arbitration*, 36 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1335–1346, 1340 (2003).

<sup>58</sup> Such data is reproduced in J. Jemielniak, *LEGAL INTERPRETATION IN INTERNATIONAL COMMERCIAL ARBITRATION* (Routledge, 2014), 91.

<sup>59</sup> *Carbon Mission*, THE LAWYER, 28 October 2009, available at <<https://www.thelawyer.com/issues/online/carbon-mission/>>.

<sup>60</sup> S. D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of Arbitration*, 53 COLUMBIA JOURNAL OF TRANSNATIONAL LAW (2015) 429-506 (offering a ‘glimpse’ of this college through disaggregating data on conference attendance).

## II. Tracing Transplants

Scholars alert to transnational environmental law's movements are increasingly attentive to the movement of environmental law ideas, models, and forms across borders.<sup>61</sup> Discourses of diffusion, emphasizing and assuming environmental law's transferability, have become central to the way in which new environmental law ideas and approaches are developed and communicated.<sup>62</sup> Yet the tasks of tracing the movement of law and its underlying ideas are impeded by the many forces which obscure the processes by which transnational influences shape both the substance of legislative "transplants" and legislative drafting processes.

For example, a 2017 Climate Legislation Study calculated that more than 1,200 laws to curb climate change have now been passed, an increase from about 60 laws in place two decades ago.<sup>63</sup> Econometric research drawing on this dataset of legislation points to the practice of international policy diffusion whereby the climate action a country undertakes is likely to depend on prior climate legislation by other countries.<sup>64</sup> While these assertions are made and justified by regressing climate legislation against the number of laws passed in all other countries in the sample, little analysis is made of the pressures shaping legislative form and content.<sup>65</sup> Such studies make valuable contributions to an understanding of the proliferation of climate laws, but they also point to the underlying methodological challenges implicit in trying to provide a comprehensive "global" image of legislative activity, as well as a dynamic image of how law moves from place to place, and why. Moreover, they reveal how hard it is to come up with a satisfactory definition of what counts as climate legislation.

Attempts to trace diffusion of environmental law models contribute to understandings of global power dynamics, and national influence. The EU's claimed position of climate leadership can thus be partially traced to its creation of models capable of transplantation

---

<sup>61</sup> N. Affolder, *Contagious Environmental Lawmaking*, 31:2 JOURNAL OF ENVIRONMENTAL LAW 187-212 (2019); J. B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY LQ 1295-1372 (2001).

<sup>62</sup> For example, Peel and Osofsky contemplate existing rights-based judgments as offering a 'model or inspiration' for climate litigation decisions in other jurisdictions. J. Peel & H. Osofsky, *A Rights Turn in Climate Litigation* 7:1 TRANSNATIONAL ENVIRONMENTAL LAW 37-67, 37 (2018).

<sup>63</sup> M. Nachmany, S. Fankhauser, J. Setzer & A. Averchenkova, GLOBAL TRENDS IN CLIMATE CHANGE LEGISLATION AND LITIGATION (Grantham Research Institute on Climate Change and the Environment, 2017), 4.

<sup>64</sup> S. Fankhauser, C. Gennaioli, & M. Collins, *Do International Factors Influence the Passage of Climate Change Legislation?* 16:3 CLIMATE POLICY 318-331 (2016).

<sup>65</sup> A. Boute, *The Impossible Transplant of the EU Emissions Trading Scheme: The Challenge of Energy Market Regulation*, 6:1 TRANSNATIONAL ENVIRONMENTAL LAW 59-85 (2017) [Boute].

elsewhere.<sup>66</sup> The EU's Emission Trading Scheme has served as a model for many countries looking to introduce the legal infrastructure necessary for domestic carbon markets. But it is a model that is proving challenging to export.<sup>67</sup> In other areas of transnational environmental law, accounts of "borrowing" European law models for environmental legislation are equally easy to find,<sup>68</sup> but largely unsystematic, and often reveal examples rather than "thick description" of how these models were tailored for local needs. Rarely on offer is a view of how such one might adjust or fine-tune these universal or borrowed prescriptions to particular local contexts.<sup>69</sup> This gap reveals the larger challenge for environmental law research emerging from limited qualitative and quantitative data on the environmental law practices of non-OECD countries.<sup>70</sup>

These issues go further to the point that legislative drafting processes generally operate in a context of limited transparency and under a veil of secrecy. In many countries, the confidentiality of legislative drafting materials is protected through statutes.<sup>71</sup> This prevents a full understanding of the significance of transnational influences on the domestic enactment of environmental legislation. The reality of such transnational influence must instead be gleaned from reports of the practice of drafting including either voluntary or mandatory consideration of international "best practices",<sup>72</sup> reliance on

---

<sup>66</sup> K. Kulovesi, *Climate Change in the EU External Relations: Please Follow my Example (or I Might Force You to)*, in: E. Morgera (ed.), *THE EXTERNAL ENVIRONMENTAL POLICY OF THE EUROPEAN UNION: EU AND INTERNATIONAL LAW DIMENSIONS* (Cambridge University Press, 2012), 115–148.

<sup>67</sup> Boute, *supra* note 65.

<sup>68</sup> Jörgens, for example, traces the influence of European concepts of sustainable development through "diffusion" of global policies, documenting the key role of the World Bank. H. Jörgens, *Governance by Diffusion: Implementing Global Norms Through Cross-National Imitation and Learning*, in: W. Lafferty (ed.), *GOVERNANCE FOR SUSTAINABLE DEVELOPMENT: THE CHALLENGE OF ADAPTING FORM TO FUNCTION* (Edward Elgar, 2004) 246–287, 269–271. Scott's work on REACH discusses the influence of this EU on the development of US law, and specifically on the amendments to California's health and safety code. J. Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57:4 *THE AMERICAN JOURNAL OF COMPARATIVE LAW* 897–942, 910–912.

<sup>69</sup> This despite a long history of recognition that the failure of decades of "law and development" initiatives can be traced to a blindness to addressing localized contexts and challenges.

<sup>70</sup> For example, a recent book review of an edited environmental governance collection explains the dominant focus on the experience of OECD countries in this "comparative work" as not due to the OECD countries' historic responsibility for climate change, but rather due to the "availability of data on these countries": J. Barandiaran, *Review of Duit, Andreas, ed. 2014. State and Environment: The Comparative Study of Environmental Governance*, 16:1 *GLOBAL ENVIRONMENTAL POLITICS* 108–109, 109 (2016).

<sup>71</sup> For example, provisions limit access to these materials for 90 years in New Zealand, 100 years in the province of Ontario, and (with possible redactions) after 30 years in the United Kingdom. S. Tomlinson, *Public Access to Legislative Drafting Files*, 21:1 *RECORDS MANAGEMENT JOURNAL* 28–35, 28, 33 (2011).

<sup>72</sup> The Kenya Law Reform Commission's Guide to the Legislative Process in Kenya prescribes "[undertaking] comparative research to ensure that the draft legislative instrument benefits from international best practices" as a step in drafting bills. Kenya Law Reform Commission, *A GUIDE TO THE*



foreign legislative drafting consultants,<sup>73</sup> the sponsorship of drafting initiatives by international financial institutions and international organizations,<sup>74</sup> “study tours” of other countries to inform climate legislation,<sup>75</sup> job advertisements for international consultancy work on legislative drafting,<sup>76</sup> and the curricula of international legislative drafting conferences<sup>77</sup> and graduate training programs<sup>78</sup>. Yet these sources still afford only a partial glimpse of such practices.

Authors who “divulge” transnational influences and processes shaping their own legislative drafting experiences do so in the spirit of describing their work rather than through formalized research studies. The very few empirical studies of legislative drafting processes, such as Gluck and Bressman’s interview-based analysis of US Congressional practices, only confirms the methodological difficulties with gaining access to the

---

LEGISLATIVE PROCESS IN KENYA (2015), 51, available at <<http://www.klrc.go.ke/index.php/reports-and-publications/562-a-guide-to-the-legislative-process-in-kenya>>. Moldova’s Law on Legislative Acts includes a similar provision requiring comparative analysis of the proposed bill with “useful information contained in the legislation of other countries, and principles of main systems of the world applied”: T. St. John & N. Bates, *Legislating for Drafting: The Moldavian Experience*, 30:2 STATUTE LAW REVIEW 123–139, 125–126 (2009).

<sup>73</sup> Nain discusses Fiji’s reliance on foreign legal drafters since the former colony gained independence. N. Nain, *Teaching Legislative Drafting: The Pacific Experience*, 1:1 INTERNATIONAL JOURNAL OF LEGISLATIVE DRAFTING AND LAW REFORM 28–34, 29 (2012).

<sup>74</sup> UNEP’s Partnership for the Development of Environmental Law and Institutions in Africa has been influential in developing national environmental laws in Africa. E. Kasimbazi, *Application of International Standards in Drafting Environmental Legislation and Law Reform Projects: The African Experience*, 1:1 INTERNATIONAL JOURNAL OF LEGISLATIVE DRAFTING AND LAW REFORM 10–27 (2012). The Asian Development Bank has taken on similar roles in Asia including the reform of Chinese water pollution legislation, China’s framework Environmental Protection Law, and Land Administration and Natural Resource legislation. Asian Development Bank, REFORM OF ENVIRONMENTAL AND LAND LEGISLATION IN THE PEOPLE’S REPUBLIC OF CHINA (Asian Development Bank, 2000).

<sup>75</sup> Stritih and Simonič comment on the “study tour” of the UK undertaken by members of government and expert advisors tasked with producing Slovenia’s climate change legislation. J. Stritih and B. Simonič, *Drafting a Climate Change Act: Lessons Learned*, 42:1 ENVIRONMENTAL POLICY AND LAW 46–49, 46 (2012).

<sup>76</sup> UN Careers, LEGISLATIVE DRAFTING OF THE CLIMATE CHANGE BILL, MBABANE, available at <<https://uncareer.net/vacancy/legislative-drafting-climate-change-bill-consultancy-mbabane>>.

<sup>77</sup> See e.g. Fourth International Conference on Legislation and Law Reform (Washington: World Bank, November 17–18, 2016) which included sessions on Legislative Drafting for Sustainable Development and the Importance of Drafting in Implementing Sustainable Development Goals. Available at <<https://ilegis.org/files/iLegis-2016-Agenda.pdf>>.

<sup>78</sup> Nagoya University School of Law advertises a programme in *Cross-Border Legal Institution Design*, the objective of which is to “produce Asia-literate professionals who can design legal institutions for cross-border transplantation.”: Nagoya University, available at <<http://www.law.nagoya-u.ac.jp/~leading/en/index-e.html>>.

relevant people to pierce a deep culture of confidentiality surrounding legislative drafting.<sup>79</sup>

### III. Judges and “the Project” of Environmental Law

Interest in how legal norms travel has attempted to incorporate the insight that judges also travel and their travel involves “messy and diverse” processes of judicial interaction.<sup>80</sup> Judges clearly occupy a privileged place in legal analysis, yet thinking about judges as research subjects exposes still more black boxes. A wide view of transnational law-making invites questions about judicial practices well beyond written court decisions. These questions transcend current interest in “what judges do” that tends to center around issues of judicial “independence”, framing “extra-judicial” activities as transgressions.<sup>81</sup> They move analysis beyond the more easily traceable practices of explicit transjudicial borrowing reflected in the use of foreign law materials in domestic courts.

Appreciating the multi-faceted dimensions of the professional lives of judges brings into view different dimensions of judicial work including speaking, writing, and advocacy, some of which will be directly related to the judicial function (for example, advocating for specialized tribunals and the form they should take), some not. Scholars are adopting diverse strategies for attempting to access the “black box” of judicial lives outside of their courtrooms. Kendall and Sorkin traced financial disclosures to track the sponsors and funders of private judicial conferences which “represent a veiled attempt to lobby the judiciary under the guise of judicial education”.<sup>82</sup> A report on the feasibility and structure of a specialized environmental court for England and Wales revealed the involvement of a range of judges from other jurisdictions.<sup>83</sup> Environmental law perhaps offers a particularly vivid exposure to the “project” of environmental protection motivating a select group of judges who have taken on openly public advocacy roles speaking in

---

<sup>79</sup> A.R. Gluck & L.S. Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65:5 STANFORD LAW REVIEW 901–1025, 922 (2013) (“congressional staffers are a notoriously difficult population to study, both because of the difficulty of identifying the relevant staffers and also because of the strong culture of confidentiality and the fear of ‘leaks’ that permeates Congress.”)

<sup>80</sup> A.M. Slaughter, *Judicial Globalization*, 40:4 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1103–1124, 1104 (2000).

<sup>81</sup> J.C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEORGETOWN JOURNAL OF LEGAL ETHICS 1–63 (2004).

<sup>82</sup> D.T. Kendall & E. Sorkin, *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public’s Trust*, 25 HARVARD ENVIRONMENTAL LAW REVIEW 405–480, 405 (2001).

<sup>83</sup> M. Grant, ENVIRONMENTAL COURT PROJECT: FINAL REPORT (UK Department of the Environment, Transport and the Regions, 2000), xviii–xix.

conferences, publishing scholarship as well as writing judicial opinions to advance particular environmental law reforms and projects.<sup>84</sup>

Little is, however, systematically known about environmental law judges' efforts to influence law and policy as opinion leaders, network builders, publicists and law reform advocates --efforts referred to as off-bench judicial mobilization<sup>85</sup> -- or about judicial practices of off-bench resistance.<sup>86</sup> A strong sense of the common 'project' of environmental protection being advanced through the judiciary can be gleaned from articles like Lord Carnwath's "world tour"<sup>87</sup> of exceptional environmental law judges and his celebration of the crucial role that "judges for the environment" have to play, both individually and collectively.<sup>88</sup> It is equally evident from the work and choice of issue focus of judicial networks such as the ASEAN Chief Justices' Roundtable on the Environment.<sup>89</sup>

Biographies and autobiographies offer additional and valuable glimpses of the people who animate the projects of transnational environmental law. Judge Jessup's refusal to clinically separate public and private international law is rendered more palpable from an understanding of his prior legal practice that included work as a legal advisor to the governments of foreign states at the same time as representing a private non-governmental organization.<sup>90</sup> While still rare, examples of 'life writing' by and about

---

<sup>84</sup> See e.g. Brian Preston, *Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study*, 29:2 PACE ENVIRONMENTAL LAW REVIEW 396–440 (2012); Antonio Herman Benjamin, *We, the Judges, and the Environment*, 29:2 PACE ENVIRONMENTAL LAW REVIEW 582–591 (2012).

<sup>85</sup> O. Bakiner, *Judges Discover Politics: Sources of Judges' Off-Bench Mobilization in Turkey*, 4:1 JOURNAL OF LAW AND COURTS 131–157 (2016).

<sup>86</sup> A. Trochev & R. Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy Through the Prism of Off-Bench Resistance*, 2:1 JOURNAL OF LAW AND COURTS 67–91 (2014).

<sup>87</sup> R. Carnwath, *Judges and the Common Laws of the Environment – At Home and Abroad*, 26 JOURNAL OF ENVIRONMENTAL LAW 177–187, 182 (2014).

<sup>88</sup> R. Carnwath, *Judges for the Environment: We Have a Crucial Role to Play*, THE GUARDIAN, 22 June 2012, available at <<https://www.theguardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio>>.

<sup>89</sup> See R. Pepper, *The Role of Judicial Networking in Information Sharing in Promoting and Implementing Environmental Law* (unpublished speech, 12 November 2016), available at: <<http://www.lec.justice.nsw.gov.au/Documents/Speeches%20and%20Papers/PepperJ/PepperJ%20Judicial%20Networking%20in%20Promoting%20Mutual%20Assistance.pdf>>.

<sup>90</sup> C. Tietje, A. Brouder, & K. Nowrot (eds.), PHILIP C. JESSUP'S TRANSNATIONAL LAW REVISITED: ON THE OCCASION OF THE 50<sup>TH</sup> ANNIVERSARY OF ITS PUBLICATION (Martin-Luther-University Halle-Wittenberg, 2006), 12.

judges, as well as about international law scholars and practitioners, provide one route into this particular black box of transnational law practice.<sup>91</sup>

#### IV. The Private Lives of Contractual Texts

A final disparity I draw attention to here is that which exists between growing scholarly interest in exploring the significance of global value chains as aspects of environmental governance, and the still limited knowledge base of contracting upon which this research is based. Environmental law is heavily implicated in global value chains and multiple and intersecting sources of law surround and engage with supply chain contracts.<sup>92</sup> Yet a full scholarly view of how these legal obligations move across time and space through contractual practices is hampered by the challenge of accessing private contractual texts.<sup>93</sup> This is not a problem of shallow or unambitious scholarly efforts. It is a problem of the limited access to “private” sources of transnational law.

In a variety of fields scholars see great potential in contracts as accountability mechanisms for private actors operating in international legal spaces.<sup>94</sup> Yet scholarship and commentary on global value chains may emerge from a limited view of the actual content of these contracts. Scholars attempt to find a variety of ways around the problem of the “black box” of contractual texts. They may base their analysis on existing knowledge of global value chains, rather than the contracts which comprise those chains.<sup>95</sup> They may analyze contracting practices from standard form contracts that are

---

<sup>91</sup> See e.g. Judge Weeramantry’s writings. C.G. Weeramantry, *TREAD LIGHTLY ON THE EARTH: RELIGION, THE ENVIRONMENT AND THE HUMAN FUTURE* (Stamford Lake, 2009). Attempts to present fuller practice-reflecting views of international law emerge from recent collections including W. Werner, M. de Hoon & A. Galan (eds), *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI* (Cambridge University Press, 2017); J. d’Aspremont, T. Gazzini, A. Nolkaemper & W. Werner (eds), *INTERNATIONAL LAW AS A PROFESSION* (Cambridge University Press, 2017).

<sup>92</sup> L.C. Backer, *Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Collapse*, 1 U.C. IRVINE JOURNAL OF INTERNATIONAL, TRANSNATIONAL AND COMPARATIVE LAW 11–66 (2015).

<sup>93</sup> For a more extensive discussion of the challenge of accessing reliable information about contracting practices, see Affolder, *supra* note 49.

<sup>94</sup> Dickinson, whose scholarship looks at private military contracts, is enthusiastic about the potential of contracts governments enter into with non-state actors to include provisions that would help to create both standards of behavior, performance benchmarks, and a means of providing some measure for public accountability. She acknowledges that “in many cases it is impossible for the public or a watchdog group even to obtain the text of the contracts, either because government officials have kept them secret for security reasons or because the contractors have exercised what is essentially a veto, under the Freedom of Information Act (FOIA), for certain types of commercial information”. L. Dickinson, *Public Law Values in a Privatized World*, 31 YALE JOURNAL OF INTERNATIONAL LAW 383–426, 386, 402 (2006).

<sup>95</sup> K.B. Sobel-Read, *Global Value Chains: A Framework for Analysis*, 5:3 TRANSNATIONAL LEGAL THEORY 364–407 (2014).

publicly available on corporate websites.<sup>96</sup> Or they may ground their analysis in interviews of supply chain participants rather than textual review of the contracts themselves.<sup>97</sup> Scholars also may secure access to a select handful of contractual examples,<sup>98</sup> or offer a deep analysis based on a single example,<sup>99</sup> or rely on codes of conduct as a proxy for examining contracts.<sup>100</sup> This work is enriched by explicit acknowledgment of “the dense veil of confidentiality that often accompanies outsourcing” and the significant selection biases that prevent scholarship from being generalizable to the broader population of outsourcing deals.<sup>101</sup>

Further heroic attempts to provide a fuller view of contracting practices, and texts, emerge from the efforts of scholars to use their access as in-house counsel to comment on contractual forms<sup>102</sup> and from NGOs campaigning for greater transparency and contractual disclosure in natural resource project settings.<sup>103</sup> In some situations, the selective visibility of contracts might be mitigated by access to other sources such as the data emerging from interviews of managerial motivations to adopt CSR measures,<sup>104</sup> and

---

<sup>96</sup> K. P. Mitkidis, *Using Private Contracts for Climate Change Mitigation*, 2:1 GRONINGEN JOURNAL OF INTERNATIONAL LAW 54–80, 71 (2014).

<sup>97</sup> R.A. Mulhall & J.R. Bryson, *The Energy Hot Potato and Governance of Value Chains: Power, Risk, and Organizational Adjustment in Intermediate Manufacturing Firms*, 89:4 ECONOMIC GEOGRAPHY 395–419, 397–398 (2013).

<sup>98</sup> F. Cafaggi & P. Iamiceli, *Inter-Firm Networks in the European Wine Industry*, 19 EUI WORKING PAPERS, 13 (2010); R.J. Gilson, C.F. Sabel, & R.E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109:3 COLUMBIA LAW REVIEW 431–502, 458–471 (2009).

<sup>99</sup> D. Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46:2 HARVARD INTERNATIONAL LAW JOURNAL 411–425 (2005) [Danielsen].

<sup>100</sup> Lin analyzes codes of conduct as a proxy for actual contracts, noting that “contracts between private entities are usually confidential.” L.W. Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57:3 AMERICAN JOURNAL OF COMPARATIVE LAW 711–744, 722 (2009).

<sup>101</sup> G.S. Geis, *An Empirical Examination of Business Outsourcing Transactions*, 96:2 VIRGINIA LAW REVIEW, 241–300, 254, 260 (2010).

<sup>102</sup> See e.g. Danielsen, *supra* note 99, at 416.

<sup>103</sup> See e.g. the confidentiality clause examples in P. Rosenblum & S. Maples, *CONTRACTS CONFIDENTIAL: ENDING SECRET DEALS IN THE EXTRACTIVE INDUSTRIES* (Revenue Watch Institute, 2009), 65–85; Amnesty International’s work accessing contractual documents for the Baku-Tbilisi-Ceyhan and Chad-Cameroon pipelines: Amnesty International, *HUMAN RIGHTS ON THE LINE: THE BAKU-TBILISI-CEYHAN PIPELINE PROJECT* (Amnesty International, 2003); Amnesty International, *CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT* (Amnesty International, 2005). Global Witness’ work on the Mittal Steel investment contract in Liberia: Global Witness, *HEAVY MITTAL? A STATE WITHIN A STATE: THE INEQUITABLE MINERAL DEVELOPMENT AGREEMENT BETWEEN THE GOVERNMENT OF LIBERIA AND MITTAL STEEL HOLDINGS* (Global Witness, 2006).

<sup>104</sup> B. Sheehy, *Understanding CSR: An Empirical Study of Private Self-Regulation*, 32:2 MONASH LAW REVIEW 103–127 (2012).

from ethnographic accounts of corporate cultures.<sup>105</sup> But the generalizability of these “partial views” is questionable. The extent of the practical problem of access to private contracts is highlighted in contexts such as that of cobalt mining in the Democratic Republic of the Congo where corporations allege that contractual measures guarantee their compliance with human rights standards yet watchdogs are unable to access these contracts or measure their implementation.<sup>106</sup>

Knowledge of individual, localized contracts can also obscure another reality that only meta-analysis might unveil, the extent to which seemingly customized deals incorporate pressure for standardization, resulting in the use of standard templates rather than highly unique contractual terms.<sup>107</sup> Thus, the documentary lens of the deal can “prevent people from realizing that deals are not as unique and creative as advertised.”<sup>108</sup> Deal documents that might appear as “the embodiment of choices” in another light might be seen as composed almost entirely of recycled and recyclable parts.<sup>109</sup>

The “black boxes” I discuss here were not ones that likely troubled Jessup. He had his own. By acknowledging that “secret archives” do exist, and that there is a “larger storehouse of rules” worth accessing, Jessup issued an open invitation to continue to think about what legal knowledge is not satisfactorily captured in existing understandings of private and public international law. Accessing knowledge about law and about legal knowledge that operates in any kind of global space is far from straight-forward. It points to the complexity of the task facing not only lawyers and legal scholars, but many others who are “beginning to ask how precisely can any idea be understood ‘in context’ if context is now defined to encompass intercontinental communications, multilingual communities, or the expansion of world systems”.<sup>110</sup>

## **E. CONCLUSION: FROM SEEN/UNSEEN TO KNOWN/UNKNOWABLE**

As this collection of essays celebrating the 60<sup>th</sup> anniversary of Jessup’s Storrs Lecture reveals, transnational law scholarship is full of exciting and far-reaching initiatives to

---

<sup>105</sup> M. Welker, *ENACTING THE CORPORATION: AN AMERICA MINING FIRM IN POST-AUTHORITARIAN INDONESIA* (University of California Press, 2014).

<sup>106</sup> Amnesty International, “THIS IS WHAT WE DIE FOR”: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT (Amnesty International, 2016), 64.

<sup>107</sup> On the pressures to standardize procurement and finance processes in P3 deals and how this leads to the return of standard templates, see M. Valverde, F. Johns, and J. Raso, *Governing Infrastructure in the Age of the “Art of the Deal”: Logics of Governance and Scales of Visibility*, 41:51 POLAR: POLITICAL AND LEGAL ANTHROPOLOGY REVIEW 118-132 (2018).

<sup>108</sup> *Id.*, at 120.

<sup>109</sup> *Id.*, at 124.

<sup>110</sup> D. Armitage, *The International Turn in Intellectual History*, in: D.M. McMahon and S. Moyn (eds.), *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* (Oxford University Press, 2013) 232, at 244.

*make visible* aspects of law-making that narrowly targeted engagements with state-based law might miss. This chapter's perhaps overly sober comments on methodology are not designed to take away from the larger celebration of the depth and breadth of new knowledge of transnational processes, and of law, that has emerged, inspired by Jessup's own writing.

Two particular dimensions of transnational law serve as the focal points for this chapter. The first is transnational law's preoccupation with *visibility*, a concern that permeates attempts to transcend narrow conceptions of law, law's sources, and its relevant actors. The second is the privileged place that transnational law reserves for *practice*. On both fronts, there is an opportunity for scholars to be much more forthcoming in articulating how a transnational law approach might illuminate new visions of law, and in so doing, how it might employ practice. I would suggest that there is much low-hanging fruit here. The methodological bases for many practice-based insights are easily known. They are just rarely written down. The solution may be sometimes as simple as overcoming a reluctance to situate ourselves and our professional lives in our texts.

It is less obvious how to overcome the challenges of selective vision and partial knowledge. Indeed, this chapter's foray into some of the "black boxes" that complicate efforts to understand transnational environmental law-making reveals that, despite best efforts, some knowledge of law and legal processes remains off-limits. But scholars are finding new and creative ways to access sources and gain forbidden knowledge, as this chapter suggests. They are successfully breaking into transnational law's "black boxes". To conclude, as did Jessup sixty years ago, there is still work for the "headlong scholar" to go where the "foreign offices, the legislatures, and the courts" fear to tread.<sup>111</sup>

---

<sup>111</sup> Jessup, *supra* note 1, at 113.