

## SYMPOSIUM ON TRANSNATIONAL FUTURES OF INTERNATIONAL LABOR LAW

### PAST AS PROLOGUE? THEORIZING TRANSNATIONAL LABOR LAW BETWEEN JESSUP AND JENKS

*Guy Fiti Sinclair\**

When contemplating the transnational futures of international labor law, it is worthwhile pausing to reflect on the origins of that body of law and its relationship to the idea of transnationalism itself. Seeking to establish the universality of human problems, Philip Jessup famously defined transnational law as “all law which regulates actions or events that transcend national frontiers,” including both public and private international law as well as “other rules which do not fully fit into such standard categories.”<sup>1</sup> This concept has proven extraordinarily durable, impacting legal theory in a variety of fields, not least transnational labor law.<sup>2</sup> It is noteworthy, however, that Jessup’s foundational text makes only a handful of references to the International Labour Organization (ILO)<sup>3</sup> and instead focusses to a much greater extent on problems involving other aspects of international economic relations. This short essay connects and compares Jessup’s concept of transnationalism to another conceptual framework in international law, devised at around the same time, which has a more direct lineage in the practice of the ILO and, perhaps, a place in its future development.

#### *Two Efforts to Theorize Transnational Labor Law*

So what influence, if any, has international labor law specifically had on efforts to theorize international law? Of course, Jessup was hardly alone in seeking to rethink the discipline of international law in the wake of the vast changes precipitated by the Second World War.<sup>4</sup> And certainly, other contemporaries of Jessup who were engaged in the same enterprise had noted the significance of international labor law and the ILO as part of the changing face

*\* Senior Lecturer, Victoria University of Wellington Faculty of Law. Thanks to Adelle Blackett for the invitation to present this paper to the Transnational Futures of International Labour Law course at McGill Faculty of Law.*

<sup>1</sup> PHILLIP JESSUP, *TRANSNATIONAL LAW* 2 (1956).

<sup>2</sup> Adelle Blackett & Anne Trebilcock, *Conceptualizing Transnational Labour Law*, in *RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW* (Adelle Blackett & Anne Trebilcock eds., 2015). For other scholarship owing a debt to Jessup’s conception of “transnational law,” see, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996); GERALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010); *TRANSNATIONAL LAW: RETHINKING EUROPEAN LAW AND LEGAL THINKING* (Miguel Maduro et al. eds., 2014); *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer eds., 2015).

<sup>3</sup> See especially JESSUP, *supra* note 1, at 82–93.

<sup>4</sup> See, e.g., Myres McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 *HAGUE REC. DES COURS* 137 (1953); Georg Schwarzenberger, *The Province of the Doctrine of International Law*, 9 *CURRENT LEGAL PROBS.* 235 (1956); Josef Kunz, *The Changing Law of Nations*, 51 *AJIL* 77 (1957); B.V.A. RÖLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* (1960); Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 *COLUM. L. REV.* 1147 (1962); GEORG SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* (1962); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

of international law.<sup>5</sup> But the most direct influence on international legal theory can be traced through the practice and scholarship of the most prominent international lawyer associated with the ILO, Clarence Wilfred Jenks.

Born in Liverpool in 1909, Jenks attended state schools before studying history and law at Cambridge, the latter under the tutelage of Arnold (subsequently Lord) McNair. After further studies in Geneva, Jenks joined the International Labor Office as an Assistant Legal Advisor in 1931. He remained with the Office for more than four decades, rising through the ranks as Legal Advisor, Assistant Director-General, Deputy Director-General, and finally Director-General in 1970. Much of his work at the Office naturally involved routine practices of international labor law, such as advising on the drafting and interpretation of ILO standards, participating in ILO organs and committees, and undertaking technical assistance missions. But he was also intimately involved in a significant number of key milestones in the development of the ILO itself. Just as significantly, he was a remarkably prolific scholar, who published more than a dozen books and over seventy journal articles and chapters over the course of his career.<sup>6</sup> While his early writings naturally focused on questions of international labor law, his interests in international law ranged widely and his later writings tended increasingly to general theoretical reflections on the changing nature of international law.

Unlike Jessup, Jenks's contributions to international legal theory drew directly on his extensive experience within the ILO and with the operation of international labor law more generally.<sup>7</sup> Based on those experiences, Jenks was quick to observe the emergence of non-state actors as subjects and agents of international law. Uniquely among international organizations, the ILO's tripartite structure provided for the participation of private actors—delegates of employer and worker organizations—together with government representatives in both its Conference and Governing Body, as well as in its supervisory mechanisms.<sup>8</sup> That same tripartite principle therefore restricted the ability of member states to make reservations to, contract out from, interpret, amend, abrogate, or terminate ILO conventions without agreement of the other relevant delegates.<sup>9</sup> As early as 1936, Jenks argued that these features of the ILO could not “reasonably be made to square with the theory that international law is ‘a law between States only and exclusively.’”<sup>10</sup>

Jenks's experience in the ILO likewise sensitized him to the variety of lawmaking processes that could take place in and through international organizations. One such lawmaking process occurred through the Office's systematization of international labor law practice, which it accomplished by publishing its advice to member states on questions of legal interpretation in regular issues of its *Official Bulletin*.<sup>11</sup> With meticulous attention to the preparatory work of conventions and recommendations, the earliest of these guidance documents dutifully noted that

<sup>5</sup> Among others, Wolfgang Friedmann recognized the influence of the expanded functions of the welfare state on the scope of international law, the particular significance of the ILO in that connection, and the emergence of international labor law as a new field of international law. See Wolfgang Friedmann, *Some Impacts of Social Organization on International Law*, 50 AJIL 475 (1956); FRIEDMANN, *supra* note 4.

<sup>6</sup> For more biographical and bibliographical details, see Humphrey Waldock & R.Y. Jennings, *Clarence Wilfred Jenks*, 46 BRIT. Y. B. INT'L L. xi (1972–1973); Felice Morgenstern, *Wilfred Jenks in the I.L.O.*, 46 BRIT. Y. B. INT'L L. xvi (1972–1973); *Wilfred Jenks, 1909–1973*, 108 INT'L LAB. REV. 455 (1973); Jaci L. Eisenberg, *Jenks, Clarence Wilfred*, in IO BIO, BIOGRAPHICAL DICTIONARY OF SECRETARIES-GENERAL OF INTERNATIONAL ORGANIZATIONS (Bob Reinalda et al. eds, 2016).

<sup>7</sup> Jessup served briefly as an assistant secretary general of the United Nations Relief and Rehabilitation Administration, and had various important roles in connection with the United Nations, albeit as a representative of the United States, before his election as a member of the International Court of Justice. See Oscar Schachter, *Philip Jessup's Life and Ideas*, 80 AJIL 878 (1986).

<sup>8</sup> See E.A. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION* (1966).

<sup>9</sup> C. Wilfred Jenks, *The Significance for International Law of the Tripartite Character of the International Labour Organisation*, 22 TRANSACTIONS GROTIUS SOC'Y 45, 58–69 (1936).

<sup>10</sup> *Id.* at 77.

<sup>11</sup> See C. Wilfred Jenks, *The Interpretation of International Labour Conventions by the International Labour Office*, 20 BRIT. Y. B. INT'L L. 132 (1939).

the Office was “not empowered by the Treaty of Peace to deliver interpretations of terms in Conventions.”<sup>12</sup> Within two decades, however, the Office had established a higher interpretive authority. That authority applied where the Office gave an opinion on a particular provision that had been submitted to the ILO’s Governing Body, published in the Bulletin, and met with no adverse comment. If the International Labour Conference subsequently included an identical or equivalent provision in another Convention, it was presumed to have intended that provision to be understood in the manner in which the Office had previously interpreted it.<sup>13</sup> By 1939 Jenks was able to state that “[t]he practice of requesting the Office for its opinion has ... developed to the point at which there is a considerable ‘*jurisprudence*’ of Office opinions upon disputed points of interpretation.”<sup>14</sup>

Lawmaking processes such as these transcended the traditional distinction between domestic and international law. From the outset, the ILO had dedicated itself to what Jenks called “an attempt to create a common world law in respect of social questions.”<sup>15</sup> The subject matter of the ILO’s conventions and recommendations, which were primarily concerned with the conditions of work, exemplified the convergence of domestic policy and international law. The Preamble to the ILO’s constituent instrument declared that universal peace would only be possible if based upon social justice, and that “the peace and the harmony of the world [was] imperiled” by the “injustice, hardship and privation” of existing labor conditions.<sup>16</sup> Aiming to redress these conditions, the ILO widened its activities during the interwar period to become a champion of values associated with the welfare state, in turn making questions of social rights and Keynesian economics central concerns of international law.<sup>17</sup> That work reached an apotheosis in the Declaration of Philadelphia, coauthored by Jenks, which was adopted by the International Labour Conference in 1944 and subsequently appended to the ILO Constitution.<sup>18</sup>

For Jenks, then, the evolution of international labor law demonstrated how international lawyers could play a direct role in developing a set of shared and coordinated norms through the “mutual interaction of different legal systems.”<sup>19</sup> In preparing the texts of ILO conventions and recommendations, the “international legislative draftsman” performed the crucial function of ensuring that lawmaking instruments expressed the shared intentions of the parties while reinforcing each other “so as to constitute a coherent international Statute-book.”<sup>20</sup> But a more proactive shaping of domestic law was also possible. Beginning during the Second World War, the International Labour Office thus led an effort to influence the postwar reconstruction of welfare states, not only in Europe but also in independent states and dependent territories around the world. Jenks’s main contribution to this effort was the curation of an *International Labor Code*—a volume he described as a “Codex of social justice” compiling the “world’s law regarding social and economic questions”—which put forward model texts for future domestic constitution making and legislation.<sup>21</sup>

<sup>12</sup> *Interpretation of the Decisions of the International Labour Conference*, 5(4) ILO OFFICIAL BULLETIN 57, 59 (Jan. 25, 1922).

<sup>13</sup> *Interpretation of the Decisions of the International Labour Conference*, 23(1) ILO OFFICIAL BULLETIN 30, 32 (Apr. 10, 1938).

<sup>14</sup> Jenks, *supra* note 11, at 133.

<sup>15</sup> [Jenks](#), *supra* note 9, at 81.

<sup>16</sup> [Constitution of the International Labour Organization](#) pmbll., June 28, 1919, 49 Stat. 2712, 225 Consol. T.S. 378.

<sup>17</sup> See GUY FITI SINCLAIR, [TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES](#) (2017).

<sup>18</sup> [Declaration Concerning the Aims and Purposes of the International Labour Organisation](#), May 10, 1944, 15 UNTS 35.

<sup>19</sup> C. WILFRED JENKS, [THE COMMON LAW OF MANKIND](#) 109 (1958).

<sup>20</sup> *Id.* at 433, 435.

<sup>21</sup> Subtitled “A systematic arrangement of the Conventions and Recommendations adopted by the International Labour Conference,” the *International Labor Code* first appeared in 1941 and was published in revised form with a lengthy Preface and Explanatory Note by Jenks in 1952. INT’L LABOUR OFFICE, [THE INTERNATIONAL LABOUR CODE 1951](#) (1952); see also C. WILFRED JENKS, [LAW, FREEDOM AND WELFARE](#) 102–113 (1963).

Together, these and other experiences in the ILO shaped Jenks's view of an emerging "common law of mankind," which he elaborated in a series of articles culminating in a book of that name, published in 1958.<sup>22</sup> Jenks's thesis, stated in the preface to that book, was that "contemporary international law [could] no longer be reasonably presented within the framework of the classical exposition of international law as the law governing the relations between States but must be regarded as the common law of mankind in an early stage of its development."<sup>23</sup> Central to Jenks's conception, therefore, was the observation that public international law was increasingly addressing itself to actors other than states, such as individuals, international organizations, and corporations. Elaborating that thesis through a sequence of chapters that ranged from the cross-cutting and general to the highly specific and technical,<sup>24</sup> *The Common Law of Mankind* presented an analysis of international law that brings to mind other more recent public law-oriented projects.<sup>25</sup>

### *Different Perspectives on Global Governance*

How does Jenks's *The Common Law of Mankind* compare to Jessup's *Transnational Law*? There are obvious differences in style and presentation: Jenks's text is much longer, with lengthy passages dealing with technical details of the law, whereas Jessup is more interested in providing a broad-brush conceptual account. Indeed, there might be a temptation to attribute the wider popularity of Jessup's work to this difference. However, there are also important substantive similarities, several of which may be noted briefly here.

First, at the most basic descriptive level, both the "common law of mankind" and "transnational law" were efforts to give a name to what both authors saw as a new, complex normative landscape involving the intersection of national and international legal systems, state and non-state actors, and public and private law.

Second, as a matter of diagnosis, both works share a striking preoccupation with the problems arising from the dissolution of European empires after the Second World War. For Jenks, the international legal system had been weakened by certain "underlying strains" and now faced a "crisis of growth,"<sup>26</sup> in which (among other concerns) rapid decolonization carried the "grave danger" of diluting the content of the law.<sup>27</sup> Some of the same anxiety can be detected in the examples chosen by Jessup to introduce the idea of transnational law: negotiations and disputes over Iranian oil;<sup>28</sup> a comparison of divorce to decolonization;<sup>29</sup> efforts by "newly independent nations" to advance their own development;<sup>30</sup> and the democratization of decision-making procedures in the United Nations.<sup>31</sup> In the words that Jessup puts into the mouth of his character Iconoclast, "You can trace ... the invasion of the domestic

<sup>22</sup> JENKS, *supra* note 19.

<sup>23</sup> *Id.* at xi.

<sup>24</sup> Cf. "The Scope of International Law" (Chapter 1), "The Universality of International Law" (Chapter 2), "The Impact of International Organisations on International Law" (Chapter 3), and "Craftsmanship in International Law" (Chapter 10) with "Atoms for Peace in International Law" (Chapter 7), "An International Régime for Antarctica?" (Chapter 8), and "International Law and Activities in Space" (Chapter 9).

<sup>25</sup> See, e.g., JAN KLABBERS ET AL., [THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW](#) (2011); [THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS](#) (Armin von Bogdandy et al. eds., 2010); Nico Krisch & Benedict Kingsbury, [Introduction: Global Governance and Global Administrative Law in the International Legal Order](#), 17 EJIL 1 (2006).

<sup>26</sup> JENKS, *supra* note 19, at 79.

<sup>27</sup> *Id.* at 29.

<sup>28</sup> JESSUP, *supra* note 1, at 6, 13–14.

<sup>29</sup> *Id.* at 16–17.

<sup>30</sup> *Id.* at 19–20.

<sup>31</sup> *Id.* at 22–23, 27.

realm of the national state by the growing concern for minorities, human rights, and the genocide convention, and the administration of colonial or non-self-governing peoples.”<sup>32</sup>

Third, as a matter of prescription, both Jessup and Jenks advocated a turn to choice of law principles to help resolve real-world problems that traversed the traditional dichotomies of domestic/international and public/private law. In surveying the jurisprudence of the ILO and U.N. administrative tribunals, for example, Jessup observed that both bodies had drawn on an eclectic range of legal sources, including contract law, the “internal law” of the international organization in question, and “that convenient reservoir, the general principles of law.”<sup>33</sup> In this way, he concluded, “[i]t seems clear that a distinct body of international administrative law is gradually being established by this jurisprudence.”<sup>34</sup> In a book intended to elaborate upon the general thesis outlined in *The Common Law of Mankind*, Jenks similarly called for a “broadening of the concept of the conflict of laws” to manage transactions involving international corporate bodies.<sup>35</sup> Drawing on the same example as Jessup, he argued that the sources of international administrative law—the provisions of constituent instruments, staff regulations, and the decisions of municipal courts, international courts, and administrative tribunals<sup>36</sup>—were to be supplemented by recourse to private law analogies and general principles of public law, including international and administrative law,<sup>37</sup> and by broad considerations of equity and natural justice.<sup>38</sup>

Where Jenks’s vision departed most markedly from Jessup’s was in its constitutionalist vision of an international community, bound together in potentia, if not yet in actuality, by a shared set of moral values and legal obligations. Such a progressive narrative will strike many today as naïvely grandiose compared to Jessup’s seemingly more modest, and thereby presumably more realistic, account of the workings of global governance. And yet, here again we can trace Jenks’s theoretical conclusions back to his experiences in the ILO. After all, the whole of his career had instilled into him the sense of universal mission that pervaded that organization—“a faith in which the whole of mankind can believe,” in the words of the first Director of the International Labour Office, Albert Thomas.<sup>39</sup> Sustaining faith in the possibility of such a universal mission, while maintaining the critical capacities to problematize, resist, and “construct counter-hegemonic alternatives” to neoliberal globalization,<sup>40</sup> may yet prove to be indispensable to the transnational futures of international labor law.

<sup>32</sup> *Id.* at 27–28.

<sup>33</sup> *Id.* at 81–91.

<sup>34</sup> *Id.* at 93.

<sup>35</sup> C. WILFRED JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANISATIONS* 12 (1962).

<sup>36</sup> *Id.* at ch 3.

<sup>37</sup> *Id.* at ch 5.

<sup>38</sup> *Id.* at ch 9.

<sup>39</sup> ALBERT THOMAS, *INTERNATIONAL SOCIAL POLICY* 73 (1948).

<sup>40</sup> [Blackett & Trebilcock](#), *supra* note 2, at 4.