Introduction

Transnational Law, with and beyond Jessup

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Avant la règle, il y a le problème.[1]

He used concepts sparingly, but effectively, and he avoided windy rhetoric.[2]

A JESSUP'S LECTURES AND THE PROJECT OF 'TRANSNATIONAL LAW'

The here-presented book is an edited collection of original essays first presented at an international conference at the Transnational Law Institute, King's College London, to commemorate the sixtieth anniversary of the publication of Philip Jessup's landmark study *Transnational Law*, published by Yale University Press in 1956.[3] Philip Jessup, who was born on 5 February 1897 and died on 31 January 1986, just shy of his ninetieth birthday, was – at the time of delivering the Storrs Lectures at Yale Law School on which the book is based – the Hamilton Fish Professor of International Law and Diplomacy at Columbia Law School, while also playing a very active role in the university's Department of Public Law and Government (later renamed Department of Political Science).[4] He had previously served as assistant solicitor for the US Department of State as well as assumed different functions within and for the United Nations (UN) before being appointed, in 1960, to the International Court of Justice, where he was a judge from 1961 until 1970. In 1950, Senator Joseph McCarthy had charged Jessup with having 'an

* My gratitude to Priya Gupta and Vik Kanwar for comments on this chapter.

1 CHARLES EISENMANN, LES SCIENCES SOCIALES DANS L'ENSEIGNEMENT SUPÉRIEUR, DROIT (1954), 44.

2 Oscar Schachter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 878 (1986).

3 PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

4 Schachter, *supra* note 2, at 881.

unusual affinity for communist causes', delaying Jessup's appointment by President Harry S. Truman as US delegate to the UN in 1951. Given the highly visible, public role Jessup was playing at the time in international diplomacy for the United States, he was one of the most prominent targets for McCarthy.[5] Eventually, Truman managed to appoint Jessup into the role of US delegate to the 1952 UN General Assembly. Jessup was eventually cleared of all charges raised by the Subcommittee on the Investigation of Loyalty of State Department Employees, commonly known as the Tydings Committee, under McCarthy.[6] In 1960, almost a decade after the McCarthy episode, Jessup was appointed to the International Court of Justice, where he assumed his role as judge in February of 1961, serving until 1970.

> Jessup was, of course, honored and pleased by the nomination and election. He must have felt, as did many of his friends, that it was a personal vindication and repudiation of the attacks on his loyalty and integrity. However, he was disappointed by the fact that the Court had few cases and appeared to be on the periphery of international affairs. He remarked in later years that he would have probably accomplished more and been happier personally if he had remained a Rockefeller Foundation associate or a Columbia professor. The relative isolation in The Hague and the personal tensions among the judges also dampened Jessup's enthusiasm. Nonetheless, Jessup remained a strong champion of the Court. It was the main subject on which he wrote and lectured during and after his term on the Court.[7]

As will become more apparent in the ensuing discussion of his 1956 lectures on transnational law, it was Jessup's commitment to facts and problems and to the identification of practical solutions that marked his approach to international law. 'However', as Oscar Schachter observed, 'his pragmatism was also imbued with a distinct teleological element. Like Elihu Root, his early mentor, Jessup saw the main trends of international society as part of an evolutionary development toward a more organized and effective legal

[5] *Id.* at 885: 'Writing some 20 years later in *The Birth of Nations*, Jessup commented in a footnote that "the McCarthy persecutions are now as dead and dis credited as the Spanish Inquisition." While this was probably true in 1972, the impact of the McCarthy episode on Jessup's career and, more widely, on the course of American foreign policy was surely not minor.'

[6] U.S. Dep't of State, History of the Bureau of Diplomatic Security of the United States Department of State 125 (2011), https://2009-2017.state.gov/documents/organization/176589.pdf: 'McCarthy then took aim at Ambassador-at-Large Phillip C. Jessup, and this also proved embarrassing. Jessup, a highly respected diplomat, showed up with two letters testifying to his anti-Communism and loyalty to the United States – one from former Secretary of State George C. Marshall, and one from General Dwight D. Eisenhower.'

[7] Schachter, *supra* note 2, at 889–90.

order.'[8] Jessup's 'sophisticated blend of positivism, idealism and pragmatism' has to be appreciated against the background of his belief in the significance of a notion of 'international community interest', for which he drew on Elihu Root but which he eventually understood as encompassing the protection of ocean resources and the global environment.

Schachter places *Transnational Law* in relation to Jessup's strong endorsement of 'international community', which he manifested throughout his scholarly and adjudicatory work in international law and which is based on the idea of varied degrees of 'ideas of order, responsibility and justice, while recognizing that diversity and special conditions create many different kinds of international communities with their own special interests and law'.[9] Schachter correctly credits Jessup with developing and popularizing the term 'transnational law', rather than inventing it, and underscores Jessup's intention 'to show the growing legal complexity of an interdependent world'.[10] Giving Jessup's treatment of transnational law's relative prominence amidst a concluding assessment of the scholar's, judge's and diplomat's approach to law in a global context, Schachter highlights Jessup's ability to identify areas that form part of what we today would call 'global governance'. Such areas grow out of 'new relations of interdependence'[11] and prompt the development of regulatory frameworks that do not fit into either public or private international law. While these include Jessup's references to areas such as 'European Community law, maritime law, international administrative law, war crimes, the law of economic development and the rules applicable to multinational enterprises',[12] the approach towards a fact- and problem-based understanding of law, coupled with a teleological commitment to international community's or communities' interests is justified on the basis that the law needs to be able to be effective outside of national jurisdiction.

For the conference participants and contributors to this volume, Jessup's *Transnational Law*, a slim volume of just 113 pages, served as a starting, reference and orientation point for a series of critical as well as forward-looking investigations into Jessup's elaboration and discussion of something that he defined as including 'all law which regulates actions or events that transcend national frontiers' and that included '[b]oth public and private international law [. . .], as are other rules which do not wholly fit into such

[8] *Id.* at 891; Schachter ascribes to Jessup a 'sophisticated blend of positivism, idealism and pragmatism'. *Id.*
[9] *Id.* at 893.
[10] *Id.*
[11] *Id.* at 894.
[12] *Id.*

standard categories'.[13] That said, the here-following chapters engage with Jessup's introduction and his use of the term before an audience of internationally minded lawyers and policymakers by both contextualizing and transcending Jessup's understanding of transnational law. Coming from different areas of law and legal theory, from comparative law, political science and international relations, from anthropology and cultural as well as postcolonial studies, the authors in this book provide an immensely wide spectrum of perspectives from which they ultimately propose to engage with Jessup's bold proposal in today's time. As should become evident from chapter to chapter as well as from this introduction, an engagement with Jessup's *Transnational Law* continues to occur in different layers, ranging from the textual to the conceptual, from the historical to the critical. For some, Jessup was an international lawyer who sought to push the frontiers of his field in order to take a bigger-picture approach to the role that law, diplomacy and negotiation can play,[14] while others take Jessup as someone who captures a moment in which the demands of a fast-globalizing and decolonizing world prompt a critical engagement with distinctions between domestic and international law and between public and private norms. For many, the focus is less on a continued scrutiny of Jessup himself and of his proposition but more strongly on the field, the idea, the concept and the methodological challenge encapsulated in the term 'transnational law'. As such, and we will return to this point again, there are today too many highly productive conceptualizations of a transnational law to adequately trace them all back to Jessup's original contribution. We will also see that important aspects of Jessup's discussion of transnational law – ranging from his insistence on the need to understand law as a means to pursue policy goals and above all, as an instrument with which to achieve practical, problem-based and problem-oriented solutions to his acknowledgement of legal normativity outside the strict confines of domestic or international, state-based law – were not proprietary to Jessup's distinct intellectual project but can be understood as belonging to the evolving, post–legal realist, post–Second World War, transatlantic legal imagination at the time.

With that in mind, this introduction will begin by offering a brief overview of Jessup's *Transnational Law* before picking up on some of the themes that

[13] Jessup, *supra* note 3, at 2.

[14] See, for example, this observation by Schachter, *supra* note 2, at 882: 'His most influential book, The Modern Law of Nations, was completed in 1947. It was widely acclaimed, probably receiving more attention in the public media than any other book on international law ever had. His ideas on the international community interest, protection of individual rights and the regulation of force opened up vistas of a new postwar society.'

have become apparent in the discussion of transnational law in recent decades. Part literature review, part substantive argument, this part of the introduction is meant, above all, to point to the immense wealth, breadth and depth of scholarship in this area today. Finally, this introduction will conclude with a brief preview of the chapters in this book.

At the time he delivered his lectures at Yale, in 1956, Jessup offered the compelling observation that lawyers needed to find a way of expanding their legal conceptual and doctrinal repertoire in order to effectively address the growing variety of border-crossing human and institutional relations around the world. He argued that these cannot easily or can no longer adequately be grasped with the tools provided either by public international law or private international law (also known as 'conflict of laws'). Jessup was writing as both a public international lawyer and as a lawyer steeped in international economic law and diplomacy, and he was doing so at a time at which the state of the world was in disarray. The Second World War was at pains ended, and the world was rearranging itself in a mix of ideological conflict, bloc building, hegemonic aspirations and decolonization.[15] These developments reflected a variety of tensions between nineteenth-century colonizing geopolitics and the emerging development policies in the 1950s and 1960s, in which the idea and political project of the 'nation state' was pivotal.[16] Against the backdrop of European 'reconstruction', looming decolonization and the prevailing perception that the post-war creation of international law would constitute a 'clean epistemological break with the prewar international law's subservience to power and ethnocentrism',[17] who could effectively predict the way the

[15] Charles S. Maier, *The Two Postwar Eras and the Conditions for Stability in Twentieth-Century Western Europe*, 86 Am. Hist. Rev. 327–52 (1981); Andrew Phillips, *Beyond Bandung: The 1955 Asian–African Conference and Its Legacies for International Order*, 7 Australian J. Int'l Aff. 329–41 (2016). *See also* Luis Eslava, Michael Fakhri & Vasuki Nesiah, *The Spirit of Bandung*, *in* Bandung, Global History and International Law. Critical Pasts and Pending Futures (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017).

[16] Martin T. Berger, *Decolonisation, Modernisation and Nation-Building: Political Development Theory and the Appeal of Communism in Southeast Asia, 1945–1975*, 34 J. Southeast Asian Stud. 421, 422 (2003): 'Decolonisation, the universalisation of the nation-state and the Cold War provided the crucial backdrop for the rise and elaboration of modernisation theory and closely related theories of political development and nation-building that were centred on direct or indirect US involvement in the formation and consolidation of stable anti-communist national political systems. After 1945 the nation-state became the central and unquestioned unit of study for modernisation theorists and the natural object of a burgeoning number of exercises in state-mediated national development and nation-building.'

[17] Balakrishnan Rajagopal, *International Law and the Development Encounter: Violence and Resistance at the Margins*, 93 ASIL Proceedings 16, 16 (1999).

chips would fall on the table of global geopolitics in the years and decades to come?[18]

For Philip Jessup, the diplomat and, for a long time, the US ambassador-at-large, this might have looked (and felt) like that:

> In fact, his hectic diplomatic service involved a number of developments that left their imprint on international society. The historic colonial empires were crumbling and the United Nations was faced with wars of national liberation and demands for political and economic self-determination. The ex-enemy states-Germany, Japan and Italy-were reentering the international community, each with its quota of divisive issues. Collective security, the centerpiece of the United Nations Charter, was gradually perceived as unworkable in the face of East-West hostilities; in its place, the collective defense pacts of the North Atlantic and Warsaw treaties came to dominate security relations. Jessup was close to the center of the stage as these momentous events were unfolding. It often fell to him to respond to vitriolic diatribes of the Russians and their allies. Behind the scenes, he engaged in the almost continuous negotiations that are the core of United Nations diplomacy and the mainspring of its occasional achievements.[19]

This context might explain the mixed reactions that Jessup's use of 'transnational' law provoked at the time. While some scholars endorsed his call for a distinctly 'transnational' perspective, they critiqued him for potentially underestimating the resistance on the part of nation states.[20] Others were intrigued by the consequences Jessup's lectures could have in terms of rethinking international law[21] at a time, where it was anything but certain how '*inter*-*national*' the still nascent field would eventually become,[22] particularly in

[18] For an intriguing and troubling account of political theorists' and economists' resistance against a growing human rights movement with a focus on equality and socioeconomic emancipation, see Quinn Slobodian, The Globalists 125 (2018): 'Geneva School neoliberals proposed their own version of a world of right. Against human rights, they posed the human rights of capital.'

[19] Oscar Schachter, *Philip Jessup's Life and Ideas*, 80 Am. J. Int'l L. 878, 884 (1986).

[20] See, for example, David Lehman, Book Review, 18 La. L. Rev. 219–21 (1957) (reviewing Jessup, *supra* note 3).

[21] See, for example, C.G. Fenwick, Book Review, 51 Am. J. Int'l L. 444–45 (1957) (reviewing Jessup, *supra* note 3), complimenting Jessup for having taken some of the mystery out of international law and for drawing a much more realistic picture of the multiplicity of global relationships than traditional international law was able to.

[22] See the hopeful reflections by Manley O. Hudson, Progress in International Organization (1932) and the supportive comments in Valentine Jobst III's review of the book, 10 Ind. L.J. 106, 106 (1934): 'Covering thus hurriedly so much material, it may well be that at times Professor Hudson creates the impression of being unduly sanguine in his estimate of the results achieved or achievable under the League of Nations and the other new institutions of international government. Closer reading, however, reveals that Professor Hudson's is not the

view of the unstable global political and economic climate following the Second World War.[23] At the time, this approach received some support in that it was recognized as a timely and potentially important invitation to critically engage existing categories and frameworks.[24] Writing in 1981, Myres McDougal and Michael Reisman observed the following with regard to the making and the state of international law:

> No problem has proved more refractory to lawyers and scholars than understanding and explaining how international law is made. Domestic analogues, whose explanatory power may be inadequate even in their own contexts, have so little relevance to the complexities of international politics that those who invoke them finish either by throwing up their hands and conceding that the model is inappropriate for the task or by painting themselves into the palpably absurd position that there is no international law. [. . .] As the world becomes pervasively more transnational and interdependent, an understanding of how international law is made and, even more to the point, how to make it, becomes a matter of greatest practical urgency.[25]

While much suggests that this debate continued with a strong emphasis on the power politics[26] that so often have called the entire project of an international

optimism of the impractical idealist or wishful thinker; it is, rather, the considered confidence of the man of wide actual experience in international affairs who knows that the germs of progress often lie in what for the moment looks like retrogression.' See, in our present context, the elaborate and diligent study by Anthea Roberts, How International Is International Law? (2017).

[23] Thomas G. Weiss & Sam Daws, *World Politics: Continuity and Change Since 1945*, *in* The Oxford Handbook on the United Nations 3–34 (Thomas G. Weiss & Sam Daws eds., 2008). Daniel Yergin & Joseph Stanislaw, Commanding Heights: The Battle for the World Economy 75–79 (1998).

[24] See, for example, the reviews of Jessup's book by James N. Hyde (66 Yale L.J. 813–16 (1957), calling the idea 'stimulating and provocative') and by Claude L. Inis (51 Am. Pol. Sci. Rev. 1117–19 (1957), praising Jessup for throwing off old concepts and emancipating him from standard rigidities, whereby Jessup is able to provide a fresh stimulus to fresh thinking and to challenge in a detailed juridical analysis the validity and adequacy of old definitions and categories). But see also the review by Eric Stein (56 Mich. L. Rev. 1039–43 (1958)), in which Stein recognizes Jessup's project as an 'assault on the barriers of classification and distinctions traditionally separating legal disciplines'. At the same time, Stein observes that the book contains a number of 'promising and interesting (and rather vague) suggestions' for further study and finds the book to be 'Jessup's most challenging volume'.

[25] Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, *in* International Law Essays: A Supplement to International Law in Contemporary Perspective 355 (Myres S. McDougal & W. Michael Reisman eds., 1981).

[26] Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, *in* The Relevance of International Law 133, 139–40 (Karl W. Deutsch & Stanley Hoffmann eds., 1968): 'One of the inhibitions on power in

law into question,[27] 'international law' itself and in its own right resists any kind of neat, straightforward historiography. On its face more established than transnational law, international law is as kaleidoscopic, as refracted, as fragmented and as mesmerizing as its, should we say, 'younger' sibling. That is what will likely frustrate or quench any attempt to 'briefly' outline and capture the state of public international law against which Jessup sketched his idea of transnational law and which continues to provide, for many scholars in this field today, a sounding board for their engagement with the differences and the overlaps between inter- and transnational law. Similar to the manifold ways in which transnational law has been understood, right into the present time, as a framework and platform from which to place law under historical and ideological as well as interdisciplinary scrutiny, we can see such efforts carried out with regard to (public) international law with great promise.[28] The critical value of such work lies in opening up a field of legal doctrine as 'law in action',[29] as – literally – law *in context*. Rather than approaching a legal field as the collection of principles and rules, as they are elaborated, affirmed, altered and promulgated over time in a universe of legislators, governments and judges, the contextualization of a legal field and its constituent components – including its norms and processes but also its actors[30] – promises a richer and

world affairs is an elemental respect for some imperfect measure of symmetry – that is, the claims of right that one nation asserts must generally be available to other nations to assert. Of course, inequalities of power introduce some asymmetry as the powerful state can emphasize distinguishing features of the two contexts to establish why a claim adverse to its interests is "illegal" despite its own earlier reliance upon the legality of a similar sort of claim.'

[27] See, for example, now thirty years ago, Thomas L. Hughes, *The Twilight of Internationalism*, 61 Foreign Aff. 25–48 (1985), and Tom J. Farar, *International Law: The Critics Are Wrong*, 71 Foreign Aff. 22–45 (1988), as well as the insightful commentary by Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 Eur. J. Int'l L. 755–95 (2012), arguing that the rise of NGPs should be seen as challenge and promise to international law, specifically as it should provoke western lawyers to critically examine their 'universalist' professions with regard to the international legal order they have been promoting.

[28] See, for example, the references in note 69, below.

[29] In this regard, see, of course, the important contributions out of the University of Wisconsin School of Law, including Stewart Macaulay, William Whitford, Kathryn Hendley, & Jonathan Lipson, Contracts: Law in Action (1991); Stewart Macaulay & William C. Whitford, *The Development of Contracts: Law in Action*, 87 Temp. L. Rev. 793–806 (2015).

[30] Yves Dezalay & Bryant Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (1996); Mary J. Mossman, The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions (2006); Swethaa Ballakrishnen, *Why Is Gender a Form of Diversity? Rising Advantages for Women in Indian Global Law Firms*, 20 Ind. J. Global Legal Stud. 1261–89 (2013).

more differentiated account of the field's entanglement in varied social environments.

Contextualization leads to a legal field becoming engaged with its actual and its discursive, its empirical and its cognitive and epistemological environments. We can see this quite clearly today in international law, and this book offers compelling evidence of such advances specifically under the heading of transnational law. As for the former, it is evident how 'international law' – as field, idea and political project – has become deeply implicated in a more expanded as well as interdisciplinary engagement with law, political theory and the prospects of democratic governance in a globally interconnected world.[31] It is here where disciplinary field borders appear to have become increasingly blurry, and international lawyers – along and in engagement with their colleagues in sociology, anthropology, politics and geography, postcolonialism and philosophy – have been engaging with questions of global governance, 'world order'[32] and with the challenges of how to productively navigate – still, as lawyers – the emerging, interdisciplinary discourses.[33] These efforts manifest themselves in the conflict sites international lawyers move into to challenge and engage inherited understandings of what international law is and isn't about. Today's international lawyers illustrate, quite strikingly, their interest in law that can reach across national borders in both directions: outwards, into the fragmented spaces of 'regime' and 'coalition' building whether this concerns the 'war on terror',[34] global financial regulation[35] or climate change governance,[36] but also inwards and towards the internal, domestic political sociology of struggling democratic societies. As Philip Alston recently observed with regard to the ubiquitous rise of populism (as well as radicalized and racialized politics), 'The world as we in the human rights movement have known it in recent years is no longer. The populist agenda

[31] *See, e.g.*, Emmanuelle Jouannet, *What Is the Use of International Law? International Law as a 21st Century Guardian of Welfare*, 28 MICH. J. INT'L L. 815–62 (2007), and Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651–68 (2012).

[32] B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER (2d ed. 2018).

[33] MICHEL-ROLPH TROUILLOT, GLOBAL TRANSFORMATIONS: ANTHROPOLOGY AND THE MODERN WORLD (2003); Saskia Sassen, *Spatialities and Temporalities of the Global*, *in* GLOBALIZATION 260–78 (Arjun Appadurai ed., 2001); William I. Robinson, *Debate on the New Global Capitalism: Transnational Capitalist Class, Transnational State Apparatuses, and Global Crisis*, 7 INT'L CRITICAL THOUGHT 171–89 (2017); RICHARD FALK, POWER SHIFT: ON THE NEW GLOBAL ORDER (2016).

[34] Ed Morgan, *Slaughterhouse Six: Updating the Law of War*, 5 GERMAN L.J. 525–44 (2004).

[35] Tony Porter, *Public and Private Authority in the Transnational Response to the 2008 Financial Crisis*, 30 POL'Y & SOC'Y 175–84 (2011).

[36] See, in this regard, Minas, in this volume.

that has made such dramatic inroads recently is often avowedly nationalistic, xenophobic, misogynistic, and explicitly antagonistic to all or much of the human rights agenda.'[37] International law, otherwise conceived as being concerned with the relations between sovereign nation states, has become deeply entangled in exercises of critical historiography, ideology critique and a self-critical evaluation of its own 'liberal' foundations and assumptions.[38]

B THE PRACTICE (NOT NECESSARILY THEORY) OF TRANSNATIONAL LAW

In order to more adequately assess the origins as well as the trajectories of today's ever more energetically unfolding engagement with transnational, it is important to first take stock of Jessup's original contribution. In this regard, it is worthwhile considering what Jessup said (and meant) and what has either been ascribed to him or presented as the result of having drawn inspiration from his ideas or having built on top of what he had lain out then, in 1956, and to recognize what he did not say and where we might identify certain limitations in his position or approach.

To begin with, it is crucial to remind ourselves that Jessup's proposal was both immensely practical as well as theoretical. On the one hand, his analysis was directed at his colleagues in public international law, international economic law and arbitration, whom he invited – in fact, encouraged – to adopt a pragmatic view of what he saw to actually be taking place all around them with regards to the nature of international and *transnational* legal problems and with view to the *actually* evolving landscape of relevant norms that are drawn upon, invoked or created in response to these problems.[39] On the other, the increasing complexity of border-crossing problems

[37] Philip Alston, *The Populist Challenge to Human Rights*, 9 J. Hum. Rts. Practice 1, 1–2 (2017).

[38] See the important, critical interventions by Isabel Feichtner, *Realizing Utopia Through the Practice of International Law*, 23 Eur. J. Int'l L. 1143–57 (2012), and by Christine Schwöbel-Patel, *Populism, International Law, and the End of Keep Calm and Carry on Lawyering*, Netherlands Y.B. Int'l L. (forthcoming 2019), https://ssrn.com/abstract=3300695. *See also* Vicki C. Jackson, *Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges*, 8 Int'l J. Con. L. 517–62 (2010), and, earlier, Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence. Racing American Foreign Policy*, 94 Proc. Am. Soc'y Int'l L. 260–66 (2000).

[39] Jessup, *supra* note 3, at 30: 'To be sure, the United Nations is not a corporation and the state members are not shareholders and the analogy is very far from perfect. But the modern state, like the big corporation, has developed, for different reasons, a new sensitivity to public pressures; and the law (United Nations Charter or United States statute) has taken account of the new social consciousness.' *See also* Wolfgang Friedmann, The Changing Structure of International Law 40 (1964): 'A gradual change in the position of the individual has