

33 FROM INTERNATIONAL LAW IN BOOKS TO INTERNATIONAL LAW IN ACTION

ELTE Law School's Jessup and Telders Victories in 2019

Gábor Kajtár – Katalin Sulyok*

“We are not unmindful of, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other, which underlie this case; but these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view.”¹

33.1 INTRODUCTION

As the ICJ put it in 1966 in the *South West Africa* cases “Law exists, it is said, to serve a social need”.² This short paper aims to give an overview of the many levels on which the above statement of the ICJ holds true.

Hungary had an outstanding year in 2019 in terms of international law moot court competitions. ELTE University Faculty of Law, the oldest and 1st ranked law school in Hungary, has won the two biggest international law moot courts in the same year. With these historic wins, Hungary is the 4th European country in the 60-year history of the Philip C. Jessup International Law Moot Competition that won the International Championship Round held in Washington D.C. Also, ELTE University is the first in the world to

* Gábor Kajtár: associate professor, ELTE Law School, Budapest, and coach of ELTE Jessup Team since 2010 as well as coach of ELTE Telders Team since 2016. Katalin Sulyok: senior lecturer, ELTE Law School, Budapest, and co-coach of ELTE Jessup Team in 2015, 2017 and 2019; co-coach of ELTE Telders Team in 2019. The authors are deeply indebted to Prof. Pál Sonnevend, Head of Department of International Law and Dean of ELTE Law School for his dedication to the Philip C. Jessup International Law Moot Competition as a former agent, coach and Vice Dean for international relations. Special thanks go to Dr. Réka Somssich, Vice Dean of ELTE Law School. ELTE Law School could not have achieved this outstanding success without its fantastic students and especially our exceptional Jessup Alumni community.

1 Joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, *South West Africa cases*, 1962 ICJ Reports, p. 466.

2 *South West Africa cases (Ethiopia v. South Africa, Liberia v. South Africa)*, Second phase 18 July 1966, 1966 ICJ Reports 6, para. 49.

win the Telders International Law Moot Court Competition in the same year as winning the Jessup competition.

This piece provides a detailed narrative of the above successes of ELTE Law School. To shed light on the wider context of these achievements, it will demonstrate the ways in which international law moot courts are beneficial not only to the mooted students, but also to those having an academic interest in public international law. What is more, the philosophy and overall message of international law moot courts may become ever more important in times when the global world order and international multilateralism experiences efforts challenging the international rule of law.

33.2 HUNGARIAN MOOT COURT SUCCESSES IN 2019

ELTE Law School has a long history of participating in the world's biggest and most prestigious moot court competitions. The last couple of years have already seen some outstanding results on the international plane. Yet the achievement of the year 2019 will mark most probably the year, when Hungary has irrevocably been put on the map of international law moot court competitions.

33.2.1 *Winning the Jessup World Cup*

The Philip C. Jessup International Moot Court Competition was founded by Harvard Law School in 1960 and ever since, it has become the biggest and most prestigious international moot court in the world, where approximately 700 universities participate from more than 100 countries every year.³ At present it is administered by the International Law Students Association (ILSA).⁴ After the national rounds organized in each country, the best teams qualify to attend the International Final Round held in Washington D.C. The one week-long Finals usually take place in the beginning of April at the Hyatt Regency Hotel. The Final Round is typically attended by roughly 750 students who had all been working on the same Jessup Problem since September, which features an elaborate legal conflict between two fictitious States that decide to bring their dispute before the ICJ.⁵ During the competition, agents of the teams represent the applicant and the respondent before a panel of three judges. First, they have to prepare a typically 60-pages long written memorial on behalf of both the respondent and the applicant State. These arguments are then be presented in

3 See Jessup history at www.ilsa.org/jessup-history/.

4 About ILSA see www.ilsa.org/what-we-do/.

5 For this year's Jessup case see www.ilsa.org/Jessup/Jessup19/2019%20JESSUP%20FINAL%20COMPRO-MIS%20with%20CandC.pdf. Problem Authors: Michael Peil, Hannah Zhao and Douglas Pivnichny.

the national rounds as well as in the International Final Round in a 45-minute long oral pleading on each side.

ELTE Law School has been participating in the competition for 30 years. In the last 10 years ELTE Jessup Team was coached by Gábor Kajtár, associate professor of international law. During these years ELTE Law School has always qualified for the International Final Round and in the last couple of years, its team, representing Hungary, achieved outstanding results in Washington D.C. In 2014, Dávid Surjányi was the Third Best Oralist and in 2015, Dániel Pap was named Second Best Oralist out of 700 students. In 2018, ELTE Jessup Team (Gergő Balázs, Barbara Bazánth, Zolta Buda, Olívia Németh and Dzenifer Orosz) won the award for the best combined memorials not only at the International Rounds in Washington D.C. (Alone E. Evans Award First Place), but also out of the more than 700 competing universities from all around the world (Hardy C. Dillard Award First Place).⁶ Notably, Dániel Pap and Barbara Bazánth were chosen as best non-native oralists in 2015 and 2018 respectively, both receiving the International Law Institute's scholarship to attend a summer school at Georgetown University.⁷

Hungarian law schools provide a five-year training program, during which Public International Law is a 2 semester long compulsory course. This year's Jessup team was composed as follows. Team members: Zolta Buda (in the 5th year of his law studies), Gábor Bazsó (in the 3rd year of his law studies), Marcell Koncsik (in his 2nd year of law studies) and Vanessa Szép (in the 5th year of her law studies). Their coach was Gábor Kajtár and co-coaches were Katalin Sulyok and Dániel Pap.

In the Preliminary Rounds that take place in the first three days of the International Final Rounds, the Hungarian team met with teams representing China, Romania, Ireland and Panama. By being ranked in the top 32 teams from among the participating 143, the ELTE Jessup Team qualified to the Advanced Rounds. Here, it won against a team representing Russia, and then proceeded to the Octofinals, where it competed with the team of Ukraine. In the quarterfinals it met with the team of the Philippines, a former world champion. In the semifinals its counterpart was the team of Singapore Management University, also a multiple former world champion. In the final Championship Round, ELTE Law School competed as respondent against Columbia Law School as applicant, a team which is a four times World Champion, and hence one of the most successful teams in the history of Jessup. The bench of the Championship Round comprised Hugh Adsett (Global Affairs Canada), S. James Anaya (former UN Special Rapporteur, dean of University of Colorado Law School), and Andrew B. Loewenstein (partner at Foley Hoag LLP).⁸

6 See www.ilsa.org/Jessup-history/Jessup-2018/.

7 See www.ilsa.org/Jessup-history/Jessup-2015/.

8 See www.ilsa.org/Jessup-history/Jessup-2019/.

GÁBOR KAJTÁR – KATALIN SULYOK

Besides winning the Championship round based on the unanimous decision of the bench, Gábor Bazsó received the Stephen M. Schwebel Award as best oralist at the Championship Round. Also, ELTE won the third-place award for the best written memorial for the Applicant, and the combined memorial scores also placed them in the Top 10 among participants of the International Final Round.

33.2.2 *Winning the Telders Cup*

The Telders International Law Moot Court is a European-wide competition that is organized in The Hague since 1977. Its final round is traditionally held in the Peace Palace and is presided by judges of the ICJ. Agents, *i.e.* team members are expected to prepare written and oral pleadings mimicking the proceedings of the ICJ. The memoranda are usually approximately 40-pages long and the oral presentation is about 30 minutes per side.⁹

ELTE University has participated in Telders several times and achieved its biggest success this year by winning the final round. Team members were second year law students: Dóra Balogh, Dávid Máté, Balázs Schultz and Franciska Tóth. Their coaches were Gábor Kajtár and Katalin Sulyok.

The finalists were Leiden University (applicant) and ELTE Law School (respondent). The final round judges were Judge Giorgio Gaja (ICJ) presiding, Judge David Re (Trial chamber President, Special Tribunal for Lebanon) and Maria Teresa Infante Caffi (Ambassador of Chile to the Netherlands). One of the Hungarian agents, Franciska Tóth also received the Best Oralist Award.¹⁰

33.3 BENEFITS OF INTERNATIONAL LAW MOOT COURTS

Mooting experience has obvious benefits for the participating students themselves, but other benefits of taking part in such competitions may not be that self-evident. In the following we comment on these often overlooked or under-appreciated aspects of participating in international law moot courts.

33.3.1 *Educational Benefits*

Moot courts represent an enormous added value to legal education especially in countries with civil law systems, where education is more focused on the theoretical and doctrinal

9 For this year's Telders case see <http://teldersmoot.com/2017/10/06/telders-case-2019/>.

10 See <http://teldersmoot.com/2017/05/22/telders-results-2019/>.

aspects of positive law rather than the pragmatic aspects of crafting persuasive legal arguments. In such education systems, moot courts represent a hands-on approach to studying law, where students can gain some practical insights into the art and craft of preparing effective written and oral pleadings based on an elaborate and complex set of facts.¹¹ The moot experience therefore mimics real life lawyering work of representing clients.

Preparing effective and persuasive arguments requires practical training in legal research, legal writing and legal rhetoric. And even more importantly, moot court problems give an excellent opportunity to face, for the first time, some of the most typical dilemmas in legal argumentation: how one may identify legally relevant facts, how to peruse over uncomfortable gaps in the agreed facts, how to build a persuasive litigation strategy where none of the claims are in contradiction, but follow a tight logical order, or how to select those arguments of the opponent that can be conceded should the judges insist upon it. These are skills that cannot be taught in theory, only on a learning-by-doing basis.¹²

Students involved in moot courts can hone such skills during the year-around preparation, which will be a highly valuable asset on the job market. Our Jessup alumni typically work in the private sector at international law firms in Hungary or abroad. Some of them continued to nurture their close relationship with public international law even after the moot court and specialized in investor-state arbitration. Increasingly, our students have started to secure internships and employment with international judicial fora. Others have used their Jessup experience to work in other branches of law, yet even in those fields they benefitted greatly from the practice-oriented, sharp legal thinking they developed during their moot year.

33.3.2 Academic Benefits

As it may be clear by now, there are obvious educational benefits of international law moot courts for participating students. But what is in it for junior and mid-career academics? What can be learnt by those international lawyers who are coaching Jessup teams? Working with the most talented and creative students has been always a privilege for us. The Latin maxim *docendo discimus* aptly describes the co-benefits that coaches gain by teaching those most interested in the deeper complexities of international law: ‘by teaching, we learn’.¹³ Questions asked by these students may provoke new ideas for academic research as well.

11 For some of the most important guidelines on preparing memorials and preparing for the oral rounds see www.ilsa.org/ilsa-other-stuff/ilsa-publications/ilsa-guide-to-international-law-moot-court-competitions/.

12 For the given year’s best memorandums see www.ilsa.org/ilsa-other-stuff/ilsa-publications/jessup-compendium/.

13 ‘*Homines dum docent discunt*’, Seneca, Letters to Lucilius, Book I, letter 7, section 8.

Furthermore, moot courts can provide an important avenue for recruiting excellent prospective PhD candidates and hence they are of significant value from the perspective of the entire faculty. Lastly, but perhaps most importantly, international law moot court cases are typically written in a way as to target some of the most developing fields of international law, highlighting thereby some current problems of international law worth researching more in depth. The Jessup case does not yield to one single ‘correct’ solution, since international law does not provide yes-or-no type (*i.e.* lawful-unlawful) answers to legal dilemmas in these areas. International law concerning these questions (and arguably, many more) can be more adequately described as lying in a grey zone, where the legal status quo is increasingly challenged by emerging new norms. For those who have already taken part in moot courts comes as no surprise that the goal of a moot court pleading is to compile the most persuasive legal, factual, and policy arguments on both sides.

Strong arguments can be made with respect to both the applicant and the respondent side – ideally the case is balanced in a way that one of the sides will have stronger arguments in positive law, while the other may have advantage on moral grounds or policy. In fact, the Jessup problem is usually written in a way as to articulate a clash between international law as it stands today and emerging waves of legal development challenging old paradigms. Typically, one side will argue for a conservative approach based on positive law while the opponent side will have to argue based on emerging customary law and soft law instruments, representing a more progressive approach to the international law issue at hand. Researching these problems therefore brings students and coaches to the heart of the dynamically evolving questions of international law, which are marked by uncertainty inherent to law, and to international law more specifically.¹⁴ These legal issues always provide fertile ground for further doctrinal research.

This year, for instance, the Jessup problem, the case concerning the Kayleff Yak,¹⁵ featured several such fast developing problems. For one, the case brought up issues of the protection of biodiversity and traditional knowledge of indigenous communities concerning the use of genetic resources. To what extent are international conventions on biodiversity protection directly enforceable before an international court? How can questions of scientific proof and complex causal scenarios be adequately argued by a party to prove that a sudden decline in the Yak population was in fact caused by the respondent State’s hunting, and not by natural factors, such as climate change, or the applicant’s own taking that has been ongoing for millennia for cultural and religious purposes? What hard and justiciable obligations can be discerned from the Nagoya Protocol for a territorial State to share the benefits with an indigenous community of a pharmaceutical product that has been arguably developed based on the community’s traditional knowledge, but was produced from an

14 See Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective*, Routledge, 2012.

15 See www.ilsa.org/Jessup/Jessup19/2019%20JESSUP%20FINAL%20COMPROMIS%20with%20CandC.pdf.

enzyme that was first derived by a state-funded researcher? How can the ‘inventive step’ be defined in practice, which would render a pharmaceutical product a patentable intellectual property, distinct from traditional knowledge entailing benefit-sharing obligations?

The most topical question regarding the extent and enforceability of human rights obligations of corporations as well as the extraterritorial application of human rights guarantees also permeated the case. This aspect entailed questions of attribution, where different international adjudicatory bodies adopt divergent standards to define the level of state control over a company giving rise to the imputability of the corporation’s conduct to the State. The possibility of enforcing human rights guarantees are increasingly discussed in international case-law and scholarship. The ‘orthodox’ view fosters extraterritoriality strictly based on exercising effective control over the territory in question, while a more progressive approach increasingly emerges in judicial decisions and soft law documents favoring more extensive possibilities to create extraterritorial application and enforceability of human rights guarantees.

All of these issues raise yet unanswered questions in international legal doctrine and therefore inspire new frontiers of academic research.

33.3.3 *Benefits for Participating Universities*

ELTE Law School’s outstanding performance in the Jessup and Telders competitions has significantly contributed both to the further success of our students in their career and to the various international LL.M. programs of ELTE Law School.

ELTE Jessup and Telders alumni have been admitted to best LL.M. and Ph.D. programs around the world. Our alumni earned LL.M. degrees *e.g.* from Cambridge, Oxford, Harvard, Sorbonne and Heidelberg. ELTE Law School runs three international LL.M. programs: the European and International Business Law LL.M. program, the European Human Rights LL.M. program and the International and European Taxation LL.M. program. The visibility of these programs is also enhanced by the university’s successes on the world’s mooted stage.

The European and International Business Law LL.M. program is designed to prepare an international group of legal practitioners for the global challenges of the 21st century. At a time when globalization and European integration are on the agenda, an intercultural approach to law and its application, in other words, comparative legal studies are indispensable for a sound analysis of legal issues and the settlement of legal disputes. The course concept links theory to real world business. The high-level curriculum offers solid

grounding in the institutional fundamentals of the European economic integration and an introduction to international business law.¹⁶

The European Human Rights LL.M. program started in September 2016 and focuses on complex and creative problem solving in the field of human rights law and wishes to enable students to take new approaches in human rights litigation on various European fora. Globalization has prompted interest in a deeper understanding of the relationship between human rights and traditional areas of law. Important efforts have already been made by various international organizations to disentangle the links between ethics, human rights, development and economics. Human rights advocates can provide a rights-based approach not only to strive for higher level protection, but also to bring about better economic and developmental results, thereby instrumentalizing human rights values and concepts.¹⁷

The International and European Taxation LL.M. program is designed to give students the knowledge necessary to understand the ongoing tax issues of the world we live in. The program ensures a well-balanced education in terms of theory and practice. An advantage of the program is that it is run in association with market leader tax advisor companies. Top managers and partners of Hungarian Big4 provide the students with practical knowledge.¹⁸

33.3.4 *Benefits for the International Community (of Lawyers)*

The Jessup also provides benefits for a wider community of international lawyers, by creating a worldwide network of future international law practitioners. The competition also fosters mutual understanding and respect for students coming from other countries. The philosophy of the competition avowedly and openly nurtures a belief and associated world view where real life disputes between states can be mediated if not resolved through adjudication and legal means. As it has been repeatedly emphasized by speakers at opening ceremonies, the Jessup is organized in the hope that it will help educate a future generations of lawyers, who are committed to the cornerstones of international law, such as the equality of states, international rule of law, respect for human rights, and the peaceful resolution of inter-state disputes.

‘Ubi societas ibi ius’ – ‘wherever there is society, there is law’. Evidencing this fact, the Charter of the UN and the Statute of the ICJ signaled the beginning of a new world order based on the peaceful settlement of disputes rather than wars, and ultimately *‘Faustrecht’*. As Judge Jessup has famously put it in 1948 “the ultimate function of law, which is the

16 For more information see www.elte.hu/en/european-and-international-business-law-llm.

17 For more information see www.elte.hu/en/european-human-rights-llm.

18 For more information see www.elte.hu/en/international-and-european-taxation-program-for-lawyers-llm.

elimination of force for the solution of human conflicts.”¹⁹ Judge Jessup steadfastly believed that “law is indeed a human necessity”²⁰ and, that conflicts should be solved peacefully based on the rule of law. ‘*Ubi ius ibi remedium est*’ – ‘wherever there is a law, there is a remedy’.

Admittedly, “international law is not rules. It is a normative system” as the former president of the ICJ, Rosalyn C. Higgins has famously put it.²¹ These rules are not just an accumulation of past decisions, as judges must constantly decide between competing legal arguments when making decisions.²² Along the same lines, the essence of the judicial task was summarized by Hersch Lauterpacht as a choice “not between claims which are fully justified and claims which have no foundation at all but between claims which have varying degrees of legal merit.”²³ Thus, law in action and especially in adjudication is not a black-white logical formalism but “judicial discretion as governed by law”.²⁴

Hersch Lauterpacht’s words are worth reproducing in full here:

“The salient factor in most situations is that the legal merits of a case are seldom so obvious as to permit the elimination of the necessity to balance the conflicting or competing legal considerations – all of which are relevant to the case and all of which, though in different degrees, are worthy of consideration. [...] It is, as a rule, a question of giving effect to a better right against a right of less compelling legal merit.”²⁵

International moot courts like Jessup and Telders are great opportunities to demonstrate the processes of international law. The cases are usually written in a way where clear-cut legal answers are impossible to give. Also, competing legal considerations between applicant and respondent reveal two other challenges: how to accommodate policy and humanitarian considerations into the law, into a legal argument. Striking a good balance between the two extremes of international law in splendid isolation detached from the realities of international relations and being hollowed out by purely policy arguments and *Realpolitik*, a good Jessup or Telders agent has to keep in mind the words of the ICJ:

19 Philip C. Jessup, *A Modern Law of Nations*, The Macmillan Co., 1948, p. 2.

20 Id. p. 3.

21 Rosalyn Higgins, *Problems and Process. International Law and How We Use It*, Oxford University Press, 1995, p. 1.

22 “Subject to that overriding primacy of the existing law, they bring to mind the fact that the necessity of choice between conflicting legal claims is of the very essence of the judicial function, whether within the State or in the international sphere.” Hersch Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press, Cambridge, 1982, p. 399.

23 Hersch Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press, Cambridge, 1996 (reprinted), p. 398.

24 Id. p. 399.

25 Id. pp. 396-397.

GÁBOR KAJTÁR – KATALIN SÜLYÖK

“The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered. Humanitarian considerations may constitute the inspirational basis for rules of law. [...] But the existence of an ‘interest’ does not of itself entail that this interest is specifically juridical in character. [...] An interest, no doubt; but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form.”²⁶

A good Jessup or Telders problem thus teaches students and reminds their professors of the essential relationship between law and policy and between law and ethics that cannot be avoided.²⁷ Indeed we must deal openly with these factors both in teaching and in the practice of international law. Overall, international law moot court experience allows law students to face the complexities and even the weaknesses of the normative system of international law, making them better equipped for legal advocacy and lawyering in every branch of law.

26 *South West Africa cases (Ethiopia v. South Africa, Liberia v. South Africa)*, Second phase 18 July 1966, 1966 ICJ Reports 6, paras. 49-51.

27 Higgins 1995, p. 5.