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CONGRESS OF
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PHILIP C. JESSUP
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1992 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Media Gulf War

Atlantis

v.

Bergenia

CONFIDENTIAL

MEMORANDUM OF LAW AND AUTHORITIES FOR JUDGES

NOTICE

This Memorandum is exclusively for the use of Judges in the 1992 Jessup Moot Court Competition. It may not be shown to, read by, or in any other way communicated to or made available to competitors in the Jessup Competition.

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INTRODUCTION

The Problem was drafted to allow participants an opportunity to address current law and to encourage legal imagination in its application. The relevant international instruments were kept to a minimum to allow participants to discover and come forward with a variety of international legal instruments that arguably bear on the issues, as evidence of customary law. Remarks on the specifics of the Problem follow a few paragraphs that should be useful to newcomers to the Jessup, especially judges in the oral sessions.

I. JUDGING THE JESSUP

Judges in the Jessup Competition exercise their competence in a different way from those who sit on the World Court. Jessup Judges do not issue opinions. Although they may address the participants informally, they do not provide an oral judgment, and they are not expected to indicate what determinations they made. They are expected to meet collegially at the Competition and to consider among themselves the arguments presented orally and in the memorials.

Judges are expected primarily to judge the performance of the participants. Standards for grading the oral arguments and memorials are provided by the Jessup Office. The written memorials are not revised once submitted, while the participants who ascend the competitive ladder have the unique opportunity to develop and refine their oral arguments and to take both sides of

the issues.

Several other factors should be mentioned: much of the quality and the standards of the Jessup Competition depend upon the scrupulous exercise of fairness among the judges, upon their meeting the highest standards in judging what the participants are saying and the arguments that the contestants are making, and upon their pursuing questions that lead to probing the skills, competence, and advocacy of the contestants. The contestants as well as the audience sense this challenge.

The Jessup is not a tutorial or a lecture course. It is not intended to set the stage for up-staging the participants. It is not a platform where the judges are expected to monopolize the time, either in formulating complex questions, or providing commentary, or asking questions and failing to get answers, to provide their own. Judges should not attempt to show the participants and the audience how much they know about the Problem, the arguments, their grasp of international law, and possible solutions. The use of the Bench as a podium for teaching the participants international law should be carefully avoided.

The participants learn as they pass from one level to the next from information they gain from questions raised. They build on this process until those who reach the final round find that they have refined their thinking and oral arguments substantially. They cannot, of course, modify their written briefs.

The Jessup bench is not a place to attack or engage in deep criticism of the participants, nor to "show them up." The Jessup should encourage a high level of dignity among contestants and judges alike. If it does, the Jessup will continue to be a major

instrument for shaping the thinking of all concerned with international law. The Competition offers a unique opportunity to provide a simulation or gaming device to test thinking and theories about the law applicable to cases intended to be drawn from real world problems. Published, the Jessup and its materials should become a resource for others to draw upon.

The Jessup is more than a moot because international law is at a stage where much needs to be done at the philosophical or conceptual level. This effort can be stimulated through Jessup Competitions. Stimulus in part arises from deep-seated and long enduring effort in a law application problem, but it may also be aroused by a realization in all participants that the Jessup can be the means to promote international law as such. The Jessup Problem may be used as a teaching instrument, and one Problem has already appeared in a text for that purpose.

This memorandum does not purport to be a primer on international law nor does it set forth all of the issues, approaches, or problems raised in the main Problem. It is designed to offer guidelines only. Much depends on the judges, specifically on their listening closely to the participants and, as in all courts, eliciting the perspectives of the contestants as to the applicable law, the facts to which it is applied, and the legal implications of their efforts. Although not specifically required, judges may be able more effectively to fulfill their functions if they come together prior to the Competition. This may compensate for the fact that most judges have not had an opportunity to serve on the bench over a period of time and they will also gain the collegiate experience such an opportunity

affords.

1. BACKGROUND IN INTERNATIONAL LAW.

The judges may wish to consult the texts and opening chapters of casebooks on international law to refresh their own recollections about the law. During the judging activity, they will be questioning the participants concerning customary international law - and the shared expectations of states. Participants will be invoking treaties, and judges may find the Vienna Convention on the Law of Treaties especially useful. Although some of its major provisions are controversial, it may provide a more precise framework for analysis. Judges may draw upon general principles of law and use those principles to fill gaps in the law or to question the participants about the direction they are attempting to go. Although judges may be mindful of certain prominent jurists or important cases involving the issues, caution is recommended. The Problem is not designed as a "United States" problem, intended for U.S. solutions. The Problem does not raise questions concerning the domestic jurisdiction of the United States, the application of its law or Constitution, or its domestic policy.

The Jessup Court will be governed by the rules and regulations of the World Court. However, issues regarding these are not raised in the current Problem. Judges should skim the Statute establishing the Court, its jurisdiction and competence. Note that cases brought before the Court include, as here, those involving legal disputes between nation-states.

2. Source Materials.

Judges needing familiarity with international law in general

should peruse the following: Whiteman, DIGEST OF INTERNATIONAL LAW, Vol. 1, first chapters on sources of law; Brierly, LAW OF NATIONS, various editions; the major casebooks on international law, and in particular the introductory chapters dealing with international law as law or with the "sources" of international law; in addition to Brierly (which is brief) other standard textbooks on international law will be useful; and for those who seek more detailed or philosophical treatment, the relevant lectures on the law of war or the use of force given at The Hague and published in the RECUEIL (a yearly compilation of the proceedings and lectures). The books devoted to the use of force (e.g. McDougal and Feliciano, Bowett, Brownlie) and to the law of war are useful but are too detailed to be recommended to judges who may not have the time to study them. The goal is to gain familiarity or refresh recollections about international law. To a limited extent, attempt is made in this memorandum to provide the needed background, with the expectation that the judges will be able to work with (or against) the arguments of the participants, or to compel them to provide proper authority for their arguments. Presumably, improper use of authority by one side will be detected by the other, but the judges may need to encourage this sort of contest.

II. AUTHORITIES

Among the international conventions that, pursuant to the call of the Problem, teams should take into account and judges should review are:

Hague I	1 Bevans 577, 187 CTS 410
Hague IV	1 Bevans 631, 205 CTS 277
Geneva, civilians	75 UNTS 287, 6 UST 3516
Geneva, prisoners	75 UNTS 135, 6 UST 3316
Geneva, protocols	16 ILM 1391

Chapter VII of the United Nations Charter should also be consulted.

Among the conventions that teams are likely to bring forward are treaties on:

Treaties (Vienna)	1155 UNTS 95, 8 ILM 679
Environmental Modification	1108 UNTS 151, 31 UST 333
Human Rights (civil, etc.)	999 UNTS 171, 6 ILM 368
Human Rights (economic, etc.)	993 UNTS 3, 6 ILM 360
Opening of Hostilities	1 Bevans 619

There are arguably issues in the Problem that may lead to citation of treaties on:

Apartheid	1015 UNTS 243, 13 ILM 50
Genocide	78 UNTS 171, 28 ILM 760
Torture	23 ILM 1027
The Wounded	75 UNTS 31, 6 UST 3114

Bear in mind that many international instruments apart from treaties may be offered as evidence for the existence of an international customary rule. Within the context of this Problem, one might note the following General Assembly Resolutions and International Law Commission drafts on:

Aggression	13 ILM 710
Human Rights	GA Res. 217A(III)
Friendly Relations	GA Res. 2625(XXV)

The Environment

11 ILM 1416, 22 ILM 455

State Responsibility

ILC YrBook, 1980, 85, 86

The foregoing lists are meant to be suggestive only. Many teams may find relevant materials not listed here.

III. ISSUES

There are a number of sub-issues which might be raised on these facts, but the following questions must be addressed by the teams:

What are Bergenia's obligations, if any, under the OPS agreement, and were they breached?

Did Atlantis breach the Pipeline Treaty?

Is Atlantis an aggressor?

Is Bergenia an aggressor?

Has Atlantis violated the laws of war?

Has Bergenia violated the laws of war?

Among the sub-issues raised by the Problem, two issues must be discussed by the teams. 1) What responsibility, if any, does Bergenia have for the acts of Victorian troops at the Epsilon Caves and for the treatment of prisoners by the Devonians? 2) What responsibility, if any, do the parties bear for environmental damage?

There are certain tangential issues here. The teams should not be penalized for missing them nor credited unduly for noticing them. The "apartheid" or "genocide" practiced or intended by the Bergenians might be noted as well as the Ethlantians' struggle for "self-determination," bearing in mind

that particularly well-formed analyses, brief and succinct, regarding these issues should be regarded favorably. Judges should regard unfavorably any "issues" that are remote from the fact pattern and call of the Problem. Examples include: the criminal responsibilities of individuals, the possibility of intervention at the ICJ by Bergenia's Coalition partners, and the nature and extent of remedies sought by the parties.

IV. THE OPS AGREEMENT

The legal authority of the OPS depends upon the shared expectations of its members: they may expect the OPS to have a high degree of authority, even if not "legally" binding, or they may expect it to be a clearing-house of proposals or demands made among its members, with recommendations on the courses of action to take.

OPS is modelled on OPEC. It has no formal authority - it cannot and does not purport to have the authority to enforce informal understandings oil producing states may reach. Though it may have been formed through a treaty, the organization has no authority except to make recommendations and provide advisory opinions to members.

The argument may be made that states do not enter into arrangements, even if informal, as gestures or to symbolize friendly relations. The OPS promulgates accords among its members that are entered into as solemn declarations, and which are intended to be fulfilled in good faith. Though the accords are not legally binding, they are instruments through which the

parties share common expectations. OPS members share the belief that the accords they reach are in their common interest and should be fulfilled. The argument may be made that this, though short of hard law, is part of either "soft" law or emerging law, and that over time, the continued observance of accords would lead to a pattern of expected observance in the future. This is the basis for the evolution or emergence of much of customary international law.

The opposing arguments may suggest that if the parties wanted a strong organization they could have created one. OPS was created to allow the parties a substantial if unstated reserve of discretion and freedom to act with regard to OPS matters. The natural position of states is their independence and their claims to exclusive authority; unless states explicitly and unambiguously delegate that authority, they retain their freedom to act. Arguments falling between these two positions may suggest that even if states retain this freedom, they must provide the other parties with a clear statement of why they do not intend to respect OPS accords, while remaining members and benefiting from the group's actions.

V. THE PIPELINE AGREEMENT

Little is known about this treaty, but Atlantis appears to be in prima facie breach. The Atlantisans' best defense would probably be built on the provisions regarding changed circumstances in the Vienna Treaty on Treaties (Article 62). Atlantis entered into the agreement during a period of adequate

oil prices; it is now suffering important economic set-backs, perhaps economic collapse, due to the export practices of Bergenia. Atlantis also entered into the agreement as a law-respecting member of the international community; now it is an unwilling accomplice to Bergenia's violation of the OPS agreement since part of the oil-glut that Bergenia is sending into the world market is being moved through Atlantisan pipes.

A claim of reprisal is suggested by the explanation Atlantis offers for shutting down the pipeline. The law of reprisal entails the right of an injured state to commit an illegal act in response to the illegal act of another state, in order to compel the offending state to conform with the law. Atlantis is faced with the same problem of establishing the nature and gravity of Bergenia's present wrong that it met regarding Bergenia's breach of the OPS agreement, since the breach is fundamental to the legality of Atlantis' act.

VI. JUS AD BELLUM

In attempting to justify their resort to military action the parties will rely primarily on the principles of self-defense, humanitarian intervention, and enforcement of the United Nations Charter.

1. Humanitarian Intervention

The matter of humanitarian intervention and the invocation of inhumane treatment as the justification for using force are speculative matters. The United Nations General Assembly and countless other bodies have insisted in a variety of resolutions and instruments that such interventions must be consistent with

international law or the U.N. Charter. The Israeli raid on Entebbe was in large measure justified on this basis, and the United States indicated that its invasion of Grenada was also based upon such a claim.

Humanitarian intervention must be undertaken only with the amount of force needed to achieve relief from the inhumane treatment and no more. (The proportionality principle) The elements of necessity, proportionality in the use of force, confinement of targets, missions and attacks all make up the standards that are applied. The intervening state must be able to justify, under community standards, whether the use of force, though responding to inhumane treatment, is justifiable in view of the costs of using force.

Atlantis' claim of the right to invade by way of humanitarian intervention is subject to the same standards of reasonableness as claims of self-defense. There must be a legitimacy of intervention established by the facts of inhumane treatment, a showing of necessity to use force to correct such treatment, a showing that the force used in amount, duration, and targeting or missions is proportional to the requirements of relief of the victims of inhumane treatment, and a showing that only legitimate targets are attacked - usually military forces, or other enforcement bodies. The opposing position is based upon a claim that humanitarian intervention is a weak instrument under international law, that it is ambiguous both in its invocation and application and that in practice it is largely an ad hoc, "quick fix" measure, such as that used at Entebbe (where Israelis introduced special forces in Kenya to effect the release of hostages

held under governmental auspices, and their return to Israel).

2. Mobilization of forces, etc.

States mobilizing their forces beyond the needs of peacetime measures suggest an offensive posture - an intention by implication that the forces are to be used, and if there is no other justifiable reason for using them, that they may be used for a strike, aggression, or threat of aggression. Both sides have mobilized their forces, so they are in "balance" on this issue. Arguments might be raised as to who was the first to mobilize, but those arguments are primarily factual issues. Either side might respond that mobilization was an exercise, and that it was essential in times of tension.

3. Measures taken to correct misconduct toward the peoples in Province.

Atlantis called for Bergenia, through diplomatic channels, to correct the misconduct and mistreatment of Ethlantians living in Province; these failed to produce desired results. An independent survey taken by international groups confirmed abuse of the Ethlantians. The question is raised whether that is sufficient to base a claim for humanitarian intervention by forcible invasion. The judges should consider this in their deliberations with regard to necessity, proportionality, and appropriateness of action.

4. Atlantis without warning or declaration of war invades the Province.

Declarations of war are no longer necessary to establish the state of war, but failure to provide a declaration may become the basis for insisting that the strike was aggression. Participants

may raise the Hague Conventions on declaration of war, but the Conventions are not conclusive. A state of war, and therefore the application of the laws of war, arises with the commencement of hostilities.

5. Complaint submitted to Security Council.

Bergenia's submission to the Security Council immediately followed the invasion. The Security Council responded with its first resolution, 910. The resolution does not provide authority to take forcible action, but is addressed exclusively to Atlantis, with demands to withdraw from Bergenia and Province.

Judges should review Articles 2(4) establishing undertakings among members to refrain from aggression, Article 2(3) to settle their disputes by peaceful means, the preambles and other articles, relating to peaceful relations among the member states, and Article 51 concerning the "inherent" rights of states to self-defense and collective self-defense. They should also review the authority of the Security Council generally.

6. Both Atlantis and Bergenia insist on the claim of acting in self-defense.

Both parties may invoke customary international law or their interpretations of Article 51 of the Charter. They may find useful commentary in such cases as the Corfu Channel Case or the Caroline Case. They may adopt a strict interpretation of Article 51. They may also claim that once the Security Council is seized of the case, the rights of the parties to exercise self-defense are suspended. The argument could then be made that the Security Council has exclusive jurisdiction of the case once it is seized unless, by its resolutions and decisions it shows that it has

taken seizure of only part of the case. Arguments will also be raised that the right of self-defense or collective self-defense is an "inherent right," and cannot be suspended. It would then always arise where a state under attack perceives that it must act, or where it perceives that the defense, if any, it receives through the Security Council action is insufficient. The judges should be alert to this issue providing a number of themes and arguments and should pursue them with the participants.

It may be necessary to pursue the strength or persuasiveness of the claims of the parties. Both sides may claim their right of self-defense on the basis of the facts previously noted. But it should be clear that once hostilities are commenced, both sides are subject to the law of war and under the law of war they are treated as equals. There is no law that gives unique or special privileges or protections to the party who is or is shown to be the victim of aggression.

7. Security Council Seizure under Resolution 928.

The Security Council in Resolution 928 has authorized Bergenia and the Coalition states to use all means necessary to restore international peace and security. In effect, it is calling for the member states to return the situation to the status quo ante. The Security Council is acting under the larger authority of the Charter in general, as well as under Chapter VII.

An issue raised here is whether the Security Council has exclusive jurisdiction over the parties and the conflict, or whether the parties have authority of their own, under Article 51 of the Charter, customary international law or both. The parties will make arguments on both sides.

VII. JUS IN BELLO

This section of the Problem raises the violations of the law of war issues. There are a sufficient number of such violations that each side can claim that the other has been the primary violator, and each can claim exoneration on the basis of various arguments. Judges will apply the Geneva Conventions of 1949, and the Geneva Protocols of 1977, the relevant Hague Conventions, and several others. In the event that judges do not have access to the treaties, they should ask the participants to clarify their positions by citing the relevant elements from treaties during the rounds. Some of the important issues are considered below.

1. The Alpha Power Plant.

The questions to be raised might include whether air attacks against targets such as power stations and utility facilities are permissible and whether the attack on the 500 civilians was a violation of the law of war in view of the use of the facility attacked.

2. The Beta River Bridges.

Coalition forces have attacked the bridges that were vital transport routes for food and medical supplies, as well as other necessities for civilians. Bergenia will argue that the bridges were used for military objectives, and Atlantis that they had little impact on the Atlantan military effort. Bergenia will then argue that it did not know but had every reason to believe that the bridges would indeed be useful to the military effort.

3. The Gamma Hospital.

Under the Geneva Protocols of 1977 states must refrain from locating military targets near civilian targets. Hence, the argument may be raised by Atlantis that the launching sites were military targets, and that Bergenia had violated the conventions by selecting such sites. Atlantis would, however, be forced to use attacking measures that would ensure as much as possible that the hospitals would not be damaged, a precaution lacking under the facts.

4. The Epsilon Caves.

In addition to using flame-throwers and riot-control agents, a practice which it may be able to defend, Victoria also fired upon Atlantisan troops coming out of the shelters who were demanding to surrender and be taken as prisoners of war. This act is a violation of the Geneva Conventions and the Hague Convention #4. The extent of Bergenia's responsibility for this violation should be argued by both sides.

5. The Zeta Executions.

Bergenia's legal responsibility for these acts depends upon the status of the Ethlantian Front members as combatants. While in general, combatants under the Conventions are members of the armed forces of the contending states, "irregular" forces are protected according to criteria established in applicable treaties, e.g., membership in a cohesive organization, fighting under the orders and discipline of leaders, bearing arms openly, wearing visible distinctive insignia or apparel, etc. The fact pattern favors combatant status for the members of the Front, while still leaving room for argument to Bergenia.

6. The Eta Executions.

Battlefield reprisals are permitted under the law of war, but Bergenia's stance here is not entirely clear. Spies and mercenaries are specifically excluded from the protections of the Conventions, but we have only Atlantis' word that the persons executed belong in these categories. The facts (given in a single sentence) are insufficient for either side to produce solid conclusions. The point here is not that either side establish that it is "right," but that both sides recognize the reprisal issue, show awareness of the law of belligerent reprisal in contemporary international legal thought and practice, and make some considered effort to apply that law to the ambiguous facts given.

7. The Theta Oil Spill.

This raises issues as to damage to the environment in general and the use of the environment as an instrument of war. The Geneva protocols indicate that attacks on the environment are violations of the law of war. The ENMOD or Environmental Modification Techniques Convention should be consulted as to whether it has been violated. The issue whether this convention applies during wartime might be raised between the participants.

8. The Iota Oil Fields.

The participants must again consider the environmental issues. Atlantis will insist that it has acted properly under military necessity. The counter arguments are that the acts were not necessitated by the conduct of war - the application of the principle of necessity. Damage to neutral states might be considered as part of a claim of the greater damage to the environment.

9. The Kappa Oil Fields.

Bergenia may claim that it ignited the oil fields to create smoke fumes - a kind of smoke screen - to obscure potential targets in order to frustrate attacks by Atlantis. Again the issues relate to environmental damage, improper use of environmental modification, improper or impermissible attacks, and application of the principle of military necessity. The participants may raise the issue of reprisal here.

10. The Lambda Bombing.

The issue here is that of "indiscriminate attack," defined and prohibited in Article 51 of Geneva Protocol I. Atlantis will claim that this was an act of wanton destruction; Bergenia will contend that under the law of war this targeting is permissible in these circumstances.

11. The Fort Mu March.

The nature and extent of Bergenia's responsibility is the main issue here. Other issues include the "death march," inadequate provisions furnished by a state whose population itself is severely suffering, work by officers, and prisoners' coerced contribution to the war effort of their captors. Judges will note that the facts are very much "loaded" against Devon, while imputing them to Bergenia is more arguable.