The 2009 Philip C. Jessup International Law Moot Court Competition Pacific Super-Regional Round

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Keynote Address
by
Steven M. Schneebaum

It is a great pleasure to be able to speak to you this evening, in the midst of the exhilaration and the exhaustion that invariably mark the Jessup International Law Moot Court Competition. And it is a special honor to be here in Portland during the 50th Anniversary of this wonderful event, which will culminate in the Shearman & Sterling International Rounds in Washington next month.

I bring special greetings to those of you who have traveled many hours to be here this evening, from the distant lands of Alicanto and Ravisia. Representatives of both nations, who have presented their cases so ably in the past several days, deserve high praise, not only for the quality of their argument and their preparation, but for having entrusted this dispute to a legal forum for resolution in the first place. I am going to say some more about this issue in a moment.

But first I want to express my thanks to your Super-Regional host, Dagmar Butte. I have known Dagmar for many years, and we currently serve together on the Board of the International Law Students Association, which sponsors the Jessup. ILSA has an interesting name. It always provokes the question of which noun the adjective "International" modifies. Is ILSA the international (law students association)? or the (international law) students association?

A whole identity crisis lurks in that question. And I am reminded of this ambiguity as I refer to Dagmar as the Super-Regional host. Is she the (super-regional) host? or a super (regional host)?

As with ILSA itself, the organization to which she has given so much for so many years, I think that the answer is: both. She has certainly done a super job in making this Super-Regional competition possible. Please join me in letting Dagmar know that she and her tireless efforts are deeply appreciated.

I also want to thank another old friend, the Dean of Lewis & Clark Law School, Bob Klonoff. I first came to know Bob years ago when we had a litigation client in common. But we found out rather quickly that we shared more important interests: we were both runners, as we learned when we nearly collided early one morning in Dallas, and we were both partners in charge of our law firms' pro bono programs in Washington. The spirit and dedication that Bob brought to those roles when he was at Jones Day obviously were good preparation for his success in this

rather more rarified intellectual atmosphere. Bob, thanks for welcoming the Jessup and its participants to Lewis & Clark. It is good to see you again.

It was great fun drafting this Compromis, and it is flattering to know that so many law students and teachers around the world have been intrigued sufficiently by the problem to spend so much time on it. I can tell you that one of the hardest things I have had to do, over these months, is to conceal my identity as drafter from my own Jessup team, at the School of Advanced International Studies, Johns Hopkins University. SAIS has for nearly two decades been one of only two non-law schools in the country that field a Jessup program.

I made a promise to the ILSA National Office that I would not publicly confess my authorship until my students were eliminated from the competition, which we were last weekend in Washington (in good company, I might add). When I told them, they were surprised, to say the least, but they asked me a very hard question, which I will reveal in a moment. It was not the question I expected.

What I expected them to ask me was, where did you find the names in the Compromis? And I will tell you the answer. Alicanto, Bennu, Simurg, the Rocian Plateau, Meratha, Phoenix, Dasu, and Zavaabi are all names, or derivations from names, of mythical birds. I wanted a theme! The name of the Talonnic faith comes from the word "talon," a bird's claw. And Ravisia is a contraction of my first choice, Raravisia – from *rara avis*, rare bird -- a foreshortening that had to be made, as ILSA's wonderful Executive Director, Amity Boye, reminded me, to accommodate those for whom two "r"s in the same word would have rendered it unpronounceable.

Leila Skylark takes her surname from a real bird, of course, with her given name a tribute to Professor Leila Sadat of Washington University School of Law in St. Louis, the Chairwoman of ILSA's Board of Directors. And Piccardo Donati evokes Piccarda Donati, a character in Dante's *Divine Comedy*. Suora Piccarda was a nun, who was unable to reach the highest levels of Paradise because she had violated one of her vows: the one of chastity, even though whether she did so voluntarily is debatable. Yet she was selfless in her resignation to her fate, telling Dante that blessed souls long only for what they have.

You may infer from that what you will.

I thought you would like to know. If this strikes you as just a bit random, well, it is. But the names of the players are about the only random thing in this or any Jessup compromis. Because beneath the fun of constructing the hypothetical fact pattern, there lurks some very serious business: an attempt to get you thinking about critically important open questions in international law.

My SAIS students, as I said, however, did not ask me about the names. They asked me which side I think should win. And that was and is a question for which I am completely unprepared.

As the person who made you suffer for all of the months that you have worked on this compromis, I want to impose on you for just a few more minutes. You have all explored this fact pattern deeply, and by now you know its intricacies better than I do. But I want to call your attention this evening to one specific aspect of the case of *Alicanto v. Ravisia*. And in doing this,

I am going to try hard to observe the Jessup tradition of avoiding comment on the legal merits of either side's case, since some of you have arguments yet to present, and some of us have rounds yet to judge.

Probably the most important single issue in this year's Jessup is the so-called responsibility to protect. That is the doctrine according to which states claim the authority to act, even using armed force if they deem it necessary, to defend the basic, fundamental rights of our fellow human beings whose own governments are unable, or more often unwilling, to do so.

Whether international law permits states to discharge what they may see as their responsibility to protect is very much an unresolved question. It is engaging the attention of scholars and of diplomats around the globe. On the one hand, Ravisia and its supporters evoke the horrors of the Holocaust, or of the genocides of Cambodia or Darfur, and they ask whether human rights can have meaning if international frontiers bar states from acting to prevent massive crimes against humanity. On the other side, Alicanto and those who defend it suggest that granting members of the international community the authority to use force on their own initiative, no matter the purity of their intentions in this or that individual instance, undermines the very foundation of the United Nations, and places humanity back on the same slippery slope that once led inexorably to the Second World War.

I need hardly tell this audience that there is very little controlling authority on whether the responsibility to protect is endorsed by contemporary international law. Cases in which the Security Council has blessed the use of force cannot be determinative, because by definition these are instances in which unilateral action was neither required nor undertaken. Most attempts to justify purely unilateral intervention have in fact been condemned, although not always with great resolve.

And yet, the words of the Ravisian President are important, and she is surely correct. "Shielding the vulnerable from crimes of catastrophic dimension" is, in fact, as she said, "in the best traditions" of Ravisia and for that matter of the United States, and it is equally "in the best interests of all nations." "Old notions of sovereignty" do, in fact, as she said, "remain important to the international regime, but they are not its most important value." How can we allow the Burmese junta to ignore the plight of typhoon victims, when it is within our power to help to save their lives?

Whether you represent Alicanto or Ravisia, the Case Concerning Operation Provide Shelter does not ask you merely to argue that you have the law on your side. That is . . . well, I almost said "easy," but you know it is not easy, since you have been immersed in the literature on this subject for so long. But, even if it is not easy, this is what lawyers do. This is how we are trained to think, and to analyze, and to advocate.

This year, however, the compromis very directly asks you not only to deploy legal argument: it requires you in a more fundamental way to address the question of what is right.

This year's problem asks what the world is to do the next time that a Hitler or a Pol Pot takes power in a distant land. Yes, the Charter allows the Security Council to authorize the use of armed force, that is clear: but what happens if it will not, or does not, even in the face of a near-

certain apocalypse? What happens if political, historic, diplomatic, or ethnic factors come together to defeat the resolution that its drafters claim would permit civilization to assert itself over barbarity?

And if you can answer those questions (I cannot), consider this one: what if we are dealing not with the S.S. or the Khmer Rouge, but with a more nuanced threat? Before we say that there must be an exception to the prohibition of unilateral force in cases where a catastrophe is imminent, are we sure what we mean by "catastrophe"? Are we sure what we mean by "imminent"? Do we want individual members of the United Nations, no matter how true their moral compasses, making these decisions, and thereby perhaps setting precedents for other actors whose virtue may not be quite so obvious? On the other hand, how will we explain to those who are murdered in the next Holocaust that, although we could have saved them, we decided not to do so, because an international legal regime dating from the Treaty of Westphalia continues to command our commitment?

If we are ready to permit Ravisia to save the hapless Dasu, will we allow Russia to intervene by force in Georgia, claiming to protect ethnic enclaves in Abkhazia and South Ossetia? But if we leave them to their fate, how can we have claimed to have made human rights part of international law? Who will make these decisions? How will they be made? Is the responsibility to protect the natural next development of the principles of the United Nations Charter? Or is it the exception to those principles that will inevitably swallow the rule?

Lawyers do not always feel at ease navigating the landscape of right and wrong. The Case Concerning Operation Provide Shelter very deliberately required you to travel into that unfamiliar territory. And I hope it made you distinctly uncomfortable.

The lesson here is this. The law is a powerful, and I would argue a necessary, tool in determining what is consistent with principles as to which we are in fundamental agreement. In the domestic context, that consistency can be determined by recourse to a constitution and to laws, which codify, or reflect, the basic truths that, in Thomas Jefferson's words, we hold to be self-evident.

But international law has no constitution, embodies no statutes, enshrines no precedent, and reveals no certainties to be found in texts. We must tread gently as we establish its content, through the very tentative and tedious methods of negotiating treaties, or gathering state practice and coalescing *opinio juris* around prospective elements of custom.

So international law peculiarly lends itself to misuse: it is available to those who would distort its objectives, and who would justify by legal means that which cannot be justified as a matter of morality. In our own country, we have recently had the sad experience of watching lawyers highly placed in our own Government managing to deploy legal argumentation to defend the indefensible, such as the use of torture under the guise of national security. I don't know about you, but I never thought I would live to hear such arguments put forward in the name of my country.

We have also heard the assertion that the need to protect this nation obviates the need even for it to be subject to the law. This is the claim that nationalism trumps legality, and that both can

exist outside any moral sphere. I hope you all note how extreme are some of the claims made in this context, including the contention that people who may have ordered the commission of war crimes should be exempt not only from criminal prosecution but from all legal responsibility, because they were motivated in good faith by a desire to protect us all from terrorist assaults.

The lesson of the last decade is exactly what makes this compromis timely. It is open to all of us to agree or to disagree about the content of the law. It is not open to us to contend that our superior morality provides us a free pass from the application of the law.

As Winston Churchill famously said, "To jaw-jaw is always better than to war-war." I want to argue that "to law-law" is better still. The logic and the structure of the law, through the skills of research, presentation, and advocacy that the Jessup encourages you to develop, permit the peaceful resolution of disputes among states, and among women and men of good will. But they also permit the continued perpetration of injustice. Which will prevail depends on whether the practitioners of the law have their focus on the quality of their premises, as well as of their arguments.

The major lesson of The Case Concerning Operation Provide Shelter is that mastery of the law is the starting point, not the destination, of the journey. The law is a necessary, but not a sufficient, means of achieving a satisfactory result. The outcome of the exercise is crucial, but the means of reaching it is more important still.

You are asked, in this compromis, to discuss what the law is, but also what it should be. I hope that this aspect of the problem has troubled and challenged you. I hope that the question what the law should be has required you as Jessup participants, coaches, and spectators to think differently about international law from the way you thought when you began last autumn.

The compromis frames other questions in that same light. Regardless of whether the Court can compel the production of the classified intelligence, is it right to permit its use? We all agree that sexual exploitation by peacekeepers is unacceptable, but what right do victims have to a remedy? Who should be held legally responsible? To what extent are nations obligated to honor religious and traditional value systems that seem inconsistent with the liberal notions of, for example, equality of the sexes before the law? And what about the death penalty: has the world evolved to the point that capital punishment may be seen as incompatible with the international legal regime? Or is greater consensus and firmer resolve required before a moral imperative can take on the cloak of law?

I have no definitive answers to these questions, and neither do you. But that is the point. You must struggle not only to craft the best legal arguments, but to use them to defend what is right. The logic of the law will guide you surely from right premises to right conclusions. But it will not provide those premises: you will have to find them for yourselves. That requires serious study, deep thinking, careful and close cooperation with colleagues, and constant self-criticism. The real genius of the Jessup is the extent to which it frames these questions in the context of international law, and then gives you free rein to see your answers through to their consequences.

As Jessup participants, you have had a unique opportunity to deploy international law in a practical way, and with luck and good guidance you will have internalized something that I hope you will long remember. You have also joined a worldwide fraternity of students of international law, now of 50 years' standing. This year, 565 teams in 80 countries have wrestled with these same issues. They are all your colleagues, and you have shared something very special with all of them.

Please remain involved in the Jessup International Law Moot Court Competition. Please explore its contours, reaching around the world and both backward and forward in time. Come back to judge, to coach, or just to watch. I promise that the reward will amply repay your investment.

Thank you for reminding those of us who practice international law, and who try to teach legal skills, that we are passing along a precious legacy to a generation eager to receive it. In the law lies the hope of the future that disputes between states over matters critical to their very identities may be resolved by recourse to rules, applied by neutral judges who care not about your wealth or your appearance, but only about the quality of your argument and the rightness of your cause.

I hope that the lessons of the Jessup experience stay with you, and continue to inspire you throughout your careers, wherever in the world they may take you.

Thank you for inviting me to speak to you, and welcome to the family that the Jessup Competition has become.