

STRENGTHENING THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

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I. INTRODUCTION

The Jessup Competition has awakened perspectives about decision making in the students of international law. It has served in the legal education of countless students, and it has even served the promotion and perhaps the development of international law itself.¹ In pursuit of its objectives, the Jessup has grown to command major worldwide attention and substantial prestige due to its inclusion of contestants originating from all parts of the globe. The inclusion of these worldwide contestants is enough evidence to show that the Jessup Competition has caught the

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1. Legal education was afforded a major impetus in the writings of Myres McDougal and his associates. See, e.g., Harold Lasswell & Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) [hereinafter *Legal Education*]; Florentino Feliciano, *Book Review*, in MYRES MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 1024 n.8 (1960); MYRES MCDUGAL ET AL., *THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER* (New Haven Press 1994) (1967) [hereinafter *INTERPRETATION*]. See generally MYRES MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960) [hereinafter *STUDIES*].

imagination of law schools throughout the world.² With the aid of television, video cassette recordings, and the publication of Jessup materials, the competition could expand its reach even further.³

Even given these past accomplishments and the present praiseworthy state of the Jessup, it is not inopportune to make a reappraisal at this time to determine whether we can strengthen the Jessup. In making this appraisal, we can draw upon the experience of other devices operating in reasonably similar contexts or situations to aid us.⁴

One device available to us is the art of gaming. Specifically, war gaming offers us great potentialities: it can be conceived primarily as a means for assembling and collecting information, data and intelligence in groupings suitable or relevant to a given inquiry; for identifying outcomes or potential outcomes; for working with problems that have a need for urgent action; for promoting data access or retrieval; and for building a data bank or even tapping other data banks. War gaming makes us data conscious as no other technique does.

Of course, there are differing perspectives about the conceptual element in making war. We look to this exercise as an art, while the Soviet Union in their war gaming were said to consider it a science with applicable principles, but including the application of complex technological advancements and features such as those evidenced by nuclear weapons and the high technology jet aircraft.⁵

Similar to the differing perspectives of the United States and the Soviet Union about the concept of war gaming itself, war gaming and moot court participants differ in their approaches to their respective games. War gaming participants are eager to refine the power element in their games

2. The leading article on this subject expressed in comprehensive sweep, and in detailed terms, is Legal Education, *supra* note 1.

3. Numerous other applications for more effective and powerful uses of simulation are now beginning to appear. The Internet, for example, holds the promise of a wider audience, and wider participation in the Jessup, and the impact of an increased amount of scholarly assessment of the competition itself. Much will depend upon introducing the Jessup itself onto the Internet.

4. Various devices have been formulated for simulation of the symbolic framework of reference and the real world decisions and actions. *See generally* A. H. HAUSRATH, VENTURE SIMULATION IN WAR, BUSINESS, AND POLITICS (McGraw-Hill 1962). Hausrath says that war games differ in many ways, but he lists the *salient similarities* to be found. *Id.* at 82-97. These strongly suggest analogies and similarities to those found in the moot court competitions:

Every war game simulates a military operation (irrespective of phase or manner of gaming); each game involves two or more opposing forces; each war game is conducted in accordance with data, rules, and procedures acceptable to the military profession; every war game represents an actual or assumed real-life situation.

Id. at 82.

5. *See* THOMAS ALLEN WAR GAMES 59-62 (McGraw-Hill 1987).

whereas those engaged in Jessup Moot Courts tend to keep the rules of the moot court game intact and unchanged. The attitude of the moot court participants runs parallel with the prominent attitude about our courts and their proceedings, but it interferes with the development of refinements, which have only recently and slowly come into view in the interest in alternative dispute settlement procedures. Borrowing from this recent refinement, if encouraged by the adoption of gaming, the Jessup might consider the possibility of alternative settlement devices tested in a simulation framework.

Another interesting possibility that may be encouraged by gaming is the intrusion or intervention of law as an element in the decisions to be made when states are interacting with each other in a global, even if competitive, arena. Introduction of law as an element in the decision process amounts to an introduction of a theory or concept of public legal order, ambiguous to a large extent in this period of largely unorganized organs for a global community.⁶ It also introduces the legal processes applicable under this legal order, and the outcomes expected in introducing law into the decision process. This possibility can be explored, through the application of law in gaming, i.e., in the war games, or other conflict-oriented games.⁷

But instead of limiting the discussion to war games, this paper will look at war gaming on a conceptual level to determine whether the Jessup might benefit from the experience that has accumulated through the use of war gaming. My primary objective is clarification of the Jessup as an instrument involving policy problems. I intend to consider standards that might be applied to add useful modifications to the Jessup.⁸ I have

6. See generally 10 YALE J. INT'L L. 1 (1984). This volume is a recommended collection of academic approaches to problems of international law, introducing the use of the incident as a decisional unit in international law, both the theoretical and operational dimensions. The chapter on the claims in Canada relating to accident of Cosmos 954 is useful for illustrating this approach, and for providing a future Jessup problem. *Id.* at 78. For a scientific counterpart to public order in the communities or states, i.e., the conception of nature and the physical world in terms of a scientific order, see generally ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD (Cambridge Univ. Press 1926).

7. See ALLEN, *supra* note 5.

8. The Jessup practice might be appraised at this time as well: would it be advisable, for example, to limit the appearances of judges in a given competition, particularly if it is likely that they will appear at various stages in the competition and find the same adversaries before them? Or would it be desirable to permit a one or two time modification and refinement of the Jessup memorials during the competition itself to incorporate the growing sophistication of the contestants? (This presupposes the use of a word processor). Or what steps should be taken to prepare the judges, or to make the scheduling of the Jessup closer to the real time needs of the law schools? Should the Jessup memorials be published and more widely circulated by the American Society of International Law, or the finals televised, and the television rights extended

refrained from assessing the housekeeping or even major repair efforts for running the Jessup at this time. Consequently, this inquiry is limited to the possible cross-fertilization of gaming and moot court procedures.

II. STRENGTHENING THE JESSUP COMPETITION

A. *The Jessup As an Instrument for Learning and Promoting Policy*

What are the objectives of the Jessup Competition? Foremost among the Jessup's objectives is to facilitate the learning experience for the contestants, and, to a comparable extent, for the judges, faculty advisors and others who participate.⁹ But what does this learning experience entail? Moreover, what learning experiences can be added to the presents ones, partly as an effort to promote policy?

1. Present Learning Experiences

The Jessup offers a valuable instrument for improving the general lawyer skills of the contestants, coupled with improvements in the analytical skills of the observers of the moot court cases.¹⁰ The Jessup also provides a forum of deliberation and discourse for probing current problems in law, especially when presented in the context of a legal dispute. As such it enables those who participate or analyze the Jessup cases an opportunity to see the perspectives of numerous participants at play upon such problems, paralleling one of the ways in which the student is introduced to practice in the law schools. It extends a student's effort beyond the review of cases and appellate review into a complex, real-world simulation where the performance is judged by the effective invoking and appraisal of law, and the innovative effort in making law serve us, rather

to the public broadcast stations? These more sophisticated developments might be considered if we move the Jessup closer to an instrument for probing or refining the practices of the real world of the International Court of Justice, or other international tribunals.

9. The leading article on this subject expressed in comprehensive sweep, and in detailed terms, is *Legal Education*, *supra* note 1.

10. *Cf.* ALLEN, *supra* note 5. Definitions are not essential in the development of wargaming. We are concerned with a dynamic medium, a simulation of decision making with respect to actions to be taken, pursuant to standards and conditions, inferences and assumptions, law and standards of reasonableness. The primary outcome desired is that of command and control over information essential at all levels of human experience: information, data and intelligence for inputs; data banks and data sources readily accessible for data availability and evaluation; data relevance, economy of data preservation, analysis of impact on goals; data access or retrievability, with regard to what is time urgent, action urgent, action impact.

than having us serve the law and the rigidities we might arbitrarily impose upon it.¹¹

In essence, the Jessup is a collegial effort, where reinforcement and testing of learning arises from the interaction of the participants. Our experience so far shows that this interaction has been strongly motivated among them. Because the problems presented by the Jessup are problems of global significance, the problems add to that motivation the element of exhilaration. At least a major refinement of the competition would be one which facilitates greater and deeper participation. This refinement would be sharpened if we could apply the Jessup as an instrument to refine our critical faculties.

Because the development of international law is in part an outcome of attitudes and perspectives, the Jessup offers opportunities for practicing lawyers, acting as judges, to gain working skills in a subject of major importance. As in the war gaming exercises, there is also the possibility of changing the format of the Jessup, adding to the overall, adjudicatory setting of the Jessup a panel for the meetings of the American Society of International Law that takes the output of the Jessup competition and then provides comments and opinion.¹²

11. The Jessup may contribute to the shaping of law through its impact upon attitudes, skills, enlightenment, and so on. How far that impact will reach is unclear, but in ALAN WATSON, *THE EVOLUTION OF LAW* 33 (Johns Hopkins Univ. Press, 1985), it is observed that: "[l]aw develops by lawyers thinking about the normative facts, whether in the abstract or in relation to hypothetical or actual societal facts. A course becomes set which is difficult to alter."

Lawyers, he argues:

come to treat law as fact - normative fact, of course, but still something existing in its own right. Faced with a legal problem, lawyers contemplate the societal facts of the issue and the normative facts of the law that have to be applied to them to come up with the answer. The societal facts and the normative facts may be equally hard to discover.

Id. at 32, 33.

12. This proposal is preliminary; it presupposes that if the American Society of International Law were to provide for such a panel commenting on and even critiquing the Jessup, as well as mining it for its effectiveness and content, it would be necessary to have the Jessup final early in the annual meetings rather than at the last day. The panel then convened would be an ad hoc panel, but this drawback can be overcome if experienced panellists are chosen, it would offer a chance to add a refining procedure to the Jessup and to strengthening its policy content. A frame of reference, familiar to international lawyers, is that of HAROLD LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY* (Yale Univ. Press 1950) [hereinafter *POWER*]. These terms of reference relate to unraveling the ambiguities and uncertainties in the decision and policy making activities of individuals, enterprise and governments. The approach is that of the problematic, and aimed at future courses of action: "From the manipulative standpoint, the problematic situation with which inquiry begins is resolved into alternative goals possible in the situation, and the problem is formulated in terms of courses of action leading to the goal." *Id.* at xi.

2. Possibilities for the Future

Carefully designed Jessup problems can introduce social order perspectives critical to the evolution of international law intended to serve global public order.¹³ Hence the Jessup can serve other law and policy oriented objectives.¹⁴ It can provide a valuable instrument for probing real world disputes, the policies and competing claims entailed, and their ramifications. Even real world courts do this: they consider various situations that have not come before them, and they provide dicta to reach situations or issues not before the Court.¹⁵ Their dissents reveal differences in attitudes and perspectives among the judges, and so on.¹⁶ Hence the Jessup offers us an instrument to probe important, but oft-treated marginal, issues that every international court must face such as whether a dispute offers a legal issue or, instead, is too political or too involved in

The systemic standpoint, or the overall *logic* of the method is a separate point of departure - referred to as *the contemplative standpoint*. The key point in the value system adopted is that of power: "political science, as an empirical discipline, is the study of the shaping and sharing of power." *Id.* at xiv. The dynamic features are characterized by perceptions that show change, "patterns of succession of events," rather than fixed equilibria. The overall frame of reference is readily adopted in the Jessup because both it and the framework of power and society speak to the realities of human action and decision. Hence, decision making is forward looking, formulating alternative courses of action extending into the future, and selecting among the alternatives by expectations of how things will turn out. *Id.* at xv-xvi.

13. See generally Legal Education, *supra* note 1 (discussing the interaction of social policy and law in the context of practicing international law).

14. See POWER, *supra* note 12, for a frame of reference familiar to international lawyers. This frame relates to unraveling the decision and policy making activities of individuals, enterprise and governments. The approach is aimed at the decision process in the context of problems, and the overall goal is aimed at future courses of action.

15. The latest opinion of the International Court of Justice, an advisory opinion, relating to the permissibility under international law of states possessing, or using, nuclear weapons includes *declarations* of a number of the judges. This device enables the judge to step aside from handing down a concurring or dissenting opinion, or, presumably from refraining from giving any opinion at all, though this is controversial. It enables such judges to speak to all or any occasion, for any purpose, simply because the declaration is that judge's perspective or comment on the case even while he is refraining from any further participation in the case. See The Nuclear Weapons Opinion, 1996 I.C.J. The larger problem of the *declaration* might be explored along with advisory opinions by future Jessup competitions. See, *infra*, discussion on advisory opinions in this paper.

16. See LOUIS JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 7 (Harvard Univ. Press 1933). Though his inquiry primarily assesses the role of the courts in foreign policy, Jaffe's remarks bring up the general problem of making decisions and policy in foreign affairs:

[t]he courts must move about in the spacious and dangerous realms of policy and statesmanship; they are called upon to make a choice from among conflicting attitudes. Such a choice will not only answer implicitly the given problem, but will also transcend the results in individual case. Unless, then, a writer admits that below the reasoned surfaces there is a question of attitudes, his objective legalism will rest on a quicksand of subterranean compulsions.

regulatory, administrative or discretionary matters for an international court to tackle, let alone monitor or supervise.¹⁷

The Jessup problem is a problem that should be designed so that it can address a situation or events that have already been presented before a court. Or, the Jessup can look at an array of real world problems and situations to consider issues that might never be raised in the immediate term of a court. Or it can look into a hypothetical problem working with real world premises and assumptions. Or, we can even consider for the Jessup a problem that is *sub judice* in international courts or tribunals.¹⁸ All of these matters will eventually flow into the broader streams that make up the great collegial effort that is part of the conscious shaping of international law, its concepts, and its decision-making impacts. But to achieve this expanded perspective for the Jessup we must adopt as its goals wider missions, such as those mentioned here.

The Jessup is also a valuable and refined instrument of learning and argument that can be used by others such as courts, schools, advocates, working in or concerned with analogous cases. It offers a rare opportunity to undertake with great care and in great depth an appraisal of disputes and the applicable normative rules or principles. Clearly, the effectiveness of the Jessup Competition depends upon the participants, but in the hands of outstanding practitioners the Jessup and its contestants can reach outcomes that match the efforts of experienced jurists. The Jessup

17. The notion of the *political question* and the practice of international courts to deny adjudication of such questions is pervasive in the legal disputes brought before international courts. However, the distinctions made between legal issues and political issues are not precise. United States Supreme Court practice should be consulted. Jaffe considered this problem in the context of the domestic courts of the United States, and in the context of a Constitution calling for a separation of powers, but not laying down standards that determine precisely when and how those powers are to be separated. The interaction and complexity of making this cut between the authority of the executive and legislative branch is such that the Court, as Jaffe points out, has frequently abdicated decision and left it a *political question* to be worked out by the other two branches. With italics of his own, Jaffe cites Quincy Wright, and his observations that we can make our distinction between the practice of the courts — constitutional understandings — and the law of the Constitution, to wit:

The constitutional understandings are based on the distinction between the possession of a power and discretion in the exercise of that power. The law of the constitution decides what organs of the government possess the power to perform acts of international significance [inter alia], but the understandings of the constitution decide how the discretion or judgment, implied from the possession of power, ought to be exercised in given circumstances.

Id. at 10.

18. In a sense a matter that is *sub judice* in the international tribunals simply is converted into a hypothetical problem because the Jessup designers will not have what the court or tribunal itself has by way of facts. Additionally, because the approaches of a real world court and a Jessup differ the case will have the hypothetical element imparted by these factors.

does include among the judges, especially in the final round, distinguished jurists from the International Court of Justice and other high tribunals. And perhaps more than the ICJ, the Jessup has the added competence to question and probe issues from many points of view. The repetition of the moot court trials upward through the Jessup competition tends to add further refinements. To facilitate these refinements, the Jessup might include a rule enabling contestants to modify their memorials several times as they move forward.

The Jessup also provides us with a teaching tool. In praise of this teaching aspect, the losing contestants have indicated that they benefited from this feature even though they also saw the contest as one to be won. Taking advantage of the Jessup is a teaching text about the law of war, which makes use of a modified version of the Jessup. The text is open-ended because a given problem in factual terms will always face changing law, or changing attitudes about law. Thus, an instructor using a Jessup oriented text is in the position to use an appropriately designed text over a period of years, adding or eliminating situations or facts, and adding supplementary materials of the instructor's own law or, for teaching purposes, even facts that had not been included in the earlier versions.¹⁹ We can envision that this use of the Jessup might expand in the future because the instrument it provides demands wide participation by the class and instructor.

In this text the student learns from a form of practice. Through a simulated unraveling of a problem dealing with a complex subject, the student becomes familiar with the law of war and the law relating to the use of force. The Jessup format is being used except that the facts are not presented all at once, but in a sequential and simulated real time basis as the conflict proceeds, uncovering a wide variety of legal issues to be considered. This approach has some similarities to the briefings of high ranking military officers at the Department of Defense in the various exercises involving contingency operations, where the officers are briefed in a real time combat situation, and then enabled in the game that follows to engage in a simulation of a wartime situation.

19. I am suggesting here that this text might be able, appropriately designed, to remain as the primary problem theme. If for example the Geneva Protocols of 1977 (Publication of the International Committee of the Red Cross, Bern, 1977) had appeared after the text was in print, a supplemental text could readily be added incorporating the impact of those Protocols, and the documentary supplement could include the Protocols. Additional protocols have been concluded concerning weapons of mass destruction, land mines and so on. In other contexts, such as the games and briefings that make up the teaching techniques of a military staff there is now a wide body of experience concerning the use of briefings and simulated actions taking place under conditions very similar to those of an emergency or crisis.

Although beyond the scope this paper, we might raise a further problem to be probed through Jessups in the future. The Jessup approach might enable us to consider more deeply on a collegial basis the decision and law-making processes and activities of governments. Because disputes, disagreements and misunderstandings are natural features of human interaction, we need to know continuously how far we can invoke a court in such matters. It is evident that most of the law-making process, especially those that involve trans-national activities, occurs outside the courts, and much of this process involves dispute settlement and the accumulation of a wide variety of dispute settlement mechanisms.²⁰ The Jessup, modified in approach, might enable us to probe the new institutions and practices accumulated.

The Jessup offers the opportunity, not yet explored, of tackling legal questions where advisory or commentary opinions are demanded. The traditional dispute format of the Jessup, following fairly closely the practice of the International Court of Justice, involves two states with a dispute that can be resolved under law, pursuant to Articles 36 and 38 of the ICJ statute. Under this authority, the court is to resolve legal disputes by applying the applicable or relevant law. But for an advisory opinion, legal questions about law are raised before the ICJ by way of a request from an appropriate organ of the United Nations.²¹ Because the Jessup format does not precisely follow the ICJ, it would be possible, in the Jessup context, to consider requests by almost anyone for advisory recommendations concerning the implications of any legal question or prospective courses of action. In short, the Jessup offers flexibility that is

20. See John Jackson, *Dispute Settlement Techniques Between Nations Concerning Economic Relations - With Special Emphasis on Gatt*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* (T. Carbonneau ed., Univ Press of Virginia 1990). This article, as well as the book in general, provides a valuable insight into the growing competence for resolving disputes in the course of the decisions and the processes of claim.

Although I will not discuss them all, in a broad sense there a large number of GATT dispute settlement procedures. In fact, one can identify over thirty such procedures. For example, there are nineteen clauses that obligate the parties of GATT to consult with each other in specific instances. Each of these might be termed a dispute settlement procedure. Likewise, there are seven different provisions for what the GATT calls "compensatory withdrawal or suspension of concessions." *Id.* These allow one party to withdraw concessions from, or alter its trade relationships with, another party in the face of certain types of actions by that other party.

It is evident that an important procedure in dispute settlement is one aimed to achieve accommodation of differences among the parties, and that a further goal is to ensure effectiveness and enforceability of the procedures adopted in the GATT context, by giving parties the authority to impose sanctions on others who carry out "certain types of actions" not permissible under the GATT. THOMAS E. CARBONEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* (Univ. of Ill Press 1989).

21. See the U.N. CHARTER, art. 96; I.C.J. Statute, art. 65-68.

not available in the real world of the ICJ, but in return for foregoing real world decisions in a real world context, we are given the opportunity of testing such decisions where we can enjoy the luxury of trial and error. Clearly, these are matters that require further review.

Accordingly, if in the future we were to develop a Jessup competition to work with legal questions while following the practice of the ICJ, we would be looking to the interesting yet complex problem of working out an approach for future contests that would employ the advisory opinion. This would open the Jessup to a number of important possibilities in testing the contestants and in testing the ICJ as an institution to promote customary international law through its own actions in the formulation or prescription process.²² We would also be coming face to face with the matter of formulating international law through the court and the practices established or institutionalized to ensure that even though recommendatory, the advisory opinions would be expected to be assimilated as part of the customary international law. This format, both for the Jessup and for a more active ICJ involved in advisory opinions, would require that the judges, and perhaps a staff to assist the judges, have a more active role in the intended output.²³ At the same time, while the

22. Professor M. Reisman observes as to prescription that we are looking at a function of decision, pointing out:

[p]rescription or law-making...occurs when actors, with varying degrees of authority, select and install certain preferences about policy as community law. This may be accomplished by a legislature or some other organized law-maker; but it is usually, and, especially in international law, largely accomplished in informal and sometimes even chaotic processes whose outcomes are generally referred to as 'custom.'

Michael Reisman, *A Jurisprudence from the Perspective of the Political Superior*, 23 N. KY. L. REV. 605, 612 (1996).

Because decisions are effective when enforceable, the other functions of decision [six are mentioned by Reisman] can be separately assessed for the law-making impact when they are used. Law-making is a component of enforcement shaping new law or applying the *existing* law. *Id.* Articles in depth relating to this approach are cited by Reisman in his footnotes.

23. This paper does not recommend the abandonment of the Jessup format, but is intended to critique the format, seek other probing devices such as that proposed in coupling the gaming and moot court approaches, and test such things as the declaration and codification of customary international law under the advisory opinions of the International Court of Justice. Law especially as practiced among states or nations can be conceived as a policy instrument, a support to policy, a support to the creation of public order, or the management of undesirable activities such as aggression. In any event the advisory opinion has not been exploited either in the Jessup or in the real world by the International Court of Justice and the contestants have so far not exploited the opportunity to appraise the Court and its limitations in developing customary international law by way of advisory opinions. A comparison of the law-making activities and reciprocating support of such activities in the *legislative* sense of the Court under its advisory competence and the *legislative* thrust in the formulations or prescriptions of treaty law has had an ample assessment in the literature.

opinion is the opinion of judges, the advisory opinion would take on a legislative or prescriptive character.²⁴

But this is not the place to critique the use of the advisory opinion, in the real world, or in the Jessup. At the present time in the Jessups no written opinion is handed down, and it is not proposed at this time that one should be prepared in the Jessup contest. But such a proposal for the court and its work in the real world is another matter. Opinions are provided, complete with dissents, under conditions and under assessment procedures, differing from those in which states come together to make law through their treaties. But if we were to have the Jessup court pass on legal questions, we would need to be assured that the legal question is appropriately framed; that the differing perspectives of the advocates as to the legal question be introduced to the court; and that the court be called upon to issue its opinion.

Although a legal question may be the starting point for a variety of responses, including those that may be contrary to each other, we might arbitrarily break the problem involving advisory competence of the Jessup Court into two sides, each presenting an opposing view as to the response sought for the legal question. This format would be close to the war gaming approach where an analysis and a report are made at the close of the game.

If the Jessup court were given the competence to issue advisory opinions for a future Jessup Competition, the report of the Jessup judges, or even of a separately constituted panel of overseers and reporters, might be simplified. Under this approach, the Jessup judges would consider and pass upon the positions and arguments presented by the contestants, the differing strengths of these, and the conclusion of the Court, operating as a panel.²⁵

Of course, in the Jessup context, there is another possibility for the Jessup court to review requests for an advisory opinion that is somewhat less ambitious. The legal question for an advisory opinion could be presented in the Jessup context by two sides, guided by the Jessup

24. It will be recalled that the judges of the United States Supreme Court, at an early stage, advised that under the Constitution advisory opinions would not be advisable. The judges pointed out that the Court was designed to adjudicate "cases or controversies" pursuant to Article III Section 2. The cases involving the "legislative courts," their distinctions and wider jurisdiction have been widely analyzed. Advisory opinions are recognized in the adjudicatory practice in other countries. For a general assessment see HENRY MELVIN HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (Foundation Press 1953).

25. The alternative would envision a panel of judges and a panel of reporters working together: it is probably too difficult for the Jessup judges to act as their own reporters and to expect them competently to handle the judging.

guidelines to advocate differing or opposing points of view concerning the legal question, and acting in place of the larger number of participants in the real world of the ICJ. The Jessup Court could then consider the opposing positions, and come down on the position that was best presented. It might be required to provide a very brief statement supporting its determination and no more.

The first approach might provide a more valuable output both for the academic and the practicing community of lawyers and jurists, but the second might be more appropriate for the decisions that are to be taken by an ad hoc group of judges operating in the traditional form of the Jessup. It should be borne in mind, however, that even with the traditional Jessup competitions, the court provides only its views as to the persuasive or argumentative quality of the contestants' presentations and it does not provide an opinion. The Jessup court does not rely upon facts or materials introduced from outside the problem, nor does it review the memorials, which are reviewed by others. The second approach thus serves one of the major objectives, to wit, an appraisal of the forensic capabilities of the contestants and the selection of those that are superior in a given contest. Of course, both approaches serve the learning objective mentioned earlier.

But if pursued, the venture into advisory competence offers the Jessup an opportunity to undertake a further task of probing.²⁶ The ICJ,

26. Pursuit of a theory of advisory opinions might also benefit by assessments or inquiry into what is expected from a court that is providing such opinions. See, e.g., ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY* (Chandler Pub. Co. 1964). According to Kaplan, we are not compelled in social order inquiries, including inquiries into law and its jurisprudence, to meet the standards of a pure and exact science, or those expected in the physical sciences. He points out that "science itself manages quite well even though its own most basic principles are something less than necessarily and unconditionally true." *Id.* at 13. If the preparatory work for an advisory opinion in the ICJ or the Jessup Court requires new methods or techniques, there is ample development of methodology to draw upon:

[m]ethods are techniques sufficiently general to be common to all sciences, or to a significant part of them. Alternatively, they are logical or philosophical principles sufficiently specific to relate especially to science as distinguished from other human enterprises and interests. Thus, methods include such procedures as forming concepts and hypotheses, making observations and measurements, performing experiments, building models and theories, providing explanations, and making predictions.

Id. at 23.

Kaplan later observes:

[a] scientific concept has meaning only because scientists mean something by it. The meaning is scientifically valid only if what they intend by it becomes actual: problems are solved and intentions are fulfilled as inquiry continues. Since Kant, we have come to recognize every concept as a rule of judging or acting, a prescription for organizing the materials of experience so as to be able to go about our business. Everything depends, of course, on what our business is.

Id. at 46.

the object of such probing, is an institution that is gradually gaining strength with regard to customary international law and the promotion of treaty law. The global community stands to benefit from such efforts at promoting a court that began its life in a weakened position. A determination, even on the moot court-gaming dimension, may assist us in finding what we can expect from the ICJ, and under what conditions these expectations might become operative. Hence the venture can probe the possibilities through moot court exercises of strengthening the competence of the ICJ itself. The specific possibilities of this nature and even a preliminary inquiry into the appropriate theory of advisory opinion jurisdiction, either for the ICJ or the Jessup Court, are not explored here. But such an inquiry might include in our objectives an expansion of the ICJ and its panels to reach regional disputes, and a more sophisticated competence for the advisory jurisdiction of the ICJ.²⁷

“Recognition is the source of all our natural knowledge,” Whitehead has said. “The whole scientific theory is nothing else than an attempt to systematize our knowledge of the circumstances in which such recognitions will occur.” It is the enterprise of making those identifications in experience which prove to be most significant for the control or appreciation of the experience yet to come. *Id.* at 85.

Laws are not generalizations at which we arrive we have established the facts; they play a part in the process of determining what the facts are. Indeed, we may without a vicious circularity accept some datum as a fact because it conforms to the very law for which it counts as another confirming instance, and reject an allegation of fact because it is already excluded by law.

Id. at 89.

27. KAPLAN, *supra* note 26, at 89. Also see the discussion made in this paper *infra*. Whether or not theory formation is the most important and distinctive scientific activity, in one sense of the term *theory* this activity might well be regarded as the most important and distinctive for human beings. In this sense it stands for the symbolic dimension of experience, as opposed to the apprehension of brute fact. The content of our experience is not a succession of mere happenings, but a sequence of more or less meaningful events, meaningful both in themselves and in the patterns of their occurrence. They are consequential, that is - significant in their bearings on one another. *Id.* at 294.

A theory is a way of making sense of a disturbing situation so as to allow us most effectively to bring to bear our repertoire of habits, and even more important, to modify habits or discard them altogether, replacing them by new ones as the situation demands. In the reconstructed logic, accordingly, theory will appear as the device for interpreting, criticizing, and unifying established laws, modifying them to fit data unanticipated in their formulation, and guiding the enterprise of discovering new and more powerful generalizations. To engage in theorizing means not just to learn by experience but to take thought about what is there to be learned. To speak loosely, lower animals grasp scientific laws, but never rise to the level of scientific theory. *Id.* at 295.

Theory puts things known into a system. But this function is more than a matter of what the older positivism used to call *economy of thought* or *moral shorthand*, and what today is expressed in terms of the storage and retrieval of information. It is true that the systematization effected by a theory does not have the consequence of simplifying laws and introducing order into congeries of fact. But this is a by-product of a more basic function: to make sense of what would

Lastly, we can invoke the Jessup moot court framework for testing and also teaching the use of models or theories to promote the assimilation of common standards of policy and law.²⁸ In short, it offers a setting amounting to a meta-world setting: it offers us a chance to look at how we and others look at real world happenings, and with sophistication of technique, how we from differing cultures go about solving and working the problems. Although the Jessup invokes law, it is not the means for generating law. It might of course generate law for the problem, but this is not the law we might anticipate will be applicable in the real world. And it is evident that the Jessup does not provide us with precedents of law either for future Jessups, or otherwise. But participating in the Jessup assists in the promotion of scientific thought, and assists in shaping effective mind sets of those involved in clarifying complex problems of policy and strategy.

But, this is not the place for working out a theory of theories²⁹ or for constructing a program that might help us break up and analyze policy and legal problems as such.³⁰ Unquestionably our goals will call for

otherwise be inscrutable or unmeaning empirical findings. A theory is more than a synopsis of the moves that have been played in the game of nature; it also sets forth some idea of the rules of the game, by which the moves become intelligible. *Id.* at 302.

It might well be said that the predicament of behavioral science is not the absence of theory but its proliferation. The history of science is undeniably a history of the successive replacement of poor theories by better ones, but advances depend on the way in which each takes account of the achievement of its predecessors. Much of the theorizing in behavioral science is not building on what has already been established so much as laying out new foundations, or even worse, producing only another set of blueprints. *Id.* at 304.

28. See discussion generally in the notes from Kaplan's study.

29. See POWER, *supra* note 12; KAPLAN, *supra* note 26. See brief introductory note in the discussion of this paper. The commentators generally perceive strategy as a theory of control, and military strategy therefore becomes a control over the weapons, methods of use, and the war fighting activities.

30. For the interaction of concepts in theory and strategy, see J.C.WYLIE, MILITARY STRATEGY: A GENERAL THEORY OF POWER CONTROL (Greenwood Press 1980). Although discussed later in this paper, that discussion can usefully be anticipated here. Wylie uses the term *power* as a term of value, following the usage adopted by Lasswell, McDougal and their associates. See STUDIES, *supra* note 1. He observes that "while strategy itself may not be a science, strategic judgment can be scientific to the extent that it is orderly, rational, objective, inclusive, discriminatory, and perceptive." Wylie's definition thus contains two elements. Strategy, he says, can best be defined as "a plan of action designed in order to achieve some end; a purpose together with a system of measures for its accomplishment." WYLIE *supra* at 13. Wylie argues that his definition has two elements: the definition is not limited to war or even military applications. And the definition involves the balancing of relevant factors that comprise the definition. Hence the purpose and system of measures to achieve the purpose are included in the single concept. His framework thus would assist us in using the Jessup moot or the wargaming concepts and contexts or all of these. Wylie observes: "It should be recognized at

achieving such a program or even a theory of control eventually.³¹ But the purpose here is to introduce the gaming concept in the framework of the moot case, and analyzing that framework to determine its potential in shaping or at least testing attitudes. The Jessup offers us the opportunities for exposing the attitudes of the participants in the context of a Jessup context — the predispositions, biases, assumptions, inferences, and the skeptical features in their decision making efforts. Our purpose, which is scientific in nature, is to work toward finding the way to common objectives and standards and a common vocabulary among the contestants and others; toward installing trend thinking; and toward scientific skepticism. These attitudes are likely to be most fruitful in pursuing a scientific inquiry and the scientific and progressive development of the decision-making art.³²

the outset of this discussion that a strategy has no moral quality of its own. It is inherently neither good nor evil; it is always normative or concerned with values." *Id.* at 15.

Wylie referring to principles of war observes a qualification to the effect that the wise commander must know when and how to apply the principles and also when and how to violate them. I think that what the principles really are is an attempt to rationalize and categorize common sense. I suggest that worship of any such pater as the *principles of war* is an unaware substitution of slogan for thought, probably brought about by intellectual formlessness that must inevitably exist when there is no orderly and disciplined pattern of fundamental theory from which one consciously or unconsciously takes departure. *Id.* at 20. Wylie points out that he has never come across the use of principles as the means to achieve a strategy.

31. See WYLIE, *supra* note 30, at 10 (discussing strategy a quest for control).

The basic patterns of strategic thought should not be looked on as any kind of a secret. The more people who know about and understand these patterns, the more healthy will be our democracy in its strategic decisions. The Congressman voting on a military appropriation is, in a very real sense indeed, making a fundamental strategic decision, and he does not need very many *secrets* to lead him toward a sound decision.

The same could be said of the citizen's participation and enlightenment about the emergence of a global law affording him as a major outcome the enhancement of his nation's - and his - security. Hence Wylie, while speaking of military strategy, has reached the conclusion that the McDougal-Lasswell approach provides the appropriate theory:

I have been talking about one form or another of military control. But I do hope that it has come out clearly that military control, or military affairs in the broad sense, can seldom be taken up in isolation. Military matters are inextricably woven into the whole social power fabric. And this is why a general theory of strategy must, I believe, be a theory of power in all its form, not just a theory of military power.

Id. at 110

32. See *id.*, for a discussion of the interrelationship of theory and strategy for military purposes: Wylie is on a continuous quest for control in the decision process that will enable his strategy to serve military activities in a collegiate sense. In law the general approach is toward the promotion of public order - global public order among states. But as McDougal and his associates have pointed out, we realistically seek immediate attainable goals, and carry this out in the larger context of a comprehensive program for more remote goals. See STUDIES, *supra* note 1. The observations of Hausrath are enlightening:

B. *The Benefits of Gaming*

So, to what extent can the experience of gaming benefit the strengthening of the Jessup Moot Court as an instrument both for learning and for promoting policy? Some experts to be sure have insisted that the potential for prediction through war games or through moot competitions are matters that are generally speculative. Allen, citing other authors, points out:

I believe that models can be used for military gaming. But political-military gaming? You can't predict. You can't even predict what's likely to happen. You may get some insights, but unless you have enough data that can be quantified and enough data that will give you what I call actuarial comparisons, you can't be sure of what is typical and what is atypical. The model is useful only if it can represent a typical situation.³³

Despite these comments, combinations of gaming and the adversary test of the moot court regime might be considered through a joint effort among theorists for both approaches. The objective of combining the two is to look into validation of a theory not possible by pursuing one approach alone. The adversary environment of the Jessup problems offers us an opportunity of testing the receptivity of claims by an independent, objective tribunal. The data and intelligence flowing to the war gaming center, appraised after the introduction of the military and

[f]ormal games attempt to investigate a particular group of questions or problems, obtain an adequate amount of data from the game, and organize all into meaningful comparisons or summaries. It is rare that the gross result of the game - as, for example, Who won? - is a prime consideration. In this respect a war game is unlike a sports contest. In a sense, all war gaming is undertaken for learning purposes, in preparation for leadership and employment of military forces in real war. Therefore, the emphasis is placed on finding ways to improve, or to use, resources for maximum combat effectiveness.

So likewise the use of a gaming approach coupled with the moot court might serve us in the future for the same purposes, but perhaps more for the purposes of extending our use of the International Court of Justice, and the options available for expanding a reasonable claim of jurisdiction. Hausrath pursues his inquiry into the use of war gaming to reduce the costs as well as to refine the methods of warfare.

Id at 91.

33. See ALLEN, *supra* note 5, at 64. Writers such as Klaus Knoor and Oscar Morgenstern have denied the scientific possibility of prediction. McDougal and his associates propose the use in the social sciences at least of a value orientation and trend thinking. See STUDIES, *supra* note 1, at 51-58.

other related instruments in the gaming context, can become an appraisal of testing data by claims, and of compelling the adversary system to produce its results by imposing the claims process on a changing environment. In effect, the judges for the gaming action are not the judges of the gaming process, but the judges and the process of adversarial claims of the moot court. Adjustments to make this system operative, and to introduce law as an element in decision will be required. The procedures and process for working in the gaming setting as the setting that is the precondition for the adversary setting of the moot court must also be designed. But in doing this we must recognize that data banks are not infallible. If there is no funding to keep them complete and current, or if the personnel for producing and maintaining the data banks are untrained or incompetent, they will fail us when we need them.

The experience so far with war gaming suggests that gaming techniques might be coupled with the moot court in order to strengthen the moot court as a probing or testing mechanism. When the Jessup competition is considered in the gaming context; that is, when we perceive a widened number of participants and situations involving legal disputes in which a larger number of participants are involved, we can exploit opportunities for testing or probing perspectives of the larger number of participants much as we encounter these in real world conditions. Although gaming differs whenever we shift the context of the games, or whenever the policy content and context are varied, the gaming approach can be refined by considering the experience of gaming in general, especially war gaming.³⁴ Allen describes the sophistication reached so far in war gaming:

34. Wargaming might be expanded and in view of their similarities, the Jessup Moot Competition might also be expanded where the objective is to get results not presently achieved by the real world courts. War gaming for example might include the peacetime problems of force planning. See ROBERT P. HAFFA, *PLANNING U.S. FORCES*, (Nat. Def. Univ. Press 1988). He observes in a passage that suggests the similarities between the approaches to problems concerning the use of weapons and military attack [wargaming in the *pure* sense] and the preparation of military capabilities under force planning. There are further similarities in gaming military exercises, and so on. Haffa states:

Paul Nitze distinguished between declaratory policy - statements of political objectives with intended psychological effects - and action or employment policy - concrete military objectives and plans employing current [military] forces in support of those objectives. Nitze also saw the requirement to match the two levels closely, lest declaratory policy appear hollow or employment capability inadequate. But that fit has never been perfect

Force planning is the development of [military] forces flowing from the requirements of declaratory policy or the shortfalls in employment policy. Force development planning should, therefore, unite a declared strategy and the means to implement it. . .

I really try to create the atmosphere of a White House; the confusion, the leaks, [and] the turf problems. When I put a game together I'm looking for certain decisions to be made and I want to confront them with certain problems. And then I want to give them out to these human beings and I want them to get upset. Not too upset. It's not a highly refined art form. And yet you can kind of predict where it's all heading because you know what the options really are.

I think the term art form is correct. I don't think there's a science in this. It's not inferentially based. Nor are there controlled conditions under which it's done enough to get neat statistical evidence.

The search for that neat statistical evidence has led military game designers away from human beings and toward the most rational of all players, the computer.³⁵

The most appropriate appraisal can be made by considering the widely adopted practice among military officers to become involved in war gaming. The experience gained in gaming about war is useful in itself for assessing the success of the Jessup Moot Court and similar dispute

. Declaratory policy is the strategy of the elected political leaders. . . . Employment or action policy, on the other hand, lies in the domain of the military.

Id. at 4.

35. ALLEN, *supra* note 5, at 281-82. Consider the conclusions concerning the utility and effectiveness of gaming as established by Allen. War gaming is at the stage where effective use of the games is achieved by simulated solutions to real problems. *Id.* at 289. War gaming is already used to test hypothetical but real world simulations as well as to provide experience and teaching to those who participate in the game: Simulations are the next best thing to testing weapons and defenses against real Soviet submarines or tanks. And here the spectrum [of gaming] gets cloudy. Testing is a fine art that balances the reality of battle against the abstraction of a would-be weapon. Testing is an art like other arts, for it attracts creators, clients, patrons - and critics.

War gaming teaches that only the games that have a working framework of rules can be played and if the problems are raised under the rules they can then be solved:

[w]e learn very early in life that games have rules. The value of a war game is that it shows the results of a war when it is played as a game, with rules. Ever since the days of the Battle of Maldon the warriors of Western civilization have tried to wage war by rules. When nuclear war became the new kind of war, we tried to stick with the old rules. If Ivan and Sam have taught us anything it is this: The nuclear threshold is the place where war by the rules ends. Beyond that threshold, no war game can go, for beyond that threshold there are no rules.

Id. at 350.

settlement contexts when measured against their objectives, and it is also useful because gaming is a process in which adversary positions are taken. An imaginative group of participants may also be able to mine their war gaming efforts to uncover new or innovative means of dispute settlement. New process-oriented dispute settlement procedures might benefit us by reducing the possibility of a failed enterprise, or the likelihood of producing a controversy that might become more important than the enterprise once entertained in an adversary setting such as an arbitration or adjudicatory tribunal.

Gaming, in general, provides the situations and simulation for working with perspectives and principles in an operational context, where others are involved, and where differing perspectives are in contest. It provides an operational setting for the vocabulary, concepts and symbols that must be used for communications among opposing groups and within the groups as well.³⁶ But unlike war gaming, the gaming of legal disputes through refinement of the Jessup would draw more deeply upon the interaction of decisions and claims that reach into principles and theory; the application of principles and theory; and the theory of application.

We can anticipate and draw upon fruitful experience from the war gaming context, and work with conceptual elements that have their counterpart in the struggles of advocates. In time, if adopted, the gaming of the moot court situations will reinforce and strengthen the war gaming process also.

War gaming is undertaken by military and political policy-makers to investigate the processes of combat. The objective is not the real world of combat in an effort to assist in calculating the outcomes of those processes, but to provide a setting in which decisions are made, abstracted from the real world, yet linked to it because the experience in gaming decisions in itself is useful. But caution is needed. One writer on war gaming, familiar with the use of such games at the Naval War College in Newport, Rhode Island observes:

The power of a wargame to communicate and convince, however, can also be a potential source of danger. Wargames can be very effective at building a consensus on the importance of key ideas or factors in the minds of

36. According to PETER PERLA, *THE ART OF WARGAMING* (Naval Institute Press 257 1990), playing non-U.S. or threat roles in a professional wargame is not really much different from playing friendly or *Blue* roles. Playing the threat well, however, requires special effort, and often special training or expertise. *Red* players must understand not only the technical capabilities of the opposition, but their tactical and strategic doctrine as well. To *play Red*, the player must learn to *think Red*.

participants. They attempt to create the illusion of reality, and good games succeed. This illusion can be a powerful and sometimes insidious influence, especially on those who have limited operational experience. For example a poorly designed game could allow players access to an unrealistic quantity and quality of information and so give those players a false picture of the worth of a weapon system that relies on just such unattainable information to be effective.

In wargames, as in any approach to study and analysis, there is always a possibility that intentional or unintentional advocacy of particular ideas or programs may falsely color the events and decisions made in a game and lead to self-fulfilling prophecies. The designer of a game has great power to inform or to manipulate.³⁷

Nevertheless, the experience of those involved in war games and the practice that they afford can be probed for looking into the use of the Jessup competition as a multi-faceted instrument. As such it can serve to examine in depth the current problems of international law. It can serve to provide innovative ideas for promoting that law. And it will serve in honing the minds and thinking of the contestants and observers with regard to that law. The final rounds of the Jessup, even in its present form, without the added refinements that may be available in the war gaming experience, deserves to be televised for broader public consideration.

To determine the concepts of gaming and their application to the Jessup competition, we might look more closely at the experience achieved in war gaming. The purpose of these games has been to acquaint those who play with the past experience of others in military combat. The predictability powers of war games in the past has been spotty, but the utility of war games, as the only device that has been sufficiently refined to approximately fit real world activities played out in real time, has been recognized.³⁸ And if it does not serve explanation, war gaming, in any event, serves other purposes which will be discussed here.

37. *Id.* at 182.

38. Predictability through models may be something that cannot be expected scientifically even when the models are used for the physical sciences. As part of an analysis in greater depth, Abraham Kaplan, appraising explanation and prediction, points out:

In whichever way explanation is reconstructed [i.e., as a deductive model or pattern model], prediction is at least a possibility. In both models, laws serve to explain events and theories to explain laws; a good law allows us to predict new facts and a good theory new laws. At any rate, the success of the prediction in either case adds

According to one expert, the war game has many of the features that were first caught up by Clausewitz, observing that warfare is the great decision arena of the unpredictable, described in his metaphor of "the friction of war."³⁹ James F. Dunnigan, a consultant to the Department of Defense on wargames, first notes that there are various ways to play the wargame. However,

Basically, you obtain good games by paying attention to past experience (history) and letting the chips fall where they may. Combat is a dispassionate arbiter of what works and what doesn't. If your games reflect political rather than combat reality, you're likely to find yourself fatally ill-prepared on the battlefield. . . . However, current peacetime illusions will always carry more weight than future wartime reality. Unless someone is shooting at you, immediate political demands take precedence over potential military ones. This can change if you actually develop realistic wargames, use them diligently, and widely distribute the results.⁴⁰

As mentioned earlier, wars are arenas replete with uncertainty — with the murkiness of weather symbolizing the murkiness of the military campaign. Hence, according to Dunnigan,

Nothing new here except that historically there has always been a steady drift from reality in the peacetime military. Warfare is a complex process that cannot be easily

credibility to the beliefs which led to it, and a corresponding force to the explanations which they provide.

KAPLAN, *supra* note 26, at 346.

39. According to Clausewitz:

[e]verything in war is very simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war. Friction is the only concept that more or less corresponds to the factors that distinguish real war from war on paper. This tremendous friction, which cannot, as in mechanics, be reduced to a few points, is everywhere in contact with chance, and brings about effects that cannot be measured, just because they are largely due to chance. One, for example, is the weather. Fog can prevent the enemy from being seen in time, a gun from firing when it should, a report from reaching the commanding officer. Rain can prevent a battalion from arriving, make another late by keeping it not three but eight hours on the march, ruin a cavalry charge by bogging the horses down in mud, etc.

CARL VON CLAUSEWITZ, *ON WAR* 119, 120 (Howard and Paret, ed. And trans. Princeton Univ. Press, 1976).

40. PERLA, *supra* note 36, at xviii.

understood when you can't actually do it. So it's understandable that peacetime preparations, including gaming, will 'drift' away from the unknown wartime reality. Contributing to this drift are new weapons and equipment, new tactics and doctrine, and new political situations. Social changes also have an impact: things like economic growth or decline, different partisan political differences, and the replacement of conscription with volunteers. These changes are complicated by changes within potential enemy nations. All of this is further clouded by secrecy.⁴¹

Dunnigan's observations conclude with the general usefulness of the wargame. In his view, the games provide a setting for exercising thinking, perception, and decision making skills that no other device could afford. Though warfare is fraught with uncertainty, he noted that the usefulness of war games is in what it can accomplish in the decision-process, experienced in practice with others. The quest is toward the assimilation of the realistic patterns of behavior and conduct, and the cautious assimilation of what the games can offer. "Before the Japanese defeat off Midway Island in 1942, Japanese admirals dismissed wargames that showed they could lose their carriers using their current plans. The Japanese admirals went ahead, and lost four carriers and naval superiority in the Pacific. You trifle with wargame validity at your own risk."⁴²

We could add to the above the fact that war games extend back to antiquity. Though the games of antiquity take different forms, as in the *Odyssey* of Homer, and in those forms lack some of the precision, predictability, or explanatory power of the present games, they afforded much in common. Decisions and policies are made by human beings in contexts that can be reasonably replicated, and the experience of making those decisions, in itself, is a significant skill-oriented and skill-shaping effort.

War games are thus mentioned here primarily to consider the conceptual elements that may be common to games in general. These

41. *Id.* at xix.

42. *Id.* at xx. It should be borne in mind that the Japanese Chiefs of Staff did use war games, but their assumptions and inferences, and their perceptions of the realities of the war, were affected by outcomes that they insisted upon achieving. They had achieved great success in using their intelligence sources to locate the United States naval fleet at Pearl Harbor, the priorities to be attained as to military targets, etc. But they failed to consider the possible outcomes especially when all of the outcomes might be materially out of control once the fighting had commenced.

common elements may be used to consider the Jessup competition, or the moot court, used by lawyers, and to determine how the moot cases such as the Jessup might be strengthened; thereby, strengthening the skills and the exercise of perceptions over situations by jurists. The jurists' art when faced with the legal order and decisions under law among nation-states, perhaps more than that of the military commander, may be able to benefit from war games concepts, adapted to the decisions of law even more than the military commander under his war games, because so much of the legal issues among states are issues that can only be approached or analyzed through the symbolism of policy, or through high degrees of abstraction, or by way of the generalities, and vague expressions and vocabulary of principles that must be brought to bear for resolution among choices.

The nature of war games indicates much that can be shared in common with the Jessup and other moot court games. To gain a better base for the purposes of comparison, consider the war game and how it operates at present. The war game, we have been told, is not analysis or intended to provide analysis of real world situations. It is not the means for making comparisons among alternative solutions. Second, the game is not part of the realities of state behavior; it is abstracted with changes necessary for games and the compressed time span for decisions. Third, the games are not things that can be duplicated.

The results, the nature of the play, the decisions and policies made or adopted, the reactions and tactics will differ, the strategies, if similar, will have been so broadly posited that they could encompass a variety of tactics and possibilities, with a variety of chances for success or failure. Though the non-duplication element reflects reality, the approaches taken are unique, as they are in the real world. The game, as Thomas Schelling has indicated, operates in the context of decisions and the decision process, and the strategies and tactics are shaped in the interaction process, that is, by the interaction of decisions.

In the war context, actions or decisions made by one side — new weapons, new tactics or methods of attack, new uses of weapons, and so on — lead to responses on the other side, not necessarily predictable. Wars occur in conditions of such uncertainty as to lead to chaos as to the choices and the conditioning factors that might determine the choices to be made by the decision maker, both in the real world and in the game. Wars are charged with variables and involve chaotic situations that affect military choices or affect decisions and action, but this element of chaos simply becomes a challenge for those involved to find innovative ways to accommodate change. And its presence is such that it becomes a factor in

the war game, or any other game of policy and decision, reflecting that change and chance may affect the results.⁴³

War games, we are told, have objectives, whose clarity determine the effectiveness or success of the game. The overall context of the war game should be considered briefly in order to determine whether refinements to the moot court approach are possible, and whether, in particular, we can adapt the approach to enable the Jessup and similar moot court problems to provide a useful base for courts or other decision-makers that might be concerned with a similar problem.

The war game is designed to place the participants in specific situations — a context in which they make their decisions. The gaming procedure involves a data base or the information needed by the participants with regard to their making decisions. And it includes models or tables that translate the data of the game into the events that are taking place: these may be tables and mathematical expressions offering an opportunity to reflect chance in the operation. Rules and procedures set forth the means for applying the models. Finally, the game will have game analysis as one of its essential elements but the use of analysis will vary according to the purpose of conducting the wargame:

In a training game, analysis will usually consist of an instructor's observation and critique of the student's play. In a research game, analysis focuses on understanding why decisions were made. A good analysis plan, outlining where observers should be placed and what they should be looking for, is essential, but the process of game analysis not simply one of mechanics or even observation. The data collected during game play are only the raw material for the synthesis of insights and identification of issues.⁴⁴

Perla summarizes the usefulness of war gaming in terms of the element of process: the role of the game is "to help human beings

43. Perla argues that among the objectives or services afforded through wargaming are those that enable the participants to process information, to consider differing inputs and their impacts on expected outcomes, to investigate processes involved such as those of the interaction of belligerents to provide opportunities for learning, including the means to motivate or encourage further learning, to supplement other measures for assessing future policy, and so on. Wargames he warns are not to be confused with systems or operations analysis wargame analysis must be based "on a careful and comprehensive observation of the gaming process." Wargaming, he believes, resembles most closely *exploratory* science or historical research. *Id.* at 1-12.

44. *Id.* at 167.

investigate the processes of combat, not to assist them in calculating the outcomes of those processes."⁴⁵

Perla refers to the design as an art, pointing out that experience alone of military officers, or others familiar with the workings of games, will suffice. War gaming, he points out, is a form of communication and resembles the construction of a historical novel. Gaming design requires "the construction of a framework, the creative building of an internally complete and consistent world whose broad contours are contained within the bounds of its historical context."⁴⁶

The game, in play, arouses participants of the game itself, and, the wargame calls for the *sponsor* of the game, the source of the messages put to the players, to be involved in a communications flow actualized amongst players and sponsor. Communications entail the transmittal of questions, interpretations, inquiries for clarification, and even insights amongst these two groups.⁴⁷

Design extends through the stages of concept development, research, drafting of rules, and so on. The primary guidelines are: first, those of an attempt to simulate accurately the historical events intended to be the subject matter of the game; and second, the simulation materials must be commensurate with that guideline. In a sense, these are the requirements aimed at a degree of realism and playability, making the game operative.

Other features in designing the game can be by-passed at this point, or briefly mentioned. The sponsor seeks to learn about certain outcomes through communications with the players: the sponsor thus has a stake in the game though it may differ from that of the players. Perhaps further analysis will show the nature of the stake of the judges of the Jessup in learning about outcomes, as well as the stake of the advocates or agents who argue the cases and seek to hone through their instruments of persuasion. Various questions can be raised as to these features. But these features resemble in many ways the framework of inquiry developed by Lasswell and McDougal, and their associates.⁴⁸ Objectives, participants, strategies, conditioning factors, all enter into the design inquiry and make the ultimate game more likely a successful exercise. The data should be

45. *Id.* at 179.

46. PERLA, *supra* note 36, at 183.

47. The discussion here draws heavily on the study by Perla, Chapter 5, "Designing Wargames." That chapter, and the book itself, would need to be examined in greater detail, along with other texts to provide a complete comparison and review of the wargaming and the gaming in the Jessup competitions. *Id.* at 183ff.

48. *See generally* POWER, *supra* note 12.

commensurate with the game — the data made available in the problem; the data acquired during the moot trials; and the data molded and even synthesized by the interdependency of a successful give and take of argument in the trial itself.⁴⁹

Perla suggests some fundamental principles applicable, at least, in the wargaming context:

- 1) Adapt the rules to the game, and not the game to the rules.
- 2) Tell the players everything they need to know to play the game by structuring the rules around the sequence of play.
- 3) Provide plenty of examples to illustrate how the rules are supposed to work, both individually and in concert.
- 4) Explain the underlying rationale for particularly important or especially unusual rules.

49. Perla refers to the use of "scenarios" or what might be called the situation in which the game takes place. He argues that the scenarios must be designed to permit decision making flexibility, minimizing restrictions on those decisions, and permitting as much freedom of choice as is possible. PERLA, *supra* note 36, at 203, 204. Simply stated, a scenario should include all essential information about the game's setting and subsequent planned modifications to it, and should contain no superfluous information. *Id.* at 205.

The designer is in a unique position because he creates the environment for the play of the game:

Good scenario-design practice involves four fundamental principles: understanding the problem, building from the bottom up, documenting choices, and communicating results. *Id.* at 207.

The expression "building from the bottom up" refers to a design that defines the decision points, provides for a hierarchy of information and assumption, flowing through those who are made part of the problem, simulating their real world activities, and ensuring completeness, coherence, and credibility of the problem. *Id.* at 211, and see previous pages for discussion.

Perhaps differing from the moot court situations a large data base is made available, and then drawn upon by the players or contestants in the war game. The data base is constant, but the base itself is a source to be tapped, and not provided as the data afforded all parties as in the Jessup. If the Jessup had this data base, it would have a data source available to the Jessup judges, and common to all of the proceedings, but it would be a matter for the contestants to request and draw upon or be refused the data they request.

- 5) Integrate the text explaining the rules with the graphical play aids designed to help implement them.⁵⁰

Clearly, the format and the practice of play in war games is not identical with that of the Jessup Competition. However, there are features and experience, shown in this brief discussion that can be used to refine the Jessup, or to provide us with standards to test and assure the effectiveness of the Jessup. It might be possible in the Jessup, though not in the wargaming enterprise, to consider the problems considered by the international court in exercising its advisory jurisdiction. Hence, the gaming plan and situations may be adapted so that the contestants and the games can be adapted to the context of an inquiry into legal questions as distinguished from legal disputes.

Other features make distinguishing contrasts between the objectives of war gaming and moot court gaming; the differences in situations or scenarios alone are sufficient to lead to these distinctions. Perla argued that the war games results are validated best by the degree to which they reflect reality "as opposed to the artificiality of the gaming environment."⁵¹ War games include a report of the game by third parties — a procedure not adopted in the Jessup, though it might be considered — and analysis by third parties as well. But even in the context of the military campaign or combat, the analysis will not apply according to mathematical strictures:

While analysis focuses on systems, the true value of wargaming lies in its unique ability to illuminate the effect of the human factor in warfare. By their very nature, wargames seek to explore precisely those messy, 'unquantifiable' questions that analysis must ignore. Wargames teach us what we didn't know we didn't know.

To accomplish that, however, wargames must give up any vain hope of achieving the detailed mathematical structure and rigorous calculation characteristic of analysis. A wargame is not and will not ever be a mathematical experiment whose initial conditions can be recreated precisely and varied at will. The fundamental initial conditions of a game - the knowledge, talent, character,

50. *Id.* at 227.

51. *Id.* at 236.

and experience of the players - changes as players change or as they play the game more.⁵²

With growing use and familiarity of the wargaming techniques consciously applied to the gaming elements of the Jessup competition we might expect that we shall have new insights into the gaming process itself, so that we can refine that process. To do this we would need to turn to the possibility of adding to the moot court a program for analyzing the results of the Jessups, and monitoring and appraising the process itself. This would be aimed at the process itself, but also the process in a given moot court case, to provide clarification and better understanding about how it works and what would make it serve our objectives more effectively.

Though the element of analysis needs further assessment than that given here, because it would require assessment in context of the moot court cases, we can turn once more to Perla who catches a part of this feature in his remarks:

Wargames allow for the continual adjustments of strategies and tactics by both sides in response to the developing situation and outcomes of specific engagements; such adjustments are not seen in campaign analysis. Wargames afford their players a measure of control over events through the decisions they make during play. Unlike a campaign analysis in which changes in strategy occur as a result of calculating the outcomes of implementing the strategy, wargame decisions are not based on a clear and complete understanding of all the facts (much less the results) but rather on how the players view the facts through a cloudy and possibly incomplete frame of reference that is often distorted by preconceived notions, poor information, and the pressure of time - in other words, the fog of war. In a campaign analysis, a strategy that leads to disastrous losses is simply discarded; in a wargame, most decisions cannot be recalled after they have been made.⁵³

52. PERLA, *supra* note 36, at 284, 285. Perla further distinguishes in such games the differing perspectives of the military player or military analyst, from the civilian. This derives in part from differing experience or vocational cultures, and in part because the military officer is placed in a military decision making role, while the civilian is put in the role of the analyst. The civilian is tempted at least to impose rigor, and to that end has invented the operations research, the systems analysis, and other mathematically oriented analytical tools for that purpose.

53. *Id.* at 283.

III. CONCLUSION AND RECOMMENDATIONS

From a policy perspective, this paper is an inquiry into exploring and reappraising the application of the Jessup competition as a means of enhancing legal education. But it also provides a preliminary look at other uses. With regard to legal education, as Professors McDougal and Lasswell had observed:

A first indispensable step toward the effective reform of legal education is to clarify the ultimate aim. We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic training for policy-making. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.⁵⁴

The two authors supported the moot court as a key device for professional training:

One principle of professional training is to project the student into situations that resemble as closely as possible the circumstances of his future career. One well-established pattern of this type can, in the reformed law school, be turned into a more productive instrument of legal education. We refer to the moot court. It is common in some places to conduct various autopsies on the performance of students before these tribunals. What we propose is that the appraisal should be conducted not only in terms of legal technicality but for the purpose of revealing the total effectiveness of the participant in handling himself in the situation.⁵⁵

Experience with war gaming indicates that a key refinement involving policy can be made with the Jessup moot case by increasing the number of participants and by specifying the appropriate objectives in designing both the problem and the conduct of the competition. By adding on participants that critique the Jessup as well as others that might draft a report on the Jessup's findings, or by including additional competence for the Jessup format, such as the preparation of advisory opinions, the Jessup has the possibilities of providing a more substantial contribution to

54. Legal Education, *supra* note 1, at 46.

55. *Id.* at 149. Lasswell and McDougal note the potential use of recording measures, motion pictures, testing facilities, and intensive coaching, applying some of the procedures to be found in modern clinical psychology.

international law itself. Finally, the Jessup format can be used by experienced lawyers or jurists. If they are used, the differing or matured perspectives of the practitioner or scholar can be added. In all of these refinements, we bear in mind that the Jessup is a simulation, not a real world exercise, but, as such, it has the advantages of operating in a framework that can focus on the law and its impacts.

The Jessup is conceived in this paper as an instrument; that is, it is an instrument that is aimed at policy or strategic objectives. Seen in that light, law, especially international law, is a strategic instrument in itself, coupling in some instances, diplomatic, economic, ideological or even military strategies. Thus, law beyond the Jessup, extending to enforcement, includes resort to permissible force, where force is perceived as an essential means to maintain or protect public order.

Hence the Jessup can be used as an instrument that enables us to probe either past policy or prospective policy that is involved with the impacts of law. Second, the Jessup is an instrument that enables the participants to learn about law, policy and decision-making. The effectiveness of this depends upon the problem design and upon the motivation and capabilities of the participants. Problem design thus requires separate attention so that the design is aimed at specific objectives — probing law, testing law and its applications, and so on.

Third, the Jessup can be used to review cases that have taken place in the ICJ, thus affording another vehicle for critiquing those cases. Such critiques have greater strength than those that are in the form of commentary, and should produce publishable material for learned and practicing lawyer journals.

The Jessup necessarily is an instrument to promote international law. And the law it promotes is then perceived as a strategic instrument with strategic goals of its own to attain. Moreover, it is then perceived as part of the larger, collegial, global strategy to establish and strengthen global public order and its law. Hence it can also serve to probe and assist the law-making process; to condition or alert the attitudes of the practitioners; to hone the minds and analytical skills of the jurist involved in international law; and to arouse the interaction of theory and practice, and the choices that are available for the pursuit of goals and action.⁵⁶

56. Compare the warning of McDougal and Feliciano:

Inasmuch as an absolute prohibition of coercion has not been feasible, the historical alternatives of the general community have been either to permit complete disorder or to aspire to minimum public order. Complete disorder, failure to forbid even the most intense and comprehensive destruction of values, is not only possible, but has in fact long characterized the perspectives of traditional international law. If, on the other hand, the deliberate choice is made to pursue at least a minimum of order in the world

Some emphasis should be given to the collegial element that it applies; this is the element that we find in operation in the law making context. Those who participate in the Jessup become familiar with what the collegial aspect is all about. Law is not the output of a single scribe.

Fourth, the Jessup can operate as the simulation of an instrument, or vehicle, that works with other strategies. It is in a sense a diplomatic strategy, but as a vehicle, with varying policy content, it can include diplomatic, economic ideological strategies, or strengthen these. The wide variety of international institutions attest to the effectiveness of this.

Finally, implicit in the other observations above, the Jessup is an instrument that can sharpen the critical skills — the skills of the scientific mind — applied to the complexities of human action. We can anticipate that those motivated or stimulated by such an activity are likely to continue with their self-development, but will be stimulated toward an environment in which law-making actually takes place.

The brief excursus in this paper into strategy, theory, and wargaming highlights some of the possibilities of pressing the Jessup format into new uses, into texts for teaching, and into exploratory efforts that may lead to uncovering further applications. In some respects, the Jessup will gain in strength and effectiveness once it is perceived that whatever its shortcomings, the potentials are large, and open-ended. The need to have greater participation in law-making at all levels of human activity is widely acknowledged. The Jessup serves this need.⁵⁷

To this end, the Jessup is a simulation of decision and policy-making and operates as the means to enable us to refine, correct, and amplify the jurisdiction of the Court, including the reduction of the impact of the denial of jurisdiction by the court's invoking the political question, enabling those involved in the Jessup, like those that were involved in war gaming, to pursue what the ICJ and other international tribunals are now

arena, the coercion that is to be prohibited clearly must be distinguished from that which is to be permitted. The conceptions both of impermissible and of permissible coercion are thus necessary in the theoretical formulation of authoritative policy as well as in the practical application of that policy to interacting human groups.

MYRES MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD ORDER* 128-29 (Yale Univ. Press 1961).

57. There are other instruments to attain this goal. Standardized terms for contracts and adherence to the policy if not the form of such terms and of contracts relating to trans-national activities is one of them. A participatory effort for developing and testing such terms might be conceived to support the aims of the Jessup. See Harry H. Almond, Jr., papers presented at the meetings of the I.A.F. published in part in Montreal, 1991, Washington 1992, and Graz, 1993, and Beijing, 1996. Some of these approaches calling for the use of recommendations, joint adherence to common guidelines, advisory opinions and inquiries, and so on are sometimes called "soft" law because they are to be distinguished from the work that enters into undertakings, commitments and the like.

actively doing. But with the growing appeal of cooperative and joint enterprise among states, their disputes and disagreements in the future will tend to disrupt their common enterprise, or even endanger the neighborly approach to achieving common goals.

Thus, the Jessup, with some of the refinements proposed in this paper, can first be fashioned into an instrument reaching beyond the traditional moot court format to serve us in more effective ways, such as the treatment of issues through alternative dispute settlement procedures. Perhaps the future combinations might include both gaming and moot court approaches so that the Jessup Moot Court, no longer rigidly tied to the traditional confrontational and adversary entity, will be exploited for the invention and adoption of more appropriate means for shaping our needed, future law.⁵⁸ Or it may be made available for testing the work of the courts themselves so that the current debate over the law promoting efforts of the advisory opinion courts can reach more substantial results and even substantive outcomes.⁵⁹ Assessment of such alternative settlement procedures may ultimately lead us to using them in place of the traditional courts and tribunals, or to supplement the work of those tribunals.⁶⁰ A similar assessment of the application and use of general principles of law as a means for strengthening the law of the global community may prove to

58. Cf. Myres McDougal and Michael Reisman, *International Legal Essays*, at 306:

In a community which recognizes knowledge as a crucial scope and base value, an increasing number of individuals will tend to perceive themselves as participants in the shaping and sharing of intelligence.

As the pattern of science-based technology moves toward universality, traditional careers are abandoned for careers generated by the new knowledge. [Citation omitted]

The two authors in further clarification suggest that competent and experienced policy scientists may mediate between groups of physical scientists, for example, who have competing claims to authority.

59. The use of the traditional adversary process of litigation is likely to require alternatives to avoid the confrontational element of the tribunal. States assessing confrontation as an option are quick to discern that other means of confrontation may be more desirable in attaining their goals. The rise of the new institutions - fact-finding in the context of the law of war, the standing consultative commission of the Anti-Ballistic Missile Treaty to recommend the various paths to agreement, the institutions of numerous agencies and their authority to reach deeply into promoting the process of negotiation, concession and bargaining - are all familiar techniques that may replace adjudicatory and arbitrational procedures in the future. Numerous studies are available on the advisory opinion, its potential for shaping future "legislation," the overlap of problems concerning the concept of *forum non conveniens*, and so on.

60. Alternative dispute settlement procedures mentioned earlier in this paper may include those that take place in an adversary setting, or those in a cooperative or friendly setting. The latter may be designed to provide for greater party participation through the negotiation and guided negotiation stage, and less of party confrontation in tribunals and adversary settings. Also it is possible to design the procedures to afford greater participation in general in resolving disputes while the enterprise is on-going so that the delays and other problems will not be raised, or the obstacles of resentment will not occur.

be as valuable.⁶¹ The call of these demands is therefore a call for imaginative and innovative collegiate efforts that will best serve a global community of growing interdependence.⁶² For these purposes we can look for analogies, simulations, and models in the municipal legal system, particularly as it has grown to serve a more complex community, and a greater, more incessant, interaction of activities.⁶³

61. The application and standing of general principles of law as law to be applied by the International Court of Justice pursuant to its Statute's Article 38 has not been fully or comprehensively explored either by the Court or by commentators. See STUDIES, *supra* note 1, at 987-1019, for an important study of principles crucial to the framework of inquiry into the decision process. The authors describe this framework - and then later the favored principles - as follows:

I will rather simply recommend the continuous employment, in all our specialized roles, of a certain process of thought - a frame of reference, a method of inquiry, a disciplined and contextual mode of analysis - intended to promote the most effective use of our minds in bringing to bear upon inquiry and specific choice the most relevant findings and techniques of contemporary science and knowledge

Though my principal emphasis will be upon the importance of maintaining a flexible, policy-oriented, contextual approach to all problems, in an effort to attain the most direct and immediate contact with contemporary reality, I will develop in some detail certain suggested alternatives of policy which express my appraisal of the relevant goals, conditions, trends, and probable future developments. *Id.* at 990, 991.

The six primary principles are not principles of law in the traditional sense but are organizing principles enabling the shift toward strengthening public order to meet desired standards and outcomes, and to be facilitated by the adoption of common concepts. *Id.* at 999-1010.

62. A part of these efforts may require the adoption of interviews of past contestants and past participants in general to establish the Jessup moot courts and their refinements in the future. It might also benefit from those who have had experience in legal disputes brought before the International Court of Justice. The overall purpose of such efforts should be kept in view: the Jessup need not be a simulation of the practice before the ICJ, and, in operation, it is not such a simulation, but only an approximation. This leaves the way open to refining the competition and its rules to make it serve more emphatically the learning and probing processes.

63. The essays in the collection *An Introduction to Law*, 76 HARV. L. REV. (1962) might serve this purpose in part. The articles taken from various issues of the Review include Felix Frankfurter, *A Note on Advisory Opinions* 37 HARV. L. REV. 1002 (1924) (looking into the legislative implications of the advisory opinion and distinguishing the opinion from those that involve directly the *case* or *controversy* in the jurisdictional principle for subject-matter jurisdiction of the Federal Courts); see also JAMES B. THAYER, *ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 435 (1893) (considering the formal constitutive or constitution building processes in American practice). Thayer's article also contains a study with regard to advisory opinions. *Id.* at 459. For differing approaches, but showing the flexibility and innovative quality of American law, see Robert H. Jackson, *A President's Legal Opinion*, 66 HARV. L. REV. 1353 (June 1953). President Franklin Roosevelt's own opinion as to the Lend-Lease Bill that by-passed the Congress and perhaps the Constitution as well to establish a binding obligation with Britain during the second World War. *Id.* Other approaches are suggested in Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); the Brandeis dissent in *Myers v. United States* 272 U.S. 52, 293 (1926); and, BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).