Critical Reflections On Jessup 2022: The Unsettled Promise of Decolonization

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TWAILR THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

As part of our ongoing reflections on *Teaching International Law*, Abhijeet Shrivastava and Rudraksh Lakra reflect on their recent experience as Jessup mooters. They explore how the institutional expectations of Jessup mooting and broader context of international law discourage certain arguments about decolonization.

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Jessup 2022 Problem. Credit: ILSA, 2022

Introduction

The 2022 edition of Jessup Moot Court concluded recently on April 10th, simulating a fictional hearing before the International Court of Justice ('**ICJ**'). Participants entered the world of Sutha, Antara and Ravaria – in the 'case concerning the Suthan referendum'. Antara, Sutha, and Ravaria were all colonies under the Zemin Empire until 1947. While Antara and Ravaria became independent states after World War II, the status of Sutha remained disputed between the two parties until 1962. Then, the trilateral Treaty of Singapore ('**TOS**') was signed between Zemin, Antara, and Ravaria. Although Ravaria had pushed for immediate Suthan statehood before this, it now recognized Sutha as an Antaran province until 1987. Thereafter, Suthans could propose a referendum on their political future at any time – which they opted for in 2020. Further, the *Compromis* notes that as per 'surveys' held in 1962, the TOS was not 'universally embraced' by Suthans and that a minority of its populace pushed for 'immediate [Suthan] independence'.

The *Compromis* involved the alleged online spread of disinformation by the Ravarian State (Respondent). This campaign of disinformation targeted the historic vote on the fate of the entire Suthan population, in a referendum that resulted in the secession of the Suthan province from the Antaran State (Applicant). Importantly, Sutha was a former colony which had become part of Antara, *subject* to the result of the aforesaid referendum. While the *Compromis* was inspired by recent events of States using social media to influence elections, Sutha's referendum was evidently more than just an ordinary election.

Much has been said recently about how the hierarchies of law schools, legal practice and international law itself are reproduced in mooting. Mooting thus risks entrapping future international lawyers in these existing hierarchies. Nonetheless, many members of this community have evoked hope in the possibility of nurturing critical sensibilities through mooting (see Professor Aman, Dr Samtani, and Professor Abhimanyu George). As two-time Jessup participants, we wish to affirm and concretize this sentiment by focusing on our experience with a particular *legal* contention we felt was unwelcome in the 2022 Jessup. We argued that the 'process' of decolonization in the Suthan colony was 'incomplete', even after becoming an Antaran province and no longer a colony of the Zemin empire. Under the premise of international law, Sutha became decolonized through the referendum, the first-ever instance of Suthan peoples being accounted for in deciding their political future.

In frankness, part of the motivation for writing this reflection is a search for some catharsis and closure. After all, for reasons we elaborate, never in our oral rounds could we advance the decolonial argument, despite feeling that it was indispensable to the *Compromis*. We will discuss how the institutional expectations of Jessup mooting and international law discouraged and, thus, excluded the 'incomplete' decolonization argument. We will also consider how despite the absence of this decolonial imagination throughout the competition, we stand by our view that it ought to have been debated by all 600 teams. In doing so, we reflect on the aforesaid belief that the Jessup, despite such constraints, has the potential for facilitating critical sensibilities. But first, a necessary detour on what the expectation and atmosphere of Jessup argumentation is.

All Rise! The ICJ Is Now In Session

When the courtroom opened (albeit virtually this time), we were well-aware that taking the 'floor' was very much akin to a theatrical performance with predefined tropes of actors that we had to imbibe. In this reflection, we will not highlight the ever-present prejudices in the imagination of these 'ideal-type' actors.[1] Our focus is instead on how the expectation of the Jessup moot is not merely the presentation of *tenable* arguments, but *persuasive*arguments (something that late Judge Crawford mentioned in the 2017 Finals). Most good teams will offer a plethora of citations for their claims – but only the supposedly 'great' ones are able to *persuade*.

Consider then this idea of 'persuasion' – against whose perspective of the law does one measure an argument as 'persuasive'? Like any other institution, there are inherent biases in the environment of Jessup mooting. We must typically offer legal arguments that are rooted in authorities or logic that is familiar to classical (Global North centric) understandings of international law (similar to Professor Maldonado's observations for comparative law scholarship). For it is this practice and language that forms the 'commonsensical default' of the Jessup for Judges – and often considered credible even in the absence of proof. Such logics are easier to appreciate as *legal* contentions – while the rest is more prone to being brushed off as perhaps progressive, but nevertheless a *political* posture. And as hinted earlier, it is this hierarchy (among others) that is continually reproduced, because participants whose legal training is shaped in this

manner, later return as Judges. We were reminded of Professor Gathii's rumination on the practice of non-citations of Global South sources – as he emphatically pinpointed in relation to the African Court on Human and Peoples' Rights. We certainly cannot deny the Jessup's representation of over 3,500 students from over 100 countries. Yet the fact remains that the Jessup *is* a United States-centric Moot Court.

For example, one of the issues of the 2022 edition was centred around the legality of unilateral cross-border interference with 'data' during cyber law enforcement. The arguments of all the teams that we competed with – and even our own – were dominated by the practices of a handful of Global North states (primarily the United States – such as in the Coreflood and Trickbot Botnets). Practice from the Global South was virtually non-existent in these pleadings. In turn, this was likely because there is a striking dearth of literature addressing any such practice as mainstream scholarship is itself dominated by Global North events. Perhaps at least in part, this is explainable by the fact that it is only these states that have the infrastructural capabilities required to carry out major cyberoperations. However, it remains true that the geographic exclusions of this argumentation never raised eyebrows – the assertion of citations from the Global North sufficed. In contrast, time had to be spent to justify citing sources which some Global North states previously voted against (see for instance, Resolution 36/103 of 1981).

This is not to say that all arguments are based on Global North citations; only that some State practices are more equal than others (and not just 'specially affected' ones). Furthermore, ideas familiar in Global North-centred legal perspectives appear easier to digest even when unanticipated by the authors. For example, in the 2020 edition of the Jessup, it was not expected for teams to make arguments on the use-of-force prohibition. As such, many teams began raising self-defence arguments to justify supposed force targeted at non-state actors in foreign territory. This was based on the nebulous 'unable and unwilling' doctrine, which argues that the right to self-defence can be invoked against non-state actors. This concept harbours tremendous opposition from the Global South as a thinly veiled political device that can validate abuse of sovereignty. Nevertheless, most Judges took these arguments for granted as 'creative' – and not merely *rhetorical*. Again, the idea is to *persuade* the 'Jessup audience', not purely to offer tenable law.

The Case For Sutha's Incomplete Decolonization

Having underscored the biases in classifying persuasive Jessup argumentation, we now turn to the heart of our experience. That being our legal submission that Sutha's decolonization process was incomplete until the 2021 referendum. Strategically, as we elaborate below, we pursued this to justify the Respondent State, Ravaria's, 'interference' around the referendum.

As agents of the Applicant State (Antara), which alleged and contended that Ravaria spread false information promoting secession around the 2021 referendum, we were expected to argue that Ravaria's actions violated the non-intervention rule. One element of the non-intervention rule is that an affair must be 'internal'. Consider the peculiar facts of the *Compromis* where a former colony (Sutha) was made a province of another State

(Antara). If Sutha's decolonization is shown to be incomplete, then this referendum is arguably not Antara's 'internal' matter when viewed from the perspective of Suthans. Instead, it would concern the right to 'self-determination' of a former colony, a right that renowned authorities including Judges of the ICJ have considered to be of interest to the international community *as a whole* (see ¶14 and ¶79 of the Separate Opinion of Judge Sebutinde[2]).

Furthermore, one could submit that disinformation is part and parcel of political campaigning. As physical voter rallies were banned in Antara due to COVID-19, online campaigns became the sole means of promoting political views. Thus, as one *could* argue, Ravaria's amplification of 'secessionist' speech online is comparable to legally valid 'moral and material support' in previous cases of decolonization processes. This is because the secessionist groups are a minority who lack the reach of the majority. Establishing this argument as tenable would have discharged Ravaria's burden as the Respondent against Antara's objection to its alleged social media campaigns.

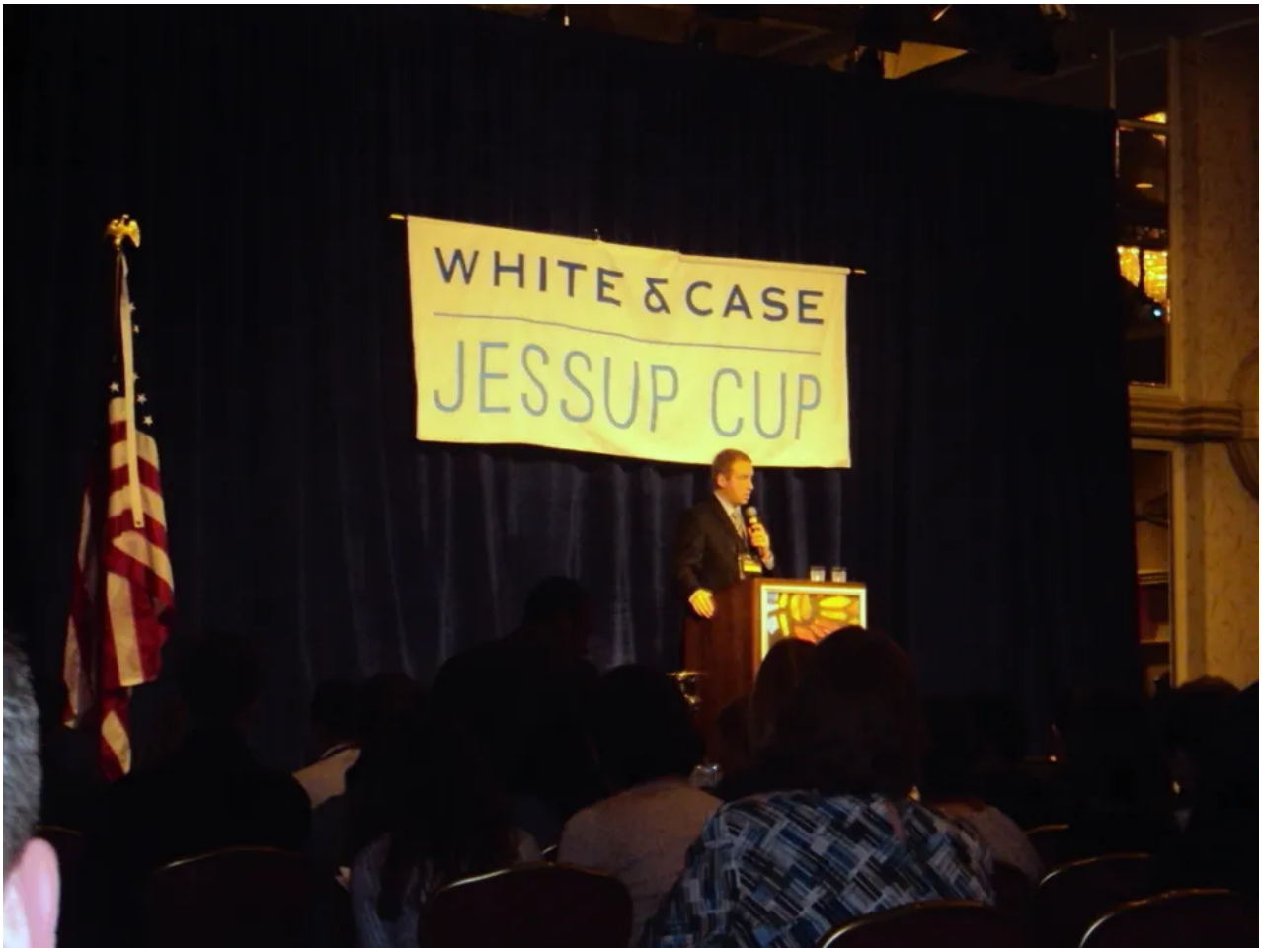
Yet how would one say that Sutha's decolonization process remained incomplete, even after the Zemin colonial empire had collapsed and Sutha became an Antaran province? To be sure, the integration of a colony into another State is a valid method of fulfilling self-determination (see Friendly Relations Declaration of 1970). However, Principle IX(b) of Resolution 1541 makes it clear that such integration must be 'the result of the freely expressed wishes of the territory's peoples…having been expressed through…democratic processes'. As such, the consent of the people of the former colony is vital for deciding their own destiny. This may include indirect consultations, i.e., consulting the elected representatives of a colony, rather than referenda.

Now, Antara, Zemin and even Ravaria never consulted Suthans before making Sutha a part of Antara through the TOS. However, Ravaria could still argue that it only agreed to this arrangement *because* a future referendum ensures Suthans were consulted. In other words, making Sutha an Antaran province is conditional on eventually consulting Suthans about their collective statehood. This future consultation would complete Sutha's decolonization. As one could tell, the framing of our pleading concerning 'incomplete' decolonization borrowed heavily from the 2019 *Chagos Archipelago* Advisory Opinion of the ICJ.

In response to the allegation that Suthans were never consulted, Antara could counter that, in reality, Suthans have participated in Antara's Parliament and elections. By implication, this could show their consent to remain in Antara. Yet as a matter of fact, there are contemporary situations of former colonies where the United Nations General Assembly has consistently insisted on referendums being held to consult peoples on their political status, such as Montserrat (see here and here), French Polynesia and New Caledonia. Similarly, the African Commission still considers that La Reunion and Mayotte are under colonial control. This is despite the fact these regions held democratic elections.

Such an approach stems from the realisation that the mandate of elections for participating in democratic institutions is very narrow compared to a consultation about peoples' political status (see in the context of occupations).[3] While the *Compromis* mentioned consultative 'surveys' being taken after the TOS was in force, this had little worth; not least because there is no information on how they were held, but also because there is no indication surveys had legal effect in view of the Suthan peoples' collective intent (see more on such factors here).

Again, we emphasise that there is no need for us to bear the burden to show that the above position of law is necessarily correct. In theory, we only need to show that we have the appropriate citations, that the law proposed is logical enough to be arguable from both sides, and that it connects to the facts of the *Compromis*. That said, we want to share our experience in the actual oral rounds with this line of argumentation, once we articulated in the Memorials.



Jessup Cup 2012. Credit: Wikimedia Commons.

Abandoning the Decolonial Imagination

Expectedly, the contemporaneous practices cited *ad nauseam* in the rounds were Global-North centric and limited to ordinary elections. These were deliberate choices by teams. For example, the 2016 or 2020 United States elections and the 2021 German Parliamentary elections were often referenced, as if online disinformation in general elections were a threat affecting only the Global North. In the Memorial rounds of the

Jessup, any argument of 'incomplete decolonization' was absent in each of fifteen teams we faced and the other rounds we saw. No Judge pre-emptively raised a question – even purely policy-based – on the fact of Suthans not being consulted prior to Antara making the Suthan colony its own province, or the referendum being the first instance of such consultation. In the case of the former colony of New Caledonia, France had agreed to three separate referenda on its potential secession through Noumea Accords. A third of these votes were held during the Memorial submission stage of Jessup. It is therefore unfortunate that no team or Judge in our Moot experience connected the dots between the Suthan referendum and such referenda in other former colonies.

We thus conjectured that an argument on these lines would likely be absent from the 'Bench memoranda', a document prepared for briefing the Judges as to legal nuances of the case. Our speculations here found more ground when given a chance to speak to the *Compromis* authors, who shared with participants that the choice of a referendum in the case was inspired by the Scottish referendum in the United Kingdom, and the narrative surrounding Catalonia in Spain. Thus, the original imagination of the context may not have involved former colonies in the Global South like New Caledonia.

Recall the 'incomplete decolonization' argument to be made from our Respondent pleadings, including the written memorial. All Applicant teams we faced would be aware of the space we spent on this contention. As such, it is the Applicant's burden in oral rounds to pre-emptively rebut the Respondent's memorial as first speakers. Those teams also chose to ignore incomplete decolonization, perhaps expecting us to not raise it during our rounds. And they were right to do so.

The Jessup's institutional set-up involves many former participants, including our coach, Aman. He was in support of us raising the argument during our rounds because bizarrely enough, it seemed intuitive to him to emphasise that Suthans had no say in the imposition of the TOS. Without his past engagements and sensibilities, we would not have meaningfully explored this argument even during the Memorials stage. Yet whenever we did so in practice sessions with other Judges conscious of how Jessup rounds work, we were told this argument was too progressive, novel, sentimental, or ignorant of the larger picture that the *Compromis* wanted us to explore. There seemed to be immense discomfort attached to the idea that the process of decolonization can remain incomplete even after a coloniser is gone. This contention would be far too radical or disruptive to raise during a 22-minute Jessup submission. It appeared as a statement regarding *politics* rather than law – an academic endeavour at best. Alongside our intuition built from past Jessup experiences, and hearing this consistent feedback, we made the strategic call of not raising the argument at all in the orals phase. If we chose the contrary, we likely would not have made it as far as we did (Round of 32). Despite how far we reached, the abandonment of something so crucial to our imagination of Sutha was very disheartening. After all, we entered the oral rounds phase hoping that other teams make arguments similar to ours. When they do, it is an immense vindication of our efforts.

All these factors are symptomatic of a larger problem: very little literature discusses in detail the *legal* implications and formation of a situation of incomplete decolonization. The practices we highlighted remain hidden in plain sight, despite the ICJ's opinion in *Chagos* (for exceptions, see here, here, and here). Added to that lack of literature is the understanding of several academics that the decolonization movement was largely complete world-wide by the 1980s. Thus, one can appreciate how many of our practice-round Judges felt that the colonial context in our *Compromis* was at most a red herring from the 'real issues'. It is therefore far different from the 'unable and unwilling' doctrine invoked in Jessup 2020 – as mentioned earlier – given frequent invocations by Global North states. This confirms how legal research, thought, and reasoning of future international lawyers participating in the Jessup becomes entangled in the existent hierarchies of international law.

The Appropriation of Suthan Voices

If we accept the analogy of mooting to a theatrical performance, Suthan perspectives should have been spotlighted in a case concerning their own referendum. Yet they have in fact been side-lined owing to the exclusively inter-State nature of the proceedings – a concern that Dr Samtani also felt in her experiences with the 2015 Jessup.

Consider further assumptions about the Suthan populace central to the legal issues discussed above. To argue that Ravaria's alleged social media campaigns could impact the referendum, would imply that Antaran agents consider Suthans as incredulous or unable to make independent decisions. Ravarian agents would respond that the spreading of false information supporting secession was rather facilitating a more plural public discourse. Yet at no point does the *Compromis* indicate how the Suthan populace specifically was responding to that campaign. More importantly, this legal hair-splitting ignores the fact that Ravaria's efforts were geared toward its own strategic self-interests. To elaborate, Ravaria desired to secure Sutha as its own province by convincing independent Sutha to join the Ravarian State. In the same vein, the 'incomplete decolonization' argument is not benign, since it draws attention to potential manipulation of Suthans, rather than ensuring free consultation through the referendum.

Perhaps the omission of Suthans' own perspective or response to the disinformation was essential to ensure a 'balance' of argumentative merit from either side in the mooting exercise. Yet as mentioned, this reflects the very design of inter-State centrality in ICJ proceedings. That is owed to Article 34 of its Statute – by which only States can be parties to disputes before it. While we appreciate these limitations in the very format of inter-State mooting, it is important to be conscious of that limitation, lest its implications remain unquestioned.

A Continuing Conversation, Not A Conclusion

From this long meandering reflection, it is difficult to devise concise conclusions (unlike Jessup Memorials!). In that spirit, although we have discussed how the institutional atmosphere of the Jessup moot and international law more broadly was hostile to an

argument about Sutha's 'incomplete decolonization', the fact remains that we were able to imagine this argument through the moot preparation. In fact, to our elation, at least one other participant questioned the authors on this point during the problem discussion (we are unsure if they argued it either, however). Further, even when we added the argument in Memorials, we were already aware of institutional faults in systemically invisibilizing Suthans in a case about their own political status. That awareness was only possible because we could detach ourselves from the arguments we made, owing to critical sensibilities that came about during our work, and how we perceived the *Compromis*. From our experiences, we concur with writers who comment on the possibility of critical awareness through and within mooting.

Yet for any such critical awareness to arise, a consciousness of international law's hierarchies and the Jessup moot is imperative, from both coaches and participants. We were fortunate to share our journey with our coach, Aman, who made conscious attempts to facilitate conversations calling out and addressing these hierarchies. Even in the twilight of our moot, our imagination of a decolonization context remains valid for us as we reminisce about Jessup 2022. As Margaret Davies notes, distinct meanings may very well co-exist in the same text (here, the *Compromis*) – even when beyond original authorial intent.

We hope to hear more from fellow participants on how such sensibilities feature into their experiences, such that through a continuing conversation the Jessup may become a more generative space that not only tolerates, but also welcomes critical thought – not just as a by-product.

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2. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 28 February 2019, <https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf> accessed 28th Oct 2022.

3. Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16:4 EJIL 683; Yutuka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill, 2009) at 21