

## **Tips for Writing Memorials For the 2015 Competition**

Written by a Group of Friends of the Jessup

Participation in the Philip C. Jessup International Law Moot Court Competition involves both writing a memorial and oral advocacy. Many teams lost points and failed to advance when their memorials did not comply with the writing requirements of the competition, lacked professionalism, and, more important, did not provide legal clarity and reasoning in developing their legal arguments. Every participant should realize that in real legal practice, well-reasoned, polished professional communications, both in writing and advocacy, are a “must”.

This guide aims to provide Jessup teams with several points to improve their memorials--and their oral advocacy--both technically and substantively.

1. Read very carefully the current 2015 Rules of the Jessup governing Memorials. These can be found in Official Rule 6.0 “Memorials” of the Rules found on the website of the International Law Students Association ([www.ilsa.org](http://www.ilsa.org)). All of the subparagraphs in Rule 6 are important, but note the structure of the memorial found in Subparagraph 6.6, and the word count for each section in Subparagraph 6.12.

2. The ILSA on-line distribution of the *Compromis* will subsequently be followed by at least two bundles of legal materials. A team is well-advised to read these materials thoroughly, not just the head notes, to understand which, if any, is relevant legal authority to support the legal argument and how it applies or why it should be distinguished. This is the start of legal research: One is not restricted to use all or only the legal materials provided by ILSA. If something such as a word or clause is unclear, make certain that you clearly understand what it means. Seek out a recent law review article for clarification of legal principles and conventions/treaties and statutory and regulatory materials. Do not neglect their definitions and language that restricts or expands applicability of particular provisions. Conventions, international agreements, statutes, and regulations sometimes provide for something in one paragraph and then limit it sharply in another. Read the entire document, including any annexes or rules of procedure, to assure

thorough understanding. For example, one issue in last year's *Compromis* involved application of the UNESCO Convention on the Protection of Underwater Cultural Heritage. The Convention contains the main text and an annex, which sets out rules for activities directed at underwater cultural heritage. Many teams were unable to explain to the court what that convention required under international law, because they had not read the entire convention and annex.

3. "Index of Authorities". Some teams have included every authority in the background materials supplied by the Jessup competition. Do not include all these materials without good reason to do so. Include in the Index of Authorities only those that the writer has incorporated, whether negatively or positively, in the memorial's legal arguments. To do otherwise evidences laziness, because the writer has shown no consideration how that authority supports the legal proposition under review. Judges are looking at how the teams use these authorities to develop legal analysis that leads to a conclusion. Double check to assure that the listing is correct. Otherwise, a memorial judge may regard the listing as deception rather than error.

4. "Questions Presented" should reflect the issues found at the end of the *Compromis* for each party. The parties have already agreed to the four issues given in the *Compromis*. Always stick to the text you are given; the *Compromis* provides you with all the information you need to know, but also the information you are allowed to use. You may briefly clarify the Questions Presented, but do not add issues. Elaboration in this section is unnecessary.

5. In developing the "Statement of Facts", review the requirements in Subparagraph 6.9 of the 2015 Rules. Remember the parties to the dispute have stipulated the facts in the *Compromis*. In drafting the Statement of Facts, look to the stipulated facts that are relevant and support your party's submissions. Cite to the record for each fact. Don't add to or elaborate on the facts in either written or oral argument because this will lead to incorrect legal analysis! Many students tend to massage or expand on the facts to get to a desired result. Wrong! This also evidences laziness and may raise questions about counsel's integrity. You will lose points if you do this and it may be noted in comments from a memorial judge or later in oral argument.

6. "Summary of Pleadings" (Subparagraph 6.10 of the Rules) should consist of a substantive summary of the Pleadings. As the Rule states, this is more

than a simple reproduction of the headings contained in the Pleadings. Substantive also means more than just a single declaratory sentence, perhaps with a footnote that does not explain its relevance to the statement. One sentence is NOT legal analysis. The writer needs to use facts and relevant law to provide the essence of the legal arguments on each of the issues, within the limitation of 700 words (Subparagraph 6.12(b) of the Rules).

7. “Citation Requirement” (Subparagraph 6.13 of the Rules). A citation (or cite) in legal research is a reference to a specific legal source, such as a constitution, statute, reported case, treatise, or law review article. One basic format of a legal citation includes the volume number, the title of the publication, the page or section number, and date.

**Citation alone does make the legal argument.** Writing legal citations follows thorough legal research. As you carry out your research, your notes should capture all the information you will need to write the necessary citations. The writer must explain what the cited authority is about and how it helps the court to decide the case before it. Moreover, the writer must explain what legal authority the cited case has. No case will be mandatory. The cases and other legal sources vary in degrees of persuasive authority, which depends largely upon who decided it, the circumstances, when it happened, and whether it was the result of litigation or arbitration. This applies also to cites to United Nations resolutions and U.N. committee statements.

Prioritize case law over scholarly writings to support the argument. If possible, look for case law of international courts and tribunals. National court decisions do not provide a strong precedent in most international law cases. Make sure that you cite the correct paragraph of the respective decision. If you must prove that something is a rule of customary international law, cite evidence for both state practice and *opinio juris*.

It is inappropriate and unprofessional to throw several citations into a footnote without understanding the relevance of that authority to the proposition made by the party. Never cite to a case without knowing the facts and circumstances of that case for relevance to the your submissions. Don't go crazy with string citations; this only eats up valuable space that is better used in legal argument. Make sure that the footnotes are necessary to your argument. Points will be deducted if the memorial judges check the citation to see relevance to the proposition only to find the citation itself is

either incorrect or irrelevant. Make certain the legal authority put forward is the most current statement of the law.

In the Common Law practice of citation (which is increasingly used in international legal tribunals), a note may be added after the citation to further explain the relevance of the case to the argument. For example, “While Judge A gave a dissenting judgment, this did not find significant support from learned publicists.” Or “The subsequent rejection of the applicant’s case by the Supreme Court was founded on a different matter.”

A Utah Supreme Court recently upheld an appellate court’s refusal to consider a certain argument that had not been adequately briefed. The Court wrote:

“We have repeatedly warned that [appellate courts] will not address arguments that are not adequately briefed, and that are not a depository in which the appealing party may dump the burden of argument and research.” An adequately briefed argument contains “the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.” **“Mere bald citation to authority, devoid of any analysis, is not adequate. [Emphasis added] And we may refuse, *sua sponte*, to consider inadequately briefed issues.”**

The Jessup Rules include an example of a proper citation.

“ Certain Norwegian Loans (Fr. V. Nor.), 1957 I.C.J. 9, 23-24 (July 6) [hereinafter Norwegian Loans] (holding that France’s reservation in its declaration denying the Court jurisdiction over issues essentially within the national jurisdiction as understood by France could be utilized reciprocally by Norway).”

Additional information about how to read and write legal citations can be found at various websites on the Internet.

8. In Pleadings, don’t begin with a conclusion. It might be useful to apply the IRAC formula that forms the fundamental building blocks of legal analysis. The IRAC equation is Issue, Rule, Analysis, and Conclusion. State the facts, citing to the *Compromis*, and the relevant law that lead to the conclusion. Keep your English sentences simple, avoiding too many clauses.

This should assure that your arguments are not choppy or disjointed, but are logical and understandable. You don't want to lose your reader! If a word or phrase is important but unclear to you, look it up. For example, a few years ago issues concerning "immigration processing" were considered. In both written and oral arguments, some students did not understand what that term generally meant from the perspective of a state's immigration procedures such as the examination of certain documents to grant a visa.

Use terms that are relevant to your argument consistently throughout the memorial. Avoid use of different terms if you imply the same thing, as this may mislead the reader. Spell all the specific terms consistently throughout the memorial.

If you use abbreviations, introduce them the first time they appear in the memorial with a full reference to the term, e.g., exclusive economic zone (EEZ). This only needs to be done when the term is introduced in the memorial; there is no need to replicate this definition throughout the memorial. However, don't overuse abbreviations. Use only a few core or very well known abbreviations (e.g., EEZ) to avoid pleadings that turn into an incomprehensible alphabet soup!

Some teams sprinkle their memorials with foreign terms. Use Latin or foreign words or phrases sparingly, and only when legally relevant. Overuse is not only confusing to the reader, but judges may consider this to be showing off. When such words are legally relevant to your argument (e.g., *jus cogens* or *ergo omnes*) be sure to include a footnote defining the term in English the first time it appears

Use common sense in argument. Avoid absolute or extreme positions. Do not exaggerate. Plain facts, with their implications explained, can be far more powerful than adjectives and adverbs. Tell your story using the facts and the law to support your submissions. Write clearly what you want to communicate to the judges and to opposing counsel. Deal candidly and forthrightly with adverse authority and unfavorable facts. This is one of a lawyer's professional, ethical obligations. Do not try to defend the indefensible. Do not claim that the law is settled unless it is settled. The International Court of Justice is not bound by case law; you may argue that the facts and various legal developments warrant a new legal approach. Write with the attitude that you are helping the Court to solve a difficult legal problem. Be analytical. Protect your credibility.

Don't overlook procedural issues in the *Compromis*. The 2013 Malachi Gap *Compromis* noted the denial of applicant's request for a provisional measure from the I.C.J. Few students researched the Procedures of the International Court of Justice and what was required to obtain a provisional measure. Although there was no reference to the Rules of Procedure in the ILSA-provided legal materials, few students researched these Rules on their own. Instead, many teams simply jumped to an incorrect conclusion that the I.C.J. passed judgment on the risk of harm due to respondent's conduct in the Malachi Gap. There were, however, certain procedural requirements that the applicant did not satisfy that warranted the Court's denial, such as having a related case already filed with the I.C.J. and evidence of the risk of serious harm to respondent's conduct in the Gap.

In some situations, it might be useful to explain why the state you are representing has "standing" before the I.C.J. (e.g., in reference to Article 42 of the Articles on State Responsibility).

9. Once you have an initial draft, read it to someone who is not a lawyer (friend or family member) to gauge whether the arguments are logical, clear, and persuasive. Then go back through it to assure seamlessness of the team's reasoning and writing effort. Sharply edit the entire brief for consistency, clarity, conciseness, allegiance to fact, and understanding of the law and its implications. Inconsistency of legal argument is a common fault. Don't invoke a legal principle for one issue and then take the opposite legal position on another. Don't be repetitive. Resist the urge to quote excessively and to over-argue an issue, especially when arguing in the alternative. Keep your writing simple and non-wordy. As Strunk and White wrote in *The Elements of Style*, "vigorous writing is concise...this requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell." If your sentence can be interpreted in more than one way, rewrite it until it can be understood only as you intend. Jessup judges are amused by sentences that are ridiculous in or out of context. That does not help the teams. Review your drafts critically. Proofread! Proofread! One proofreader and one proofreading are simply not enough.

10. Layout. An obvious factor for a well-written memorial is its layout. Paragraph 6.6 of the Rules lists the eight required parts of a memorial. Paragraph 6.7 of the Rules sets out the information to be included on the

cover page. The document should look professional, well arranged, without typographical errors, misspellings, or redundant spaces between words, headings or text. Computer spell-check programs may be helpful, but sometimes introduce errors. Again: Proofread!

Since word count is limited for certain sections of the memorial (Subparagraph 6.12 of the Rules), avoid the temptation to leave out spaces between words to reduce word count. Manipulation of the word count is prohibited in the Rules. A team that omits spaces between words or abbreviations in citations where a space would normally occur using standard citation formats will be subject to penalties.

11. Be original and creative. Judges appreciate hearing innovative legal arguments that are well-reasoned. Don't plagiarize. Plagiarism is the act of appropriating the literary parts or sections of another's writing and passing them off as the product's of one's own mind. (Subparagraph 11.2 of the Rules) Such manipulation is subject to penalty. Clarity, consistency, and originality are key.

At the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia in the Krajisnik case (10 October 2007) reminded us:

“...the forcefulness and efficacy of an appeals brief submission does not hinge on the number of words used to support an argument but rather on the clarity and coherence of the argument, an endeavor aided more by succinct reference to legal and evidentiary issues requiring the Appeals Chamber's attention rather than by an excessive level of detail that may not bolster the cause of an efficient administration of justice.”

### **Examples of Memorial Writing from Jessup 2014 without Citations**

A poorly drafted legal argument:

“Ritania's conduct with respect to Excelsior Island Project complied in all respect (sic) with its obligation under international law and the terms of the Malachi Gap Treaty (A) and the landslide is force majeure therefore Ritania has no obligation to compensate Amalea (B).

“Ritania fulfilled its obligations under international law. According to Article 56 of the United Nations Convention on the Law of the Sea, Ritania

has the right to establish artificial island. And the construction process fully complied with the terms of the Malachi Gap Treaty. Moreover, Ritania fulfilled the cautiousness duty before established the island. Ritania prepared an E.I.A. for the Excelsior Island project. From the report of E.I.A., it showed no potential impacts for the dredging program on the waters of the Malachi Gap or the fish species living there. According to Art. 12(b) of the Malachi Gap Treaty, Ritania has a right to explore the natural resources of the seabed and subsoil.”

A better legal argument on the same issue:

“Under international custom, the obligation of due diligence requires an environmental impact assessment (“E.I.A.”) to be conducted when there are reasonable grounds to believe that activities under a State’s control may cause significant transboundary harm. A State must take a precautionary approach to the assessment, establishing that the activities are safe before it can approve them. Certain activities require an E.I.A. because they are presumed to be harmful. Dredging is one such activity under the United National Convention for the Law of the Sea (“U.N.C.L.O.S.”). Excelsior Island Gas & Power Limited’s (“E.I.G.P”) dredging required an E.I.A. not only because it was presumptively harmful, but also because the International League for Sustainable Aquaculture (“I.L.S.A.”) report provided reasonable grounds to believe that dredging would be environmentally harmful. The report, prepared by an international non-governmental organization with expertise in marine science, indicated that some harm from dredging was likely and catastrophic consequences were possible.

“Although international law does not specify fixed content for an E.I.A., an adequate E.I.A. must consider the nature and magnitude of the proposed development and its likely adverse impacts, to ensure that it is environmentally sound. Comparable regional and international standards are relevant. At minimum, an E.I.A. must evaluate the possible impact of the proposed activities on the persons, property, and environment of other States, and identify practical alternatives and risk-mitigating measures. This allows a State to determine the extent and nature of the risk involved in an activity, and preventive measures it should take.”

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