

# COMPROMIS ANALYSIS AND RESEARCH

ADVOCACY SKILLS LEGAL REASONING (INTERNATIONAL LAW MOOT COURTS)

## COMPROMIS ANALYSIS

What is **Compromis** ?

- hypothetical case involving topical issues of international law
  - limited set of facts concerning a dispute between two fictional states appearing before the International Court of Justice
  - analysis of the Compromis critical to other tasks in the competition
- mooted fact-patterns differ in length, complexity and detail

## READING THE COMPROMIS

### **First reading: Generalities**

- what types of governments are represented by the parties,
- what sort of history the two disputant states have with each other,
- how individuals noted in the Compromis fall within each government's bureaucracy,
- the general types of harm suffered by those who are claiming redress, etc.

### **Second Reading: Specifics. Organizational tools:**

- **Laws/Treaties** (a list of legal instruments; municipal law or regional agreements solely for the purpose of the competition)
- **Prayers for Relief** (a list of relevant facts for each Prayer for Relief)
- **Timeline** (quick-reference list of every major event)
- **People/Organizations** (a list of all individuals and organizations mentioned)
- **Statements**
- **Questions**

## COMPROMIS ANALYSIS

### **Third Reading: Prepare for research**

- prepare the set of notes dedicated to the issues to be researched
- pay attention to the word and phrases
  - Compromis („almost", „without knowing", „promptly", „efforts")
  - Prayers for Relief - examples:
    - People/ organizations note → particular terminology („responsibility", „immunity", „attributable", „injury") ?
    - Status of the people involved ?
    - Reference to particular legal instruments ?

## COMPROMIS ANALYSIS

- general sections, paragraphs
- the first few paragraphs – background information
  - Geographical location
  - Political system
  - Level of economic development (example, due diligence standard)
  - Population
- Facts most relevant to the case –balance of legal issues between the parties

## COMPROMIS ANALYSIS

- Small picture:
  - Who are the parties to the dispute ?
  - What are their recent actions which have raised the legal issues ?
  - What is being sought by the parties ?
- Big picture:
  - Historical relationship between parties
  - Timeline
  - Policy considerations and balancing exercises in which the parties must engage to meet its

## COMPROMIS ANALYSIS

### Major Topics Indicated by the Prayers for Relief

16. On 1 October 2015, the Esperyan government (...) filed a claim against Ionia before the ICJ requesting that the Court adjudge and declare:

- that Ionia breached freedom of navigation under Article 87 of the UNCLOS;
- that Ionia breached Article 33 of the 1951 Refugee Convention.

17. Ionia does not contest the jurisdiction of the Court. It does, however, question the admissibility of the claim. It requests the Court to adjudge and declare:

- that Esperya has no interest in relation to the facts alleged and thus lacks standing to bring a claim under either instrument relied upon;
- in any event, that the claim under UNCLOS cannot proceed in the absence of Oenotria, the flag state;
- in the alternative, that both of Esperya's claims should be rejected on the merits.

## COMPROMIS ANALYSIS

• 18. Furthermore, Ionia makes a counter-claim, and requests the Court to adjudge and declare:

- that the arrest and detention by Esperya of Ionia's captain, Mr Clark, is in breach of international law rules on immunity;
- that the domestic law of Esperya extending its criminal jurisdiction to this case is contrary to international law, notwithstanding the Convention against Torture.

• 19. Esperya does not contest the admissibility of the counter-claim, but requests the Court to dismiss it.

## COMPROMIS ANALYSIS

### The major topics raised by these Prayers for Relief are:

- Freedom of navigation (interference with foreign flagged vessel on the high seas)
  - Admissibility
    - „no interest“
    - absence of the flag State
  - Merits (breach of art. 87 UNCLOS, exception?)
- Non-refoulement principle (art. 33 Refugee Convention)
  - Admissibility („no interest“)
  - Merits
- Immunity of public official (Mr Clark's arrest and detention)
- Criminal jurisdiction (extra-territorial application of domestic legal order)

## COMPROMIS ANALYSIS

### Major Topics Indicated by the Prayers for Relief (24-27)

- 24. On 3 July 2016, **Twiga** filed an application against Pundamilia before the International Court of Justice. Twiga requests the Court to adjudge and declare that:
  - - By instituting proceedings against Mrs Fisi, Pundamilia breached the **immunity from jurisdiction and the inviolability** enjoyed by her under international law, notably the Vienna Convention on Diplomatic Relations and customary international law.
  - - By **searching and attaching the premises of the Twigan Cultural Centre** located at 22 Baobab Street in Savannah, which are the property of the Republic of Twiga and used for the purposes of its diplomatic mission in Pundamilia, Pundamilia breached its **obligations under international law**, notably the Vienna Convention on Diplomatic Relations and customary international law.

## COMPROMIS ANALYSIS

- 25. Twiga further requests the Court to **order Pundamilia to put an end to the ongoing proceedings against Mrs Fisi**, to recognize the status of the building located at 22 Baobab Street in Savannah as part of the premises of its **diplomatic mission** in Pundamilia and to ensure its protection as required by international law.
- 26. **Pundamilia** does not contest the jurisdiction of the Court or the admissibility of Twiga's claims, but requests the Court to dismiss them on the merits. In addition, it makes a counter-claim, and requests the Court to adjudge and declare that by **suspending the delivery of 10 military helicopters**, Twiga breached its obligations under **Article I of the Military Assistance Agreement**, and that no circumstance justifies that breach.
- 27. **Twiga** does not contest the admissibility of the counter-claim, but requests the Court to **dismiss it on the merits**.

## COMPROMIS ANALYSIS

### **The major topics raised by these Prayers for Relief are:**

- **Immunity from jurisdiction & inviolability accorded to family member** (Twigan ambassador's wife & Twigan Ministry of Defense's sister)
  - By instituting proceedings against Mrs Fisi
  - Order Pundamilia to put an end to the ongoing proceedings against Mrs Fisi
  - Pundamilia rqsts to dismiss claim on the merits
- **Legal status of Twigan Cultural Centre**
  - By searching & attaching the TCC
  - Property of the Republic of Twiga & Used for the purpose of diplomatic mission in Pundamilia
  - Order: to recognize TCC as a part of diplomatic mission & ensure protection
  - Pundamilia rqsts to dismiss claim on the merits
- **Breach of treaty obligation**
  - by suspending the delivery of 10 military helicopters [Article I of the Military Assistance Agreement]
  - Twiga rqsts to dismiss claim on the merits

## COMPROMIS ANALYSIS

- Recognize Deliberate Gaps and Ambiguities in the Facts
- Explore Reasonable Inferences. Examples of reasonable inferences (Jessup Guide):
  - Mr. Good was allowed to be a pilot, but he is actually a pirate (or some other type of criminal). It may be inferred that the screening process for the piloting program must be deficient
  - Under the piloting program, the Raglanian Royal Navy was supposed to monitor the progress of piloted vessels electronically. As soon as the vessel deviated from its course, the Royal Navy should have noticed and acted, but there is no evidence of action by the Navy for at least a day. It may be inferred that either the Navy's monitoring equipment is deficient, or the Navy failed to pay attention in this case.

## COMPROMIS ANALYSIS

- Use Facts and Events from the Real World with Caution
  - use the experience to make inferences about the facts or to accept inferences relating to real world matters (basic knowledge – rotten eggs example)
  - do not try to introduce facts from the real world where the existence of those facts cannot be proved (unchallengeable by the other side of the dispute; fall outside what judges are generally expected to know)

## RESEARCH

1. Starting the research: Compromis / case
  2. Article 38(1) of the Statute of the International Court of Justice (and hierarchy ?)
    - a) Treaties [UNTS]
    - b) Customary international law [elements of custom, evidence to prove or disprove]. Footnote from the Best Respondent's Memorial in support of customary norm:
- "3. See *High Seas Convention, supra note 1, Preamble; Case Concerning Delimitation of the Maritime Boundary of the Gulf of Maine Area (Can. v. US), 1984 I.C.J. 246, 294; Case Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 30; Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1990 I.C.J. 64, 72, (separate opinion of Judge Evensen); Case Concerning Passage through the Great Belt (Fin. v. Den.), 1991 I.C.J. 2, 13; Restatement (Third) of Foreign Relations Law of the United States, Part V, Introductory Note [hereinafter Restatement of Foreign Relations]."*

## RESEARCH

How to identify state practice and *opinio iuris*?

- diplomatic correspondence,
- policy statements and press releases by states,
- opinions of Ministry of Foreign Affairs (or other state government) legal advisors
- official rules and procedures adopted by national governments (for example, military manuals)

How to do it?

- websites of states' foreign ministries [policy statements, treaty's status]

US([www.state.gov](http://www.state.gov)), UK ([www.fco.gov.uk](http://www.fco.gov.uk)), Canada ([www.international.gc.ca](http://www.international.gc.ca)), France ([www.diplomatie.gouv.fr](http://www.diplomatie.gouv.fr)), China ([www.fmprc.gov.cn](http://www.fmprc.gov.cn)), India ([www.meaindia.nic.in/](http://www.meaindia.nic.in/)) and Russia ([www.mid.ru](http://www.mid.ru)).

## RESEARCH

- Research and advocacy organizations (Human Rights Watch, Amnesty International, International Committee of the Red Cross, International Law Association)
- International Law Commission
- Resolutions of international organizations, e.g. UNGA resolution ?
- Written submissions by states appearing in cases before the ICJ
- National legislation and judicial decisions

## RESEARCH

- Counter-argument to a claim of customary international law [„negative" evidence]
  - conflicting legal theories from qualified publicists
  - conflicting judicial decisions on the status of a principle as customary international law
  - persistent objectors
  - travaux-preparatoires
  - reservation to treaties

**RESEARCH****c) General principles of law**

- National legal order (legislation, judicial decisions)
- Bin Cheng's treatise, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 2006)

**d) Judicial decisions and Highly Qualified Publicists**

- Judicial decisions [subject matter of the case; international and national judicial bodies]
- Textbooks: Ian Brownlie, *Principles of Public International Law* (6th ed. 2003); Vaughan Lowe, *International Law* (Oxford, 2007); L. Oppenheim, *Oppenheim's International Law, Part 1 and 2* (Robert Jennings and Arthur Watts eds., 9th ed. 1992); Malcolm N. Shaw, *International Law* (5th ed. 2003)

**RESEARCH**

- The Hague Academy of International Law, *Receuil des Cours*
- Max Planck Encyclopedia on Public International Law
- Restatement of the Law Third, *Foreign Relations of the United States* (American Law Institute)
- Annual Yearbooks of International Law (British, Netherlands, *Annuaire Français de Droit International*)
- Online database LexisNexis, Westlaw, or HeinOnline
- International Law Commission