

# ORAL PLEADINGS

## ORAL ROUNDS – BASICS

- ▶ oral match:
  - ▶ consists of 90 minutes of argument
  - ▶ between two teams
    - ▶ one team arguing the side of the Applicant,
    - ▶ the other team arguing the side of the Respondent.
  - ▶ each team has 45 minutes to make its case, but only two members of a team can argue in any given match (first oralist, second oralist, with time reserved for rebuttal or surrebuttal)
- ▶ A1 -> A2 -> R1 -> R2 -> Rebuttal -> Surrebuttal

## OPPONENTS MEMORIALS

- ▶ Opponents' memorials are received in advance
  - ▶ a team will always learn something new about the problem while reading competitor's memorials:
    - ▶ new arguments
    - ▶ important cases and articles that a team had not previously considered
    - ▶ Applicant memorial: role of Respondent
- ▶ Memorials from the opposing team will also give you insight into your opponent's style and substance e.g.
  - ▶ unsophisticated – the team was unable or unwilling to conduct much research
  - ▶ team relies heavily upon sources from a particular part of the world (or a particular area of international law) – team has more expertise in that area and less in others

## DIVIDING THE ARGUMENTS

- ▶ In most problems there are four **Prayers for Relief**; hence teams will assign
  - ▶ the first two claims in Applicant's Prayer for Relief to the first Applicant oralist
  - ▶ the second two Prayers for Relief will be addressed by the second Applicant oralist
  - ▶ Likewise, the first Respondent will address the first two claims in Respondent's Prayer for Relief, and the second Respondent will address the second two claims
- ▶ The order from the problem should be generally preserved

## DIVIDING SPEAKING TIME

- ▶ Rule in most competitions:
  - ▶ Each team has 45 minutes to make its case
  - ▶ This includes time reserved for rebuttal (when Applicant) or surrebuttal (when Respondent)
- ▶ Allocation of the time subject to the rules of particular competition, example:
  - ▶ No more than ten minutes for rebuttal or surrebuttal
  - ▶ No single oralist may argue for more than 25 minutes, including rebuttal or surrebuttal
  - ▶ [The same rules applicable during the seminar for teams arguing before ICJ]
- ▶ Traditionally: 20 minutes for the first oralist, 20 minutes for the second oralist, and 5 minutes for rebuttal or surrebuttal

## ORAL PLEADINGS – BASIC OVERVIEW

- ▶ **1. BAILIFF announces the entry of the judges into the courtroom** by asking all present to rise: “All rise. The International Court of Justice is now in session. President [NAME] and the Honorable Judges [NAME] and [NAME] presiding.”
- ◎ **2. APPLICANT /first oralist/**
  - ◎ President will tell the first [A oralist to begin → the first Applicant introduces himself and Co-Agent
  - ◎ summarizes the aspects of the argument that each Agent will address
  - ◎ states the allocation of time
  - ◎ (may be asked by President to present summary of facts)
  - ◎ than, should start oral argument

▶ **3. APPLICANT /second oralist/**

- ▶ start with a brief introduction (to outline the submissions that they will be making)
- ▶ start oral argument
- ▶ concludes with submission to the Court

▶ **4. RESPONDENT**

- ▶ The first [R] states that they appear for the Respondent, introduces himself and his Co-Agent, then summarize the aspects of the argument that each Agent will address and state the allocation of time → starts oral argumentation
- ▶ The second [R]: a brief introduction outlining the submission → oral argumentation → concludes with prayers for relief

◎ **5. REBUTTAL**

- ◎ one of the two [A] oralists should stand at the podium, wait to be recognized, and present Applicant's rebuttal

◎ **6. SURREBUTTAL**

- ◎ one of the two [R] oralists should move to the podium and present surrebuttal
- ◎ When [R]'s surrebuttal is concluded, the oral match is completed

- ◎ **7. BAILIFF** announces: "The Honourable Court is now adjourned. Will the teams and audience please leave the room while the Judges deliberate"

## STYLE AND STRUCTURE

- ◎ **Terms of art** – unique terminology, inspired by or taken from the terminology used by the ICJ
  - ▶ Judges: referred to as “Your Excellencies” (For example, “As His Excellency has already noted, this point is correct.”)
  - ▶ The President: referred to as “Madam President” or “Mister President,” as appropriate
  - ▶ Oralists: referred to as Agents; teammate referred to as Co-Agent; opponents – as “Agents for Respondent” or “Agents for Applicant”.

- ◎ Pleading style and attire
  - ▶ important to keep in mind the criteria and qualities the judges will be looking for in oral rounds:
    - ▶ knowledge of the law;
    - ▶ application of law to the facts;
    - ▶ ingenuity and ability to answer questions;
    - ▶ style, poise, courtesy and demeanor;
    - ▶ time management and organization

## GENERAL NOTES ON ARGUMENTATION

### ◎ The role of Applicant

- ◎ crucial to decide **whether and how to preemptively “respond” to the Respondent’s arguments** before they are presented
- ◎ [A] deals with its own arguments
- ◎ [A] should anticipate and address the major [R]’s counter-arguments (sufficient time to do so and without detracting from the Applicant’s main pleadings)
- ◎ the best middle path – be aware of the [R]’s likely arguments and refer to them, and refute them, in the context of an answer to a judge’s question

### ◎ The role of Respondent

- ◎ the primary purpose of [R]’s main pleading is to respond
- ◎ argument will change considerably from one match to the next [will likely have to modify its argument to respond to the issues that [A] has addressed]
- ◎ example:
  - ◎ The [A] based its entire claim upon an interpretation of the Articles on State Responsibility
  - ◎ Respondent should modify its argument to address the Articles on State Responsibility, rather than sticking to a prepared speech about some other source of law (violation of a treaty on the basis of VCLT)

- ◉ **Rebuttal and surrebuttal**

- ◉ Rebuttal

- ◉ [A] refutes a limited number of points raised by the Respondent

- ◉ structure

- ◉ no new arguments may be raised during rebuttal

- ◉ Surrebuttal

- ◉ [R] responds to the Applicant's rebuttal

- ◉ [R] may not raise legal issues on surrebuttal that were not raised during Applicant's rebuttal

- ◉ Judges are entitled to ask questions during the rebuttal and surrebuttal

## ORAL ROUNDS

## INTRODUCTION

- ▶ Introduction (3:31)
- ▶ Structure:
  - ⦿ “Good morning, Your Excellencies.
  - ⦿ May it please the Court, my name is Andrew Adams, and I am Agent for the Applicant, the Republic of Andova. My Co-Agent is Beth Bilbo. **[presentation of the Applicant’s team]**
  - ⦿ I will be addressing the first two issues concerning state responsibility, and Ms. Bilbo will address the second two issues concerning international environmental law. **[structure]**
  - ⦿ Both my Co-Agent and I will take 20 minutes each for our presentations, and Applicant has reserved five minutes for rebuttal.” **[allocation of the time]**

## STATEMENT OF FACTS

- ⦿ the first Applicant oralist should offer to present a summary of the facts from the Problem [depends upon the competition]
- ⦿ necessary to prepare a concise summary of the key facts of the case
  - ⦿ focusing in particular on those facts which will become relevant in your legal argument (but without ignoring facts that are problematic for the Applicants)
- ⦿ as a general rule, if your summary of the facts takes more than a minute, it is too long

## ROAD MAP OF ISSUES

- ▶ Road map (4:05-4:38)
  - ◉ purpose: inform the judges of the legal basis of the claim and to give them an outline of the argumentation
  - ◉ explain to the judges precisely how the issues will be addressed
  - ◉ describe the relationship between different arguments
    - ◉ Example: “First, Andova did not support the terrorists. Second, even if this Court finds that Andova supported the terrorists, Andova did not know that they were terrorists.”

- ▶ method of presenting oral argument „IRAC”
  - ▶ present the Issue, identify the Rule, describe the Application of the rule, and state the Conclusion
  - ▶ clear, concise and logical
- ▶ state the legal basis for your claim with precision
  - ▶ Example: ICJ → rely upon legal bases described in Article 38(1) of the ICJ Statute
  - ▶ “Your Excellencies, Article 16 of the International Covenant on Civil and Political Rights states, ‘...’ In this case, Respondent has breached this obligation because ....”

- ▶ a team's oral arguments are not limited by its memorial
- ▶ team may alter the arguments set out in your memorial or decline to make them entirely
- ▶ Possible explanation if a judge asks questions:
  - ▶ Why you are not making a particular argument  
→ “[u]pon further research, we determined that there was a stronger argument to be made in the limited time available during oral arguments.”
  - ▶ Explain an obvious contradiction with the memorial → “[a]fter further research, we determined that that argument was legally imprecise.”

## FIRST APPLICANT

- ▶ **Main pleading**
  - ▶ a presentation of the law and facts to support the Applicant's legal conclusion.
  - ▶ remind judges about the outline of argument → example: “Yes, Your Excellency. That question leads to Applicant's second argument in support of this claim. Namely,…”
  - ▶ the first oralist will often be asked a question relating to an argument to be made by his or her Co-Agent:
    - ▶ briefly answer the question, and politely inform the judge that your Co-Agent will address the question more fully
    - ▶ purpose: test the understanding of Co-Agent's arguments or to demonstrate an apparent conflict between your argument and your Co-Agent's

## FIRST APPLICANT

- Pleadings (4:40-5:50)
- Transition to the second issue
  - ▶ each oralist typically addresses two claims
    - ▶ at same point: necessary to conclude discussion of the first issue, and move to the second issue
    - ▶ introduce the second issue, explain precisely how you intend to address it and then proceed to your main pleading
  - ▶ Lack of time
    - ▶ “Your Excellencies, I see that time is short. If I might, I would like now to move to my second issue, namely...”

## FIRST APPLICANT

- Conclusions
  - prepare and memorize a concise conclusion that will last no longer than 45 seconds
  - as a back-up: an even shorter conclusion, no longer than 10 seconds “For all of the foregoing reasons, Applicant respectfully requests that this court find that [FIRST CONCLUSION] and that [SECOND CONCLUSION].”

## SECOND APPLICANT

- ▶ Main pleadings
  - ▶ extra duty of paying careful attention to the first oralist's pleadings
    - ▶ if the first oralist was having difficulty with a particular question, the judges may ask the second oralist to deal with that question or issue
    - ▶ the second oralist must be careful not to contradict any arguments made by the first oralist (the Problem is often written to create apparent conflicts between the two oralists' arguments)
- ▶ Conclusions – should include a statement of the Prayer for Relief

## QUESTIONS FROM JUDGES

- ▶ Role of questions
  - ▶ to test how well you know the facts or the law
  - ▶ to see how able you are to return to the structure of your argument, as reflected in your “road map”
- ▶ Questions from judges should be expected and should be embraced as one of the most challenging aspects of the competition

► **Answering questions**

- if a judge asks a question that calls for a “yes” or “no” answer, then the first word of your answer should be “yes” or “no”
- if the question concerns a controversial issue:
  - qualify a response by responding “Yes, Your Excellency, but...” and then link the qualification back to the main structure of the argument and provide the relevant legal or factual support for the qualified answer

► **Refer to the main structure of the outline**

- ability to move from issue to issue while maintaining the integrity of the outline of what was presented at the beginning of the pleadings
- example: “Yes, Your Excellency. Article 117 of the treaty sets a territorial limit of 200 miles on the Applicant. This relates directly to my second argument, that Applicant has breached that treaty by attempting to exercise jurisdiction outside its territorial limit.”

▶ **Simultaneous questions from judges**

- ▶ listen carefully to each question, reformulate the questions in a clearly organized and logical plan of response, and then proceed with your response
- ▶ For example, if all three judges have asked successive and/or overlapping questions, you might say “Your Excellencies, given the several questions and comments from the Court, if I may, I will first respond to the question from Madam President with respect to state responsibility, the answer to which is directly related to the comments by Your Excellencies as to whether Mr. X was acting on behalf of the state.”

◎ **Question containing multiple parts**

- ◎ Example of the answer: “Your Excellency’s question raises three key issues which I intend to answer successively: first, what is the relevant legal standard of state responsibility applicable in these circumstances; second, did the Applicant violate that standard; and third, is there some exception in international law that might excuse Applicant’s behavior?”
- ◎ **Questions about the law / facts**
  - ◎ explicitly cite the source of law / facts to demonstrate your command of the argument
  - ◎ Example: “No, Your Excellency. According to Article 47 of the treaty, the obligation is on the accusing State to prove each aspect of its claim.”

- ▶ question about the facts of the case, directly cite the relevant paragraph(s) in the problem
- ▶ example: “Yes, Your Excellency. According to paragraph 27 of the Compromis, Mr. Smith returned to his home at 8:00 in the morning.”
- ▶ citing law or facts - Jessup Guide

◎ **Incomprehensible question**

- ◎ ask for clarification
- ◎ example, “Your Excellency, I’m afraid I do not understand your question—could you please clarify what you mean?”. If a judge asks you about a case you have not read, it is best simply to admit it. For example, “Your Excellency, I’m afraid I am not familiar with that case.”

- ▶ Key points while answering the questions:
  - ▶ Answer the question directly and briefly, to allow the judges to ask follow-up questions if they wish
  - ▶ Demonstrate that you understand the relevance of the question to your argument
  - ▶ Demonstrate that you know and understand the law and facts applicable to your answer
  - ▶ Return to your argument

## RESPONDENT

- ▶ Firstly, Respondent addresses the major legal and factual arguments raised by Applicant
  - ▶ by contesting the facts and the law relied upon by Applicant,
  - ▶ or demonstrating that the Applicant's argument does no harm to Respondent's case
- ▶ whenever possible, Respondents should specifically refer to Applicant's arguments when presenting the arguments
- ▶ incorrect Applicant's arguments

## RESPONDENT

- ▶ the most common tactic is the demurrer
  - ▶ Example: "Your Excellency, Applicant argued that Respondent may not rely upon the International Covenant on Civil and Political Rights because Respondent is not a party to that Convention. However, Respondent does not base any of its arguments upon that Convention, and relies instead upon the Convention Against Torture."
- ▶ correct or uncontroversial Applicant's arguments → "As Applicant has already argued, it is uncontested that 43 people were trapped in the building for two days. Respondent does not disagree with this characterization."
- ▶ Secondly, Respondent may bring up new legal and factual arguments in its main pleading

## REBUTTAL AND SURREBUTTAL

- ▶ Rebuttal
  - ▶ responsive to Respondent's main pleading
  - ▶ Applicant may not
    - ▶ introduce new substantive arguments on rebuttal
    - ▶ nor may it revisit its own arguments that Respondent did not address
- ▶ Surebuttal
  - ▶ Respondent may only respond to Applicant's rebuttal
  - ▶ Respondent may not
    - ▶ introduce new points,
    - ▶ nor may it return to points raised by Applicant or Respondent in their main pleadings

## REBUTTAL AND SURREBUTTAL

- ◎ REBUTTAL – the usual format of a good rebuttal
  - ◎ a small number of very short arguments
  - ◎ each argument is directly responsive to a specific point raised by Respondent in its arguments
  - ◎ begin by telling the judges how many points Applicant will raise: **"Your Excellencies, Applicant raises three points on rebuttal. First..."**
  - ◎ begin each point by demonstrating that the point is connected to Respondent's argument: "First, Respondent stated that the Iran Hostages case stands for the proposition that a State may broadly endorse the actions of private actors. This is incorrect."

## **REBUTTAL AND SURREBUTTAL**

### ▶ SURREBUTTAL

- ▶ proceeds in the same fashion, except that the issues are limited to those specifically raised by Applicant during its rebuttal
- ▶ “re-correct“ the “corrections” that Applicant presented during rebuttal or explain why Applicant's corrections are irrelevant or misguided

### ▶ Each rebuttal and surrebuttal

- ▶ should satisfy three criteria:
  - ▶ 1) your opponent is clearly wrong
  - ▶ 2) you can quickly explain why your opponent is wrong
  - ▶ 3) the point is material to the outcome of the case