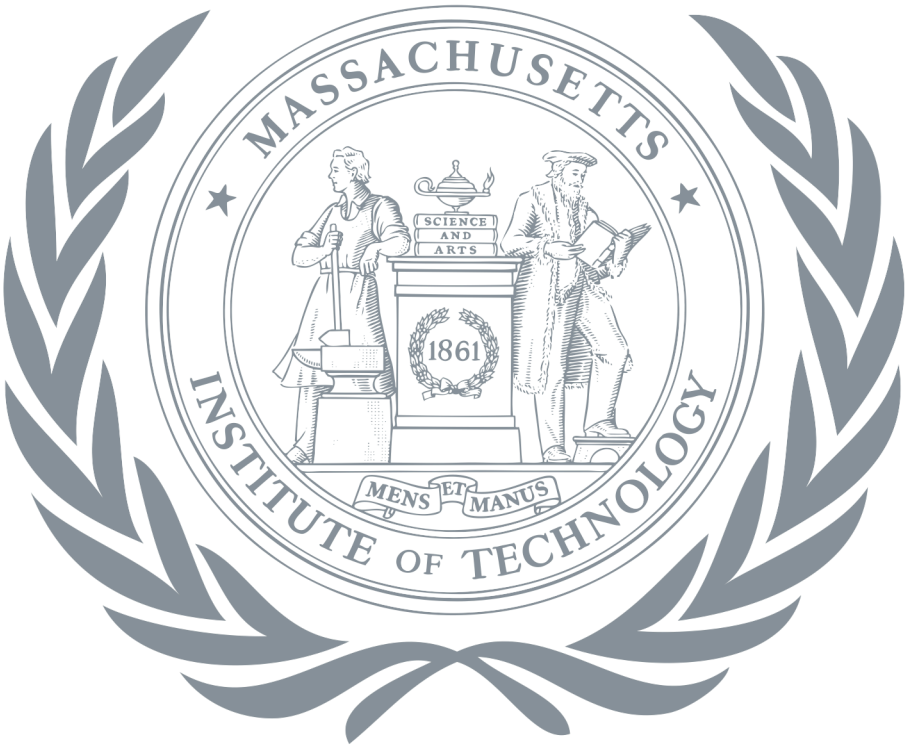

ICJ

MITMUNC 2014

Dear Delegates,

I am Moriel Levy and I will be ICJ President for MITMUNC 2014. I am a freshman at MIT, majoring in Chemical Engineering. In high school I went to 14 MUN conferences including judging and being the President in ICJ.

ICJ is an amazing experience. We thoroughly analyze a single case over three days. Judges are collaborators: each judge presents their opinion but is open to differing analysis of the international law. Advocates are researchers, who bring to the judges their various points of evidence and their own analysis of the case. Everyone is constantly engaged and intellectually stimulated. If you have done ICJ before, you know this and so you're coming back. If this is your first time, I am so excited to introduce you to this simulation.

As a judge, you must be ready to be open and unbiased. You must read the background guide and the Brief before the conference. You can read around the case a little, but you **must not** look up the actual ICJ judgment.

Advocates must be thoroughly prepared. As soon as you have your assignment, you must start preparing. This process is outlined in the Brief. Your role will include extensive reading, organizing evidence and witnesses and writing several documents. This is the most challenging and most rewarding ICJ role. It is a role that feeds off a passion and curiosity of international law.

In ICJ we deal with law and not policy. Judgments are binding. Discussion is cooperative and delves into the details of the case. I personally believe the ICJ is the most stimulating and thought-provoking of any MUN exercise. Get pumped.

Yours,

Moriel Levy

MITMUNC ICJ BRIEF

A brief written by Moriel Levy on trial procedure for a Simulation of the International Court of Justice, based on a brief written on trial procedure for the Model International Court of Justice at The Hague International Model United Nations, by Robert S. Stern.

I. Burden of Proof

The *Burden of Proof* used in the MITMUNC ICJ is *Preponderance of the Evidence*. This is the lowest burden possible, and it means that the Applicant must persuade a simple majority of the judges that its position carries its weight, or is persuasive by at least 51 %. Each piece of evidence is weighted in such a manner, where the judges ask "Is it persuasive by 51%?" or "Is it more convincing than not?" Also, each piece of evidence may carry different weighting because of its **authenticity**, **reliability**, **truth** and **relevance**. The totality of the evidence is weighed at the end of the case to determine whether the burden has been met.

As the Applicant party has the ultimate burden of proof, if the burden is met, the Applicant wins. If it is not met, the Applicant loses. That is, if the evidence supports the case so that it is 51% convincing, the burden has been met and the Applicant wins, and vice versa.

II. Before the Conference

Each participant should read the International Court of Justice RULES OF THE COURT[1], most importantly Articles 54 through 78. The procedure at the MITMUNC ICJ is based on this document. Whenever there is a discrepancy between those rules and the present brief, the brief is preponderant and conveys the MITMUNC ICJ practice. Each participant would benefit from reading about the ICJ, its history and its place in international law. Furthermore, both judges and advocates should read through this whole Brief and be comfortable with its content. The President and Vice-President should be contacted regarding questions of procedure, research and substance of the case.

i. Stipulations

Together, the two advocate teams must prepare a set of *stipulations*. Stipulations are matters of fact and of law that both sides agree to before the case is presented. These are presented as a single document, stating: "The parties stipulate that: (1)...,(2)...,etc.". This will be submitted to the Executive Team by the date specified on the list of deadlines. These deadlines are included in an Appendix to this document.

ii. Memoranda

Each advocate team will prepare a short written *Memorandum of Points and Authorities*. This is a document presenting the party's view of the pertinent facts and legal principles as espoused by its advocates. It should present a party's position, the facts and points of law to be applied (citations may be included), though it need not give away trial strategies.

The Memorandum should be a minimum of 1,000 words. It will be submitted to the Executive Team by the date specified on the list of deadlines.

iii. Witness Preparation

At the MITMUNC ICJ, the advocates may prepare any delegate to be a witness in the capacity they choose. This includes as

eyewitnesses, experts, officials, authors of a piece of evidence, or another capacity the advocates deem relevant, subject to approval by the Executive Team. Advocates should be prepared to give a justification for the use of the witness, and the Executive Team has the right to make a final decision on the relevance, and therefore the use, of any witness. These witnesses need to be chosen and contacted well in advance of the conference, and a witness list provided to the Executive Team by the specified deadline. This list should include contact information for the witness, the chosen capacity of the witness and a brief summary of their intended testimony. Each Counsel may present up to five witnesses. Advocates should thoroughly prepare the witnesses before the conference. The witnesses should be aware of the questions that the advocate intends to ask on direct examination, what answers are expected and what questions the witness should expect on cross-examination. Advocates should bear in mind that the demeanor and authenticity of the witness is important in determining the weight the testimony is given by the judges. For these purposes, witnesses **must** testify from memory, i.e. they may not have written notes during their testimony. The details of direct and cross-examination are explained in the 'Witness Testimony' section of this Brief. Furthermore, before the conference, each counsel has the right to contact and interview the witnesses of their opposing counsel. This should be done after the deadline for witness preparation. The witnesses may decline to be interviewed by opposing council. However, the judges may take that into consideration when giving weight and credibility to their evidence.

Most importantly, witnesses must not invent facts or skew the truth, and advocates must keep this in mind when preparing their witnesses.

iv. Judges' Preparation

Judges are required to read all material sent to them by the MITMUNC ICJ, and are free to read about the issue, but as they do so must remain objective and unbiased. Judges **must refrain** from reading the judgments from the original ICJ case, to prevent pre-judgment and therefore an unfair case. Furthermore, any separate material or communication presented by the advocates or witnesses to a judge should not be entertained.

III. The Courtroom Proceedings

Judges will be addressed as "Judge (*name*)" or "Your Honor". Advocates will be addressed as "Counsel", as in "Counsel for (*country*)".

i. Body of the Case

Each advocate team has three hours to present its case, including up to one hour of cross-examination by the opposing counsel. It is key that this presentation is well organized. After the opening statement, the evidence, which is the body of the case, is presented in a rational and intelligible order, building up to the conclusion.

a. Opening Statement

Each advocate team has fifteen minutes to present its opening statement. This tells the Court what the advocates intend to show/prove in the presentation of the case. It should also include the "*prayer*" of the party, i.e. the judgment requested by the advocates. The Applicant presents the opening statement first, and the Respondent may choose to present its statement immediately after, or wait until the Applicant has rested its case. This statement should be presented by one member of the advocate team.

b. Presentation of Evidence

The presentation of evidence during the trial is governed by principles called '*rules of evidence*'. Judges balance the evidence, weighing whether the trial would be fairer with or without a piece of evidence in question. Two types of evidence are presented at the MITMUNC ICJ, namely *real evidence* and *witness testimony*. First the stipulations are entered into evidence, followed by the presentation of evidence by each advocate team.

The authenticity, reliability, truth, and relevancy of the evidence are what are being determined by the judges as the evidence is presented.

Real Evidence

Real evidence consists of material of any kind. These are presented as follows:

1. *Marking*: the Registrar marks the piece of evidence in question. Moving party's evidence is marked in numbers, and responding party's evidence is marked in letters, e.g., Applicant's "1" and Respondent's "A".

1.A Counsel asks that a piece of evidence be marked and must then go on to authenticate that piece of evidence, i.e. establish the writer, maker or source of the evidence. For reasons of time, it will not be necessary to present witnesses to authenticate each piece of evidence, though this should not limit the advocates in choosing the writer or maker of a piece of evidence as one of their witnesses giving testimony. Advocate teams may present up to 15 pieces of evidence.

Advocates should note that the role of the Judges is to determine the **authenticity**, **reliability**, **truth** and **relevance** of evidence, and thereby give it a weight. This should be kept in mind when choosing, presenting and authenticating evidence.

2. *Cross-examination*: The opposing advocate team may present a cross-examination of a piece of evidence showing that the item is not what it purports to be, or that it shows bias. This may lead to the item not being admitted into evidence by the judges, or if it is, given little weight. Furthermore, if the knowledge or expertise the evidence is attempting to establish is weak, it may also be given very little weight.

3. *Admission*: Before the Judges' Questions, each party presenting real evidence asks the Court to have their evidence admitted, piece by piece. Opposing counsel may object on the grounds of authenticity, reliability, accuracy, and/or relevance. Reliability or accuracy usually go to the weight a piece of evidence will be given. Doubts as to the authenticity and relevance are objections that may lead the judges to keep evidence from being admitted. Note that a judge who feels that he/she would give certain evidence undue weight or would be greatly prejudiced by seeing or hearing it, would not allow that evidence to be presented.

<u>To note, regarding real evidence:</u>

The more authors saying the same thing, or the more credible the source, the more weight the evidence in publications can be given.

The pleadings (Application and Response) from the actual ICJ are each party's position in the case, and are thus not evidence

Any supplemental material for a case presented to the actual ICJ is not evidence unless an advocate attempts to place it into evidence, using the rules stated above.

Some facts or information are common knowledge, e.g. today's date. Rather than having to go through the process of authentication, direct testimony, cross-examination, and so forth, the court may take "*Judicial Notice*" of the fact, document, decision, or whatever information is in question.

The statements of the advocates are not evidence. They present facts and law to the judges for their consideration and object to the admission of improper evidence.

Advocates may not comment on the evidence or argue their case until the *Closing Argument*. That is, they may not discuss what the evidence purports to say, infers or implies. The presentation of evidence is used only to literally explain what the evidence says.

Witness Testimony

Testimony is the statement of a competent witness. This testimony proceeds as follows:

Direct Examination: At this stage, the advocate team presenting its case questions its own witnesses. The advocate cannot ask **leading** questions*. Leading questions* suggest the answer by the nature of the question, for example "You saw him, didn't you?." The exception to this is if the witness is established as an expert. The court decides if a witness is an expert by engaging in a '*voir dire*', i.e. asking the witness specific questions about his/her expertise in the field, including his/her education, years of practice, publications and number of times used as an expert witness.

In no case can the advocate ask the witness a question to which the expected answer would be ***hearsay***. A statement will be considered hearsay if it is: (i) an assertive statement (ii) made by an out-of-court declarant; (iii) offered to prove the truth of the matter asserted therein[2]. For example, Franziscus testifies that he spoke to Joana at the electronics store on Saturday, and she said, "I'm going to steal an iPod." If Joana is on trial for stealing an iPod and this statement is being used to establish the fact she stole the iPod, it is hearsay. If Joana is on trial for murdering someone in the parking lot of the electronics store, and Franziscus's testimony is being used to establish her presence in the vicinity of the parking lot that day, then it is not hearsay.

Cross Examination: At this stage, the opposing Counsel questions the witness. It is their aim to create a dispute about the witness's statements, and/or to place the witness's credibility (believability) into question. The questions on cross-examination cannot exceed the scope of the direct examination. They must relate to the questions asked on direct examination. Advocates cannot ask the witness hearsay questions, but may ask leading questions.

Judges' Questions: At any time during the testimony of a witness, a judge, subject to the approval of the President(s), may ask a question of the witness. However, rather than interfere with the flow of testimony, it is prudent for judges to wait until all direct testimony and cross-examination of a witness are completed, at which time judges will have the opportunity to ask questions of the witness.

The order of the questioning is: direct, cross, *re-direct*, *re-cross*, continued until there are no further questions. At this point, judges' questions are entertained. The advocates

then have the opportunity to address further direct and cross-questions, until there are no further questions, or as time allows. Only one advocate from each team should question any one witness.

As with real evidence, witness testimony is weighted according to the **authenticity**, **reliability**, **truth** and **relevance** of the evidence. This means that the credibility and demeanor of the witness is important in deciding on the weight of the evidence, something that should be kept in mind by both judges and advocates.

c. Rebuttal

Following the presentation of evidence by each party, the advocate teams move to the *rebuttal* portion of their cases. At this stage, no new evidence is presented, but witnesses and documentation may be admitted into evidence to "rebut" evidence presented previously by opposing counsel. The same rules of evidence presentation apply and each advocate team has up to 30 minutes to present their rebuttal, not including cross-examination.

d. Judges' review of evidence

After rebuttal, each piece of marked evidence is submitted to the judges by counsel for admission into evidence, subject to objection by opposing counsel. The judges then meet *in camera* to review the evidence admitted. Each judge is given one or two pieces of evidence to study and report/summarize his/her findings regarding those pieces of evidence to the entire body of judges.

e. Judges' questions

Judges then have the opportunity to question the advocates. These questions clarify issues, facts and points of law. Each judge will ask questions in turn. The questions should be addressed to one advocate or another, referring to them as "advocate (or counsel) for the Applicant" or "advocate (or counsel) for the Respondent" .The judges should act professionally when asking questions and not take on an adversarial role. This question sessions last approximately one hour.

ii. Closing Arguments

In the Closing Argument, the advocate teams have the opportunity to argue their case. They bring everything together and argue what it means, says or concludes. At this point they may comment on evidence, discuss its inferences and implications and argue the facts, the law and the case. Usually, the advocates state what they think the issues are, what the answers to those issues are, and what the judgment should be. They must re-state their "prayer". If damages are involved, the advocates state the amount(s) they think the Court should award, supporting this with proof. However, at MITMUNC, the Court can decide that a party is liable for damages, and leave the value of these damages to be determined at a later time.

Each team has 30 minutes to present its Closing Argument. The Applicant party goes first, but can reserve an amount of time for the end, making the order Applicant, Respondent, Applicant. Both members of an advocate team may share in the presentation of the Closing Argument.

iii. Deliberation

Deliberation by the judges is the final step in the case. The advocates are not in the room during deliberations, and no further evidence can be taken. Deliberations are closed to the public.

The first step in the deliberation is to determine the issues that must be decided on before a decision can be reached. The issues are listed on a large piece of paper. The list

usually includes 5-10 issues. Each issue is discussed and determined in turn. The Court then reaches a verdict. This process takes at least three hours.

A judgment is then written by a committee of four or five judges who present the judgment to the remaining judges for review and correction. This process may last up to two hours.

There is often more than one judgment. The one with the most votes is the "*Majority Opinion*". This constitutes the Court's ruling and is the judgment that will be read in the Closing Ceremony of the conference. Judges who agree with the decision but differ on the reasons why write a "*Separate, But Concurring Opinion*". Judges who arrive at a different decision and are in the minority write a "*Dissenting Opinion*" and judges who dissent, but differ on the reasons why, write a "*Separate, And Dissenting Opinion*."

IV. Role of the Executive Team

In the MITMUNC ICJ, the primary role of the officers (President and Vice-President) is to lead the trial and deliberation and ensure that correct procedure is followed. To perform this role they have the following powers:

- Setting deadlines for submission of pre-conference documents
- Deciding on the relevance and use of a witness
- Deciding on consequences for lateness or inappropriate behavior by those in the courtroom
- Choosing the time allowed for each section of the case
- Ruling on objections to leading questions and hearsay (though consulting other judges on complex matters)

Officers at MITMUNC will not serve as judges for the case.

The primary role of the Registrar is to organize the real and testimonial evidence to assure the smooth running of the case. The Registrar marks and keeps the real evidence and coordinates the presence of the witnesses. The Registrar also aids advocates in gathering evidence during the research stage. At MITMUNC, the role of the Registrar will be filled by the President and Vice-President.

V. Additional Notes for Advocates

Communication

- Co-counsels should communicate frequently and early on devise a plan to present their case, dividing up responsibilities between them.
- Opposing counsels should also communicate often to minimize issues and maximize stipulations.

Preparation

- The preparation required prior to the ICJ must be extensive, and it is essential to the program. Often, it is not the brightest advocate who "wins" a case, but the one who is the best prepared. Said another way, a thoroughly prepared advocate never really "loses" a case.
- There are specific deadlines that the advocates should meet in submitting their preparation material. These will be provided by the Executive Team well before the conference.
- Witnesses should be prepared long before the conference.
- Opposing Counsel witnesses should be interviewed before the conference so that advocates can get to the conference fully prepared

Tactics

· Advocates should not make assertions or promises to the judges that they cannot keep. The opposing counsel will certainly remind the judges later on of promises made in the opening statement that were not kept.

· Often the Applicant (moving party) is specific in what they want and how they present their case, making it clear and concise, not muddled by the opposing counsel. The Respondent takes a 'kitchen sink' approach, throwing in everything they can, confusing issues and preventing the Applicant from being clear, concise and focused. These tactics are not appropriate for every case, and both require skill, appropriate behavior and proper legal presentation. Careful consideration should be put into the tactic chosen by the advocate team.

· In direct examination, it is important to be careful to avoid hearsay and leading questions (unless the witness is an expert, then leading questions can be asked). It can make the testimony seem week if the questions are constantly 'out of order'.

· In cross-examination, leading questions may be asked. These can skillfully be used to tell the witness what the advocate wants him/her to say, directing the answers and providing questions in a 'yes' or 'no' answer format, e.g. "You were lying when you said you saw the defendant in the store, weren't you?" "Isn't it true that the person you saw was not the defendant, but someone else?". Most, if not all, cross-examination questions *should* be leading, but hearsay must be avoided.

· Advocates should try to reinforce the credibility of their witnesses for truth and accuracy, while attempting to establish that the credibility of certain opposing witnesses is poor.

· Witnesses should not be asked questions to which the advocate does not know the answer, nor should they be asked 'why?' nor should advocates argue with a witness.

· It is a wise advocate who knows when to say either "no further questions," or even "no questions". Strategy and timing are very important.

And finally;

· *Never* take anything personally

· *Never* 'hit an opponent below the belt'

· *Always* act professionally.

VI. Additional Notes for Judges

The role of a judge is to adjudicate the case based on everything that has been heard and presented only and exclusively during the proceedings, and to ultimately provide a verdict. Judges at MITMUNC ICJ should adhere to the following procedures and guidelines throughout the course of the conference:

1. ***Never*** pre-judge the case! A judge must remain unbiased and objective throughout the proceedings as much as possible. One cannot determine the case properly until all of the evidence is presented and all of the arguments have been heard, and so a decision should not be made until the judges deliberate. In fact, a judge may even change his/her mind several times during deliberation.

2. A judge ***must*** take copious notes of the proceedings. One cannot remember everything that is presented and so it is the responsibility of each judge to take note of the points and arguments of the advocates. Notes should cover the following areas:

a. Basic points made by the advocates,

b. Significant points that are raised,

c. Validity and strength of arguments of evidence and witnesses,

d. Questions for the advocates,
e. The issues that are crucial to the case (i.e. the issues that should be discussed during deliberation)

3. Judges are bound to follow the general principles of law. One cannot bend the rules in order to appease each party. A decision ***must*** be based on written and precedent law.

4. In the ICJ, judges have a dual role. Normally, when there is a jury – which is *not* the case in the ICJ – all questions of fact (is this fact true or not, did this really happen etc.) are determined by the jury. Whereas all questions of law are determined by the judge(s). So, since there is no jury in the ICJ, the judges take on *both* roles. A judge is therefore a "finder of fact" and a "trier of law". One must keep this dual responsibility in mind during the proceedings.

5. The role as a "finder of fact" grants a judge the right to sustain or overrule an objection made by an advocate to a piece of evidence. For example, the applicant might object to a piece of evidence from the respondent on the ground of Hearsay. If this objection is sustained, it means that the court agrees with the person making the objection, in this case the applicant. If it is overruled, this means that the judges oppose the objection and the evidence can be heard/seen/presented by the respondent. At MITMUNC ICJ, the President will rule on all objections.

6. Some evidence presented by the advocates might seem more reliable or believable than the others. Because of this, the degree of how much "weight" given to a piece of evidence will be determined by the judges during deliberation. Some evidence might be more useful to the case or more important, so these might receive more weight from the judges, while other pieces of evidence receive less.

Appendix

Glossary of terms

Burden of Proof – the requirement that the plaintiff (Applicant party, in the case of the ICJ) show by a ″preponderance of evidence″ or ″weight of evidence″ that all the facts necessary to win a judgment are presented and are probably true. In a criminal trial the burden of proof required of the prosecutor is to prove the guilt of the accused ″beyond a reasonable doubt,″ a much more difficult task. Unless there is a complete failure to present substantial evidence of a vital fact (usually called an ″element of the cause of action″), the ultimate decision as to whether the plaintiff has met his/her burden of proof rests with the jury or the judge if there is no jury. In the case of the ICJ, the judges act as the jurors. However, the burden of proof is not always on the plaintiff. In some issues it may shift to the defendant if he/she raises a factual issue in defense, such as a claim that he/she was not the registered owner of the car that hit the plaintiff, so the defendant has the burden to prove that defense. If at the close of the plaintiff's presentation he/she has not produced any evidence on a necessary fact (e.g. any evidence of damage) then the case may be dismissed without the defendant having to put on any evidence.

Preponderance of the Evidence –the greater weight of the evidence required in a civil (non-criminal) lawsuit for the trier of fact (jury or judge without a jury) to decide in favor of one side or the other. This preponderance is based on the more convincing evidence and its probable truth or

accuracy, and not on the amount of evidence. Thus, one clearly knowledgeable witness may provide a preponderance of evidence over a dozen witnesses with hazy testimony, or a signed agreement with definite terms may outweigh opinions or speculation about what the parties intended. Preponderance of the evidence is required in a civil case and is contrasted with "beyond a reasonable doubt," which is the more severe test of evidence required to convict in a criminal trial. No matter what the definition stated in various legal opinions, the meaning is somewhat subjective.

Stipulations – Matters of fact and of law that both sides agree to before the case is presented. These (...)

Memorandum of Points and Authorities – a document presenting the party's view of the pertinent facts and legal principles as espoused by its advocates. It should present a party's position, the facts and points of law to be applied (citations may be included), though it need not give away trial strategies. (...)

Prayer –the specific request for judgment, relief and/or damages at the conclusion of a complaint or petition. A typical prayer would read: "The plaintiff prays for 1) special damages in the sum of $17,500; 2) general damages according to proof [proved in trial]; 3) reasonable attorney's fees; 4) costs of suit; and 5) such other and further relief as the court shall deem proper." An ICJ example might read: " 1) The Equidistant line starting at the border of Peru and Chile marks the maritime boundary between the two countries and 2) That Chile recognize the Peruvian sea as Peru's territory." Damages may also be requested in the prayer, though often a value is not placed on them in a model ICJ.

Rules of evidence – Rules governing the presentation of real evidence and witness testimony. The rules are based on the ICJ procedure but modified for the model ICJ program.

Real evidence – Evidence consisting of material of any kind. This can include treaties, agreements, documents, photographs, maps, or any other object.

Witness testimony –oral evidence given under oath by a witness in answer to questions posed by attorneys at trial.

Marking – The process by which evidence at the model ICJ is organized. It consists of labeling the evidence submitted by the Applicant using numbers and the evidence submitted by the Respondent using letters. It allows the advocates to refer to specific pieces of evidence and the judges to be able to view these in an organized fashion.

Cross-examination (of real evidence) – The opportunity for the advocates to argue the validity of the real evidence presented by the other set of advocates. This can consist of pointing out bias in the evidence or trying to show why the evidence is not what the other advocates claim it is. This may lead to judges not admitting the evidence, or giving it less weight. This gives the advocates the opportunity to weaken the case of their counterparts.

Admission – The decision-making process of the judges regarding admission of evidence. The judges also consider the weight of the evidence, but this is only decided when the evidence is reviewed.

Judicial Notice – The process by which judge's take official note of a document, agreement, decision or other fact that is

common knowledge. This saves time as it is not necessary to go through presentation of evidence and cross-examination to establish the fact.

Closing Argument –the final argument by an attorney on behalf of his/her client after all evidence has been produced for both sides. The lawyer for the plaintiff or prosecution (in a criminal case) makes the first closing argument, followed by counsel for the defendant, and then the plaintiff's attorney can respond to the defense argument. Unlike the "opening statement," which is limited to what is going to be proved, the "closing argument" may include opinions on the law, comment on the opposing party's evidence, and usually requests a judgment or verdict (jury's decision) favorable to the client.

Direct Examination –the first questioning of a witness during a trial or deposition (testimony out of court), as distinguished from cross-examination by opposing attorneys and redirect examination when the witness is again questioned by the original attorney.

Leading question – a question asked of a witness by an attorney during a trial suggesting an answer or putting words in the mouth of the witness. Such a question is often objected to, usually with the simple objection: "leading." A leading question is allowable only when directed to an "adverse witness" during cross-examination (the chance to question after direct testimony) on the basis that such a witness can readily deny the proposed wording. Typical improper leading question: "Didn't the defendant appear to you to be going too fast in the limited visibility?" The proper question would be: "How fast do you estimate the defendant was going?" followed by "What was the visibility?" and "How far could you see?"

Voir dire –questions asked by the judges to determine the competence of an alleged expert witness.

Hearsay – 1) second-hand evidence in which the witness is not telling what he/she knows personally, but what others have said to him/her. 2) a common objection made by the opposing lawyer to testimony when it appears the witness has violated the hearsay rule. The rule of hearsay is the basic rule that testimony or documents which quote persons not in court are not admissible. Because the person who supposedly knew the facts is not in court to state his/her exact words, the trier of fact cannot judge the demeanor and credibility of the alleged first-hand witness, and the other party's lawyer cannot cross-examine (ask questions of) him or her. However, as significant as the hearsay rule itself are the exceptions to the rule which allow hearsay testimony such as: a) a statement by the opposing party in the lawsuit which is inconsistent with what he/she has said in court (called an "admission against interest"); b) business entries made in the regular course of business, when a qualified witness can identify the records and tell how they were kept; c) official government records which can be shown to be properly kept; d) a writing about an event made close to the time it occurred, which may be used during trial to refresh a witness's memory about the event; e) a "learned treatise" which means historical works, scientific books, published art works, maps and charts; f) judgments in other cases; g) a spontaneous excited or startled utterance ("oh, God, the bus hit the little girl"); h) contemporaneous statement which explains the meaning of conduct if the conduct was

ambiguous; i) a statement which explains a person's state of mind at the time of an event; j) a statement which explains a person's future intentions ("I plan to....") if that person's state of mind is in question; k) prior testimony, such as in deposition (taken under oath outside of court), or at a hearing, if the witness is not available (including being dead); l) a declaration by the opposing party in the lawsuit which was contrary to his/her best interest if the party is not available at trial (this differs from an admission against interest, which is admissible in trial if it differs from testimony at trial); m) a dying declaration by a person believing he/she is dying; n) a statement made about one's mental set, feeling, pain or health, if the person is not available–most often applied if the declarant is dead ("my back hurts horribly," and then dies); o) a statement about one's own will when the person is not available; p) other exceptions based on a judge's discretion that the hearsay testimony in the circumstances must be reliable

Cross Examination (of witnesses) –the opportunity for the attorney to ask questions in court of a witness who has testified in a trial on behalf of the opposing party. The questions on cross-examination are limited to the subjects covered in the direct examination of the witness, but importantly, the attorney may ask leading questions, in which he/she is allowed to suggest answers or put words in the witness's mouth. (For example, "Isn't it true that you told Mrs. Jones she had done nothing wrong?" which is leading, as compared to "Did you say anything to Mrs. Jones?") A strong cross-examination (often called just "cross" by lawyers and judges) can force contradictions, expressions of doubts or even complete obliteration of a witness's prior carefully rehearsed testimony. On the other hand, repetition of a witness' s story, vehemently defended, can strengthen his/her credibility.

Judges' Questions – The opportunity for judges to ask the questions they have that have not yet been addressed to the witnesses. Though judges may ask questions of witnesses at any time at the discretion of the President, usually these questions are saved until the advocates have finished direct, cross, re-direct and re-cross examination.

Re-direct – The time in which the advocates who have presented the witness can address questions to him/her once the opposing counsel has finished cross-examination. The same rules as for direct examination apply.

Re-cross – The time in which the advocates who performed the cross-examination (questioning of the witness of the opposing counsel) can address further questions to the witness, after re-direct. The same rules as for cross-examination apply

Rebuttal – evidence introduced to counter, disprove or contradict the opposition's evidence or a presumption.

In camera – Latin for "in chambers." This refers to a hearing or discussions with the judges when spectators and advocates have been excluded from the courtroom.

Deliberation – The act of considering, discussing and, hopefully, reaching a conclusion. This process consists of the judges considering the issues to be determined, discussing these issues at length and reaching a final verdict.

Majority Opinion – The verdict decided upon by the simple majority of judges. The judges write the verdict once they have made the decision, laying out the points of law and fact that they decided on and stating the outcome of the case, i.e. if the prayer of the advocates

was granted, granted in part or not granted at all. This is the final verdict of the case and will be read in the Closing Ceremony.
Separate, But Concurring Opinion – A verdict written by a judge or group of judges in concordance with the Majority Opinion by for different reasons. These reasons are outlined in the verdict produced.
Dissenting Opinion – A verdict written by the largest group of judges not of the Majority Opinion i.e. those who do not agree with the verdict presented in the Majority Opinion.
Separate, And Dissenting Opinion – A verdict written by a judge or judges not of the Majority Opinion but who do not have the same reasons for the dissent as the judges writing the Dissenting Opinion.

The majority of the definitions are adapted from: Hill, Gerand and Kathleen, 2002, The People's Law Dictionary [online] (updated 2012) Available at: http://dictionary.law.com/
The definitions not adapted were written by the authors of the Brief.

[1] These can be found on the website of the ICJ at:
http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0/
[2] Ewegen, Misty, 6 September 2011, *Understanding the rules of Evidence: Hearsay* [online] Available at: http://understandingevidence.com/

Cambodia v. Thailand

Introduction

The Statute of the ICJ[1] is annexed to the Charter of the United Nations and every UN member is a party to this Statute. When a case is brought to it, the first order of business of the court is to establish its jurisdiction on the case. According to Article 38 of the Statute:
"2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation."
The Court will then go on to weigh evidence and come to a decision. This is not generally straightforward. If it were, the countries wouldn't have brought the case to the ICJ. Judges not only consider all the factors, but also decide which evidence is fit for inclusion in the considerations, which evidence has more weight and whether what the evidence proves has more weight. So a very accurate and unbiased piece of evidence might prove an advocate's point, but if the point is not very important, this may not contribute as much as a less reliable piece of evidence. This process is further explained in the Brief, included in this document.

The court can come to different decisions, which can be fully in line with either party or agree with different parties on different issues. It can also agree with neither party and impart a judgment separate from what they requested. ICJ judgments are binding on the parties.

Overview of relations between Cambodia and Thailand

Advocates:

Read whatever you find relevant: remember to focus on the context of the case's time period, not today's.

Judges:

It is not important to do more research on this area, so please DO NOT read the sources quoted here as they include the judgment.
[2] [3] [4] Cambodia and Thailand share similar cultural and religious roots. Before occupation by the French, Cambodia was an independent state caught between the more powerful states of Vietnam and Siam (now Thailand). Siam exerted particular influence over Cambodia. Cambodia then became a French protectorate (read: colony) from 1863 to 1953 and was in control of Cambodia at the time when many of the treaties relevant to this case were signed. Though Cambodia was then again considered a weaker neighbour to Thailand and Vietnam, at the time the French rule would have allowed greater influence in terms of Cambodia's ability to define it's borders. Final borders were drawn up and decided upon in the 1890s and 1900s.

In the 1940s Cambodia was briefly occupied by Japan, but they relinquished their claims after they lost WWII.
Since Cambodia's independence, the Thai security services have worked to undermine the Cambodia government. Thailand supported US foreign policy view for the region whilst Cambodia did not. There was particular resentment in Cambodia about the idea of 'Thai imperialism'. Relations were passive until the 1950s. Thailand's occupation of Preah Vihear along with other factors caused the countries to break off diplomatic relations in 1958.
It is at this moment of tension and political disagreement that we find our case was submitted to the ICJ. Cambodia submitted the application instituting proceedings on October 6th 1959 and a judgment was reached on June 15th, 1962.[5]

Analysis of treaties and borders

If two countries sign a treaty, how does it have to be respected?

Cambodia is a signatory to the Vienna Convention on the Law of Treaties[6] of May 22nd, 1969. Thailand is not a signatory. Even so, the principles of the convention can be considered "general principles of law recognized by civilized nations" as stated in the Statues of the ICJ. This statement describes part of the guiding principles of how the ICJ comes to a decision.
Article 31 of the Vienna Convention explains how treaties should be interpreted:
"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

If a border is not well established, how can it be determined?
Referring again to the Vienna Convention, an important stipulations is that "There shall be taken into account, together with the context: any subsequent practice in the application of the treaty which establishes the agreement of parties regarding its interpretation." This is an important stipulation in that even if a treaty itself is vague, the past actions of parties in reference to the treaty can be used in the interpretation of the treaty. In fact, these can be considered binding in reference to future actions, depending on the length and circumstances of the actions of each party. This is similar, though not the same, as situations of adverse possession, acquiescence and prescription described below. It differs in that this stipulation refers to a mutual understanding of a treaty and could encompass any actions of the parties, whilst the three situations below are for more specific situations.

If a border is well established, how can it change?

Acquiescence – This is the idea of tacit agreement. In the context of borders this refers to inaction by one state to protest against the use of an area of land by another. You can read page 3 of the reference document to understand this better. [7]
Adverse possession – "A method of gaining legal title to real property by the actual, open, hostile, and continuous possession of it to the exclusion of its true owner for the period prescribed by state law" [8]
Prescription – "A method of acquiring a non-possessory interest in land through the long, continuous use of the land." [9]

The meaning of these three terms in international law is not well defined. The ICJ has used various terms in different contexts and has not made it clear where these will apply and exactly what situations constitute [10]. Therefore it will be valuable for each judge to do some reading about these situations so that during deliberations past ICJ arguments can be discussed.

Issues to begin considering

- Means of border delimitation that were employed and how much can be interpreted now
- What to do when borders are unclear
- Military involvement that allegedly occurred
- Treaty interpretation and enforcement over time
- Cultural issues with the affiliation and meaning of the temple itself
- Historical tensions between Cambodia and Thailand

Goals – an ideal ICJ simulation

- Prepared, focused and comprehensive memoranda (see Brief), statements and evidence presented by advocates
- Well-prepared and engaged witnesses
- Precise and incisive questions from judges to witnesses and both advocate teams
- Good note-taking by judges, allowing for a judgment based on the whole case, not only what was heard last
- A well weighted judgment coming from thorough analysis in judge's deliberation and based not on past literature but on advocate's presentations

Web Sources:

Vienna Convention:
http://www.worldtradelaw.net/misc/viennaconvention.pdf
ICJ Statute:
http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0
Case documentation:
http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=46&case=45&code=ct&p3=0
Prescription:
http://legal-dictionary.thefreedictionary.com/prescription
Adverse Possession:
http://legal-dictionary.thefreedictionary.com/Adverse+Possession
On ICJ dealing with similar issues, see page 53:
http://ejil.oxfordjournals.org/content/16/1/25.full.pdf
Acquiescence:
http://books.google.com/books?id=sChXB4k_fEwC&printsec=frontcover#v=onepage&q&f=false
Overview of relations between Cambodia and Thailand (not for judges!):
http://www.opendemocracy.net/article/preah-vihear-the-thai-cambodia-temple-dispute
http://www.fairobserver.com/article/underneath-surface-thailand-cambodia-and-shinawatras
http://www.academia.edu/876632/Cambodian__Thai_Diplomatic_Relations_since_1950

[1] United Nations. Charter of the United Nations and Statute of the International Court of Justice. New York: United Nations, Office of Public Information, 1974. Print.

[2] Osborne, Milton. "Preah Vihear: The Thai-Cambodia Temple Dispute."OpenDemocracy. N.p., 8 Feb. 2011. Web. 24 Nov. 2013
[3] Witoonchart, Ken. "Underneath the Surface: Thailand, Cambodia, and the Shinawatras."Fair Observer°. N.p., 21 Feb. 2012. Web. 24 Nov. 2013.
[4] Deth, Sok Udom. "Cambodian-Thai Diplomatic Relations since 1950." Cambodian. N.p., n.d. Web. 24 Nov. 2013.
[5] International Court of Justice. Cases | Temple of Preah Vihear (Cambodia v. Thailand). N.p., n.d. Web. 24 Nov. 2013.
[6] United Nations. United Nations Conference on the Law of Treaties. Vienna Convention on the Law of Treaties = Convention De Vienne Sur Le Droit Des Traites = Convencion De Viena Sobre El Derecho De Los Tratados. Vienna: United Nations, 1970. Print.
[7] Antunes, Nuno. "Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement (Google EBook)." Google Books. N.p., n.d. Web. 24 Nov. 2013. <http://books.google.com/books?id=sChXB4k_fEwC>.
[8] "Adverse Possession." TheFreeDictionary.com. N.p., n.d. Web. 24 Nov. 2013. <http://legal-dictionary.thefreedictionary.com/Adverse Possession>.
[9] "Prescription." TheFreeDictionary.com. N.p., n.d. Web. 24 Nov. 2013. <http://legal-dictionary.thefreedictionary.com/prescription>.
[10] Lesaffer, Randall. "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription." European Journal of International Law16.1 (2005): 26–58. Web. 24 Nov. 2013. <http://ejil.oxfordjournals.org/content/16/1/25.full.pdf>. Important analysis on page 53