



NMUN • NY

INTERNATIONAL COURT OF JUSTICE BACKGROUND GUIDE 2011

WRITTEN BY: Alex Tompkins and Tessa Endelman



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NATIONAL MODEL UNITED NATIONS
nmun.org

CONTACT THE NMUN

Please consult the FAQ section of nmun.org for answers to your questions. If you do not find a satisfactory answer you may also contact the individuals below for personal assistance. They may answer your question(s) or refer you to the best source for an answer.

NMUN Director-General (Sheraton)
Holger Baer | dirgen@nmun.org

NMUN Director-General (Marriott)
Brianna Johnston-Hanks | dirgen@nmun.org

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NMUN Secretary-General
Ronny Heintze | secgen@nmun.org

NMUN•NY 2011 Important Dates

IMPORTANT NOTICE: To make hotel reservations, you must use the forms at nmun.org and include a \$1,000 deposit. Discount rates are available until the room block is full or one month before the conference – whichever comes first. **PLEASE BOOK EARLY!**

31 January 2011	<ul style="list-style-type: none"> • Confirm Attendance & Delegate Count. (Count may be changed up to 1 March) • Make Transportation Arrangements - DON'T FORGET! (We recommend confirming hotel accommodations prior to booking flights.)
15 February 2011	<ul style="list-style-type: none"> • Committee Updates Posted to www.nmun.org
1 March 2011	<ul style="list-style-type: none"> • Hotel Registration with FULL PRE-PAYMENT Due to Hotel - Register Early! Group Rates on hotel rooms are available on a first come, first served basis until sold out. Group rates, if still available, may not be honored after that date. See hotel reservation form for date final payment is due. • Any Changes to Delegate Numbers Must be Confirmed to: outreach@nmun.org • Preferred deadline for submission of Chair / Rapp applications to Committee Chairs • All Conference Fees Due to NMUN for confirmed delegates. (\$125 per delegate if paid by 1 March; \$150 per delegate if received after 1 March. Fee is not refundable after this deadline.
15 March 2011	<ul style="list-style-type: none"> • Two Copies of Each Position Paper Due via E-mail (See Delegate Preparation Guide for instructions).
NATIONAL MODEL UNITED NATIONS	<p>The 2011 National Model UN Conference</p> <ul style="list-style-type: none"> • 17 - 21 April – Sheraton New York • 19 - 23 April – New York Marriott Marquis <p>The 2012 National Model UN Conference</p> <ul style="list-style-type: none"> • 1 - 5 April – Sheraton New York • 3 - 7 April – New York Marriott Marquis • 30 March - 3 April – New York Marriott Marquis

POSITION PAPER INSTRUCTIONS

Two copies of each position paper should be sent via e-mail by 15 MARCH 2011

1. TO COMMITTEE STAFF

A file of the position paper (.doc or .pdf) for each assigned committee should be sent to the committee e-mail address listed below. Mail papers by 15 March to the e-mail address listed for your particular venue. These e-mail addresses will be active when background guides are available. Delegates should carbon copy (cc:) themselves as confirmation of receipt. Please put committee and assignment in the subject line (Example: GAPLEN_Greece).

2. TO DIRECTOR-GENERAL

- Each delegation should send one set of all position papers for each assignment to the e-mail designated for their venue: positionpapers.sheraton@nmun.org or positionpapers.marriott@nmun.org.

This set (held by each Director-General) will serve as a back-up copy in case individual committee directors cannot open attachments.

Note: This e-mail should only be used as a repository for position papers.

- The head delegate or faculty member sending this message should cc: him/herself as confirmation of receipt. (Free programs like Adobe Acrobat or WinZip may need to be used to compress files if they are not plain text.)

- Because of the potential volume of e-mail, only one e-mail from the Head Delegate or Faculty Advisor containing all attached position papers will be accepted.

Please put committee, assignment and delegation name in the subject line (Example: Cuba_U_of_ABC). If you have any questions, please contact the Director-General at dirgen@nmun.org.

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for more information

COMMITTEE

EMAIL - SHERATON

General Assembly First Committee	ga1st.sheraton@nmun.org
General Assembly Second Committee	ga2nd.sheraton@nmun.org
General Assembly Third Committee.....	ga3rd.sheraton@nmun.org
Human Rights Council.....	hrc.sheraton@nmun.org
ECOSOC Plenary	ecosoc.sheraton@nmun.org
Commission on Crime Prevention and Criminal Justice	ccpcj.sheraton@nmun.org
Commission on the Status of Women	csw.sheraton@nmun.org
Economic and Social Commission for Asia and the Pacific	escap.sheraton@nmun.org
Economic and Social Commission for Western Asia	escwa.sheraton@nmun.org
United Nations Environment Programme	unep.sheraton@nmun.org
United Nations Population Fund	unfpa.sheraton@nmun.org
United Nations Children's Fund.....	unicef.sheraton@nmun.org
World Intellectual Property Organization	wipo.sheraton@nmun.org
African Development Bank	afdb.sheraton@nmun.org
Group of 20.....	g20.sheraton@nmun.org
Organization of American States	oas.sheraton@nmun.org
Organization for Security and Co-operation in Europe.....	osce.sheraton@nmun.org
Security Council.....	sc.sheraton@nmun.org
Security Council 2.....	sc2.sheraton@nmun.org
International Court of Justice.....	icj.sheraton@nmun.org
Non-Proliferation Treaty Review Conference	npt.sheraton@nmun.org

COMMITTEE

EMAIL - MARRIOTT

General Assembly First Committee	ga1st.marriott@nmun.org
General Assembly Second Committee	ga2nd.marriott@nmun.org
General Assembly Third Committee.....	ga3rd.marriott@nmun.org
Human Rights Council.....	hrc.marriott@nmun.org
ECOSOC Plenary	ecosoc.marriott@nmun.org
Commission on Crime Prevention and Criminal Justice	ccpcj.marriott@nmun.org
Commission on the Status of Women	csw.marriott@nmun.org
Economic and Social Commission for Asia and the Pacific	escap.marriott@nmun.org
Economic and Social Commission for Western Asia	escwa.marriott@nmun.org
United Nations Environment Programme	unep.marriott@nmun.org
United Nations Population Fund	unfpa.marriott@nmun.org
United Nations Children's Fund.....	unicef.marriott@nmun.org
World Intellectual Property Organization	wipo.marriott@nmun.org
African Development Bank	afdb.marriott@nmun.org
Group of 20.....	g20.marriott@nmun.org
Organization of American States	oas.marriott@nmun.org
Organization for Security and Co-operation in Europe.....	osce.marriott@nmun.org
Security Council.....	sc.marriott@nmun.org
Security Council 2.....	sc2.marriott@nmun.org
International Court of Justice.....	icj.marriott@nmun.org
Non-Proliferation Treaty Review Conference	npt.marriott@nmun.org

OTHER USEFUL CONTACTS

Entire Set of Delegation Position Papers	positionpapers.sheraton@nmun.org
(send only to e-mail for your assigned venue).....	positionpapers.marriott@nmun.org
Secretary-General	secgen@nmun.org
Director(s)-General	dirgen@nmun.org
NMUN Office	info@nmun.org



THE 2011 NATIONAL MODEL UNITED NATIONS

SPONSORED BY THE NATIONAL COLLEGIATE CONFERENCE ASSOCIATION

New York City, 17-21 April (Sheraton) & 19-23 April (Marriott) • www.nmun.org

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Dear Delegates,

Welcome to the National Model United Nations (NMUN) 2011! We look forward to meeting all of you and welcoming you to New York City for our simulation of the International Court of Justice at the Sheraton and Marriott venues this spring.

We would like to take this opportunity to introduce ourselves. At the Sheraton, Alex Tompkins has just finished an MA in International Law and Human Rights at University College London and has an undergraduate Law Degree from the University of Plymouth. At the Marriott, Tessa Endelman recently completed an LLM in Dispute and Conflict Resolution at the School of Oriental and African Studies. She also has an MSc in Comparative Politics and Conflict Studies from the London School of Economics.

This year's agenda is:

1. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)
2. Certain Criminal Proceedings in France (Republic of the Congo v. France)

This background guide has been prepared to assist delegates in their preparation for the conference. It is intended as a starting point only and should be used in collaboration with other sources. Detailed research and preparation work is considered an integral part of the NMUN experience. The NMUN simulation of the ICJ provides a unique experience for delegates, demanding a high level of engagement and participation. A very challenging but highly rewarding committee, involvement in the NMUN ICJ simulation offers an insight into the practical application of international law. Lots of work will be required but we promise an exciting and enjoyable experience.

The ICJ is a small committee and may differ from other MUN simulations that delegates have participated in. As the ICJ is the principal judicial organ of the United Nations, it deals in interpretation and application of International law, there will be less focus on facts and country positions and standpoints. Instead, delegates will be given the task of getting to grips with legal principles and decisions of the court.

Owing to the differences in the simulation, ICJ delegates will be required to submit a different sort of position paper. Justices should submit a Preliminary Opinion, and Counsel should submit a Memorial. This guide will contain guidance as to how to produce these documents, and both Directors will be available to discuss any difficulties you may encounter up until the deadline of 1 March 2011.

We would both like to wish you good luck in your preparations and look forward to meeting you in New York in April and feel free to contact us by email with any problems you may be having, or just to introduce yourself!

Yours sincerely,

Sheraton Venue

Alex Tompkins

Director

icj.sheraton@nmun.org

Marriott Venue

Tessa Endelman

Director

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Message from the Directors-General Regarding Position Papers for the International Court of Justice 2011 NMUN Conference

At the 2011 NMUN New York Conference, each delegation submits one position paper for each committee it is assigned to. Delegates should be aware that their role in each committee impacts the way a position paper should be written. While most delegates will serve as representatives of Member States, some may also serve as observers, NGOs or judicial experts. To understand these fine differences, please refer to the Delegate Preparation Guide. Due to the special nature of the simulation of the International Court of Justice (ICJ), please read the following points and the points in the rest of this ICJ delegate preparation manual before you construct your position paper for the ICJ.

The position papers for the Justices should not reflect their particular nation's position on the topics, but their own objective opinion based on their reading, research and assessment of the issues presented in each case. It should identify what the facts and issues are for each case as well as what possible legal standards should be applied; describe how the standards should be applied to the particular facts; and conclude how the various issues should be resolved. It should be written with the utmost objectivity and reflect on a preliminary finding of fact and law. Please refer to the next pages and the Special Instructions for ICJ Position Papers for more information on position paper requirements.

Please be forewarned, delegates must turn in material that is entirely original. ***The NMUN Conference will not tolerate the occurrence of plagiarism.*** In this regard, the NMUN Secretariat would like to take this opportunity to remind delegates that although United Nations documentation is considered within the public domain, the Conference does not allow the verbatim re-creation of these documents. This plagiarism policy also extends to the written work of the Secretariat contained within the Committee Background Guides. Violation of this policy will be immediately reported to faculty advisors and may result in dismissal from Conference participation. Delegates should report any incident of plagiarism to the Secretariat as soon as possible.

Delegation's position papers can be awarded as recognition of outstanding pre-Conference preparation. In order to be considered for a Position Paper Award, however, delegations must have met the formal requirements listed below. Please refer to the sample paper on the following page for a visual example of what your work should look like at its completion. The following format specifications are **required** for all papers:

- All papers must be typed and formatted according to the example in the Background Guides
- Length must **not** exceed two single spaced pages (one double sided paper, if printed)
- Font **must** be Times New Roman sized between 10 pt. and 12 pt.
- Margins must be set at 1 inch for whole paper
- Country/NGO name, School name and committee name clearly labeled on the first page; the use of national symbols is highly discouraged
- Agenda topics clearly labeled in separate sections

To be considered timely for awards, please read and follow these directions:

1. **A file of the position paper** (.doc or .pdf) **for each assigned committee** should be sent to the committee email address listed in the Background Guide. These e-mail addresses will be active after November 15, 2010. Delegates should carbon copy (cc:) themselves as confirmation of receipt.
2. Each delegation should also send **one set of all position papers** to the e-mail designated for their venue: positionpapers.sheraton@nmun.org or positionpapers.marriott@nmun.org. This set will serve as a back-up copy in case individual committee directors cannot open attachments. These copies will also be made available in Home Government during the week of the NMUN Conference.

Each of the above listed tasks needs to be completed no later than **March 15, 2010 (GMT-5) for delegations attending the NMUN conference at either the Sheraton or the Marriott venue.**

PLEASE TITLE EACH E-MAIL/DOCUMENT WITH THE NAME OF THE COMMITTEE, ASSIGNMENT AND DELEGATION NAME (Example: AU_Namibia_University of Caprivi)

A matrix of received papers will be posted online for delegations to check prior to the Conference. If you need to make other arrangements for submission, please contact Holger Baer, Director-General, Sheraton venue, or Brianna Johnston-Hanks, Director-General, Marriott venue at dirgen@nmun.org. There is an option for delegations to submit physical copies via regular mail if needed.

Once the formal requirements outlined above are met, Conference staff use the following criteria to evaluate Position Papers:

- Overall quality of writing, proper style, grammar, etc.
- Citation of relevant resolutions/documents
- General consistency with bloc/geopolitical constraints
- Consistency with the constraints of the United Nations
- Analysis of issues, rather than reiteration of the Committee Background Guide
- Outline of (official) policy aims within the committee's mandate

Each delegation can submit a copy of their position paper to the permanent mission of the country being represented, along with an explanation of the Conference. Those delegations representing NGOs do not have to send their position paper to their NGO headquarters, although it is encouraged. This will assist them in preparation for the mission briefing in New York.

Finally, please consider that over 2,000 papers will be handled and read by the Secretariat for the Conference. Your patience and cooperation in strictly adhering to the above guidelines will make this process more efficient and is greatly appreciated. Should you have any questions please feel free to contact the Conference staff, though as we do not operate out of a central office or location your consideration for time zone differences is appreciated.

Sincerely yours,

Sheraton Venue
Holger Baer
Director-General
holger@nmun.org

Marriott Venue
Brianna Johnston-Hanks
Director-General
briannaj@nmun.org

Special Instructions for ICJ Position Papers

Position Papers for the ICJ follow a slightly different format to other committees.

Preliminary Opinions (Justices ONLY)

The Justices' Position Papers take the form of Preliminary Opinions. These should not reflect any Member State's position on a case, but an objective personal opinion based on reading, research and legal assessment of the issues presented in each case. It should identify what the facts and issues are for each case as well as what possible legal standards should be applied; describe how the standards should be applied to the particular facts; and conclude how the various issues should be resolved. It should be written with the utmost objectivity and base its findings on the facts and the law.

Justices' Preliminary Opinions should include:

1. The date on which it was prepared;
2. The name of the Justice preparing the opinion;
3. The name of the case and its parties;
4. A statement of the applicable law (What laws, customs, precedents or treaties apply?);
5. An application of the law to the facts (How does the law view the situation?);
6. A conclusion

All Justices are expected to provide a Preliminary Opinion on each of the two cases included on the Court's General List. The Opinions should be no longer than two pages in total.

Memorials (Counsel ONLY)

Counsel will produce a position paper in the form of a Memorial or Counter-Memorial from the perspective of the State Party that they are representing. Papers should outline the arguments/positions of the State Party, as well as counter-arguments to points that may be made by opposing Counsel.

Counsel memorials/counter-memorials should include:

1. The date on which it was prepared;
2. The name of the Counsel preparing the memorial/counter-memorial;
3. The name of the case and its parties;
4. A brief statement of the disputed facts (What are the facts of the case, as viewed in the light most favorable to your position?);
5. A statement of the applicable law (What laws, customs, precedents or treaties apply?);
6. A detailed argument section (How do the laws and facts support your case? This should include an application of the law to the facts in accordance with the claims of the State party you are representing, as well as a counter-argument to the anticipated arguments of the opposing counsel);
7. A summary and request for remedy (What do you want the Court to do?).

The Memorials submitted by Counsel may be up to two pages long for each case.

The Memorials provided by Counsel will also serve as written proceedings in advance of the oral proceedings that take place at the conference. Once the submission date for Position Papers has passed, the Court Directors will send an electronic copy of the Memorials and Counter-Memorials to all delegates in the Court.

An Introduction to NMUN Court Simulations

NMUN's recreation of the International Court of Justice (ICJ) offers a very different experience to taking part in the other committees simulated at the conference. Taking on the role of a Justice or Counsel may seem daunting if you are used to representing Member States in simulations of diplomatic forums. While you might be familiar with the framing of international law in committees such as the United Nations (UN) General Assembly or Security Council, examining how and if the treaties and resolutions passed by these bodies are actually implemented may appear challenging. The following few pages have been prepared to explain what you can expect from the simulation and hopefully inspire you to approach the simulation with confidence and anticipation.

Participating in the Court will test all the skills that you would use in a regular MUN committee. As you prepare for the conference, these will include research, analysis and evaluating contending arguments. Your participation in the committee will test your skills of teamwork, leadership, public speaking, debate and the ability to work under pressure. You will also be required to listen to and understand the viewpoints of others, and try to find consensus on points of difference.

However, you will find that there are differences from other committees at the conference. Those of you acting as Justices will not be representing the policies of Member States, but putting forward your own opinion on the evidence presented to the Court. The Court is a very small committee and your level of participation is therefore likely to be higher. Both Justices and Counsel will be regularly invited to speak before the committee and make frequent contributions to the Court's proceedings and deliberations. You must therefore ensure you are thoroughly prepared before attending the conference and are in a position to speak authoritatively on the cases from the Court's first sitting.

The Court will also be employing different Rules of Procedure to other NMUN committees. The Rules of Court used in the NMUN simulation are modelled on the actual Rules of Court used by the International Court of Justice but have been modified to fit the time constraints and aims of the conference. There will be a training session held at the beginning of the conference to ensure that all ICJ delegates are familiar with the specific rules for the Court.

The Role of the Court's Staff and Delegates

Committee Director

As with other committees at NMUN, a Committee Director is responsible for guiding delegates through the simulation and managing the Court's work during the conference. During the conference, the Director will have overall responsibility for moderating the Court's proceedings, and ensuring the rules of procedure are followed. He or she will also edit drafts of the judgment, helping delegates to structure their ideas and express them clearly.

Registrar

The Registrar serves as the Director's aide and is responsible for the administrative management of the Court including the taking of minutes. The Registrar will *not* be selected from delegates already within the Court, but from applicants from other committees.

The committee's delegates will either take on the role of Justices or Counsel.

Justices

The fifteen Justices are responsible for passing a judgment on each of the cases presented to the Court.

Before the conference, they will thoroughly research the facts and law of each case, and write a *preliminary opinion*, which shall take the place of a position paper. During the conference, the Justices will assess the evidence and arguments presented to the Court, and ask questions of the advocates.

After Counsel have been heard, the Justices will debate the merits of each case and find in favor or against either party based on the arguments and evidence presented during the simulation. The Justices will prepare a written judgment, which shall state the facts of the case and outline the legal reasoning behind the Court's decisions.

The Justices judge the cases on the strength of the arguments and evidence presented to the Court, and do not represent the interests or policy positions of Member States. Due to the small size of the committee, Justices are prohibited from applying to act as chairs or rapporteurs in other committees.

President

Under the authority of the Committee Director, the President is responsible for chairing the Court's proceedings. He or she shall moderate the committee's sessions and the deliberations according to the Rules of Court. They will combine these duties with those of a regular Justice. The President will be elected from the fifteen Justices on the first night of the conference in accordance with the Court rules. Those Justices wishing to stand for election as President should ensure they are very familiar with the Rules of Court before arriving at the conference.

Counsel

Working in teams, the Counsel provide legal representation to the States that are party to the cases before the Court. It is expected that Counsel will communicate with each other extensively before arriving at the conference to ensure that they are fully prepared as a team to present to the Court as soon as it is in session.

Before the conference, Counsel will thoroughly research the cases on the Court's docket and prepare the arguments that they will present to the Court. They will also draft *memorials*, which shall take the place of a position paper and will be circulated to the Justices and opposing Counsel in advance of the conference.

During the conference, they will present evidence and oral arguments at length to the Court and take questions from the Justices. They will also respond to requests made by the Court for written submissions.

Due to the small size of the committee, Counsel are prohibited from applying to act as chairs or rapporteurs in other committees.

An Overview of the Simulation

The General List of the Court

Two cases have been approved for inclusion in the ICJ's agenda (known as the General List of the Court). The order in which the cases shall be heard will be determined at the first session of the Court.

Memorials and Preliminary Opinions

As part of the preparation for the simulation, all participants will be required to submit a position paper. For Justices, the position paper will take the form of an objective Preliminary Opinion. Counsel will submit draft Memorials. Please see the earlier section on Position Papers in this Background Guide.

The following section is broken into segments for ease of explanation and understanding. The segments do not necessarily reflect the activities of separate committee sessions.

Convening the Court

Once the Committee Director has made his introduction, he or she will open the first sitting of the Court. All officers of the ICJ are required to give declarations that they will carry out their duties according to certain personal and professional standards as per the court rules. The Director will begin with his or her own declaration. Each Justice will then read their declarations from a card. Both Justices and Counsel will remain standing while this takes place. Once a Registrar has been selected, he or she will also make a declaration to the Court.

Once declarations are over, the Director will suspend the meeting so that the Justices can elect a President, decide which case to hear first and consider their preliminary opinions, while the Counsel teams meet to make final preparations for their opening statements and arguments. Please note: this will not be a long suspension and Counsel should not rely on having an extended period of time to complete their preparations.

Opening Statements

The President will return the Court to formal sessions and invite Counsel for one party and then the other to deliver their opening statements for the first case. Lasting no more than 15 minutes, the opening statements will preview the evidence and highlight the main points of law. It is strongly recommended that Counsel prepare these statements prior to the Conference and practice delivering them in public. During Opening Statements, Justices and Counsel from the opposing party will not be allowed to interrupt.

Presentation of the Cases

The Counsel of one side and then the other will then be invited to deliver their full arguments to the Court. Each Counsel team will be allowed around 45 minutes to an hour to present their arguments. Both Counsel and Justices may motion to suspend the sitting as necessary.

Counsel should present the facts of the case as viewed by the State they are representing and explain any law relevant to the case. The arguments should focus on the points of law that most divide the parties. In this simulation, the Counsel will *not* be allowed to present any witnesses, instead focusing on the substance of the law. The Justices will listen carefully to the arguments, taking notes on points that might shape their judgment. With permission from the President, they may also interrupt delegates to ask questions.

Counsel may also present further written documents to the Court, such as summaries of key parts of their oral arguments, evidence, or excerpts from relevant treaties that might guide the Justices' decision. Counsel should approach the Court Director about making copies of any written documents they wish to submit to the Court.

Both Justices and Counsel can motion to suspend the sitting as necessary but should communicate the reason for suspension to the Court Director.

Initial Deliberations/Justice Questioning

Once arguments have been heard, the Justices will meet to begin debate of the issues. They will work together to formulate a list of questions to be put to Counsel. This allows the Justices a chance to identify any points in the arguments that are unclear or have been poorly covered. Questions may be in oral or written form; however, if numerous questions are to be considered, Justices may be encouraged to formulate a list of questions to be submitted to Counsel in writing. Where this is the case, a further recess may be necessary to allow Counsel to prepare their responses.

Questions to Counsel at this stage should be directed to one side or the other and used to clarify issues, facts and points of law. Justices and Counsel can motion to suspend the sitting as necessary.

Closing Arguments

After answering questions posed by the Court, Counsel will be allowed around 15 minutes to make final statements. At this stage, Counsel will have the opportunity to interrupt their opposite Counsel with questions. The Counsel who currently has the floor may choose to hear or not to hear these questions as he or she feels necessary.

Deliberation and Judgment

The Justices now consider their judgment. During their deliberations, the Justices will consider the points of law and evidence that have been presented to the Court. They should work together to understand the opinions of every Justice, and as far as possible find consensus on the contested issues. If necessary, they may pose further questions to the Counsel. Once their deliberations are complete, they will vote formally on each point, and draft a judgment.

The first part of the judgment will be prepared by the Registrar, and shall contain:

- The date on which it is read;
- The names of the justices and counsel;
- The names of the parties
- A brief summary of proceedings; and
- The submission of the parties as contained within the memorials.

The second part of the judgment will be drafted by the Justices, and shall contain:

- A statement of the facts;
- The legal reasoning behind the Court's decision; and
- The Court's formal decisions on each contested point and the names of those Justices that found in favor or against.

If there has been significant disagreement on certain points of law, and individual or multiple Justices disagree with the judgment, the Committee Director may allow the drafting of a brief dissenting opinion.

While the Justices are deliberating, Counsel will prepare for their next case and remain near the Courtroom to provide any written documents that the Justices may require, or answer additional questions.

Once the judgment is complete, the Justices will sign it and the formal decision shall be read to the Court at a public sitting on the final day of the conference. The Court shall then hear the next case on the General List of the Court.

Preparing for the Conference

Having read this Background Guide, your next step should be to consult the ICJ's own website at <http://www.icj-cij.org/>. The amount of information available for any particular case will vary, but is likely to include the arguments of real Counsel currently arguing the cases before the ICJ. These may take the form of applications, memorials and counter-memorials presenting each side's case in writing, as well as transcripts of oral proceedings before the Court including arguments made by Counsel. Care should be taken that these are only used as research resources, and not plagiarized during the simulation.

Once you have a list of treaties, conventions and other legal documents that are relevant to your case, you should start researching these. Many of these are freely available on the Internet or through online subscription services held by most university libraries.

Once you feel you have a thorough understanding of the case, Counsel should begin preparation of the arguments that they will be presenting to the Court. Carefully structure your thoughts, referring regularly to relevant law and making sure that the Justices will be able to clearly follow your reasoning.

Your argument should include the following sections:

- A statement of facts (What are the facts of the case, as viewed in the light most favorable to your position?);
- A statement of the applicable law (All possible legal standards should be applied. What laws, customs, precedents or treaties apply?);
- A detailed argument section, which discusses how the law and facts apply to the particular case as well as a counter-argument to the anticipated arguments of opposing Counsel (How does the law and facts support your case?);
- A summary and request for remedy (What do you want the Court to do?).

Summarizing these arguments in a written memorial will help this process. You can see how Counsel present their cases before the real ICJ in transcripts of Court sessions on the ICJ website.

The Justices should prepare their preliminary opinions on the case, coming to an objective conclusion based on the facts of the case. Although the cases must be judged on the arguments and evidence presented to the court simulation, the formulation of a preliminary opinion is an important exercise to ensure that all Justices are familiar with the content and issues involved in each case. Preliminary opinions should be objective and Justices should not attend the court with preconceived biases.

The Committee Staff are also available to help answer questions. Please do not hesitate to contact them using the email addresses listed in the welcome letter at the top of this Background Guide.

A Quick Guide to the Structure of International Law

Introduction to International Law

International law is mainly composed of the rules and norms which regulate the conduct of States. It contains principles that States feel bound to and that they observe in their conduct with each other. International law also contains rules that regulate international organizations, such as the United Nations. Finally, during the last century international law has expanded to include rules that apply to individuals. These rules on individual conduct consist of both rights (human rights are the most common example of rights to which individuals are entitled *qua* international law) and obligations (individuals are obliged not to commit certain crimes, including the crime of genocide or crimes against humanity). The international legal system has thus evolved into a complex system of norms applying to a variety of actors. States remain to date the main subject of international law. The following introduction aims to familiarize delegates with some underlying concepts of international law that they will need to use and apply throughout their committee work and in their preparation. It is highly recommended that delegates consult textbooks on general international law in order to get a better insight into legal thinking and the issues at hand in the two cases that the ICJ will discuss at NMUN.

Sources of international law

Art. 38 (1) of the ICJ Statute mentions the following as sources of law: (a) international conventions, (b) international custom, (c) the general principles of law and lastly, as a subsidiary source, (d) the “teachings of the most highly qualified publicists of the various nations”. International conventions and international customary law remain to date the two main sources of law. Both are an expression of the consent of States to certain conduct.

Conventions or treaties are explicit agreements, usually written, between two (bilateral treaty) or more states (multilateral treaty; often also called convention) and are binding only on the parties to the agreement. Examples of such treaty agreements include the UN Convention Against Torture and the Charter of the United Nations. States normally accede to multilateral conventions by ratification. Normally, the convention foresees that a certain number of ratifications (i.e. state parties) is required for a treaty to enter into force. Once this number of ratifications is reached, the treaty has binding force on all states parties.

Customary international law is non-written law. It is formed through consistent State practice adhered to over a period of time by States from a sense of obligation (so-called *opinio juris*). These two criteria for the development of customary international law have been confirmed by several judgments rendered by the International Court of Justice. The *opinio juris*, the fact that States regard a given norm as legally binding, is crucial for the qualification as customary international law. If there is only State practice, but no *opinio juris*, the conduct is usually named as “international comity”. Complete uniformity of State practice is not necessary.

Customary international law includes certain norms by which all nations must abide. These peremptory norms are referred to as *jus cogens*. The 1969 Vienna Convention on the Law of Treaties (VCLT) defines a peremptory norm as one accepted and recognized by the international community from which no derogation is permitted (Article 53 VCLT). It follows that, if a treaty is concluded in violation of such a peremptory norm of international law, the treaty is null and void. An example of *jus cogens* is the general acceptance of the prohibition of genocide. States are forbidden from both committing genocide and from creating or entering into treaties that permit genocide. Note however that genocide has also been codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. States that have ratified this convention need to adhere to all its provisions.

General principles of international law, the third source mentioned in Art. 38 ICJ-Statute, have lost their importance due to an ever-increasing legal system of international conventions. Scholars agree that general principles will not contain specific rules of conduct, but rather indicate main, underpinning principles. One example is the principle of *pacta sunt servanda*, which means that once adhered to a treaty, the treaty must be observed.

Lastly, Art. 38 (1) ICJ-Statute lists “teachings of the most highly qualified publicists of the various nations” and specifies that these be a “subsidiary means for the determination of rules of law.” International legal research or case law from international courts (especially the ICJ) does consequently *not* constitute a source of law in themselves. However, they play an important role when determining the exact scope of a given international norm.

The codification of international law and the role of the International Law Commission

As customary international law is often hard to grasp and not easily determined especially when it comes to details, the international community has aimed at increasingly codifying international law. Since there exists no international legislator (States are the supreme subjects of international law, and to date, there is no organization of a supra-national nature), multilateral treaties are the main means of codification.

Many of these treaties are concluded under the auspices of the United Nations, i.e. they are negotiated within the United Nations framework (e.g. in the General Assembly, or at World Summits). In this context, the International Law Commission (ILC) plays a vital role. The ILC is a subsidiary organ of the General Assembly, established in 1947 to pursue one of the main functions of the General Assembly, namely “encouraging the progressive development of international law and its codification” (Article 13 (1) (a) UN-Charter).

The ILC consists of independent legal experts that meet once a year. They discuss current developments and trends in international law and attempt to codify existing customary international law. One prime example of the ILC’s work was the drafting of the 1969 Vienna Convention on the Law of Treaties, which codified the legal rules governing international treaties. Another important work are the ILC’s Draft Articles on State Responsibility, outlining the constitutive elements of an internationally wrongful act committed by a state, and the consequences under international law arising out of such an internationally wrongful act. While the Vienna Convention on the Law of Treaties is a proper multilateral treaty, having been ratified by 96 states, the ILC Draft Articles on State Responsibility are – as the name indicates – a draft. However, the majority of the rules contained in the Draft Articles reflect current customary international law.

Interpreting norms of international law

Throughout committee work, delegates will be faced with interpreting certain norms of international law. Arts. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) contain the main rules of treaty interpretation. These rules are universally accepted and should be applied whenever interpreting a treaty norm.

Art. 31 VCLT provides that: “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”. When interpreting a particular norm, one looks first at the ordinary meaning of the term that requires qualification. “Context” is defined in Art. 31 (2) VCLT and comprises the entire treaty text, including the preambulatory part, as well as agreements that are somehow connected to the treaty in question. Subsequent practice in applying the treaty between states parties is also to be taken into consideration. The object and purpose of a treaty is often found in its preambles.

If interpretation according to Art. 31 VCLT still leaves uncertainties, Art. 32 VCLT contains subsidiary means of interpretation. Thus, the drafting history of a treaty (*travaux préparatoires*) can be consulted in order to clarify the object and purpose.

History of the International Court of Justice

The International Court of Justice (ICJ) is the main judicial organ of the United Nations (UN). From its base at The Hague in the Netherlands, it provides judicial settlement of disputes in accordance with Article 33 of the UN Charter.¹ The court operates under the Statute of the International Court of Justice, and fifteen judges sit on the court for renewable terms of nine years, working and issuing judgments in French and English.²

The ICJ in its current form was created in 1945; however the history of the court can be traced back to 1897.³ The Hague conferences of 1897 and 1907 resulted in the formation of the Permanent Court of Arbitration.⁴ This court still exists today, providing non-judicial dispute resolution services to the international community.⁵ The Hague conferences began the codification of international law in treaty form, thus forming the substantive basis of international legal obligations.⁶ The end of World War I saw the creation of the League of Nations in 1920.⁷ It was decided that a new stronger court should be created, and the Permanent Court of International Justice (PCIJ) was formed, with the Statute of the Permanent Court of International Justice being signed in Geneva in December 1920.⁸ The PCIJ ruled on 29 contentious cases, or disputes between states, and gave 27 advisory opinions between 1922 and 1940, after which the usage of the court declined.⁹ In 1945, the San Francisco conference established a new world organization, largely modeled upon the dissolved League of Nations.¹⁰ Implicit in this dissolution was that the PCIJ was to be replaced, partly motivated by increasing the representation of states in the court.¹¹ The ICJ was then formed in April 1946.¹²

The key function of the ICJ is to achieve peaceful resolution of disputes submitted to it by sovereign Member States of the UN in accordance with International Law.¹³ The ICJ is an important tool in maintaining international peace and security as it is able to offer impartial and non-politically motivated judicial dispute resolution.¹⁴ The ICJ can only preside over cases with state parties and cannot entertain arguments as to individual actions unless sufficiently linked to the state.¹⁵ Non-Member States can also appear before the ICJ after accepting the statute of the court, agreeing to abide by the decision of the court, and committing to paying annual contributions to the court.¹⁶

A subsidiary function of the court is to issue advisory opinions in response to questions of law that are submitted to it by any of the UN organs and specialized agencies.¹⁷ These decisions may not have authoritative, binding status but can be important in diplomatic relations, subsequent cases, and may even form part of customary international law as evidence of state practice.¹⁸ Advisory opinions can be good alternatives for states, which may bring requests for advisory opinions to the court via their participation in other UN organs, wishing to avoid expensive and long trials, by simply requesting how it should act in order to comply with international law.¹⁹

The ICJ has specific procedural rules contained in the ICJ Statute which includes supplementary “rules of the court,” provided for by Article 30 of the Statute.²⁰ Article 59 provides that the doctrine of judicial precedent (*stare decisis*)

¹ United Nations, *Charter of the United Nations*, 1945.

² International Court of Justice, *Statute of the International Court of Justice*, 1945.

³ International Court of Justice, *The Court*, n.d..

⁴ Permanent Court of Arbitration, *Home*, n.d.

⁵ Permanent Court of Arbitration, *Home*, n.d.

⁶ International Court of Justice, *The Court*, n.d.

⁷ United Nations, *United Nations Documentation Research Guide, Courts and Tribunals*, n.d.

⁸ International Court of Justice, *The Permanent Court of International Justice*, n.d.

⁹ International Court of Justice, *The Permanent Court of International Justice*, n.d.

¹⁰ United Nations Educational, Scientific, and Cultural Organization, *ICJ: History*, n.d.

¹¹ International Court of Justice, *The Court*, n.d.

¹² United Nations Educational, Scientific, and Cultural Organization, *ICJ: History*, n.d.

¹³ International Court of Justice, *The Court*, n.d.

¹⁴ International Court of Justice, *The Court*, n.d.

¹⁵ BBC, *Q&A: International Court of Justice*, 2007.

¹⁶ International Court of Justice, *The Court*, n.d.

¹⁷ Inside Justice, *United Nations Courts and Tribunals*, n.d.

¹⁸ University of California Berkeley Law Library, *International and Foreign Legal Research Researching Customary International Law and Generally Recognized Principles*, 2007.

¹⁹ International Court of Justice, *The Court*, n.d.

²⁰ International Court of Justice, *Statute of the International Court of Justice*, 1945, Article 30.

does not apply to judgments delivered by the ICJ.²¹ As such, each judgment is delivered on a case-by-case basis and two issues may be decided differently at two different junctures.²² In practice however, the court does not depart from its previous decisions and often treats previous decisions as precedent.²³ ICJ judgments are always binding on the parties before the court.²⁴ The ICJ may also issue provisional measures, which constitute interim provisions to prevent occurrences that may exacerbate any situation in consideration by the court.²⁵ Provisional measures may be issued in response to a request by either party to do so at any time after the application has been accepted pursuant to Article 73 of the rules of the court.²⁶

Article 38 of the ICJ statute contains the recognized sources of international law that the court may take into account in consideration of contentious cases and in issuing advisory opinions.²⁷ The sources of international law are international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions, and teaching of most highly qualified publicists of various nations as subsidiary means of determination of rules of law.²⁸

The majority of cases before the ICJ concern international conventions and a disagreement as to whether a certain set of facts or actions by a specific state can be reconciled with obligations under a certain convention.²⁹ For example, in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, which is currently being heard at the ICJ, the issue for the court to decide is whether actions carried out by Serbia in the territory of Croatia were in violation of Serbia's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.³⁰

Other cases before the ICJ may concern issues of "international custom," "the principles of law recognized by civilized nations," or "customary international law."³¹ In these cases, the court may be asked by the state parties to consider customary international law or may by its own accord deem it necessary to consider customary international law in its judgment.³² It is not possible to point to a definite concise list of all customary international law. The existence of customary international law is recognized by judges in the event that they are satisfied that there is sufficient state practice (states acting in a particular way) and that *opinio juris* is present (states acting because they believe it is legally required to do so).³³ Any action or source may be used to constitute state practice; statements by politicians and General Assembly resolutions have both been used in the past.³⁴ For example, in *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, the ICJ was satisfied that both Article 2 (4) and Article 51 of the UN Charter had sufficient basis in state practice accompanied by *opinio juris* that they could be considered customary international law.³⁵ Customary international law can be used for different purposes and can be applied in any circumstances if the justices deem it appropriate. For example, in *Nicaragua v. United States*, it was necessary to use customary international law, due to issues with the jurisdiction

²¹ International Court of Justice, *Statute of the International Court of Justice*, 1945, Article 59.

²² International Court of Justice, *The Court*, n.d.

²³ International Court of Justice, *The Court*, n.d.

²⁴ Uniosil, *International Court of Justice*, n.d.

²⁵ International Court of Justice, *The Court*, n.d.

²⁶ International Court of Justice, *Rules of the Court*, n.d.

²⁷ International Court of Justice, *Statute of the International Court of Justice*, 1945, Article 38.

²⁸ Harris, *Cases and Materials on International Law*, 2006.

²⁹ International Court of Justice, *The Court*, n.d.

³⁰ International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, 1999.

³¹ International Court of Justice, *Statute of the International Court of Justice*, 1945, Article 38.

³² Pursuant to: International Court of Justice, *Statute of the International Court of Justice*, 1945, Article 38.

³³ International Justice Project, *Customary International Law*, n.d.

³⁴ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States)*, 1986.

International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Denmark)*, 1968.

³⁵ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States)*, 1986.

of the court over the United States.³⁶ By finding parts of the UN Charter to be customary international law, the ICJ was able to hold the United States to account as rules of customary international law apply to all states.³⁷

The ICJ has also recognized non-derogable norms of international law.³⁸ These norms, known as *jus cogens* norms, have a special status and importance. *Jus cogens* norms were defined in article 53 of the Vienna Convention on the Law of the Treaties as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."³⁹ The most widely recognized *jus cogens* norm is that of the prohibition of torture.⁴⁰ Importantly, it is seen that there is an international consensus on the need to prohibit torture.⁴¹ It is also widely believed that the prohibition of Genocide is now a *jus cogens* norm.⁴²

Article 36 of the ICJ statute details when the court may have jurisdiction; jurisdiction is always based on consent.⁴³ The court may have jurisdiction when parties refer a case to the court, when matters arise that are provided for in the UN charter or in treaties and conventions, when states make bilateral treaties or agreements, and when issues of customary international law arise.⁴⁴ Consent to jurisdiction is usually found by virtue of being a Member State of the UN and by being a signatory to a particular treaty or convention that provides for dispute resolution by the ICJ.⁴⁵ For example, article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide reads that, "Disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."⁴⁶ This has been interpreted by the court to mean that in the event that there is any dispute as to the interpretation, application, or fulfillment of the convention, the ICJ has jurisdiction.⁴⁷ Therefore a party complaining of genocide of its peoples can invoke this article as forming a basis for the court to have jurisdiction over its case.

The ICJ is different from other courts in that its function is to interpret the law and it does not enter into discussion about which facts are true or false.⁴⁸ As such, the burden of proof is on the applicant party to present the facts and the law to the court. The court will then analyze the facts and how they relate to the law, interpreting the law to the factual scenario presented before it.⁴⁹ As a result, arguments in the ICJ typically will involve parties arguing that the factual scenario does or does not constitute a violation of the source of law in discussion, not that a fact or event did or did not happen.⁵⁰

The ICJ is an indispensable tool for the existence of the UN framework and the maintenance of peace and security, providing a method of enforcing commitments made by state parties. With the rise of customary international law, even more state promises and commitments can be enforced in addition to International Conventions. Critics often brand the UN a "talking shop;"⁵¹ however the ICJ provides an effective arena for dispute settlement for states.

³⁶ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States)*, 1986.

³⁷ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States)*, 1986.

³⁸ United Nations, *Vienna Convention on the Law of the Treaties*, 1969, Article 53.

³⁹ United Nations, *Vienna Convention on the Law of the Treaties*, 1969, Article 53.

⁴⁰ De Wet, *The Prohibition of Torture as an International Norm of jus cogens and its implications for National and Customary Law*, 2004.

⁴¹ International Justice Project, *Jus Cogens*, n.d.

⁴² Criddle and Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 2009.

⁴³ International Court of Justice, *Statute of the International Court of Justice*, Article 36.

⁴⁴ International Court of Justice, *Statute of the International Court of Justice*, 1945, Article 36 (1).

⁴⁵ International Court of Justice, *The Court*, n.d.

⁴⁶ United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, Article 9.

⁴⁷ International Court of Justice, *The Court*, n.d.

⁴⁸ International Court of Justice, *The Court*, n.d.

⁴⁹ International Court of Justice, *The Court*, n.d.

⁵⁰ International Court of Justice, *Rules of the Court*, n.d.

⁵¹ Ban, *More than just talk*, 2008.

I. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)

This case concerns a series of conflicts in Georgia between 1990 and 2008 – allegedly orchestrated by the Russian Federation – which has resulted in the killing of several thousand civilians, the forced displacement of over 300,000 people, and a full scale military invasion in August 2008.⁵² The events in examination concern separatist movements from Abkhazia and North and South Ossetia, regions that Georgia claim to part of their sovereign territory and that are recognized as such by all states with the exception of the Russian Federation.⁵³ The United Nations (UN) and the Organization for Security and Cooperation in Europe (OSCE) have deemed the attacks on civilians to be instances of ethnic cleansing.⁵⁴ The response of the international community to the conflict has been minimal, and an EU independent fact finding mission has proclaimed that the conflict has been allowed to have a “free run” with the situation having “hardly changed.”⁵⁵ Georgia brought the case, which is still ongoing, to the ICJ in 2008, under the Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁵⁶

History of conflict and facts

The Georgian application to the ICJ presents the actions of the Russian Federation in three distinct phases:

Phase One

In the first phase between 1990 and 1994, Georgia argues that the Russian Federation provided essential support in the form of the provision of weapons, supplies, and mercenaries to South Ossetian and Abkhaz separatists in their attacks against, and mass-expulsion of, virtually the entire ethnic Georgian population of South Ossetia and Abkhazia.⁵⁷ This allegedly resulted in the killing of thousands of civilians and the forced displacement of over 300,000 people.⁵⁸

Phase Two

Georgia characterizes the second phase as being the result of two agreements: the “Sochi Agreement” signed in July 1992 by Georgia, the South Ossetian separatist forces, and the Russian Federation; and the “Moscow Agreement” signed in May 1994 by Georgia, the Abkhaz separatist forces, and the Russian Federation.⁵⁹ Georgia argues that the two agreements formalized the Russian Federation’s status as party to the conflicts and as peacekeeper and facilitator of negotiations.⁶⁰ Georgia concludes that by implementing racially discriminatory policies in South Ossetia and Abkhazia under cover of its peacekeeping mandate, the Russian Federation sought to consolidate the forced displacement of the ethnic Georgian and other populations that resulted from ethnic cleansing from 1991 to 1994.⁶¹ In particular, the Russian Federation allegedly supported the South Ossetian and Abkhaz separatists’ quest for independence from Georgia.⁶² Achieving this goal necessarily implies the expulsion of ethnic Georgians and other populations from their homes and denial of their right to return to their homes and to live in peace within the sovereign territory of Georgia.⁶³

⁵² BBC, *Georgia-Russia Conflict*, 2010.

BBC, *North Caucasus: At a glance*, 2010.

International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4 - 6.

⁵³ BBC, *Georgia Russia conflict a year on*, 2009.

⁵⁴ United Nations General Assembly, *Towards a Genuine Partnership in a New Era*, 2008.

⁵⁵ European Union, *Independent International Fact-Finding Mission on the Conflict in Georgia*, 2009.

⁵⁶ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008.

⁵⁷ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

⁵⁸ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

⁵⁹ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

⁶⁰ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

⁶¹ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

⁶² International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

⁶³ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 6.

Phase Three

Georgia argues that the third phase began on August 8, 2008 when Russian ground forces, warships, and airplanes launched a full scale invasion on Georgian territory.⁶⁴ Georgia contends that this invasion was motivated by the recent international recognition of Kosovo in February 2008 and discussion of Georgia's potential membership of NATO in April 2008.⁶⁵ It is claimed that the attacks were efforts to legitimize the de facto South Ossetian and Abkhaz separatist authorities.⁶⁶

Jurisdiction

Georgia argues that jurisdiction should arise as a result of article 22 of CERD which provides that the ICJ should settle any dispute arising under the convention which both states are party to.⁶⁷ Georgia also advanced article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) as an additional basis for jurisdiction.⁶⁸ In its preliminary hearing the Court advanced that there was a disagreement as to the interpretation of two articles of CERD and accusations of acts that would be capable of contravening rights provided for by CERD; therefore the Court felt that it had sufficient grounds for jurisdiction under article 22 of CERD.⁶⁹ The ICJ may consider all elements of international law in consideration of a case however, and arguments of customary international law may be advanced for crimes under the Genocide Convention.⁷⁰

Procedural History

Georgia applied to the ICJ seeking the following three actions from the Russian Federation:

1. "The Russian Federation shall give full effect to its obligations under [the] CERD;
2. The Russian Federation shall immediately cease and desist from any and all conduct that could result, directly or indirectly, in any form of ethnic discrimination by its armed forces, or other organs, agents, persons and entities exercising elements of governmental authority, or through separatist forces in South Ossetia and Abkhazia under its direction and control, or in territories under the occupation or effective control of Russian forces; and
3. The Russian Federation shall in particular immediately cease and desist from discriminatory violations of the human rights of ethnic Georgians, including attacks against civilians and civilian objects, murder, forced displacement, denial of humanitarian assistance, extensive pillage and destruction of towns and villages, and any measures that would render permanent the denial of the rights to return of IDPs, in South Ossetia and adjoining regions of Georgia, and in Abkhazia and adjoining regions of Georgia, and any other territories under Russian occupation or effective control."⁷¹

The Russian Federation has responded that the obligations contained within the CERD cannot be applied to actions of states extraterritorially, that is to say actions taken by a state outside of its own borders.⁷² Conversely, it could be argued that this is the very nature of an international treaty, and the Court decided in its hearing on provisional measures that this argument should not be accepted.⁷³ This will be a good area for conversation however, as arguments as to the legitimacy of this decision can be raised; in other words, it could be advanced that "anything that is not prohibited is permitted," as was decided in the *Lotus* judgment.⁷⁴

The Russian Federation also filed preliminary objections in an attempt to establish that there was not a significant degree of involvement by the Russian Federation in the actions of the separatist forces to warrant attributing them to

⁶⁴ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 6.

⁶⁵ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 6.

⁶⁶ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 6.

⁶⁷ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

⁶⁸ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 9.

⁶⁹ International Court of Justice, *Response to Georgia's request for the indication of provisional measures*, 2008, p. 4.

⁷⁰ International Court of Justice, *Response to Georgia's request for the indication of provisional measures*, 2008, p. 4.

⁷¹ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 9.

⁷² International Court of Justice, *Response to Georgia's request for the indication of provisional measures*, 2008, p. 3.

⁷³ International Court of Justice, *Response to Georgia's request for the indication of provisional measures*, 2008.

⁷⁴ Permanent Court of International Justice, *Lotus*, 1927.

the Russian Federation.⁷⁵ The Russian Federation also argued that it was in fact Georgia that first used force against South Ossetia which warranted subsequent military action from the Russian Federation.⁷⁶ It will be for the Court to decide how they feel the factual scenario can be best established and indeed what law it deems to be applicable to the scenario.

The ICJ indicated provisional measures, which provide for the time between the filing of the application and the judicial decision, on the October 15, 2008.⁷⁷ The provisional measures requested that both Georgia and the Russian Federation refrain from any act of racial discrimination, facilitate humanitarian assistance, and not act in any way that may aggravate or extend the dispute.⁷⁸

Public hearings took place at The Hague from September 13 to September 17, 2010 concerning preliminary objections raised by the Russian Federation and by Georgia in response.⁷⁹ Counsel for both the Russian Federation and Georgia presented to the Court for periods of two hours at a time. Justices have now entered deliberations for the preliminary stage.⁸⁰

Merits of the Case

It will be for the Court to decide whether the facts of the case fall within the definition of racial discrimination. This will involve an analysis of the facts, determining whether the facts of the case can be deemed to fall within the definitions within the CERD, and any customary international law that the Court may deem appropriate.

Convention on the Elimination of all Forms of Racial Discrimination

The Convention on the Elimination of all forms of Racial Discrimination (CERD) entered into force on January 4, 1969 and is overseen by the Committee on the Elimination of Racial Discrimination.⁸¹ The definition of racial discrimination for the purposes of the convention is “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁸²

As such, the state parties:

“condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”⁸³

Article 5 contains a specific list of rights and freedoms that the state parties signatory to the convention are particularly concerned with the equal enjoyment of in compliance with the fundamental obligation in article 2 of the convention.⁸⁴

⁷⁵ International Court of Justice. *Preliminary Objections of the Russian Federation*, 2009.

⁷⁶ International Court of Justice. *Preliminary Objections of the Russian Federation*, 2009.

⁷⁷ International Court of Justice, *Response to Georgia’s request for the indication of provisional measures*, 2008.

⁷⁸ International Court of Justice, *Response to Georgia’s request for the indication of provisional measures*, 2008, p. 7 – 8.

⁷⁹ International Court of Justice, *Public Sitting in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, 2010.

⁸⁰ International Court of Justice, *Public Sitting in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, 2010.

⁸¹ Office of the United Nations High Commissioner for Human Rights. *Committee on the Elimination of Racial Discrimination*.

⁸² United Nations General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, 1965, Article 1.

⁸³ United Nations General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, 1965, Article 2.

⁸⁴ International Convention on the Elimination of all Forms of Racial Discrimination, Article 2, dictates that state parties undertake to prohibit and to eliminate racial discrimination and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law.

The main articles that may be in question in this case are Articles 5 (b): right to security of person, (c): right to equal access to public service, (d) (i):right to freedom of movement, (d) (ii): the right to leave any country and to return to one's country, (d) (iii): right to nationality, and (d) (ix): the right to freedom of peaceful assembly and association. It will be for the Court to decide whether circumstances have been put in place that violate the above terms of CERD, and again whether they can be attributed to the Russian Federation. An investigation carried out by Human Rights Watch concluded that the Russian Federation should be held accountable for allowing separatist forces to kill, beat, and rape Georgian civilians.⁸⁵ The burden of proof will be on Georgia to show that the acts of the Russian Federation fall within and violate the terms of the CERD.

Convention on the Prevention and Punishment of the Crime of Genocide

Georgia alluded to bringing their case to the ICJ under the Genocide Convention, ultimately choosing to only claim jurisdiction under the Genocide Convention in the event that no jurisdiction could be found under CERD.⁸⁶ The Court may use the Genocide Convention despite this however, due to the fact that prohibition of Genocide is a *jus cogens* norm, meaning that it is a non-derogable norm of international law.⁸⁷ In other words, owing to article 38 of the Statute of the ICJ, which provides that the Court may take into account any source of international law and the *jus cogens* status of the prevention of Genocide, making it legally impossible to derogate from the conditions of the Genocide Convention, the Court will be able to take into consideration the Genocide Convention.⁸⁸

“Genocide” means acting with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, by: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group.⁸⁹ Acts that fall within the definition of genocide in article 2 may then be used to form the set of crimes contained in article 3.⁹⁰ These acts are genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.⁹¹ It will be for the Court to decide whether the Genocide convention should be considered by the Court; the burden of proof will be on Georgia to prove Genocide.⁹²

Customary International Law and Nicaragua Judgement

Article 38 of the ICJ statute details that the ICJ may take into account a number of sources, which include “international custom, as evidence of a general practice accepted as law” and “the general principles of law recognized by civilized nations.”⁹³

It seems that the events that Georgia alleges occurred could fall within many different conventions and customs. The Russian response to the Georgian application indeed accepts this, stating that the case would have been more appropriately brought under the use of force elements in the UN Charter.⁹⁴ In 1986, in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, the UN Charter could not be used because the respondent state (the USA) had not accepted the jurisdiction of the ICJ.⁹⁵ The Court however, felt able to make a ruling using article 2 (4) (Use of Force) and article 51 (Self Defense) of the Charter.⁹⁶ This was on the

⁸⁵ BBC, *S Ossetia 'war crimes' Condemned*, 2009.

⁸⁶ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008.

⁸⁷ De Wet, *The Prohibition of Torture as an International Norm of jus cogens and its implications for National and Customary Law*, 2004.

⁸⁸ International Court of Justice, *Statute of the International Court of Justice*, Article 38.

⁸⁹ United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, Article 1.

⁹⁰ Genocide Watch, *What is Genocide?*.

⁹¹ United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948, Article 3.

⁹² International Court of Justice, *Rules of the Court*.

⁹³ International Court of Justice, *The Statute of the International Court of Justice*, Article 38.

⁹⁴ International Court of Justice, *Response to Georgia's request for the indication of provisional measures*, 2008, p. 7 – 8.

⁹⁵ Charney, *Customary International Law in the Nicaragua Case: Judgment on the Merits*, 1988.

⁹⁶ Charney, *Customary International Law in the Nicaragua Case: Judgment on the Merits*, 1988, p. 2.

basis that the UN Charter could form the basis of customary international law, and that the two articles on use of force and self defense had entered into being as norms of international law.⁹⁷

After *Nicaragua v. United States*, it can be said that article 2 (4) and 51 of the UN Charter can be used as customary international law.⁹⁸ The existence of customary international law requires state practice (states acting in a certain way for a certain amount of time) and *opinio juris* (a belief by states that they act in this way because of a legal obligation).⁹⁹ A court may use any form of custom or customary international law that it deems to exist by virtue of article 38 of the ICJ statute¹⁰⁰ and therefore any customary international law may be implemented by the Court at any time and the Court may hear arguments as to the existence of any kind of customary international law.¹⁰¹ This is important in the present case because although Georgia has brought the case to the ICJ under CERD, analysis of the facts of the case suggest that other sources of law could be important; indeed Georgia's application also included the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹⁰²

Use of Force

The prohibition of the use of force contained in article 2 (4) of the UN Charter could be invoked by the Court if it deemed it appropriate.¹⁰³ The article reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁰⁴ The article could be used in conjunction with phases 1 and 3 of the facts which concern potential threats to political independence and territorial integrity.¹⁰⁵ Whether the Court would find a violation of article 2 (4) with regard to the facts of phase 1 would depend on the degree of control that the Russian Federation exercised over the South Ossetian and Abkhaz separatists (the separatists) which in turn will decide whether the actions of the separatists can be attributed to the Russian Federation.¹⁰⁶ It must be shown, in accordance with the test laid down by the ICJ in *Nicaragua v. United States* that the Russian Federation were in "effective control" of the separatist forces.¹⁰⁷

The actions of the separatists, established in the facts of the case, would surely amount to a use of force against the territorial integrity of Georgia and certainly the political independence of Georgia.¹⁰⁸ However, the ICJ can only have state parties before it, and it must decide whether the Russian Federation exercised effective control over the separatists, to the extent that the ICJ can attribute the actions to the Russian Federation. For effective control to be found it would need to be shown that there was some involvement from the Russian Federation in organizing the force, for example, or that Russians fought with the separatists.¹⁰⁹

In the third phase, the Court may find that the Russian Federation would be in violation of article 2 (4) due to the invasion on to Georgian territory of Russian warships airplanes and ground forces on August 8, 2008.¹¹⁰ The motive behind the invasion is not clear; Georgia alleges that it was a response to the international recognition of Kosovo and potential accession of Kosovo to the North Atlantic Treaty Organisation.¹¹¹ The Court will hear discussion of the reasons and details of the invasion, and it may be the case that the Russian Federation have not violated article 2 (4)

⁹⁷ Charney, *Customary International Law in the Nicaragua Case: Judgment on the Merits*, 1988.

⁹⁸ Charney, *Customary International Law in the Nicaragua Case: Judgment on the Merits*, 1988.

⁹⁹ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, 1986.

Akehurst, *Custom as a source of International Law*, 1975.

¹⁰⁰ Article 38 of the Statute of the International Court of Justice: the Court shall apply ... "international custom, as evidence of a general practice accepted as law" and "the general principles of law recognized by civilized nations."

¹⁰¹ International Court of Justice, *The Statute of the International Court of Justice*, Article 38.

¹⁰² International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008.

¹⁰³ International Court of Justice, *The Statute of the International Court of Justice*, Article 38.

¹⁰⁴ United Nations, *The UN Charter*, 1945, Article 2 (4).

¹⁰⁵ International Court of Justice. *Georgia v. Russia: Application instituting proceedings*, 2008.

¹⁰⁶ International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, 2001.

¹⁰⁷ Jinks, *State Responsibility for the acts of private armed groups*, Chicago, 2003.

¹⁰⁸ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 1.

¹⁰⁹ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, 1986.

¹¹⁰ *Russia battles Georgia over breakaway region of South Ossetia*, 2008.

¹¹¹ International Court of Justice, *Georgia v. Russia: Application instituting proceedings*, 2008, p. 4.

because the invasion does not come into the definition of use of force or that the Russian Federation has violated article 2 (4) but that this can be justified by self defense.¹¹² Article 51 of the UN Charter has been interpreted by the ICJ in *Nicaragua v. United States* to be capable of justifying a use of force.¹¹³ The threshold for proving self defense under article 51 is not clear, and there is disagreement as to the level of threat that must be endured by a state before they will be justified in acting in self defense.¹¹⁴ Martti Koskenniemi argues that there are two ways to interpret article 51: narrowly, only for use when an armed attack has already occurred, which may make it of limited use as conflict has already begun, and widely, which leaves the concept open to abuse.¹¹⁵ For example, Koskenniemi poses the question of whether the United States should be able to use article 51 in response to the State of Panama, which exports drugs that harm youths in the United States.¹¹⁶ This would not seem sensible, and Koskenniemi warns that abuse of article 51 can be a “slippery slope.”¹¹⁷ The use of article 51 might be seen as a question of interpretation, and a consideration of what actions must occur for a state to be threatened to the extent that they are able to act justifiably in self defense.¹¹⁸ The existence of nuclear weapons suggests that waiting for an armed attack may be too late.¹¹⁹ For self defense to be proven then, the Russian Federation would need to show that they were acting in collective self defense in response to a threat of the use of force against another state or were unacceptably threatened by Georgia, as was unsuccessfully argued by the United States in *Nicaragua v. United States*.¹²⁰

Issues to Discuss

Counsel will have plenty of opportunity to be creative and form original arguments in the simulation of this case. The central legal discussion will initially involve the CERD, but may also involve arguments including customary international law. Justices will have to decide whether they can interpret the CERD, in particular articles 1, 2, and 3, to include the factual situation in the case, and whether to accept arguments as to the existence of customary international law.

II. Certain Criminal Proceedings in France (Republic of the Congo v. France)

Introduction

The case of the Republic of Congo v. France concerns two of the most disputed principles of international law. Firstly, the Court is asked to consider the principle of “universal jurisdiction”: in this case, whether a State may pursue judicial proceedings against nationals of a foreign State for alleged crimes which took place abroad, against victims who were also foreigners. Secondly, the case examines the extent of the immunity of Heads of States from prosecution and participation in judicial proceedings in foreign jurisdictions, and whether this immunity extends to other senior cabinet ministers.

The Facts of the Case

In May 1999, 353 refugees were returning by boat to the Republic of Congo (hereafter “Congo”) after fleeing the fighting there.¹²¹ Although guaranteed safe passage by the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Congolese government, many reportedly never completed their journey, “disappearing”

¹¹² Franck, *Changing Norms Governing the Use of Force by States*, 1970.

¹¹³ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, 1986.

¹¹⁴ Franck, *Changing Norms Governing the Use of Force by States*, 1970, p. 813.

¹¹⁵ Koskenniemi, *Iraq and the Bush Doctrine of Pre Emptive Self Defense*, 2002.

¹¹⁶ Koskenniemi, *Iraq and the Bush Doctrine of Pre Emptive Self Defense*, 2002.

¹¹⁷ Koskenniemi, *Iraq and the Bush Doctrine of Pre Emptive Self Defense*, 2002.

¹¹⁸ Koskenniemi, *Iraq and the Bush Doctrine of Pre Emptive Self Defense*, 2002.

¹¹⁹ Koskenniemi, *Iraq and the Bush Doctrine of Pre Emptive Self Defense*, 2002.

¹²⁰ International Court of Justice, *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, 1986.

¹²¹ Freedom House, *Freedom in the World – Congo, Republic of (Brazzaville)*, 2006.

before reaching the Brazzaville Beach river port.¹²² According to Amnesty International, “it is widely believed in the country that the victims were extrajudicially executed and their bodies secretly disposed of.”¹²³ The government of Congo denies any role in the disappearance of the refugees.¹²⁴

The legal dispute between Congo and France originated on December 5, 2001, when three French and Congolese human rights groups filed a complaint with French prosecutors in Paris.¹²⁵ The complaint concerned allegations of crimes against humanity and torture, principally in connection with the Brazzaville Beach disappearances.¹²⁶ These acts were allegedly committed by Congolese nationals against other Congolese citizens, and took place in the Republic of Congo.¹²⁷ The NGOs made specific allegations against four senior figures within the Congolese government and security forces: His Excellency (H.E.) Mr. Denis Sassou Nguesso, President of the Republic of Congo; H.E. General Pierre Oba, Minister of the Interior; General Norbert Dabira, Inspector-General of the Congolese Armed Forces; and General Blaise Adoua, Commander of the Presidential Guard.¹²⁸ The three NGO complainants argued: “that the French courts had jurisdiction, as regards crimes against humanity, by virtue of a principle of international customary law providing for universal jurisdiction over such crimes, and as regards the crime of torture, on the basis of Articles 689-1 and 689-2 of the French Code of Criminal Procedure.”¹²⁹

Since one of the individuals named in the complaint, General Dabira, had a residence in Meaux, a region northeast of Paris, the *Procureur de la République* of the Paris *Tribunal de Grande Instance* (a French superior court) transmitted the complaint to his counterpart at Meaux.¹³⁰ On January 23, 2002, an application for judicial investigation was issued by the Meaux *Tribunal de Grande Instance* and a police inquiry began.¹³¹ Although Meaux’s lead on the case derived from Dabira’s residence in its jurisdiction, the application for an investigation neither named General Dabira specifically, nor identified any other individuals who were to be the subject of the investigation.¹³² Witnesses to the alleged crimes interviewed by French police made accusations against President Nguesso, and these allegations were included in a report completed by police investigators.¹³³

On May 23, 2002, General Dabira was questioned in custody by judicial police officers and on July 8, 2002, by the investigating judge.¹³⁴ On September 16, 2002, the investigating judge made Dabira the subject of a warrant for

¹²² International Refugee Rights Initiative, *Still in Search of Justice: Ten Years Since Disappearances of Over 350 in Republic of Congo*, 2009.

¹²³ Amnesty International, *République Du Congo. Un Pays Sinistré*, 2003.

¹²⁴ Amnesty International, *République Du Congo. Un Pays Sinistré*, 2003.

¹²⁵ An additional complaint was submitted on December 7, 2001; International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p. 2; International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, p.6.

¹²⁶ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p.2.

¹²⁷ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.5.

¹²⁸ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.5.

¹²⁹ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p.7.

¹³⁰ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p.7.

¹³¹ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p.7.

¹³² International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p. 7.

¹³³ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, pp. 7-8.

¹³⁴ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p. 7.

immediate appearance (a *mandat d'amener*).¹³⁵ However, by that time, General Dabira had returned to the Congo and the warrant cannot be executed outside of French territory.¹³⁶

Congo claims that: "When H.E. Mr. Denis Sassau Nguesso was on a State visit to France, the investigating judge issued a *commission rogatoire* (warrant) to judicial police officers instructing them to take testimony from him."¹³⁷ Counsel for Congo has been unable to present such a warrant to the Court and France claims that a *commission rogatoire* was not in fact issued.¹³⁸ President Nguesso was instead, France contends, the subject of a request made through diplomatic channels to give voluntary evidence as the "representative of a foreign power."¹³⁹ There seems to be consensus between the parties that Generals Oba and Adoua have neither been actively investigated by French authorities, been subject to any French criminal proceedings, nor been requested to submit to questioning as witnesses.¹⁴⁰

The Republic of Congo's Application

On December 9, 2002, Congo filed an application with the Registry of the International Court of Justice (ICJ) to institute proceedings against France.¹⁴¹ The application requested that the Court "declare that the French Republic shall cause to be annulled the measures of investigation and prosecution" taken by its courts on the basis of the NGOs' complaint.¹⁴²

The submission was based on two legal grounds:

(1) Violation of the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, exercise its authority on the territory of another State, by unilaterally attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country; and

(2) Violation of the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court.¹⁴³

¹³⁵ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p. 7.

¹³⁶ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p. 7.

¹³⁷ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court's General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p. 5.

¹³⁸ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p. 8.

¹³⁹ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p. 8.

¹⁴⁰ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p. 8.

¹⁴¹ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court's General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p. 3.

¹⁴² International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court's General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p. 3.

¹⁴³ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court's General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.3.

Jurisdiction of the Court

Neither applicant, nor respondent challenges the Court's jurisdiction to consider the case. France has been a Member of the United Nations (UN) since 1945, while Congo joined on gaining independence in 1960.¹⁴⁴ As parties to the Charter, they are also bound by the Statute of the ICJ (Charter of the United Nations, Art. 93).¹⁴⁵

Neither State has active Declarations Recognizing the Jurisdiction of the Court as Compulsory.¹⁴⁶ In order for its application to enter the General List of the Court, Congo therefore requested that France consent to the jurisdiction of the ICJ.¹⁴⁷ The Application also noted that a Treaty of Co-operation between the two States declares: "In respect for their mutual sovereignty, independence and territorial integrity, each of the High Contracting Parties undertakes to settle its disputes with the other by peaceful means, in accordance with the Charter of the United Nations" (Art. 2, Treaty of Co-Operation between the French Republic and the People's Republic of the Congo).¹⁴⁸

On April 8, 2003, the French Minister for Foreign Affairs wrote to the Registrar of the ICJ accepting the jurisdiction of the Court to entertain the Application. The letter limited consent to "the subject matter of the Application and strictly within the limits of the claims formulated by the Republic of the Congo."¹⁴⁹ It also stated its belief that the Treaty of Co-operation did not constitute a basis of jurisdiction for the Court.¹⁵⁰

The Immunity of Heads of State

In oral arguments to the Court, Congo described the immunity of foreign Heads of State as "one of the great undisputed principles of customary law."¹⁵¹ The modern customary principle that Heads of State are immune from prosecution developed from two general principles of international law: the principle of sovereign immunity and the principle of diplomatic immunity.¹⁵² Sovereign immunity dates from a time when the ruler of a State and the State itself were indistinguishable, and both entities were immune and inviolable for their actions.¹⁵³ In recognising Head of State immunity today, States are respecting foreign leaders as symbols of their State's sovereign independence.¹⁵⁴ Under the principle of diplomatic immunity, individuals responsible for a State's diplomatic relations are also accorded certain rights to enable them to carry out their official functions, including the right to be immune from arrest or prosecution.¹⁵⁵ According to the Vienna Convention, the intention of diplomatic immunity is "to ensure the efficient performance of the functions of diplomatic missions" (Preamb., Vienna Convention on Diplomatic Relations).¹⁵⁶ Thus, while they are in office Heads of State are granted immunity under customary international law so that they are free to travel, carry out their official duties, and conduct diplomacy with other States, but also because they are representative of their State's independence and sovereignty.¹⁵⁷

The ICJ ruled on the extent of Head of State immunity in *Democratic Republic of the Congo v. Belgium* (2002).¹⁵⁸

¹⁴⁴ United Nations, *Member States of the United Nations*.

¹⁴⁵ United Nations General Assembly, *Charter of the United Nations*, 1945, art.93.

¹⁴⁶ *International Court of Justice*, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*.

¹⁴⁷ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court's General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.17.

¹⁴⁸ *Traité de Coopération Entre la République Française et la République Populaire du Congo* (1982), art. 2.

¹⁴⁹ *Le Ministre Des Affaires Étrangères de La République Française au Greffier de la Cour Internationale De Justice, Paris, le 8 Avril 2003*, 2003.

¹⁵⁰ *Le Ministre Des Affaires Étrangères de La République Française au Greffier de la Cour Internationale De Justice, Paris, le 8 Avril 2003*, 2003.

¹⁵¹ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 10 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/20 (translation), 2003, p.18.

¹⁵² Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 2002, p.652.

¹⁵³ Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 1986, p.170.

¹⁵⁴ Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 2002, p.654.

¹⁵⁵ Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 2002, p.653-654.

¹⁵⁶ United Nations, *Vienna Convention on Diplomatic Relations (1961)*, preamb.

¹⁵⁷ Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 2002, p. 654-655.

¹⁵⁸ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002.

In 2000, Belgium issued an international arrest warrant against H.E. Mr. Abdulaye Yerodia Ndongbasi, the Congolese Minister of Foreign Affairs, for allegedly making speeches that incited racial hatred.¹⁵⁹ Taking the case to the ICJ, the Democratic Republic of the Congo claimed that the Belgian court's actions violated Mr. Yerodia's immunities as a Foreign Minister.¹⁶⁰ Basing its judgment solely on customary law, the Court ruled "that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States."¹⁶¹ The judgment stated:

The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.¹⁶²

The Court further found that: "It has been unable to deduce... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity."¹⁶³ In addition, the judgment held that "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity.'"¹⁶⁴

French jurisprudence is supportive of the principle of Head of State immunity. In 2001, the French *Cour de Cassation* (France's highest court) ruled that the Libyan President, H.E. Colonel Muammar Qaddafi, was immune from prosecution and sentencing for his alleged involvement in the bombing of a French airliner in 1989.¹⁶⁵ In its judgment of March 13, 2001, the *Cour de Cassation* found: "international custom prohibits the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State."¹⁶⁶ Furthermore, the Court stated: "under international law the offence alleged, regardless of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State"¹⁶⁷.

The Extent of President Nguesso's Immunity as Head of State

France and Congo seem to share common ground in recognising that President Sassau Nguesso enjoys immunities as Head of State.¹⁶⁸ In oral arguments, counsel for France noted French case law supporting the international custom, telling the Court: "One thing must be clear at the outset: France in no way denies that President Sassou

¹⁵⁹ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.9.

¹⁶⁰ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.10.

¹⁶¹ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.20-21.

¹⁶² International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.22.

¹⁶³ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.24.

¹⁶⁴ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.22.

¹⁶⁵ Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 2001, p.595.

¹⁶⁶ Cour de Cassation, Chambre Criminelle, *Décision de la Cour de Cassation du 13 Mars 2001 (N° de pourvoi : 00-87215)*, 2001.

¹⁶⁷ Cour de Cassation, Chambre Criminelle, *Décision de la Cour de Cassation du 13 Mars 2001 (N° de pourvoi : 00-87215)*, 2001.

¹⁶⁸ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p.8.

Nguesso enjoys, as a foreign Head of State, ‘immunities from jurisdiction, both civil and criminal.’¹⁶⁹ At dispute is whether President Nguesso’s immunity as Head of State was violated in the actions taken by the French authorities.

There is some discrepancy between France’s and Congo’s account of actions taken by French investigators against President Nguesso. According to Congo’s Application the investigating judge of the Meaux *Tribunal de Grande Instance*: “issued a *commission rogatoire* (warrant) instructing police officers to take testimony from H.E. President Denis Sassou Nguesso.”¹⁷⁰ As of this writing, Congo has not produced a copy of the warrant for the Court.¹⁷¹ However, France contends that President Nguesso has not been the subject of any proceedings.¹⁷² Counsel for France acknowledges that the investigating judge expressed a desire to examine him, but they claim no warrant was ever served.¹⁷³ France suggests that the judge gave thought to inviting the President to give evidence under special procedures allowed under Article 656 of the Code of Criminal Procedure, a measure whereby foreign officials may be invited to participate in French court proceedings.¹⁷⁴ However, they hold that such a request was never formally served on President Nguesso.¹⁷⁵

France’s counsel argue that an invitation to appear as a witness in a foreign courtroom would not constitute a violation of Head of State immunities. Article 656 states: “The written statement of the representative of a foreign power is requested through the intermediary of the Minister for Foreign Affairs. If the application is granted, the statement is received by the president of the appeal court or by a judge delegated by him” (Art. 656, Code of Criminal Procedure, Republic of France).¹⁷⁶ French counsel argue that any foreign officials subject to a request made under Article 656 are free to accept or decline the invitation, and so immunities are not violated. In oral arguments, they contend: “Article 656... gives the Congolese Head of State a prior guarantee that the immunities he enjoys will not be violated because the decision whether or not to give testimony lies with him and with him alone. The very purpose of that provision is precisely to ensure respect for immunity.”¹⁷⁷

However, Congo contends that immunity extends beyond a prohibition on a Head of State being made the subject of civil or criminal proceedings overseas: it also prohibits *any* kind of participation in a foreign court case, even receiving an invitation to appear as a witness.¹⁷⁸ The Application maintains that immunity: “prohibits any organ of

¹⁶⁹ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.19.

¹⁷⁰ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.5.

¹⁷¹ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p.8.

¹⁷² International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.15.

¹⁷³ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.15.

¹⁷⁴ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.15; *Code of Criminal Procedure, Republic of France, Title IV: The Way in Which the Statements of Members of the Government and Those of Representatives of Foreign Powers are Received (English translation)*, art. 656.

¹⁷⁵ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.15.

¹⁷⁶ *Code of Criminal Procedure, Republic of France, Title IV: The Way in Which the Statements of Members of the Government and Those of Representatives of Foreign Powers are Received (English translation)*, art. 656.

¹⁷⁷ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.21.

¹⁷⁸ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.15.

French criminal jurisdiction from summoning as a witness a foreign Head of State.”¹⁷⁹ Congo argues that Head of State immunities “must not be interpreted in a restrictive manner” and should not be confined “only to acts initiating public proceedings.”¹⁸⁰ The Application suggests their position is supported by the Court’s judgment in *Democratic Republic of the Congo v. Belgium* (2002), proposing that an invitation to appear as a witness constitutes an “act of authority of another State” which would “hinder” a Head of State “in the performance of his or her duties.”¹⁸¹

Congo further argues that any notice to appear as a witness made under French law may be enforced by police action, potentially further violating immunities.¹⁸² Article 109 of the Code of Criminal Procedure provides that: “If the witness does not appear or refuses to appear, the investigating judge may, on the request of the district prosecutor, order him to be produced by the law-enforcement agencies” (Art. 109, Code of Criminal Procedure, Republic of France).¹⁸³ On October 10, 2001, the French *Cour de Cassation* defined the extent of immunity of the French Presidency, ruling that the President could not appear as a witness in a French court:

Having been directly elected by the people in order, inter alia, to ensure the proper functioning of the public administration as well as the continuity of the State, the President of the Republic cannot, during his term of office, be heard as a *témoign assisté* (legally represented witness), or be *mis en examen* (placed under judicial examination), summoned to appear or committed for trial for any offence before any organ of ordinary criminal jurisdiction; whereas neither can he be obliged to appear as a witness pursuant to Article 101 of the Code of Criminal Procedure, since, under Article 109 of the said Code, there attaches to that obligation a measure of publicly enforceable constraint and it is sanctioned by a criminal penalty.¹⁸⁴

As counsel for Congo asked the Court in oral arguments: “What applies to the President of the French Republic, does it not also apply to a foreign Head of State?”¹⁸⁵ However, France argues that Article 656’s special procedures are not subject to sanctions contained within Article 109.¹⁸⁶ It denies that a refusal by a foreign official to testify under Article 656 would constitute a criminal offence or that turning down such an invitation would attract criminal sanction.¹⁸⁷

The Status of Proceedings Against Generals Oba and Adoua

While some disagreement exists on the status of proceedings against President Nguesso, the parties agree that General Oba and General Adoua, the Commander of the Presidential Guard, have not been subject to active

¹⁷⁹ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.15.

¹⁸⁰ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.15.

¹⁸¹ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.15.

¹⁸² International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.15.

¹⁸³ *Code of Criminal Procedure, Republic of France, Section IV: The Hearing of Witnesses (English translation)*, art. 109.

¹⁸⁴ Cour de Cassation, Chambre Criminelle, *Décision de la Cour de Cassation du 10 Octobre 2001 (N° de pourvoi : 01-84922)*, 2001.

¹⁸⁵ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 10 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/20 (translation), 2003, p.23.

¹⁸⁶ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.11.

¹⁸⁷ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.11.

investigation or judicial proceedings as a result of the complaint submitted in December 2001.¹⁸⁸ France claims “there is no indication that this will change in the future”.¹⁸⁹

Counsel for France therefore argues that, since the nature of any future proceedings or investigations against them are “a completely hypothetical question,” the ICJ cannot consider elements of the Application relating to Generals Oba and Adoua.¹⁹⁰ France told the Court: “At this stage in the proceedings the Court cannot order France to refrain from taking purely hypothetical measures.”¹⁹¹ Counsel for France refer to the ICJ’s jurisprudence in *Cameroon v. United Kingdom* (1963), which found: “it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved.”¹⁹²

However, Congo argues that, since General Oba, General Adoua and President Nguesso are mentioned in the original complaint, they are at the whim of French prosecutors to instigate investigations or proceedings against them, particularly if their official duties or private affairs require them to visit French territory.¹⁹³ Furthermore, allegations associated with President Nguesso are included in a report of police investigations of General Dabira.¹⁹⁴ They assert that the investigating “judge is wholly free to place under investigation whomever he believes should be placed under investigation under the relevant legal criteria.”¹⁹⁵

Extension of Immunity to Other Senior Cabinet Ministers, Including the Minister of Interior

Congo maintains that immunity not only applies to President Nguesso as Head of State, but also protects General Pierre Oba as Minister of the Interior.¹⁹⁶ The Application argues that the principle of immunity extends to a Minister of the Interior, since his or duties to maintain public order are integral to a State’s sovereignty:

He [General Oba] is alleged to have committed the offences in question in connection with the exercise of his duties of maintaining public order. A foreign State which purports to have jurisdiction over such offences is thereby interfering in the exercise by the Minister of his country’s sovereignty over fundamental matters. It follows from this that a Minister of the Interior, in regard to acts committed in connection with the exercise of his duties of maintaining public order, should enjoy an immunity.¹⁹⁷

In *Democratic Republic of the Congo v. Belgium* (2002), the ICJ was asked to consider whether the immunities

¹⁸⁸ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ, 2003, p.8.

¹⁸⁹ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.24.

¹⁹⁰ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.24.

¹⁹¹ International Court of Justice, *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/21 (translation), 2003, p.24.

¹⁹² International Court of Justice, *Case Concerning The Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963, ICJ, 1963, p.36.

¹⁹³ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, p.5.

¹⁹⁴ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, p.7-8.

¹⁹⁵ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, p.5.

¹⁹⁶ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p. 9-11.

¹⁹⁷ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p. 9-11.

afforded to Heads of State extend to one particular senior cabinet member: the Minister for Foreign Affairs.¹⁹⁸ It reasoned that a Foreign Minister “is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise.”¹⁹⁹ It further considered that Ministers of Foreign Affairs are required to “be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States.”²⁰⁰

Congo maintains that the reasoning behind the Court’s recognition of immunity for Ministers of Foreign Affairs also applies to Ministers of the Interior.²⁰¹ It argues that addressing modern security threats, such as transnational crime, requires Interior Ministers to cooperate with neighbouring countries, travel internationally and hold meetings with the security chiefs of other States.²⁰² Counsel for Congo told the Court: “In the global village of today, all sectors of governmental action may be the subject of inter-State co-operation, or even joint international management. Thus, the Congolese Minister of the Interior participates very actively in pan-African co-operation on public security policy.”²⁰³ However, counsel for France argues General Oba’s “functions and duties” as Minister of the Interior are “essentially domestic in nature” and “he is far less exposed to the need for foreign travel than a Foreign Minister.”²⁰⁴ They suggest that the logical conclusion of Congo’s argument would be that: “absolutely all the members of a government, all the senior officials of government, should henceforth benefit from immunities under international law.”²⁰⁵

Universal Jurisdiction

Under the principle of *territorial jurisdiction*, States have classically had sole responsibility for prosecuting the crimes that occur within their territorial borders. As ICJ President Guillaume argues: “That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example.”²⁰⁶ In certain circumstances, an individual State may extend its territorial jurisdiction to crimes committed overseas by one of its nationals, to crimes committed against one of its nationals, or to crimes committed threatening the State’s security. In 1927, the ICJ’s predecessor, the Permanent Court of International Justice, found in the Lotus case: “In all systems of law the principle of the territorial character of criminal law is fundamental.”²⁰⁷ The UN Charter later affirmed the principle: “Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State” (Art. 2, Charter of the United Nations).²⁰⁸

However, in recent years, this classical model of jurisdiction has been challenged by the principle of *universal*

¹⁹⁸ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p. 22.

¹⁹⁹ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.22-24.

²⁰⁰ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 2002, p.22-24.

²⁰¹ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, p.23.

²⁰² International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, p.23.

²⁰³ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/22 (translation), 2003, p.23.

²⁰⁴ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 12.15 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/23 (translation), 2003, p.4.

²⁰⁵ International Court of Justice, *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 12.15 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, CR 2003/23 (translation), 2003, p.4.

²⁰⁶ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Separate Opinion of President Guillaume*, 2002, p.37.

²⁰⁷ Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, 1927, p.16.

²⁰⁸ United Nations General Assembly, *Charter of the United Nations*, 1945, art. 2.

jurisdiction. Under the principle of universality, certain crimes are deemed to be of sufficient concern to the international community that States have jurisdiction regardless of the nationality of the accused and regardless of the territorial jurisdiction in which the criminal acts occurred.²⁰⁹

Universal jurisdiction is generally accepted to exist in three circumstances. Firstly, a State may accept the jurisdiction of another State over certain crimes by becoming party to a treaty. A number of treaties include provisions whereby a State, under certain special circumstances, may prosecute foreign nationals for crimes committed overseas. Such crimes include torture, attacks against civil aircraft, hostage taking, drug trafficking, and terrorism.²¹⁰ Secondly, an international tribunal or court may exercise universal jurisdiction. A State may accept the jurisdiction of an international court by signing a treaty, such as the Rome Statute of the International Criminal Court, or when compelled to be the Security Council establishing an international criminal tribunal with universal jurisdiction, such as those created to consider crimes in Rwanda and the former Yugoslavia.²¹¹ Thirdly, universal jurisdiction may apply to certain crimes under customary international law. Historically only the crime of piracy was treated as a crime with universal jurisdiction under customary international law, a custom since codified in treaties such as the Geneva Convention on the High Seas (1958).²¹² However, some legal scholars argue that universal jurisdiction extends by virtue of international custom to genocide, crimes against humanity, war crimes, torture, extrajudicial executions and disappearances.²¹³

Universal Jurisdiction and Crimes Against Humanity

Crimes against humanity were defined for the first time in Article 6(c) of the Charter for the Nuremberg International Military Tribunal and later in the Charter for the International Military Tribunal for the Far East and the Allied Control Council for Germany Law No.10.²¹⁴ A number of international courts have since exercised jurisdiction over crimes against humanity, including the international criminal tribunals in the former Yugoslavia and Rwanda, and the International Criminal Court.²¹⁵ However, no treaty law requires States to exercise universal jurisdiction over crimes against humanity.²¹⁶

The complainants argued in their submission to French Prosecutors that: “the French courts had jurisdiction, as regards crimes against humanity, by virtue of a principle of international customary law providing for universal jurisdiction over such crimes.”²¹⁷ Some observers, such as Amnesty International maintain that “taking into account the serious nature of the crimes,” States have a “logical and moral duty to exercise universal jurisdiction” over a number of offences, including crimes against humanity.²¹⁸ However, Congo’s application argues: “there is no rule of customary international law enabling offences under international law to be brought within the jurisdiction of national courts by virtue of the principle of universal jurisdiction. The only existing instances of universal jurisdiction stem from specific international instruments, of which none relate generally to crimes against humanity.”²¹⁹

Universal Jurisdiction and the Convention Against Torture

²⁰⁹ Randall, *Universal Jurisdiction Under International Law*, 1987-1988, p.785.

²¹⁰ International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Separate Opinion of President Guillaume*, 2002, p.39.

²¹¹ *Rome Statute of the International Criminal Court*, art. 5; *Statute of the International Tribunal for the Former Yugoslavia*, 1993; *Statute of the International Tribunal for Rwanda*, 1994.

²¹² International Court of Justice, *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Separate Opinion of President Guillaume*, 2002, p.38.

²¹³ Amnesty International, *Universal Jurisdiction: Questions and Answers*, 2001.

²¹⁴ Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, 2006, p.52.

²¹⁵ *Rome Statute of the International Criminal Court*, art. 5; *Statute of the International Tribunal for the Former Yugoslavia*, 1993; *Statute of the International Tribunal for Rwanda*, 1994.

²¹⁶ Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, 2006, p.52.

²¹⁷ International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure, Order of 17 June 2003*, ICJ, 2003, p.7.

²¹⁸ Amnesty International, *Universal Jurisdiction: Questions and Answers*, 2001.

²¹⁹ International Court of Justice, *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*, 2003, p.7.

In addition, the complainants argued that France had jurisdiction by virtue of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and Articles 689-1 and 689-2 of the French Code of Criminal Procedure.²²⁰ Article 689-1 states that: “any person who has committed, outside the territory of the Republic, any of the offences enumerated in these Articles, may be prosecuted and tried by the French courts if that person is present in France,” while Article 689-2 holds: “For the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, any person guilty of torture in the sense of Article 1 of the Convention may be prosecuted and tried in accordance with the provisions of Article 689-1.”²²¹

The Convention Against Torture considers jurisdiction in Art. 5(2), 6 and 7, which includes a provision for universal jurisdiction. Article 5(2) requires State Parties to “take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction,” while Article 6 requires “any State Party in whose territory a person alleged to have committed any offence... is present shall take him into custody or have other legal measures to ensure his presence.”²²²

However, Congo argues in its application that Articles 5(2) and 6 only apply to the nationals of State Parties to the Convention Against Torture, and Congo is not a signatory to the Convention.²²³ The application further argues that Article 5(2) of the Convention Against Torture would only permit foreign jurisdiction if proceedings were not already underway for the same offences in the alleged wrongdoer’s own State.²²⁴ Congo claims that the subjects of the complaint are already being considered in proceedings by prosecutors in Brazzaville.²²⁵

Conclusion

Republic of Congo v. France asks the Court to engage with two of the most controversial principles of international law: universal jurisdiction and the extent of the immunity of Heads of States. The background guide has only been able to offer a brief introduction to both concepts, and has concentrated on the facts of the case rather than its merits. In addition to familiarising themselves with these facts, Counsel and Justices must ensure that they have a grasp of the arguments of key legal scholars in relation to universal jurisdiction and immunity.

²²⁰ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

²²¹ Code of Criminal Procedure, Republic of France, Title IX: Offences Committed Outside the Territory of the Republic (English translation), art. 689.

²²² United Nations General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 1984, art. 5 & 6.

²²³ International Court of Justice, Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France), 2003, p.9.

²²⁴ International Court of Justice, Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France), 2003, p.9.

²²⁵ International Court of Justice, Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court’s General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France), 2003, p.9.

Annotated Bibliography

Committee history for the International Court of Justice

Ban, K. (2008). *More than just talk*. Retrieved on September 13, 2010, from <http://www.un.org/sg/articleFull.asp?TID=80&Type=Op-Ed>.

In this article Ban Ki-moon analyzes different claims and criticism about the United Nations operation generally, mainly focusing on the criticism that the UN is a “talking shop.” Ban takes us through his vision for the UN system and what he believes its role can be in the world. This is highly recommended reading for any Model UN student.

BBC. (2007). *Q&A: International Court of Justice*. Retrieved on September 25, 2010, from <http://news.bbc.co.uk/1/hi/world/europe/3879937.stm>.

This BBC resource is a must read for students who are not familiar with the organization and function of the ICJ. In simple and concise language, the BBC presents a question and answer style page in order to answer questions and common misconceptions about the court. Students should consult this as a starting point for their research.

Criddle, E and Fox-Decent, E. (2009). A Fiduciary Theory of Jus Cogens, *Yale Journal of International Law*. *This article is a large piece analyzing many different aspects of the emergence and relevance of jus cogens norms. This is recommended to students who are interested in finding out more about the nature of jus cogens norms and how the future of the international legal system may be dictated by their development.*

De Wet, E. (2004). *The Prohibition of Torture as an International Norm of jus cogens and its implications for National and Customary Law*. Oxford: Oxford University Press.

De Wet's article tackles the issue of non derogable norms, known as “jus cogens” norms, here with reference to the prohibition of torture. An interesting issue with the use of jus cogens is the issue of hierarchy of norms. There should be no hierarchy of norms in international law according to the ICJ Statute; however, the court in practice use jus cogens norms as a special level of entitlement and obligation. De Wet tackles this issue and also provides a comprehensive overview of the operation of jus cogens norms. It is not essential for students to read this article, but it is an excellent article for any student interested in jus cogens norms.

Harris, D. (2006). *Cases and Materials on International Law*. London: Sweet and Maxwell.

This text is not essential, but it is an excellent text to access if possible. This text is seen as the seminal textbook on international law and will be available at any legal library. This is particularly useful for students who are interested in reading parts of judgments and in depth facts of cases to aid better understanding.

International Court of Justice. (n.d.). *The Court*. Retrieved on September 13, 2010, from the International Court of Justice's Web site: <http://www.icj-cij.org/court/index.php?p1=1&p2=1>.

This Web site provides a comprehensive history of the ICJ including all its previous incarnations and existences. It is set out chronologically and is a great place to start with research of the ICJ. The section on the current ICJ operation which holds a concise introduction to the way that the court operates is particularly useful.

International Court of Justice. (1986). *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*. Retrieved on September 13, 2010, from <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>

This case is essential reading for students wishing to understand the basis of customary international law. Summaries are available on the ICJ Web site that cover very interesting areas including the creation of customary international law and when states should be able to justifiably use force in self defense. This should be read in conjunction with Charney's article which comments and summarizes the facts and the legal issues. It is always useful to read the Court's actual decision however, and this is no exception.

International Court of Justice. (1968). *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Denmark)*. Retrieved on October 4, 2010, from <http://www.icj-cij.org/docket/files/51/5535.pdf>.

These cases, which were joined by the ICJ in 1968 because they presented the same legal issue to the court, produced a seminal decision that is one of the most important in the history of the ICJ. The case concerned the waters between states and at which geographic point a state's territory began. The ICJ felt able to override a previous source of customary international law with a new rule of customary international law that they then created. This is good reading for any student interested in customary international law. Awareness of this case is recommended but can also be attained by reading Akehurst's "Custom as a Source of International Law."

International Court of Justice. (n.d.). *The Permanent Court of International Justice*. Retrieved on August 2, 2010, from <http://www.icj-cij.org/pcij/index.php?p1=9>.

The Permanent Court of International Justice section of the ICJ Web site is a great resource for research on this previous incarnation of the court. It provides summaries of past cases which are interesting as much of the operation of the current court was formulated in the days of the PCIJ.

International Court of Justice. (1978). *Rules of the Court*. Retrieved on September 13, 2010, from <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>.

The Rules of the Court were created in 1978 in response to a need for more detailed documentation of the procedure of the court. The rules of the court may be useful for ascertaining the meaning of certain terms or for knowing the order in which the court will do certain things.

International Court of Justice. (1945). *Statute of the International Court of Justice*. Retrieved on August 2, 2010, from <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

The Statute of the International Court of Justice details all areas of operation of the court. This resource will usually be the correct place to look for any uncertainties as to the operation of the court including jurisdictional issues and sources of law. Articles 36 through 38 may be particularly useful.

International Justice Project. (n.d.). *Customary International Law*. Retrieved on September 13, 2010, from <http://www.internationaljusticeproject.org/juvJusCogens.cfm>.

The International Justice Project Web site contains clearly explained information as to the meaning of complex terms and explains a great deal about the international justice system including the ICJ. On this Web site you will be able to find information about Treaties, Resolutions, Customary International Law, and Jus Cogens.

Inside Justice. (n.d.). *United Nations Courts and Tribunals*. Retrieved on September 25, 2010, from http://www.insidejustice.com/resources/un_courts.php.

Inside Justice boasts a Web site rich with detailed and comprehensive information on the International Legal System. This Web site is a good resource for any student seeking to learn more about international law and indeed the International Court of Justice in a compact concise manner. The home page features a question and answer section that has interesting facts to keep even the most keen international lawyer occupied.

Permanent Court of Arbitration. (n.d.). *Home*. Retrieved on August 3, 2010, from http://www.pca-cpa.org/showpage.asp?pag_id=363.

The Permanent Court of Arbitration Web site is an excellent source to gain knowledge about previous incarnations of the court. Interestingly, it was deemed necessary to keep the Permanent Court of Arbitration in operation despite the formation of subsequent courts. It deals with less serious and fewer cases.

Uniosil. (n.d.). *International Court of Justice*. Retrieved on September 25, 2010, from <http://www.uniosil.org/international-court-of-justice.html>.

This Web site contains a brief history of the ICJ written in an accessible article style. Contained within the piece is analysis on the success of the ICJ. This would be useful for students who are looking to read an analytical article about the history of the ICJ.

United Nations. (1945). *Charter of the United Nations*. Retrieved July 31, 2010, from <http://www.un.org/en/documents/charter/chapter6.shtml>

The Charter of the United Nations is the founding document of the body, upon which all bodies of the United Nations derive their jurisdiction and power. All delegates should be familiar with this document. Delegates of the ICJ in particular should be familiar with Chapter XIV, which deals with the International Court of Justice.

United Nations. (n.d.). *United Nations Documentation Research Guide, Courts and Tribunals*. Retrieved on September 25, 2010, from <http://www.un.org/depts/dhl/resguide/specil.htm#icj>.

This section of the United Nations documentation research guide contains efficiently organized information about the operation and procedure of the International Court of Justice. The fact that the Web site contains live links to all documentation that it refers to is particularly useful. Students should use this resource in order to better understand the International Court of Justice.

United Nations Educational, Scientific, and Cultural Organization. (n.d.) *ICJ, History*. Retrieved on September 25, 2010, from http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1016.

This Web site, produced by UNESCO, contains detailed information about the International Court of Justice. The article is split into three areas: the mission of the ICJ, the history of the ICJ, and the structure of the ICJ. This is an alternative to the history provided on the ICJ Web site and provides a higher level of analysis which may be useful to aid understanding.

University of California Berkeley Law Library. (2007). *International and Foreign Legal Research Researching Customary International Law and Generally Recognized Principles*. Retrieved on October 3, 2010, from <http://www.law.berkeley.edu/library/classes/iflr/customary.html>.

This resource contains key information about structural issues within the ICJ, including the nature of decisions and the way that precedent is used within the ICJ. Also included are links to other sources that may be useful for students keen to find out more about international law. This could be an excellent resource for students looking for a guide to the International legal system.

I. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)

Akehurst, M. (1975). *Custom as a source of International Law*. London: British Yearbook of International Law.

This is an excellent article that explains the processes and difficulties in recognizing the existence of customary international law. Though written in 1975, the article has become an authoritative piece on the rules of the creation of customary international law. It covers many key cases including the North Sea Continental Shelf cases.

BBC. (2009). *Georgia Russia conflict a year on*. Retrieved on September 25, 2010, from the BBC News Web site: <http://news.bbc.co.uk/1/hi/world/europe/8186356.stm>

This article by the BBC documents the effects of the conflict that are still felt one year from its beginning. It is useful for the purposes of providing an update on the situation. The ICJ has issued provisional measures in order to prevent any further violations of international law. This article argues that the response from the rest of the international community has not been ideal, with many unresolved issues needing solving on the ground.

BBC. (2009). *S Ossetia 'war crimes' Condemned*. Retrieved on September 25, 2010, from the BBC News Web site: <http://news.bbc.co.uk/1/hi/world/europe/7847285.stm>

This BBC article gives a good level of detail on the conflict, focusing on the report by Human Rights Watch on the conflict, containing information on the conflict from a more independent

source. Students would be well served by reading this article to give an idea of the human damage inflicted from the conflict. Also interesting is the insight as to the role of the Russian Federation in the human damage.

BBC (2010). *Georgia-Russia Conflict*. Retrieved on September 25, 2010, from the BBC News Web site: http://news.bbc.co.uk/1/hi/in_depth/europe/2008/georgia_russia_conflict/default.stm

BBC News holds an archive of articles and commentary on the conflict that is regularly updated with analysis as developments occur. This page in particular serves to document the history of the conflict. Students should visit this Web site in order to get a more immediate understanding of the conflict and the effect that it has had on many civilians.

BBC. (2010). *North Caucasus: At a glance*. Retrieved on September 25, 2010, from the BBC News Web site: <http://news.bbc.co.uk/1/hi/world/europe/3632274.stm>

This article from the BBC presents a detailed map of the area of the conflict. The map includes different regions of Georgia and their political allegiances and histories. Students should consider paying careful attention to this article, as it is a good starting point for getting a feel for the geography of the case. North and South Ossetia and Abkhazia are areas involved in the dispute that are commonly accepted to be within Georgia, however the Russian Federation recognizes their status as independent states.

Charney, J. (1988). *Customary International Law in the Nicaragua Case. Judgment on the Merits*. The Hague: Hague Yearbook of International Law.

Charney dissects the judgment in the Nicaragua Case, focusing on the implications of the Court's ruling, which recognizes articles 2(4) and 51 as part of customary international law. This is an important article as it provides a good analysis of the crucial Nicaragua case and explains the principles that arise from the case and why it is so important. Students will be able to have a comprehensive knowledge of customary international law by reading Charney and Akehurst.

De Wet, E. (2004). *The Prohibition of Torture as an International Norm of jus cogens and its implications for National and Customary Law*. Oxford.

De Wet's article tackles the issue of non derogable norms, known as "jus cogens" norms, here with reference to the prohibition of torture. An interesting issue with the use of jus cogens is the issue of hierarchy of norms. There should be no hierarchy of norms in International law according to the ICJ Statute, however, the Court in practice use jus cogens norms as a special level of entitlement and obligation. De Wet tackles this issue and also provides a comprehensive overview of the operation of jus cogens norms. It is not essential for students to read this article but it is an excellent article for any student interested in jus cogens norms.

European Union. (2009). *Independent International Fact-Finding Mission on the Conflict in Georgia*. Retrieved on September 25, 2010, from <http://www.ceiig.ch/Report.html>

This report, published by the European Union, allows a truly independent and deeper look at the facts of the conflict and as such can be very useful when seeking to construct an argument pertaining to a specific area of the facts. The report is however long and may not be something that can be used thoroughly. The report is recommended if researching a specific point however.

Franck, T. (1970). *Changing Norms Governing the Use of Force by States*. Retrieved on October 1, 2010, from JSTOR.

This article, also known as "Who Killed Article 2 (4)" is a famous commentary on the inherent dispute between article 2 (4) and article 51 of the UN Charter. Article 2 (4) prohibits any use of force by states against other states, however article 51 recognizes the inherent right of states to retaliate in the event that they are intolerably threatened by another state. This of course creates tension as to the interpretation and application of these two articles. Franck assesses this issue, finding difficulty with the International application of article 2 (4), which he considers to have ceased to hold all meaning. Students should either read this article or the Koskenniemi article.

Genocide Watch. (n.d.). *What is Genocide?* Retrieved on October 1, 2010, from <http://www.genocidewatch.org/aboutgenocide/whatisit.html>

Genocide Watch boast a very informative Web site that offers an explanation and history of Genocide and the Genocide Convention of 1951. This resource should be used for students who are interested in finding out more about Genocide and for those who would like a good overview of the Genocide Convention. Particularly useful is the section on the Genocide Convention that takes the reader through the Convention, explaining fully every stage and clause.

International Court of Justice (2008). *Georgia v. Russia: Application instituting proceedings*. Retrieved on September 13, 2010, from <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=GR&case=140&k=4d>

As this case is still going through the ICJ, the most detailed document outlining the facts and the main legal issues is inevitably the application document. This can be found on the ICJ Web site and is essential reading, especially the first ten pages which outline the three phases. Students must read this to understand and appreciate the issues raised in the case and the legal issues raised.

International Court of Justice. (1986). *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*. Retrieved on September 13, 2010, from <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>

This case is essential reading for students wishing to understand the basis of customary international law. Summaries are available on the ICJ Web site that cover very interesting areas including the creation of customary international law and when states should be able to justifiably use force in self defense. This should be read in conjunction with Charney's article which comments and summarizes the facts and the legal issues. It is always useful to read the Court's actual decision however, and this is no exception.

International Court of Justice. (2009). *Preliminary Objections of the Russian Federation*. Retrieved on September 25, 2010, from <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=4d&case=140&code=GR&p3=1>

This is a document submitted to the ICJ by the Russian Federation detailing preliminary objections that the Russian Federation has to the application submitted to the ICJ by Georgia. Students with a keen interest in the procedural elements of a case passing through the ICJ should look at this document briefly; however it is a very long piece and may not be of practical use for most students. Perhaps a more appropriate document to read would be the ruling on the provisional measures by the ICJ which contains an overview of the Russian Federation's arguments.

International Court of Justice. (2010). *Public Sitting in the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. Retrieved on October 3, 2010, from <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=GR&case=140&k=4d>

Public hearings featuring oral submissions from both Georgia and the Russian Federation took place from September 13, 2010 to September 17, 2010. These documents can be viewed on the ICJ Web site. The verbatim records of the submissions may be useful, however as a greater focus of the case may be on jurisdictional issues, it may not be essential. The Court simulation in April will focus on the substantive issues of law, and counsel will be expected to present arguments as to what the interpretation and application of the law should be based on the facts.

International Court of Justice. (2008). *Response to Georgia's request for the indication of provisional measures, summary of the order*. Retrieved on September 13, 2010, from <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=GR&case=140&k=4d>

The most recent activity in the ICJ for this case was the issue of provisional measures. This document can be found on the ICJ Web site and is very useful especially for finding arguments advanced in response to Georgia's application from the Russian Federation. This is essential reading for all.

International Court of Justice. (1978). *Rules of the Court*. Retrieved on September 13, 2010, from <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

The Rules of the Court were created in 1978 in response to a need for more detailed documentation of the procedure of the Court. The rules of the Court may be useful for ascertaining the meaning of certain terms or for knowing the order in which the Court will do certain things. Students should have a rough appreciation of the rules, however there will be sessions run in New York for clarification on points of procedure.

International Court of Justice. (1945). *Statute of the International Court of Justice*. Retrieved on August 2, 2010, from <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

The Statute of the International Court of Justice details all areas of operation of the court. This resource will usually be the correct place to look for any uncertainties as to the operation of the court including jurisdictional issues and sources of law. Articles 36 through 38 may be particularly useful.

International Law Commission. (2001). *Responsibility of States for Internationally Wrongful Acts*. Retrieved on October 1, 2010, from http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

Published in 2001, by the Law Commission, this document was very important in the International legal community as it set out in detail situations in which States would be deemed to be responsible for certain acts. State responsibility is a difficult thing to establish as the present case illustrates. The Guidelines set out by the ILC here are aspirational but have been used by the ICJ to assess State actions.

Jinks, D. (2003). *State Responsibility for the acts of private armed groups*. Retrieved on October 1, 2010, from <http://www.allbusiness.com/legal/international-law/991161-1.html>

An excellent journal article published in the Chicago Journal of International law that deals with the issue of when and how the actions of private armed groups, contra forces and separatist movements can be attributed to State parties. Attributing the actions of the Abkhaz and Ossetian separatist forces to the Russian Federation will be a necessary goal for Georgia in order to justify bringing the Russian Federation before the ICJ. Students should consider this very highly recommended as it is easily available on the internet and makes an interesting and relevant read.

Koskenniemi, M. (2002). *Iraq and the Bush Doctrine of Pre Emptive Self Defense*. Retrieved on September 13, 2010, from the Crimes of War Project's Web site: <http://www.crimesofwar.org/>

This is an interesting article that can be found online on the Crimes of War Project Web site. In the article Koskenniemi discusses the use of article 51, how it should be used, and the different ramifications of the use of article 51. This may be useful for students who are interested in the dispute between article 2(4) and article 51 of the UN Charter.

Office of the United Nations High Commissioner for Human Rights. (n.d.). *Committee on the Elimination of Racial Discrimination*. Retrieved on 25 September, 2010, from <http://www2.ohchr.org/english/bodies/cerd/>

The Committee on the Elimination of Racial Discrimination presides over the CERD and plays a key role in enforcing the terms of the convention. The Committee may publish clarifying remarks and documents as well as offer assistance to States seeking help in complying with the terms of the convention. Students should visit this Web site in order to gain a full understanding of the operation of the Committee.

Permanent Court of International Justice. (1927). *Lotus*. Retrieved on September 22, 2010, from <http://www.icj-cij.org/pcij/series-a.php?p1=9&p2=1>

The Lotus case involved the French and Turkish governments, which sought a ruling on jurisdiction following a collision between their respective ships: the Lotus and Boz-Kourt. The Lotus caused the sinking of the Boz-Kourt, due to an accidental collision, which resulted in the death of eight Turkish sailors. The Turkish government subsequently convicted the French captain and officer on watch of manslaughter and imprisoned them. The French argued that the Turkish court, and therefore conviction, did not have jurisdiction. The Permanent Court of International Justice (PCIJ) ruled that France and Turkey had concurrent jurisdiction over the matter. This case, however, is important because the PCIJ stated, "Restrictions upon the

independence of States cannot therefore be presumed.” Delegates should carefully consider this case and the subsequent PCIJ ruling, as well as its stance in modern-day.

Russia battles Georgia over breakaway region of South Ossetia. (2008). Retrieved on October 1, 2010, from The Guardian Web site: <http://www.guardian.co.uk/world/2008/aug/08/georgia.russia2>

This Guardian article, written at the start of the military conflict in Georgia, provides another insight into the conflict, with a video and an audio interview from Moscow from August 8, 2008. This may be useful for students for the purposes of getting a better understanding of the conflict by seeing and hearing the issues in a more human way. This may not be possible from simply reading other documents.

United Nations. (1945). *Charter of the United Nations.* Retrieved July 31, 2010, from <http://www.un.org/en/documents/charter/chapter6.shtml>

The Charter of the United Nations is the founding document of the body, upon which all bodies of the United Nations derive their jurisdiction and power. All delegates should be familiar with this document. Delegates of the ICJ in particular should be familiar with Chapter XIV, which deals with the International Court of Justice.

United Nations General Assembly. (1965). *Convention on the Elimination of All Forms of Racial Discrimination.* *All students should have at least a basic knowledge of the CERD as it forms part of the basis of the legal dispute in this case. Although other legal arguments should be used, Georgia argues the case under the CERD so it is important to be familiar with the Convention. Of particular interest are articles 2 and 5.*

United Nations General Assembly. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide.* *The Genocide Convention may have some grounding as a jus cogens norm. It is also an international convention that Georgia has invoked in its application as a potential means of finding jurisdiction. Students should have a good awareness of this convention, especially articles 2, 3, and 9.*

United Nations General Assembly, (2008). *Towards a Genuine Partnership in a New Era (A/RES/62/249).* Retrieved on October 1, 2010, from <http://www.un.org/en/ga/62/resolutions.shtml>

This is an interesting resolution that outlines the plans for security for the future from the General Assembly. Reaffirming and building upon the resolution passed at the Budapest Summit in 1994 of the same name, it sets out security policy for the UN. It is perhaps mostly interesting for present purposes due to the General Assembly declaring the present conflict in Georgia to be an instance of ethnic cleansing.

II. Certain Criminal Proceedings in France (Republic of the Congo v. France)

Amnesty International. (2003). *République Du Congo. Un Pays Sinistré.* Retrieved on August 20, 2010 from <http://www.amnesty.org/fr/library/asset/AFR22/001/2003/fr/eba13bb5-d75f-11dd-b024-21932cd2170d/af220012003en.html>.

Amnesty International considers the state of human rights in the Republic of Congo, particularly the incidents that were the subject of complaints submitted to French prosecutors in 2001. It provides details of the reported “disappearance” in May 1999 of 353 refugees from Brazzaville Beach river port. The international NGO “expresses grave concern at the ‘disappearances’ and other human rights violations to which hundreds of refugees returning to Brazzaville were subjected during and after May 1999” and remains “concerned that the Congolese authorities have failed to take adequate measures to establish responsibility for the violations and bring those responsible to justice.”

Aust, A. (2010). *Handbook of International Law.* Cambridge University Press.

Aust offers a concise and accessible textbook on international law. The handbook introduces the fundamental concepts and principles of international law. It also considers emerging specialist areas of international law, including the environment, human rights and terrorism.

Cour de Cassation. Chambre Criminelle. (2001). *Décision de la Cour de Cassation du 13 Mars 2001 (N° de pourvoi : 00-87215)*. Retrieved from August 20, 2010 from <https://www.unodc.org/tldb/showDocument.do?lng=fr&documentUId=7322>.

The Qaddafi case before the French highest court of appeal is a landmark case in establishing the parameters of Head of State immunity. Charges were brought by a lower court against Libyan leader, Muammar Qaddafi, for his alleged involvement in the bombing of a French passenger aircraft in 1989. However, the Cour de Cassation found that “international custom prohibits the prosecution of incumbent Heads of State,” regardless of the “gravity” of the alleged crime. The jurisprudence established by the case was subsequently cited by the International Court of Justice in its judgment in Democratic Republic of the Congo v. Belgium (2002).

Cour de Cassation. Chambre Criminelle. (2001). *Décision de la Cour de Cassation du 10 Octobre 2001 (N° de pourvoi : 01-84922)*. Retrieved on August 20, 2010 from <http://www.senat.fr/rap/106-194/106-19413.html>.

In 2001, France’s highest court was asked to consider the extent of immunity of the French Presidency. The case came about because H.E. President Jacques Chirac was accused of corruption during his time as Mayor of Paris and as president of a political party. The court ruled that a French President cannot be subject to judicial proceedings during his term of office. Counsel for Congo argues that immunities that apply to the French President should also apply to foreign Heads of State.

Freedom House. (2006). *Freedom in the World – Congo, Republic of (Brazzaville)*. Retrieved on August 20, 2010 from http://www.freedomhouse.org/inc/content/pubs/fiw/inc_country_detail.cfm?year=2006&country=7093&pf.

Freedom House produces annual reports on the state of human rights in all countries around the world. Its report on the Republic of Congo in 2006 considered the fate of 353 refugees who were allegedly “disappeared” on their return to Brazzaville from a neighbouring country. The incident became the subject of a complaint submitted to French prosecutors in 2001, which included allegations against four senior members of the Congolese government and military.

International Court of Justice. (1963). *Case Concerning The Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963*. Retrieved on August 20, 2010, from <http://www.icj-cij.org/docket/files/48/5207.pdf>.

In 1963, the ICJ ruled in a dispute concerning an agreement between the United Kingdom and Cameroon on the status of the Northern Cameroons territory. The facts of the case are not directly relevant to the Congo v. France case. However, the judgment stated: “it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved.” France argues that this jurisprudence suggests that the ICJ cannot rule on measures that have yet to take place, such as judicial proceedings against Generals Oba and Adoua.

International Court of Justice. (2002). *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*. Retrieved on August 20, 2010 from <http://www.icj-cij.org/docket/files/121/8126.pdf>.

The ICJ ruled on the customary principle of Head of State immunity, and its application to Ministers of Foreign Affairs, in its judgment in Congo v. Belgium (2002). The Court found: “The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.” Congo argues that an “act of authority” would include an invitation to appear as a witness. Congo further contends that some of the reasoning applied by the Court in extending immunity to Foreign Ministers must also apply to cases involving other senior cabinet ministers including the Minister of the Interior.

International Court of Justice, Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Separate Opinion of President Guillaume, ICJ, 2002

A separate opinion given by President of the ICJ, Judge Guillaume in the Arrest Warrant case as described above. Judge Guillaume's opinion is particularly notable for its exploration of the complex issues surrounding the question of universal jurisdiction. Justice Guillaume includes that there is no provision under international law for the application of universal jurisdiction for crimes against humanity under international customary international law.

International Court of Justice. (2003). *Application Instituting Proceedings Filed in the Registry of the Court on 9 December 2002 and Entered in the Court's General List on 11 April 2003. Certain Criminal Proceedings in France (Republic Of The Congo v. France)*. Retrieved on August 20, 2010 from <http://www.icj-cij.org/docket/files/129/7067.pdf>.

Delegates should begin their research by considering Congo's application instituting proceedings against France. The Application contains a formal account of the facts of the case as seen by Congo, an examination of the legal grounds behind the application, and submissions to the Court. The Application invites the Court: "to declare that the French Republic shall cause to be annulled the measures of investigation and prosecution" taken against President Nguesso and Generals Oba, Adoua and Dabira.

International Court of Justice. (2003). *Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of 17 June 2003*. Retrieved on August 20, 2010 from <http://www.icj-cij.org/docket/files/129/8204.pdf>.

The Court's provisional order of June 2003 contains a useful account of the facts of the case and where there is disagreement between the parties. The order responded to a request by Congo to indicate provisional measures, a procedure whereby the Court can give accelerated consideration to a case if there is an urgent need to do so. The Court found that there was no need to indicate provisional measures in the dispute between Congo and France.

International Court of Justice. (2003). *Verbatim Record. Public sitting held on Monday 28 April 2003, at 10 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France), CR 2003/20*. Retrieved on August 20, 2010 from <http://www.icj-cij.org/docket/files/129/4117.pdf> (translation) and <http://www.icj-cij.org/docket/files/129/4115.pdf> (original).

In April 2003, the ICJ heard the agents and counsel of France and Congo on the request for the Court to indicate provisional measures. The arguments concentrated on whether or not circumstances required the Court to accelerate consideration of the case. However, counsel for both parties debate some aspects of the merits of the case. Delegates will find reading these verbatim accounts of the proceedings a useful introduction to the case. NMUN counsel will particularly benefit from analysing how real Counsel present their arguments to the Court.

International Court of Justice. (2003). *Verbatim Record. Public sitting held on Monday 28 April 2003, at 4 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France), CR 2003/21*. Retrieved August 20, 2010, from <http://www.icj-cij.org/docket/files/129/4113.pdf> (translation) and <http://www.icj-cij.org/docket/files/129/4111.pdf> (original).

In April 2003, the ICJ heard the agents and counsel of France and Congo on the request for the Court to indicate provisional measures. The arguments concentrated on whether or not circumstances required the Court to accelerate consideration of the case. However, counsel for both parties debate some aspects of the merits of the case. Delegates will find reading these verbatim accounts of the proceedings a useful introduction to the case. NMUN counsel will particularly benefit from analysing how real Counsel present their arguments to the Court.

International Court of Justice. (2003). *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 9.30 a.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France), CR 2003/22*. Retrieved on August 20, 2010 from <http://www.icj-cij.org/docket/files/129/4109.pdf> (translation) and <http://www.icj-cij.org/docket/files/129/4107.pdf> (original).

In April 2003, the ICJ heard the agents and counsel of France and Congo on the request for the Court to indicate provisional measures. The arguments concentrated on whether or not

circumstances required the Court to accelerate consideration of the case. However, counsel for both parties debate some aspects of the merits of the case. Delegates will find reading these verbatim accounts of the proceedings a useful introduction to the case. NMUN counsel will particularly benefit from analysing how real Counsel present their arguments to the Court.

International Court of Justice. (2003). *Verbatim Record. Public sitting held on Tuesday 29 April 2003, at 12.15 p.m., at the Peace Palace, President Shi presiding, in the case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France), CR 2003/23.* Retrieved on August 20, 2010 from <http://www.icj-cij.org/docket/files/129/4105.pdf> (translation) and <http://www.icj-cij.org/docket/files/129/4103.pdf> (original).

In April 2003, the ICJ heard the agents and counsel of France and Congo on the request for the Court to indicate provisional measures. The arguments concentrated on whether or not circumstances required the Court to accelerate consideration of the case. However, counsel for both parties debate some aspects of the merits of the case. Delegates will find reading these verbatim accounts of the proceedings a useful introduction to the case. NMUN counsel will particularly benefit from analysing how real Counsel present their arguments to the Court.

International Court of Justice. (N.D.) *Declarations Recognizing the Jurisdiction of the Court as Compulsory.* Retrieved on August 20, 2010 from <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

One means of the ICJ exercising jurisdiction in a dispute between States is for both States to have filed a declaration recognising the compulsory jurisdiction of the Court with the UN Secretary-General. As of August 2010, sixty-six States maintain active declarations. These States include neither France nor the Republic of Congo. In Congo v. France, jurisdiction is based on the consent of both parties to have their case entertained by the Court.

International Refugee Rights Initiative. (2009). *Still in Search of Justice: Ten Years Since Disappearances of Over 350 in Republic of Congo.* Retrieved on August 20, 2010 from <http://www.refugee-rights.org/Publications/RRN/2009/May/V5.I3.StillInSearchofJustice.html>.

The International Refugee Rights Initiative provides another brief account of the fate of 353 refugees who “disappeared” from Brazzaville Beach in May 1999. Delegates are advised to refer to the Amnesty International investigation listed above for a more detailed examination of the event.

Le Ministre Des Affaires Étrangères de La République Française au Greffier de la Cour Internationale De Justice, Paris, le 8 Avril 2003. (2003). Retrieved August 17, 2010, from: <http://www.icj-cij.org/docket/files/129/13344.pdf>.

In its application, Congo invited France’s consent to settle the dispute in front of the ICJ, a requirement for the Court to have jurisdiction. On April 8, 2003, Dominique de Villepin, the French Minister for Foreign Affairs, wrote to the ICJ Registrar accepting the Court’s jurisdiction to consider the Application. De Villepin’s letter limited consent to “the subject matter of the Application and strictly within the limits of the claims formulated by the Republic of the Congo.”

Lippman, M. (1994). *The Development and Drafting of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.* Boston College International and Comparative Law Review: 17 (275).

Exploring the development and drafting of the CAT, Lippman’s article describes the evolution of torture in the ancient world, its use more recently and modern efforts to control it. Lippman analyzes the Convention itself and its application. Containing an in depth analysis of the actual convention, this is an important article for understanding the background to the CAT as well as the document itself.

Macedo, S. (2006). *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law.* University of Pennsylvania Press.

Focusing on universal jurisdiction, this edited book covers all aspects of the topic from the historic development to the current and future applications of the principle. It discusses the origins, evolution and implications of the legal principle. The book is a recommended introduction to debates surrounding universal jurisdiction.

Mallory, J. (1986). Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings. *Colombia Law Review*: 86 (1).

Mallory considers the sources of the custom of Head of State immunity. Written in 1986, the article precedes much existing jurisprudence on immunity, such as the ICJ's judgment in Democratic Republic of the Congo v. Belgium (2002). However, Mallory provides an interesting account of the development of the international custom.

Shaw, M. (2003). *International Law*. Cambridge University Press.

Here is a very good textbook on international law. It provides useful explanations of all basic concepts and principles involved in the study of international law. It includes coverage of the principle of universal jurisdiction.

Tunks, M. (2002). Diplomats or Defendants? Defining the Future of Head-of-State Immunity. *Duke Law Journal*: 52 (651). Retrieved on August 20, 2010 from <http://www.law.duke.edu/shell/cite.pl?52+Duke+L.+J.+651>.

Tunks considers the status of Head of States immunity in the light of the ICJ's judgment in Democratic Republic of the Congo v. Belgium (2002). It describes the origins of the customary principles of Head of States immunity, sovereign immunity and diplomatic immunity. The article also considers the recent development of immunity, including commentary on the Pinochet case, the Qaddafi case and the ICJ's judgment in 2002.

United Nations. (N.D.) *Member States of the United Nations*. Retrieved on August 20, 2010 from <http://www.un.org/en/members/>.

The United Nations (UN) lists its Member States on its website, together with the dates that they gained membership. France was an original member when the inter-governmental organisation was established in 1945, while Congo joined after gaining independence in 1960. As Members of the United Nations, they are signatories to the Charter of the United Nations. Article 93 of the Charter states: "All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice."

Zappala, S. (2001). Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation. *European Journal of European Law*: 12 (3).

Zappala provides commentary on the Qaddafi case, a ruling by the French Cour de Cassation that helped establish the modern extent of the immunity of Heads of State. The author is critical of the high court's ruling, describing the judgment as "terse and poorly reasoned." However, the court's conclusions were later echoed in the ICJ's own judgment in Democratic Republic of the Congo v. Belgium (2002).

Rules of Procedure International Court of Justice

SECTION A. INTRODUCTION

Article 1

1. These rules shall be the only rules that apply to the Court and shall be considered adopted by the Court prior to its first sitting.
2. For the purposes of these rules, the Court Director and the Under-Secretaries General are designates and agents of the Secretary-General and collectively referred to as the “Secretariat”.
3. Interpretation of the rules shall be reserved exclusively to the Director-General and his or her designate. Such interpretation shall be in accordance with the philosophy and principles of the National Model United Nations and in furtherance of the educational mission of that organization.

SECTION B. THE JUDGES

Article 2

1. In the following Rules, the term “Member of the Court” denotes any justice.
2. The Members of the Court, in the exercise of their functions, are of equal status.
3. The Members of the Court shall be considered established prior to its first public sitting. No amendments can be made to the composition of the Court according to Article 30 of the Statute of the International Court of Justice (the “Statute”).
4. The declaration to be made by every Member of the Court in accordance with Article 20 of the Statute shall be as follows:

*“I solemnly declare that I will perform my duties and exercise my powers as judge
honourably, faithfully, impartially and conscientiously.”*

5. This declaration shall be made at the first public sitting at which the Member of the Court is present.
6. The obligation of Members of the Court under Article 23, paragraph 3, of the Statute, to hold themselves permanently at the disposal of the Court, entails attendance at all such meetings, unless they are prevented from attending by illness or for other serious reasons duly explained to the President, who shall inform the Court.

SECTION C. THE PRESIDENCY

Article 3

1. The election of the President shall take place at the first public sitting of the Court.
2. Only Members of the Court present at the first public sitting of the Court may run for election.
3. Members of the Court may nominate themselves or others for election when the Secretariat asks for nominations. The election shall take place by secret ballot. The Member of the Court obtaining the votes of a majority of the Members present at the time of the vote shall be declared elected, and shall enter forthwith upon his/her functions.
4. The President may be removed from office if, in the opinion of the Secretary-General, he/she has either become permanently incapacitated from exercising his functions, has committed a serious breach of his/her duties or is otherwise unable to perform his/her functions.
5. If the President is unable to perform his/her functions, a new President shall be appointed for the unexpired term at the discretion of the Secretary-General.

Article 4

1. Subject to the consent and direction of the Secretariat, the President shall preside at all meetings of the Court, its public hearings and deliberations. He/she shall declare the opening and closing of each session, ensure observance of these rules, accord the right to speak, put questions to the vote and announce decisions. The President, subject to these rules, shall have complete control of the proceedings of the Court and over the maintenance of order at its meetings. He/she shall rule on points of order and may place limitations on the time allowed to speakers.
2. The President, in exercise of his/her functions, remains under the authority of the Court.

SECTION D. THE REGISTRY

Article 5

1. The Secretary-General or his/her designate shall appoint from applications received by the Secretariat, a Registrar.
2. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the Court:

“I solemnly declare that I will perform the duties incumbent upon me as Registrar of the International Court of Justice in all loyalty, discretion and good conscience, and that I will faithfully observe all the provisions of the Statute and of the Rules of the Court.”

3. The Registrar shall assist the Secretariat in the administration of the Court.
4. The Registrar may be removed from office if, in the opinion of the Secretary-General, he/she has either become permanently incapacitated from exercising his functions, or has committed a serious breach of his/her duties.

SECTION E. COUNSEL

Article 6

All parties shall be represented by Counsel, as specified by Article 42 of the Statute.

SECTION F. PROCEEDINGS

Article 7

The quorum specified by Article 25, paragraph 3, of the Statute applies to all meetings of the Court: “A quorum of nine judges shall suffice to constitute the Court.”

Article 8

All speeches and statements made and evidence given at its hearings shall be in English.

Article 9

The General List of the Court shall be established by the Secretary-General and considered adopted as of the beginning of the Court’s first session. The order of the General List shall be determined by the Members of the Court at its first sitting.

Article 10

The Court may receive and consider written proceedings from Counsel at any time. The Court may request and direct the format and content of such proceedings.

Article 11

The oral proceedings of the Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public not be admitted. Such a decision or demand may concern either the whole or part of the hearing, and may be made at any time.

Article 12

Both Counsel and Members of the Court may motion to suspend oral proceedings, specifying a reason for requesting a recess and a time for reconvening. Such motions shall be put to an immediate vote of the Members of the Court, requiring the support of a majority of those present to pass.

Article 13

1. Any oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain.
2. No one may address the Court without having previously obtained the permission of the President.
3. The President may limit the time allowed to speakers.

Article 14

The oral proceedings for every case shall begin with opening statements from each party. The President may impose a time limit on open statements not exceeding fifteen minutes per party.

Article 15

Once opening statements have been heard, each side shall present their oral pleadings to the Court and receive questions from its Members.

Article 16

1. The Court may at any time during the hearing indicate any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument.
2. Members of the Court may, during the hearing, put questions to the Counsel, and may ask them for explanations.
3. Each judge has a similar right to put questions, but before exercising it he should make his intention known to the President, who is made responsible by Article 45 of the Statute for the control of the hearing. The President may impose a time limit on such questions.
4. The Counsel may answer either immediately or within a time-limit fixed by the President.

Article 17

1. Members of the Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.

2. The Court Director may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings.

Article 18

Once both parties have submitted their oral pleadings, each party may choose to deliver a closing statement. During closing statements, each Counsel shall have the right to put questions to the other party. Counsel rising to ask a question must be first recognised by the President.

SECTION G. DELIBERATIONS

Article 19

1. Members of the Court may motion to enter deliberations at any time, specifying a reason for requesting a recess and a time for reconvening. A two-thirds majority of Members of the Court present is required to enter deliberations.
2. The deliberations of the Court shall take place in private and remain secret.
3. Only justices take part in the Court's judicial deliberations. The Registrar, the Court Director and other members of the Secretariat as may be required shall be present. No other person shall be present except by permission of the Court.
4. The President, after consultation with the Members of the Court, may adopt such rules of procedure considered necessary for the efficient direction and moderation of the deliberations.

SECTION H. JUDGMENTS

Article 20

1. When the Court has completed its deliberations and adopted its judgment, the parties shall be notified of the date on which it will be read.
2. The judgment shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading.

Article 21

1. The judgment, shall contain:
 - the date on which it is read;
 - the names of the judges participating in it;
 - the names of the parties;
 - the names of the agents, counsel and advocates of the parties;
 - a summary of the proceedings;
 - the submissions of the parties;
 - a statement of the facts;
 - the reasons in point of law;
 - the operative provisions of the judgment;
 - the decision, if any, in regard to costs;
 - the number and names of the judges constituting the majority;
 - a statement as to the text of the judgment which is authoritative.

2. Any judge may, if he/she so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not. A judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.
3. One copy of the judgment duly signed and sealed, shall be transmitted to each of the parties and a copy presented to the Secretary-General.