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INTERNATIONAL COURT OF JUSTICE

STUDY GUIDE

TOPIC: IMMUNITIES AND CRIMINAL PROCEEDINGS [EQUATORIAL GUINEA V. THE FRENCH REPUBLIC]

Written by Lodovica Bellora, Céline Fäh, Witold Marynowski



Letter from the Chairs

Dearest Delegates!

As the presidency of the St. Gallen's Model United Nations 2018's International Court of Justice we would like to warmly welcome you to the conference and express a wish for a truly memorable and enlightening trial. We are delighted to be able to preside over this year's proceedings and do sincerely hope that you will leave St. Gallen's satisfied by the conference, and more aware of both the nature of ICJ's work, its basis in international law, and the nature and importance of diplomatic dialogue in the modern world. It is our responsibility as the presidency to ensure you are presented with an environment in which those qualities can be nurtured; The Study Guide which this letter precedes is the first step in the journey to gain the knowledge necessary to participate in the debates successfully.

We hope that in your deliberations and proceedings of the court, you will be able to understand the role of judiciary organs as guardians of order and safety of the world, and that, to quote Martin Luther King Jr., 'Justice anywhere is a threat to justice everywhere'.

We hope to see extraordinary displays of negotiation proficiency and diplomatic prowess and can hardly wait to meet you all in Switzerland in November. Should you have any doubts or questions regarding the conference, do not hesitate to contact us.

Wishing you all the best,

ICJ presidency

Witold Marynowski

Lodovica Bellora

Céline Fäh



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Introduction to the Committee

The ICJ is the principal judicial organ of the United Nations, which was created with the aim of providing states with means to seek justice and resolve various disputes that may occur between governments. The court was established in 1945 by the Charter of the United Nations, and since that time it resides in The Hague, Netherlands. The ICJ is a successor to the Permanent Court of International Justice and its creation represents the culmination of a long period of development of methods for the pacific settlement of international disputes.

The court has two main roles: to settle, in accordance with international law, legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by authorised United Nations organs and specialised agencies. It should be noted that unlike the ICC, the ICJ is not a criminal court and that it settles disputes between governments and international organisations, but not between individuals. The body is commonly referred to as ‘World Court’ since it deals exclusively with ‘state versus state’ cases. The main flaw of the Court, however, is the lack of real means of execution and enforcing the judgments— the countries that are instructed to do something have no legal obligation to comply with the decision of the Court and only after a judgment is voted on with 2/3 majority in favour of the Security Council, a country might face real consequences if the requirements are not met.

Parties to the ICJ are all member states of the United Nations. However, it is possible to withdraw from compulsory jurisdiction. A notable example was the withdrawal of the United States of America after the Court ruled against it in the case *Nicaragua v. the United States*. According to the article 93. of the Charter all members of the UN are parties to the court; however, they are not automatically under its jurisdiction. The general rule is that both parties have to express their consent for the proceedings to take place.

The Court is composed of 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. The Court's official languages are English and French. The Statute of the International Court of Justice is the main document constituting and regulating the Court and all actions of the chamber must find their place within the regulations of the Statute.



SOURCES OF INTERNATIONAL LAW

In contrast to domestic law, international law is not based on legislative acts enacted by a parliament or equivalent legislative body (for there is no such thing as global legislature), but is derived from various sources, which are listed in Article 38(1) of the Statute of the International Court of Justice, which reads as follows:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. *international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;*
- b. *international custom, as evidence of a general practice accepted as law;*
- c. *the general principles of law recognised by civilised nations;*
- d. *subject to the provisions of Article 59, [. e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."*

Counsels shall have to refer to sources of international law when constructing a valid legal argument, whereas judges should be able to differentiate between what actually counts as a source of international law and what does not and so let us examine each source in more detail:

Treaties

Clause (a) above refers to bilateral and multilateral treaties established by states. A treaty will always be binding to its parties, unless it has been terminated, so treaties play the most crucial role as sources of international law. For more about the relevance, legal status and applications of treaties turn to The Vienna Convention on Laws of Treaties.

Customary international law

In international law, a rule of custom is a usually unwritten rule that evolves from the practice of states. State practice can be expressed in various ways, such as governmental actions in relation to other states, legislation, diplomatic notes, official statements (e.g. ministerial) and certain resolutions of the UN General Assembly if they are accepted by most of the states. It should be noted that in some cases a convention which was ratified by a significant number of



states may become international customary law and hence bind even those states that did not ratify it. Furthermore, explicit approval of rule is not required for it to be considered as a custom, for implicit acceptance in the form of not objecting to or violating the rule is sufficient.

Nevertheless, to amount to a new rule of custom, in addition to practice, there must also be a general recognition by states that the practice is settled enough to amount to an obligation binding on states in international law. This is known as *opinio juris* - a belief by States that conduct in question is not just convenient, right or in accordance with tradition, but due to a legal obligation. "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." Such recognition can be reflected in a court judgement based on extensive research and writings of international legal scholars.

Custom is therefore a well-established source of international law, consisting of two elements: state practice and *opinio juris* (also known as objective and subjective elements). If these two elements can be proven, the customary norm becomes binding.

Judicial decisions

Judgements of courts carry authority and therefore constitute binding law. Judicial decisions therefore create precedent which can be invoked when an analogical case occurs.

General principles of law recognised by 'civilised' nations

For example:

Good faith - requires states to perform their obligations arising from law in good faith.

Estoppel - bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law.

State sovereignty - each State carries its sovereignty and independence and within this understanding other States have no right of infringing the right of the State to make its own, fully independent decisions and laws in the subjects that are State's and State's alone.



Teachings of the most highly qualified publicists

Even though the role played by scholars on international law is rather subsidiary, works of rigorous scholarship in law may have some influence on a court ruling. Quoting certain prominent legal authorities might add an element of ethos to the argument.

Domestic law

When it comes to international law, the most important aspect of domestic law is its relationship with international law. For instance, international treaties have to be implemented in domestic law in order to be effective. However, international law does not allow a state to invoke its domestic law to justify its failure to perform its obligations arising from an international treaty.

GENERAL INSTRUCTION FOR COUNSELS

As Counsels (Advocates) you will be expected to prepare arguments in favour of your claim (if you are a legal representative of the Claimant) or against the claim (if you are a legal representative of the Respondent). During the conference, you will have to deliver oral pleadings on two issues of utmost importance to the case - firstly on whether the court has jurisdiction to hear the case filed by the Claimant, and secondly on whether the Respondent is in breach of its obligations arising under international law as listed in the claim.

What is more, it should be noted that the burden of proof lies on the Claimant. This means that the Counsel for Claimant will have to prove that the State of the Respondent is in breach of its obligations under international law and that the law cited by the Counsel does actually bind the respondent State. If the Counsel fails to convince the court that the above is true, the court cannot rule in favour of the Claimant and the presumption of innocence is somewhat binding even in the International Court of Justice.

During oral pleadings try to structure your speeches and make your point very clear so that the Judges understand it. Both Councils needs to refer to relevant facts and sources of international law during their oral pleadings but treat the oral pleadings also as an opportunity to construct creative (and valid) legal arguments. It is not only a question of who is truly right but also who convinces the Judges to their point of view and thus persuasion, rhetorics, and logical and legal reasoning are very important in your speeches. Furthermore, listen carefully to your opponents, look for weaknesses in their arguments and address them when given a chance to do so.



In order to prepare yourselves more effectively for the conference and to provide Judges with an insight into your arguments, you will be asked to submit memorials and a list of evidence (register) before the conference. Instructions on how a memorial and register are to be structured shall be provided for in another document.

Bear in mind that your role as Advocates is of utmost importance to the committee, as the majority of time during our deliberations will be spent on the oral pleadings of Advocates and it is your responsibility to make your arguments interesting, exhaustive and valid. What is also crucial from the Advocate's point of view, is thorough answers to the Judge's questions, as that is what might convince the Judges for, or against the claim.

GENERAL INSTRUCTION FOR JUDGES

As Judges, your responsibility is to listen to the speeches of Advocates, take note of the points that they make and evidence that they invoke as well as critically examine their arguments. For this to be effective you need to be acquainted with the relevant law and know the most important facts relevant to the case. Thus, you are encouraged to conduct some research on the topic as well as make yourself familiar with the relevant legal documents. You shall be provided with the memorials of both of the Councils prior to the conference to make your research easier.

During the deliberations, you will be able to listen to the speeches of Advocates and question them. You will also discuss with other Judges whether to consider an argument presented by an Advocate as a valid legal argument and how a particular argument influences the judgment.

During the conference, you will have to deliver a judgment on two issues respectively - firstly on whether the court has jurisdiction to hear the case filed by the Claimant, and secondly on whether the Respondent is in breach of its obligations arising under international law as listed in the claim filed by the Claimant.

Remember that as judges you should be impartial and that you should focus on the question 'what is the law?', rather than 'what sound convincing?' or 'what ought to be the law?'. Your interpretation should be based and strongly rooted within the text of the law and legal writings rather than your own moral, political, religious etc. beliefs.



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Topic: Immunities and Criminal Proceedings [Equatorial Guinea v. The French Republic]

Background

Equatorial Guinea is a country located on the west coast of Africa, which since the mid-1990s has become one of sub-Saharan's biggest oil producers. Despite this fact, according to the World Bank as many as three-quarters of the population of Equatorial Guinea live below the poverty line. The President of Equatorial Guinea is Teodoro Obiang Nguema Mbasogo, Africa's longest-serving leader, described by human rights organisations as one of Africa's most brutal dictators. His son, Teodoro Nguema Obiang Mangue was, since the year 2012, the Second Vice-President of Equatorial Guinea, and in 2016 took the one of the First Vice-President. (Equatorial Guinea country profile, 2018.) Mr. Obiang's huge expenses (including luxury cars and a 5,000 square feet home on Avenue Foch in Paris) drew criticism from international media and aroused suspicions of corruption, possibly connected to oil and gas reserves on the territory of Equatorial Guinea. Officially his salary as a government official escalates around 100 000 dollars. The value of the Avenue Foch villa is worth over 1000 times more. (BAUME, 2012.)

The case arose in the year 2007, as a result of criminal proceedings instituted against Mr. Teodoro Nguema Obiang Mangue before French courts. The suit was brought by two non-governmental organisations and the Fédération des Congolais de la Diaspora, that accused Mr. Obiang and two other African heads of state of defalcating money in order to illegally buy French properties. In 2012, as Mr. Obiang refused to be interviewed on charges of corruption, the French judges issued an international arrest warrant for Mr. Obiang, which accused him of misuse of public money, breach of trust and money laundering. In 2011 he sold his mansion on Avenue Foch, reportedly worth between 100 and 150 million euros, to the state of Equatorial Guinea. (Jarry, 2017.) One year later it was seized by France as a part of the corruption investigation. Accusations of corruption and money laundering brought by the French justice resulted in the "in absentia" trial, in October of 2017 the Vice-President was found guilty and many of his luxurious goods were confiscated.

In 2016 Equatorial Guinea filled a case against France to the International Court of Justice, claiming, that France breached the diplomatic immunity of its representatives and premises -



arguing that the Avenue Foch maison was a governmental building of Equatorial Guinea - and, just like an embassy, shall be under Guinean control.

It is also worth noting that Teodoro Obiang Mangué faced similar accusations - over corruption in the United States of America. The vice-president of Equatorial Guinea purchased a residence in Miami and numerous luxury goods - including a Michael Jackson glove. In 2014 a settlement had been reached for 30 million dollars- 2/3 of which were supposed to be donated to a non-governmental organisation operating in his home state in an attempt to 'give back' the money to its citizens. (Jarry, 2017.)

The case is unique since it is probably one of the first times an authoritative regime is facing an international trial for its abuse of power and corruption, which is still, unfortunately, a common occurrence in many African states (e.g. Rwanda's Kagame regime or Uganda's Museveni). International Court of Justice verdict, in this case, may become a precedence and hence lead to many similar trials against other corrupted officials not only in Africa but around the world.

TIMELINE OF THE EVENTS

- **2007:** Some associations and private individuals lodged complaints with the Paris Public Prosecutor against certain African Heads of State and members of their families, in respect of acts of “misappropriation of public funds in their country of origin, the proceeds of which have allegedly been invested in France”.
- **2 Dec 2008:** One of these complaints, led by the association Transparency International France, was declared admissible by the French courts, and a judicial investigation was opened in respect of the handling of misappropriated public funds, complicity in the misappropriation of public funds, misuse of corporate assets and complicity in misuse of corporate assets, and concealment of each of these offences. The investigation focused in particular on the methods used to finance the acquisition of movable and immovable assets in France by several individuals, including the son of the President of Equatorial Guinea, Mr. Teodoro Nguema Obiang Mangué, who was at the time Minister for Agriculture and Forestry of Equatorial Guinea.
- **2008-2010:** The investigations more specifically concerned on the way in which Mr. Teodoro Nguema Obiang Mangué acquired various objects of considerable value and a building located at 42 Avenue Foch in Paris. Although he challenged the measures taken against him and invoked on a number of occasions the immunity from the jurisdiction that he considered himself to enjoy in light of his functions, Mr. Teodoro Nguema



Obiang Mangué was indicted. In addition, the building on Avenue Foch was attached (saisie pénale immobilière), and various objects therein were seized. Mr. Nguema Obiang Mangué - then merely a minister of agriculture was referred to the Paris Tribunal correctionnel to be tried for alleged offences committed between 1997 and October 2011.

- **2012:** After intensive campaign of NGO's Teodoro Nguema Obiang Mangué faces accusations of money laundering and corruption in the United States. The case is settled for 30 million dollars.
- **2016:** In light of a French trial scheduled for January 2017; Equatorial Guinea files the case in the International Court of Justice; first hearings are planned for February 2018
- **September 2016:** Interpol issues an international arrest warrant; in December the ICJ upholds it
- **July-October 2017:** In the process that started in July the French court finds the now Vice-President of Equatorial Guinea guilty of "embezzlement, money laundering, corruption and abuse of trust"; he is given a suspended fine of 30 million dollars; the goods including supercars and the mansion remain under the control of French police. (Moiseienko, 2018; International Law Commission, 2008; Baume, 2012.)

LEGAL GROUND

According to Equatorial Guinea, the proceeding which was undertaken by the French justice constitute a violation of the immunity to which Teodoro Nguema Obiang Mangué is entitled under international law. As the Second (and the First) Vice-President he represents the state and acts on its behalf. In case of the mansion on Avenue Foch, Equatorial Guinea claims that ever since Mr. Obiang sold the building to the state of Equatorial Guinea in the year 2011, the property "has been used by the diplomatic mission of Equatorial Guinea", and therefore "should enjoy the immunities accorded to social premises by international law", namely in respect of the Article 35 of the *Convention against Transnational Organised Crime*, in respect of the claim relating to the immunity of Mr. Teodoro Nguema Obiang Mangué, and, second, on the *Optional Protocol to the Vienna Convention on Diplomatic Relations*, in respect of the claim regarding the alleged inviolability of the premises at 42 Avenue Foch. It is to be noted that both Article 35, paragraph 2, of the *Convention against Transnational Organised Crime* and Article I of the *Optional Protocol* make the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of the Convention to which they relate.



It will, therefore, ascertain whether, prima facie, such a dispute existed on the date the application was led, since, as a general rule, it is on that date, according to the jurisprudence of the Court, that its jurisdiction must be determined.

MERITS OF THE CASE

1. During SG Model United Nations, we will assume that the International Court of Justice has a jurisdiction to hear the case.
2. Guinea demands from France respecting Article 22 of the **Vienna Convention on Diplomatic Relations**, in order to ensure their inviolability in respect of diplomatic mission at 42 Avenue Foch;

Article 22 of the Vienna Convention on Diplomatic relations:

1.e premises of the mission shall be inviolable. e agents of the receiving State may not enter them, except with the consent of the head of the mission. 2.e receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3.e premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

3. Furthermore, Guinea calls upon recognising immunity *rationae personae* - Equatorial Guinea claims that France breached the immunity of a Guinea's official. The immunity *rationae personae* is usually granted only to head of states and foreign ministers. The question the court of has to answer is whether it extends also to vice-presidents.
4. French Republic Claims that the Article 4 of the **United Nations Convention against Transnational Organized Crime** creates the exception from the full implications of Article 22 of the Vienna Convention on Diplomatic Relations.

Article 4 of the United Nations Convention against Transnational Organized Crime:

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.



2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

5. Guinea counter claims in respect of the intention of the States parties, as reflected in the *travaux préparatoires* of Article 4, not to create new rules of immunities of customary international law in the Convention against Transnational Organized Crime cannot be interpreted to mean that the existing rules on the same subject- matter are precluded in the application of the Convention.
6. Moreover, judges shall take into account that whether an incumbent President or a Vice-President of a State enjoys jurisdictional immunity in foreign courts under customary international law is not a “distinct issue” that does not fall within the provisions of the Convention. In implementing its obligations under Article 6 (criminalisation of laundering of the proceeds of crime), Article 12 (measures to enable confiscation and seizure), Article 14 (disposal of confiscated proceeds of crime or property), and Article 18 (mutual legal assistance), a State party may have to act differently if rules of jurisdictional immunities apply. (Moiseienko, 2018; International Law Commission, 2008; Berg, 2018.)

MEMORIALS

Memorials will have to be sent to icj@sgmun.org by midnight (24:00) of the 8th of November 2018.

FURTHER READINGS

- *The Vienna Convention on Diplomatic Relations*, Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations, Treaty Series, vol. 500, p. 95.; http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf
- *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, updated October 2016, FATF, Paris, France, <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.htm>



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