IMUN ICJ Brief

Trial Procedure for the Model International Court of Justice
at the Iberian Model United Nations

Trial procedure at the IMUN ICJ is based on the procedure of the THIMUN ICJ created by Robert S. Stern.

INTRODUCTION

This brief contains a summary of the procedures to be followed at the IMUN ICJ simulation.

STRUCTURE OF THE COURT

President: The role of the President of the ICJ is to supervise court proceedings. They will be very involved in the planning of the simulation and will provide support and guidance to the advocates prior to IMUN. During the simulation, the President rules on objections.

Registrar: The Registrar will mark evidence, swear in witnesses and be the scribe during deliberation. They are also allowed to pose questions to witnesses, and as this is a relatively small simulation, they will also analyze the evidence and ask questions to counsel. Depending on the final format for the closing ceremony, the registrar may present the decision to the other committees.

Advocates: There are two teams of advocates. The success of this simulation depends on the preparation made by the advocates. The President will submit a detailed schedule with due dates to help the advocates organize their time. The advocates need to identify relevant evidence, agree on stipulations with opposing counsel, decide which witnesses they want to call, as well as the strategy they will use to present their case. The two teams should communicate with each other, and with the President. Advocates should be addressed as "Counsel" or "Counsel for (country)"

Judges: Unlike other MUN committees, the judges do not represent a specific delegation. When coming to their decision, they must decide the case based solely on law and legal principles. Judges will need to take very detailed notes throughout the case. Judges should be addressed as "Judge (name)" or "Your Honor". Judges should not discuss the trial with other judges, advocates or witnesses prior to the trial.

Witnesses: For IMUN, the witnesses are selected from the advocates' school. This is done to allow the advocates to prepare their witnesses properly prior to IMUN. Witnesses represent a country not a specific individual. Witness lists need to be presented to the opposing counsel and to the rest of the court. There is a maximum of 3 witnesses per side.

Jurisdiction: For the purpose of this model ICJ jurisdiction is never an issue. Assume that the court has the jurisdiction to hear the case.

Burden of Proof: The Applicant has burden of proof. This is decided by Preponderance of the Evidence (a simple majority of the judges must be persuaded by more than 50% of the evidence.) *Caveat:* If the Applicant is asking in its prayer for the Court to determine more than one point, and the Court agrees with, or decides in favor of any one point, the Judgement goes to the Applicant.

Prior to IMUN

Stipulations: The two teams of advocates will submit ONE set of stipulations. Stipulations are significant facts of the case that are agreed to by both sides, and, therefore, do not need to be proven or disputed. It is crucial that opposing counsel discuss those relevant issues of fact and of law to which an agreement can be reached before the case is presented. Once agreed, these stipulations become evidence, which will save advocates and the judges (the Court) vast amounts of time. These stipulations will be presented to the Court at the trial, and cannot be "taken back". There should be between 7 and 15 stipulations.

Memorandum: Each team of advocates will present a short-written Memorandum of Points and Authorities aka "Memorandum" to opposing counsel, and the judges. The Memorandum should be a party's view of the pertinent facts and legal principles/points of law as espoused by its advocates. It need not give away trial strategies; however, it should present a party's position, the facts and points of law to be applied (citations may be included). It may contradict points that counsel anticipates will be raised by the opposing party. Each Memorandum should be written clearly and succinctly. It should be 2-3 pages long, double spaced, font size 12, Times New Roman.

Real Evidence: Each set of advocates must provide opposing counsel (and judges) with a list of their Real Evidence. This list should include: (1) the title of the document, (2) its author, (3) the date, and, most importantly, (4) the source (website) of the document to judges and opposing counsel. The evidence list of Applicants is numbered, the Respondents, lettered. The minimum number is 10, the maximum, 15. Advocates must bring three hard copies of this evidence to the trial (one for the court, one for opposing counsel, and one for themselves). To ensure mindful use of resources, only the relevant part of a document should be copied.

Witness List: This list will state whom each set of advocates intends to call as witnesses (name and role at the trial). Witnesses need not speak to opposing counsel if they choose not to; however, the judges may take that into consideration when giving weight and credibility to their evidence.

At IMUN – The Case in Chief

Opening Statements: The purpose of an Opening Statement is to tell the Court what you intend to show/prove. Do not make assertions or promises to the judges that you cannot keep. The opposing counsel will make certain that the judges remember that you promised in your opening statement to prove something you failed to do. Fifteen minutes for each side is the maximum, and only one advocate presents the Opening Statement for each side. State your prayer in the Opening Argument. What, specifically, is it you want the court to find/do?

The Applicant presents their Opening Statement first. At IMUN, the Respondent will give

its Opening Statement once the Applicant has marked all its tangible evidence. Opening Statements need to be sent to the President before the start of the trial. The President will send it to all judges prior to the start of the trial. A very important rule is that the statements of advocates are NOT evidence. They are trying to persuade judges of their position, and, therefore, there will probably be some bias/slant in their presentation. Judges must listen and pay close attention to the truth and relevancy of the evidence presented to them by both sets of advocates.

Stipulations: After the Applicant's Opening Statement, the Stipulations are read out to the judges. The Applicant reads each stipulation. After each one the Respondent is asked if they agree. If they do, the President says "so-stipulated", and that single stipulation is evidence, and can be considered by the judges.

Marking the evidence: The Applicant will now be asked whether they have any real evidence. Real evidence is tangible material, such as books, articles, documents, photos. There is a maximum of 15 pieces of evidence per party. The Applicant's evidence is marked with numbers and Respondent's is marked with letters. Each piece of evidence is presented individually. The advocate must identify the piece of evidence and the author/creator/source. The President will ask if the advocate can tell the court anything about the author, the date it was written/published/discovered and its source. The President will ask if opposing counsel have seen the piece of evidence (hopefully the answer is YES). Then opposing counsel will be asked if there is an objection to AUTHENTICITY or RELEVANCE or BIAS (only). At this juncture, the only issues are whether it is authentic and/or relevant (not necessarily truthful), and if there may be any perceived bias. The document's truth or accuracy can be raised later at Closing Argument.

The President then asks the advocate what they want the judges to focus on in the evidence. It is essential to identify which part of the evidence they want the judges to analyze. They should also give a very short description of what the evidence is about. CAVEAT: No Pleadings filed at the ICJ and no judgements or writings by the ICJ that directly refer to the case we are trying may be marked as evidence.

The advocates cannot state how it helps their case. The presentation of evidence is used only to explain what that piece of evidence literally says. They may not discuss what any piece of evidence purports to say, infers, or implies. They may only do so during their Closing Argument.

The reliability, credibility, and/or truth of the document is another issue (presented when admitting the evidence later in the trial), at which time, the weight of that evidence can be argued. Cross-examination may establish that the item is not what it purports to be (Mr. Jones did not write the document—it may not be his handwriting or his style of writing, etc.). Furthermore, it may show bias; consequently, it may not be admitted into evidence by the judges, or, if so, it may be given very little weight because of the bias. Also, the knowledge or expertise that the evidence is attempting to establish may be very weak; thus, it may be given little or no weight. All in all, we are trying to determine the

authenticity, relevance, reliability, credibility, trustworthiness, *ergo*, the truth of the evidence. Does it fairly go to the weight of the evidence, and, if so, to what degree?

After the Applicant has marked all its evidence, the Respondent will present its Opening Statement. Then, the Respondent will mark its real/tangible evidence, just as the counsel for the Applicants have done. The same rules apply to the Respondents as required of the Applicants.

Analysis of Evidence: The advocates will be asked to leave the courtroom for approximately two hours. During this time, they will have time to speak to, and complete the final preparation of their witnesses, or opposing counsel's witnesses, and find out where their witness will be located when it is time for them to be called. While the advocates are fine-tuning their witnesses, judges, *in camera*, will become familiar with the marked evidence. The Registrar will give each piece of evidence to one of the judges. Because of the volume of evidence, some judges may end up with two brief pieces of evidence.

Judges will then have approximately 45 minutes to quietly review and analyze their piece(s) of evidence.

Next, starting with Applicants "1", each judge will stand up for approximately 2 minutes and summarize his/her findings regarding those pieces of evidence to the entire body of judges; thus, what his/her piece of evidence purports to say, whether it helps the side who presented it or, perhaps, the other side, pros and cons, and how much weight the judges should give to that piece of evidence----a lot, some, very little, or none. Each judge is the "expert" or "master" of one or more pieces of evidence, teaching the others about that piece of evidence. Judges will take copious notes during this presentation.

Testimony of Witnesses: Next, it is time for witness testimony. Questioning your own witnesses is done during direct examination. Cross-examination is when you question an opposing side's witness after the witness has been questioned by opposing counsel during their direct examination.

Witnesses should be very well-prepared, i.e., well-coached BEFORE the conference; they should know what questions will be asked of them on direct examination, what answers are expected (as long as they are truthful), and, most important, what questions to expect on cross-examination. Cross-examination of a witness, which follows direct examination of the witness, is meant to create a dispute about the witness's statements, and/or to place the witness's credibility (believability) into question. This includes the witness's demeanor.

During direct examination, advocates must follow two basic rules:

1. Advocates cannot ask leading questions. Leading questions are those questions that suggest the answer by the very nature of the question. "You saw him, didn't you?" "You are a good student, are you not?" Questions such as "Did you see him?" or "Are you a good student?" are not leading because we are not certain by the nature of the question

whether the answer will be “yes” or “no”. The answer is not suggested by the form of the question.

2. Advocates cannot ask **hearsay** questions. You cannot ask a witness about an out of court statement or act allegedly made by someone other than the witness. It is testimony a witness provides that is not based on personal knowledge but is a repetition of what someone else said. It is usually not admissible because it is impossible to test its truthfulness on cross-examination. “Mr. Jones, what did Mr. Smith say?” Objection, hearsay! Why? Because Mr. Smith is not available to be cross-examined to determine the veracity/truth of the matter stated. You can ask Mr. Jones what he (Mr. Jones) said, but not what someone else said unless it is an exception to the rule, e.g. a party, or in certain circumstances, a witness to the case. The principles directed at achieving truth generally fall under the headings of trustworthiness and relevance. The basic criterion for admissibility of evidence is trustworthiness. The object is to ensure that only the most reliable and credible facts, statements, and/or testimony are presented to the triers of fact.

Each witness who testifies in direct examination may be cross-examined by opposing counsel. The purpose of cross-examination is to impugn or negate the credibility of the witness. After strong cross-examination, judges are better equipped to determine the truth and veracity of a witness. The questions on cross-examination must relate to the questions asked on direct examination. Cross-examination cannot exceed, or be outside, the scope of the direct examination of the witness. Cross-examination is an art. If done properly, **every** question should be a leading question. Essentially, you **tell** the witness what you want him/her to say by leading, e.g. “You were lying when you said you saw the defendant in the store, weren’t you?” “Isn’t it true that the person you saw was not the defendant, but someone else?” Advocates direct the answers, and most, if not all answers, should be either a “YES” or a “NO” (although witnesses often may explain their yes or no answers). Again, a witness who can withstand vigorous cross-examination may be more credible than not. Ask only leading questions on cross- examination! First, we have Direct Testimony, then Cross Examination, then re-direct and re-cross, until both sides say no more questions. Short questions, no narratives, no speeches. ***Caveat***: Know when you have made your point, stop, and argue it in the Closing Argument. A wise advocate knows when to move on to a different question once they have made their point.

Once all direct testimony and cross-examination of a witness is completed, judges will have the opportunity to ask questions of the witness. Following these questions, advocates will be given a very brief opportunity to ask one, maximum two further questions of the witness. Because of time constraints, judges' questions, and any follow-up questions by advocates must be kept to a reasonable minimum by the President. The total time for each witness (i.e. direct, cross, judges’ questions, and one or two final questions by each set of advocates) is limited to between 30 and 45 minutes. **Caveat**: WITNESSES MUST TESTIFY FROM MEMORY. They may look at and comment about marked evidence as they testify, but they may NOT use any personal notes/scripts.

At IMUN, Witnesses are to be selected from delegates from the advocates' school. This is to help them be well prepared. Witnesses need to be ready to testify at the ICJ. Witnesses may not invent facts. Their statements/facts must be as truthful and accurate as possible.

When questioning a witness or referring to a member of the Court, do not use the term "you". It creates an adversarial nature. Refer to a witness as "the witness". Refer to a member of the court as "the judge" or "the advocate". For example: "The witness said on cross examination…." "The advocate said in his Opening Statement…."

If a witness cannot recall a fact or legal principle or piece of evidence, an advocate or a judge may begin a question with "If I said that…." If the witness disputes this, the person asking the question may then show the witness a piece of evidence proving the existence of the fact or legal principle. Example: "If I said that there is a piece of evidence showing/stating that…." This saves time presenting a marked piece of evidence to a witness or refreshes the memory of a witness. The question must be based on fact! However, the person asking the question must be careful how the question is further phrased, e.g. if it is asked on direct examination or by a judge, it cannot be a leading question. Also, this type of phrasing should only be allowed sparingly, not one question after the other beginning with "If I told you that…." The judges will form the opinion that the witness is unprepared or his/her testimony merits little credibility or weight.

Further, some quick pointers: Try to reinforce the credibility of your witnesses for truth and accuracy while attempting to establish that the credibility of certain opposing witnesses is poor. Never, ask a witness a question to which you yourself do not know the answer. Never ask a witness "WHY?" Do not argue with a witness! Lay a foundation with your questioning. "Is the witness familiar with…." Do not assume the judges know where you are headed with your questions. One advocate from a team should question a witness, not both advocates. This is true whether on direct or cross-examination.

Just prior to Judges' Questions of the advocates, each party presenting tangible evidence asks the Court to have their evidence admitted (e.g. responding party requests that Respondent's letter "A" be admitted into evidence). Opposing counsel may object on the grounds of authenticity, reliability, accuracy, and/or relevance. Reliability or accuracy usually goes to the weight a piece of evidence will be given. Therefore, the Court may admit the evidence but, as stated, give it limited weight in relation to other evidence presented because of the arguments made by opposing counsel. Generally, doubts as to trustworthiness (authenticity) and relevance, assuming they are well presented, are the better objections for keeping evidence from being admitted. In the search for truth (of which the rules of evidence are intended to achieve this end), a judge who feels that either he/she or a jury would give certain evidence undue weight or would be greatly prejudiced by seeing or hearing it, will not allow that evidence to be presented.

However, as stated above, the authors of books, journals, articles, or any publications, cannot be cross-examined at our ICJs. Therefore, assuming authentication is not an issue, each publication may be admitted into evidence, but given certain weight. The more

authors saying the same thing, or the more credible the source, the more weight the evidence in the publications can be given. The use of stipulations between advocates might be very helpful here.

The pleadings (ICJ Application and Response) are each party's position in the case and are NOT evidence. Any supplemental material from the actual ICJ is not evidence unless an advocate attempts to place it into evidence, using the rules stated above.

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

Also, cases previously decided by the Court may be admitted as evidence, but they are not precedent. The court does not recognize Precedence. Each piece of evidence is considered *ad hoc*.

There is no time for separate Rebuttal Evidence. Advocates can rebut opposing counsel's evidence in the time they have for Direct Examination, using Cross Examination effectively, and during Judges' Questions and Closing Argument.

Judges' Questions: The judges may ask questions of the advocates. EVERY judge should participate, usually going around the room, judge by judge. The President monitors the questioning and must keep order. Judges should not take on an adversarial role when asking questions. Their questions are meant for clarification of issues, facts, and points of law. Judges should act professionally when asking questions. Judges' questions should last up to one hour. This is the time for judges to go through their notes and the evidence admitted and ask the burning questions on their minds. Questions should be directed to one set of advocates or the other, by specifically referring to the "advocate (or counsel) for the Applicant" or "advocate (or counsel) for the Respondent". Questions are not open-ended. A follow-up question by a judge is solely at the discretion of the President.

Advocates are there to present evidence to the judges for their consideration. They present facts and law or object to improper evidence being admitted by the other side. Advocates cannot discuss what something purports to say, infers, or implies, nor can they argue the facts, the law or the case until Closing Argument.

Closing Arguments: One or both advocates may present the Closing Argument. Each side is given 30 minutes maximum to sum up its case and tie together the evidence and the legal elements. The moving party goes first but may reserve a part of its time. The responding party goes next. Finally, the moving party may use up the time it has reserved. Therefore, the moving party can sum up twice (but not to exceed the 30-minute maximum). During Closing Arguments, the advocates must state their "prayer", what each side is requesting for a judgement. Usually, it is best for the advocates to state what they think the issues are, what the answers to those issues are, and what the decision (or their "prayer" from

the court) should be. They may also comment on the evidence they have submitted, and the evidence presented by opposing counsel. Proof is essential with regard to damage; liability can be determined by the Court with the damage issue reserved for a hearing at a later time.

Deliberation: The advocates are not in the room during deliberation, and no further evidence can be considered. The first step the judges MUST take is to determine what issues are to be decided before a decision can be reached. Each judge shall pick his/her top three issues. These are listed. These issues are then put in priority order by a vote of the judges. Next, a straw poll will be taken with each judge taking a minute to state how and why they would vote at the time if they were compelled to. Then, each issue should be discussed and determined, according to the order of priority (per the vote discussed above). Once each issue is determined, it is easier for the Court to reach a decision/judgement/verdict. In the past, it has often taken the judges three hours or more to reach a verdict. Judges may change their minds several times during deliberation. Also, it is rare that one side receives no votes. You are not trying to reach a consensus. If you feel strongly about your position, hold to it, but listen carefully to the points raised by fellow judges! Your vote MUST be based on sound legal principles, and the law and facts of the case.

The party receiving the most votes is the successful party. This constitutes the Court's ruling. The majority vote of this position is known as the "Majority Opinion", and it is that judgement which will be read in the Closing Ceremony of the conference. Judges who agree with the side getting the most votes, but differ with the reasons of the majority, will write a "Separate but Concurring Opinion". Judges who arrive at a decision, which is in the minority, write a "Dissenting Opinion". Judges who dissent but differ with the reasons of the "majority" of the dissent write a "Separate but Dissenting Opinion". These decisions are all published by the conference.

The first judge selected stands and states his/her position and DETAILS, point by point, why he/she voted as they have. The next judge does the same. If that next judge votes in favor of the same party as the previous judge, that next judge states why. If he/she has any reason different than the first judge, we must go back to the first judge to see if he/she agrees with the second judge. If so, they will be writing a decision together. If not, they will be writing separate opinions (possibly on their own, or with others). And so on! The side getting the most votes with the exact same reasoning writes the "Majority Opinion". Those who voted for that same side but for different reasons will be writing "Separate but Concurring Opinions". Those who voted for the side getting the fewer votes will write the "Dissenting Opinion"; however, those who vote for that side but for different reasons than the slightly larger dissenting group, will write "Separate but Dissenting Opinions".

Judgement: Finally, judgements must be written out, and this, too, takes a long time to find the correct wording. There are templates/formats that should be used. If there is a large number for the Majority or Dissent, drafting committees are formed to write the

judgements. The first draft often takes about an hour or more. It is then presented to the remaining judges for their review and correction. Overall, it often takes close to another two hours just to write the judgements.