

MUNAAL'18

# INTERNATIONAL COURT OF JUSTICE

1- LAGRAND CASE

STUDY GUIDE

## **LETTER FROM THE SECRETARY GENERAL**

Honourable Participants,

My name is İnci Çetin and it is an immense pleasure to welcome you as the Secretary General of the very first session of MUNAAL18, on behalf of both academic and organization teams. We are exhilarated to see you join us while we are at one of the benchmarks of our club's history. We worked relentlessly to deliver you a satisfactory academic experience alongside a quality organization to make your experience a remarkable one.

We determined the theme as 'Will For Change' in hopes of emphasizing the much needed initiative taking to make a change in the world. In the upcoming days you will learn how to adopt yourself in times of crises and take actions accordingly. You will understand the dynamics of negotiating and compromising. Most importantly you will deepen your understanding regarding the importance of changing your mind and being able to come together to achieve a solution which will not only make an impact but also last for a long time. Ultimately this is what we strive for this conference as well as aim to make you contemplate through this theme.

It is genuinely an honour to be simulating the International Court of Justice in the scope of our conference. For that, I owe my thanks to firstly Mr. Safa Akbulut for truly sponsoring this committee and secondly, our hard working Under Secretary General Mr. Enes Malik Mengüç, for being a part of our team and giving his best to our conference. I am more than confident both of these amazing people are going to provide you with the best academic experience.

I highly advise you to read the guide thoroughly and make further research to make the most of this experience. The challenges might vary, but your enthusiasm and hard work will surely overcome them all.

Kindest Regards,

İnci Çetin  
Secretary General of MUNAAL 2018

## **LETTER FROM THE UNDER SECRETARY GENERAL**

Esteemed participants,

My name is Enes Malik Mengüç and I feel honoured to welcome you to the MUNAAL 2018 conference as the Under Secretary General Responsible for the International Court of Justice.

I feel privileged to be able to write the first International Court of Justice Study Guide of MUNAAL and the Court will look into a contentious case between Germany and the United States of America. The case concerns a very controversial issue which can be summarized simply as a conflict between domestic law and a multilateral international convention. It was a pleasure for me to work as an Under Secretary General in the MUNAAL conference. And I want express my whole gratitude to the hardworking members of our academic and organization teams for making this conference a reality. First of all my thanks will be towards our Secretary-General İnci Çetin and Director- General İdil Sivaslı for all of their efforts. And I have someone special to express my deepest gratitude, Academic Advisor of MUNAAL, M.Safa Akbulut for guiding me and giving me the inspiration I needed throughout the whole tiring process. I hope this conference will be enjoyed by all participants and this Court will be inspirational for all the members.

Should you have any inquiries, please do not hesitate to contact me via [enesmenguc@gmail.com](mailto:enesmenguc@gmail.com)

With my best regards,

Enes Malik Mengüç

Under Secretary General Responsible for the International Court of Justice

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## **PART I: INTERNATIONAL COURT OF JUSTICE**

### **A. INTRODUCTION**

#### **I. HISTORY**

Since the classical times pacific settlement methods have been developing for the international disputes and the creation of the International Court of Justice (hereinafter will be referred to as ICJ) represents the culmination of these developments.<sup>1</sup> Unlike 'modern' arbitration methods, the first hint of an outlined plan for the arbitration of international disputes can be traced back to 1306, when Pierre Dubois, a royal advocate for Normandy, wrote a leaflet for the recovery of the Holy Land which was depending on the peace in Europe.<sup>2</sup> Dubois advocated arbitration to settle outstanding conflicts.<sup>3</sup> International arbitration in modern sense is generally recognized as dating from the Jay Treaty of 1794 between the United States of America and Great Britain. As a result of this Treaty of Amity, Commerce, and Navigation the creation of three mixed commission which composed of equal numbers of America and British nationals has occurred to settle a various of unsatisfied conflicts between the two countries which it had not been possible to resolve by negotiation. In 1872, the more determined phase has started with The Alabama Claims arbitration between the United States of America (hereinafter referred as USA) and the United Kingdom. The two countries agreed upon, under the Treaty of Washington of 1871, to submit to arbitration claims by the former for pontificated breaches of neutrality by the

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<sup>1</sup> [Icj-cij.org](http://www.icj-cij.org). (2018). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/history> [Accessed 5 May 2018].

<sup>2</sup> Henry S. Fraser, *Sketch of the History of International Arbitration*, 11 CORNELL L. REV. 179 (1926) Available at: <https://scholarship.law.cornell.edu/clr/vol11/iss2/3>

<sup>3</sup> *Ibid.*

subsequent during the American Civil War. Aforementioned arbitration methods served crucial importance to demonstrate the effectiveness of arbitration in settling disputes between states.<sup>4</sup>

The Hague Peace Conference of 1899, which culminated with the adoption of a Convention on the Pacific Settlement of International Disputes, provided for the creation of permanent mechanism which would enable arbitral courts to be set up as desired and would alleviate their work.<sup>5</sup> Permanent Court of Arbitration is the mechanism that has been created as the final product of the Convention, which consists of a panel of jurists designated by each country acceding to the Convention.<sup>6</sup> The Convention on the Pacific Settlement of International Disputes also created a permanent Bureau, located in the Hague, with purposes comparable to those of a court registry or secretariat, and put out a set of rules of procedure to govern the managements of arbitrations.<sup>7</sup>

However the Permanent Court of Arbitration has played the role of it as giving birth to shrined fundamental basics that will lead to serve as a source of inspiration for the drafting of the Statute of the Permanent Court of International Justice ( hereinafter referred to as PCIJ).<sup>8</sup> Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for developing plans for the formulation of a PCIJ, which would be a mechanism to both hear and determine any dispute of an international parties and give an advisory opinion upon any question or conflict assigned to it by the Council or Assembly of the League of Nations.<sup>9</sup>

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<sup>4</sup> [cj-cij.org](http://www.icj-cij.org). (2018). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/history> [Accessed 5 May 2018].

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.



**Figure I:** 1 January 1960, ICJ in session in The Hague<sup>10</sup>

With the outbreak of the World War II serious consequences occurred for the PCIJ and it gave its last ruling on 26 February 1940. In 1945, following the end of World War II under the roof of United Nations, the International Court of Justice has established.<sup>11</sup> Since the Statute of PCIJ was established by the basis of the past experience, and did a decent work, the Statute of the International Court of Justice also based itself upon the Statute of PCIJ.<sup>12</sup> The PCIJ judges all resigned on 31 January 1946 and the first election for the Members of the International Court of Justice has been held on 6 February 1946, at the First Session of the United Nations General Assembly and Security Council.<sup>13</sup> The first case concerning the Corfu Channel incident was brought by the United Kingdom against Albania in May 1947.<sup>14</sup>

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<sup>10</sup> Legal.un.org. (2018). *United Nations Audiovisual Library of International Law*. [online] Available at: <http://legal.un.org/avl/ha/sicj/sicj.html> [Accessed 9 May 2018].

<sup>11</sup> Icj-cij.org. (2018). *History | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/history> [Accessed 5 May 2018].

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

## II. STRUCTURE

The Court is seated at the Peace Palace in The Hague (Netherlands), and being as that it is the only principal organ of the United States that is not located in New York (United States of America).<sup>15</sup>

The all 15 member of the Court gets elected by the United Nations General Assembly and the Security Council for nine years.<sup>16</sup> The official languages of the ICJ are English and French. The Judges that get elected for the Court have the requirement of being morally high, and possessing the qualifications which needed in the country they come from for getting assigned to the highest judicial positions, or are jurisconsults of recognized competence in international law.<sup>17</sup>

## III. JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

### a. Advisory Opinion

The ICJ is authorized to answer '*any legal question*' that has been directed to it by the United Nations General Assembly and Security Council, however other than that the ICJ may entertain '*legal questions arising within the scope of their activities*' that coming from the other UN organs and sixteen specialized agencies of the UN family or affiliated organizations such as; World Health Organization, World Bank Group, International Monetary Fund, International Labour Organization.<sup>18</sup>

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<sup>15</sup> [www.icj-cij.org](http://www.icj-cij.org). (2018). *The Court | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/court> [Accessed 8 May 2018].

<sup>16</sup> Ibid.

<sup>17</sup> [www.icj-cij.org](http://www.icj-cij.org). (2018). *Members | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/members> [Accessed 8 May 2018].

<sup>18</sup> [www.icj-cij.org](http://www.icj-cij.org). (2018). *How the Court Works | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/how-the-court-works> [Accessed 8 May 2018].

The Court also holds written and oral proceedings when it receives a request for an advisory opinion, despite the fact that in theory it is not obliged to hold these proceedings.<sup>19</sup> Foremost difference of advisory proceedings is not binding in any aspect with exceptions as, the conventions on the privileges and immunities of the United Nations.<sup>20</sup>

### **b. Contentious Cases**

States which are members of the UN and other states which have become parties to the Statute of the ICJ or the states which have accepted the jurisdiction of ICJ under all conditions may be parties to contentious cases.<sup>21</sup>

Article 36 of the Statute of International Court of Justice clarifies the frame of the jurisdiction of the ICJ concerning the contentious cases:

*"1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*

*2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*

*a. the interpretation of a treaty;*

*b. any question of international law;*

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

c. *the existence of any fact which, if established, would constitute a breach of an international obligation;*

d. *the nature or extent of the reparation to be made for the breach of an international obligation.*

3. *The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.*

4. *Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.*

5. *Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.*

6. *In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.*<sup>22</sup>

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<sup>22</sup> *icj-cij.org*. (2018). *Statute of the Court | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/statute> [Accessed 8 May 2018].

#### IV. SOURCES OF LAW APPLICABLE TO THE INTERNATIONAL COURT OF JUSTICE

The law which ICJ considers as an applicable and binding is determined in the Article 38 of the Statute of the ICJ:

*“1. 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 recognized by the contesting states;*
- b. international custom, as evidence of a general practice accepted as law;*
- c. the general principles of law recognized by civilized nations;*
- d. subject to the provisions of Article 59, 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.*

*2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono<sup>23</sup>, if the parties agree thereto.”<sup>24</sup>*

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<sup>23</sup> Is a Latin term which means what is just and fair or according to equity and good conscience

<sup>24</sup> The Statute of the International Court of Justice, op. cit.

### **a. International Conventions:**

The states or for some cases international instruments may make treaties or agreements for their mutual or multilateral benefits and those conventions are the primary actors in international law. The term convention may be used mutually as, treaty, agreement, compact or contract between states.<sup>25</sup> International conventions hold as much significance as domestic laws which are implemented in the country that is a party for the convention. Thus those countries are obliged to ensure that the law is implemented and the convention is consistent with what is required with agreement.<sup>26</sup> Treaties such as Vienna Convention on Diplomatic Relations, Vienna Convention on Consular Relations, and Vienna Convention on Civil Liability for Nuclear Damage can be counted as International Conventions that are source for the International Law.

### **b. International Custom**

International custom holds crucial importance for public international law. International Law derives from the international custom. Customs used to be the first and predominant source

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<sup>25</sup> LII / Legal Information Institute. (2018). *International conventions*. [online] Available at: [https://www.law.cornell.edu/wex/international\\_conventions](https://www.law.cornell.edu/wex/international_conventions) [Accessed 9 May 2018].

<sup>26</sup> Un.org. (2018). *Chapter Five: National legislation and the Convention - Incorporating the Convention into domestic law | United Nations Enable*. [online] Available at: <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-five-national-legislation-and-the-convention.html> [Accessed 13 May 2018].

of international law and simply the basis for the creation of concept of international law.<sup>27</sup> In simple terms, customs are informal, unwritten rules which are binding for the states and the international instruments.<sup>28</sup> Unlike rules that are coming from the conventions, which arises from formal debates and deficit recognition, rules of customary law comes from indefinite combinations of behavioural regularity and externalised admission of legality.<sup>29</sup>

### c. The General Principles of Law

Word principle is originated from the less used, colloquial Italian word '*principio*' which means '*beginning*' but otherwise it means fundamental values and bearing that in mind, the general principles of law originates from the collection of fundamental values of nations.<sup>30</sup> Those fundamental values which create those principles are '*raison d'etre*'<sup>31</sup> of the international order.<sup>32</sup> They hold crucial role for filling the legal blanks. Examples of general principles of law are: *Pacta sunt servanda*;<sup>33</sup> *res judicata*;<sup>34</sup> *uberrima fides*<sup>35</sup>; *generalia specialibus non derogant*;<sup>36</sup> *ex posterior derogat priori*<sup>37</sup> etc.

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<sup>27</sup> Milisavljević, B. and Čučković, B. (2018). *IDENTIFICATION OF CUSTOM IN INTERNATIONAL LAW*. [online] Ojs.ius.bg.ac.rs. Available at: <http://ojs.ius.bg.ac.rs/index.php/anali/article/view/32/68> [Accessed 9 May 2018].

<sup>28</sup> Byers, M. (2018). *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press, p.xi.

<sup>29</sup> Byers, M. (2018). *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press, p.3.

<sup>30</sup> Alpa, Guido (1994) "General Principles of Law," *Annual Survey of International & Comparative Law*: Vol. 1 : Iss. 1 , Article 2. Available at: <https://digitalcommons.law.ggu.edu/annlsurvey/vol1/iss1/2>

<sup>31</sup> Cause behind the existence of it.

<sup>32</sup> Pineschi, L. (2018). *General Principles of Law - The Role of the Judiciary*. 1st ed. eBook: Springer International Publishing, p.3.

<sup>33</sup> Agreements must be kept.

<sup>34</sup> Final judgment order.

<sup>35</sup> Concept in contract law specifying that all parties must act with the utmost good faith.

<sup>36</sup> Specifies that a certain matter of law be covered by the most specific laws pertaining, in the event that broader laws conflict with the specific one.

<sup>37</sup> More recent law overrules older ones on the same matter.

## PART II: LA GRAND CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS: GERMANY V. UNITED STATES OF AMERICA

### A. INTRODUCTION TO THE CASE

#### I. Consulate Relations Between Germany and United States of America

Beginning of diplomatic relations between German and American states is older than consular relations between USA and Germany.<sup>38</sup> In the late 17<sup>th</sup> century immigration from German states began as a result of the migration wave to the America from the Europe and it continued until the 19<sup>th</sup> century at surpassing rate comparing with any other country.<sup>39</sup> In 1850 estimated number of one million refugees came to the USA and this event triggered the phenomenon called '*chain migration*'<sup>40</sup> which strengthened the already existing '*German regions*' in the USA.<sup>41</sup> Consequently, foreign relations between Germany and the USA were mostly about immigration until the start of the twentieth century.<sup>42</sup>

During the first quarter of the twentieth century with the outbreak of the World War I relations between Germany and the USA became tense.<sup>43</sup> Following the U-boat warfare

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<sup>38</sup> U.S. Diplomatic Mission to Germany. (2018). *History of German-American Relations > 1683-1900 - History and Immigration*. [online] Available at: <https://usa.usembassy.de/garelations8300.htm> [Accessed 9 May 2018].

<sup>39</sup> Ibid.

<sup>40</sup> Chain migration is a system that allows U.S. citizens and legal permanent residents to apply the government to getting allowance for their close relatives to immigrate to the United States.

<sup>41</sup> U.S. Diplomatic Mission to Germany. (2018). *History of German-American Relations > 1683-1900 - History and Immigration*. [online] Available at: <https://usa.usembassy.de/garelations8300.htm> [Accessed 9 May 2018].

<sup>42</sup> Ibid.

<sup>43</sup> U.S. Diplomatic Mission to Germany. (2018). *History of German-American Relations > 1901-1939: Early 20th Century*. [online] Available at: <https://usa.usembassy.de/garelations0139.htm> [Accessed 9 May 2018].

which resulted the USA joining the war, Secretary of State, Robert Lansing sent a lengthy memorandum to the President of the United States, Woodrow Wilson, about '*Broken promise and the crime of submarine warfare of Germany*'. Memorandum was laying out possible responses to the Germany. He wrote: *"I am firmly convinced that we must without taking any preliminary step break off diplomatic relations by sending Bernstorff and his suite home and by recalling [U.S. ambassador] Gerard and closing our Embassy at Berlin."*<sup>44</sup> And he continued by the most crucial part of his memorandum by saying: *"To follow up the severance of relations by announcing to Congress this action with a statement that Germany has forfeited every consideration by reason of her breach of faith, that the full criminality of her previous acts is revived and that no honourable course remains but for this country to employ every resource which it possesses to punish the guilty nation and to make it impotent to commit in the future crimes against humanity."*<sup>45</sup> In other words Lansing was pushing for declaration of war on Germany.<sup>46</sup> On 7 May 1915, German submarines sank the British ocean liner Lusitania which was carrying over 100 Americans and this act of violence broke the neutrality policy of the USA which caused the USA to cut diplomatic relations with Germany until 1921.<sup>47</sup> Main reason behind that was a radical shift in U.S. foreign policy, which encouraged a stance of isolationism that would last until World War II.<sup>48</sup> Warren Harding won the 1920 presidential election on the promise of staying out of global problems, and by arguing that the United States needed normality and a focus on internal

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<sup>44</sup> Ibid.

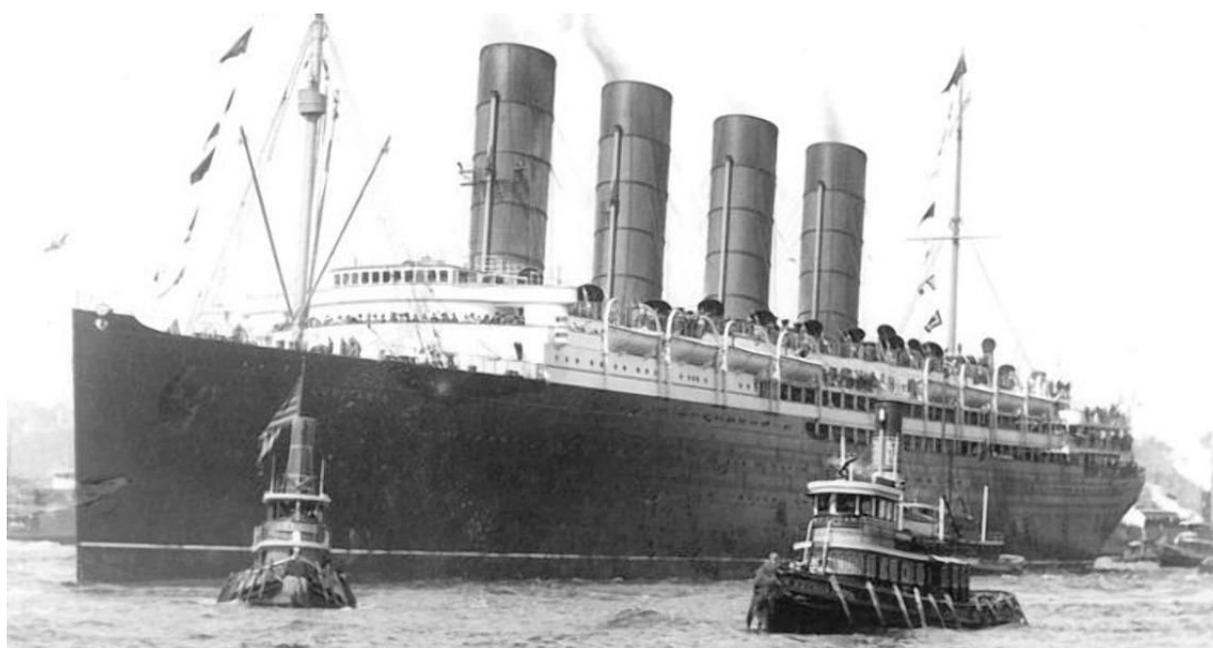
<sup>45</sup> Ibid.

<sup>46</sup> Mentalfloss.com. (2018). *U.S. Breaks Off Relations With Germany*. [online] Available at: <http://mentalfloss.com/article/91906/wwi-centennial-us-breaks-relations-germany> [Accessed 14 May 2018].

<sup>47</sup> Ibid.

<sup>48</sup> Graduate.norwich.edu. (2018). *Isolationism and U.S. Foreign Policy After World War 1 | Norwich Online Graduate Degrees*. [online] Available at: <https://graduate.norwich.edu/resources-mair/articles-mair/isolationism-and-u-s-foreign-policy-after-world-war-1/> [Accessed 28 May 2018].

problems.<sup>49</sup> Thus, U.S. foreign policy during the 1920s was characterized by the enactment of isolationist policies; for instance, the U.S. opted not to join the League of Nations, even though it had been the nation to first propose such international cooperation.<sup>50</sup> Instead, the United States shifted the focus of itself on building the domestic economy by supporting business growth, encouraging industrial expansion, imposing tariffs on imported products and limiting immigration.<sup>51</sup>



**Figure II:** RMS Lusitania<sup>52</sup>

The year 1932 had seen flashing rise of Hitler to prominence in Germany, triggered largely by dissatisfaction of the German people with horrid economic conditions and the still-festering wounds inflicted by defeat in the Great War and the ghastly peace terms of the Versailles

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Lusitania, W., Lusitania, W., Thousands, M., Castle, F. and Orders, T. (2018). *Wilson Protests Sinking of the RMS Lusitania*. [online] New Historian. Available at: <https://www.newhistorian.com/wilson-protests-sinking-rms-lusitania/6879/> [Accessed 14 May 2018].

treaty.<sup>53</sup> A charismatic speaker, Hitler channelled popular displeasure with the post-war Weimar government into support for his newcomer Nazi party.<sup>54</sup> In an election held in July 1932, the Nazis won 230 governmental seats; together with the communists, the next largest party, they made up over half of the Parliament.<sup>55</sup> However the good relations kept until 9 November 1938 when the event known as '*Reichskristallnacht*'<sup>56</sup> happened.<sup>57</sup> German Nazis burned down and destroyed Jewish apartments and stores, and many Jews were arrested, beaten and killed at that night.<sup>58</sup> After the occurrence of this event, the US president Franklin Roosevelt recalled his ambassador in Berlin.<sup>59</sup> In 1939 Germany signed a non-aggression pact with the Soviet Union and following that on 31 August 1939 Germany invaded Poland.<sup>60</sup> After the hostilities of Germany, Great Britain and France declared war on Germany on 3 September 1939 and thus World War II had begun.<sup>61</sup> Furthermore in 1941, Germany declared war on the USA and thus diplomatic relations between the USA and Germany severely harmed until the 19 October 1951 when the U.S. Congress passed a Joint Declaration about the end of the state of war between the two countries.<sup>62</sup> Following the end of war the Germany was divided into four parts.<sup>63</sup> Each of the main Allied powers (the United States, the Soviet Union, Great Britain, and France) was in responsibility of governing

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<sup>53</sup> History TV. (2018). *History TV*. [online] Available at: <https://www.history.com/this-day-in-history/adolf-hitler-is-named-chancellor-of-germany> [Accessed 28 May 2018].

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Night of the broken glass.

<sup>57</sup> History.state.gov. (2018). *Germany - Countries - Office of the Historian*. [online] Available at: <https://history.state.gov/countries/germany> [Accessed 9 May 2018].

<sup>58</sup> Ushmm.org. (2018). *Kristallnacht*. [online] Available at: <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005201> [Accessed 9 May 2018].

<sup>59</sup> History.state.gov. (2018). *Germany - Countries - Office of the Historian*. [online] Available at: <https://history.state.gov/countries/germany> [Accessed 9 May 2018].

<sup>60</sup> Ibid.

<sup>61</sup> Encyclopedia Britannica. (2018). *World War II | Facts, Summary, Combatants, & Causes*. [online] Available at: <https://www.britannica.com/event/World-War-II#ref53532> [Accessed 14 May 2018].

<sup>62</sup> History.state.gov. (2018). *Germany - Countries - Office of the Historian*. [online] Available at: <https://history.state.gov/countries/germany> [Accessed 9 May 2018].

<sup>63</sup> Ibid.

the zone they were controlling.<sup>64</sup> However with the rising tension between Soviet Union and western states, Germany got collided into two parts.<sup>65</sup> One being German Federal Republic (mostly known as West Germany) and the other being German Democratic Republic (commonly known as East Germany). And for reunification of Germany, the US gave their full support on German Federal Republic by establishing full democratic relations.<sup>66</sup>

Following the collapse of the Soviet Union and the fall of the Berlin Wall, Unification Treaty has been signed by the East and West German governments on 31 August 1990 and on 12 September 1990, a Treaty on the Final Settlement with respect to Germany was signed in Moscow.<sup>67</sup> Unification between East and West did not cause of a new state, Federal Republic of Germany technically '*absorbed*' the German Democratic Republic thus making it already recognized by the USA.<sup>68</sup>

The relations between the USA and the Germany stood solid since the '*unification*' of the Germany. Politically, economically, and socially both countries are in a close consultation. With the September 11, 2001 attacks on the World Trade Centre in New York City and the Pentagon in Washington, D.C., the cooperation between the USA and the Germany also got channelled to the riddance of terrorism.<sup>69</sup> Germany participated in Operation Enduring Freedom against Taliban regime with the USA.<sup>70</sup> And still to this day the Germany and the USA are in good consular relations.

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> U.S. Diplomatic Mission to Germany. (2018). *History of German-American Relations > 2001-*. [online] Available at: <https://usa.usembassy.de/garelations.htm> [Accessed 9 May 2018].

<sup>70</sup> Ibid.

## II. Vienna Convention on Consular Relations

### a. Overview on the Vienna Convention on Consular Relations

Roots of the consular affairs can be traced back to the ancient Greece, and the development of consular affairs is highly associated with the rising complexity of the international trade.<sup>71</sup> However consular institution was not in the same structure as today until the 12<sup>th</sup> century.<sup>72</sup> Following the infrastructure of the diplomatic missions in Europe in 17<sup>th</sup> century, a compelling shift in consular powers took place, crowning with the appearance of the first collection of consular rules (Ordinance of Marine, Colbert, 1681).<sup>73</sup> However as the first endeavour to codify law about diplomacy and consular relations was in 1815 at the Congress of Vienna can be mentioned.<sup>74</sup> Emperor Napoleon was crushed in May 1814 and Cossacks marched along the Champs-Élysées into Paris.<sup>75</sup> The triumphant Great Powers (Russia, Great Britain, Austria and Prussia) invited the other states of Europe to send diplomats to Vienna for a peace conference.<sup>76</sup> At the end of the summer, emperors, kings, princes, ministers and representatives assembled on the Austrian capital, crowding the walled city.<sup>77</sup> The first priority of the Congress of Vienna was to deal with territorial issues: a new configuration of German states, the reorganisation of central Europe, the borders of central Italy and

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<sup>71</sup> Legal.un.org. (2018). *United Nations Audiovisual Library of International Law*. [online] Available at: <http://legal.un.org/avl/ha/vccr/vccr.html> [Accessed 14 May 2018].

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Scholarship.law.berkeley.edu. (2018). *Diplomatic & Consular Law: Research Guide*. [online] Available at: [https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com.tr/&httpsredir=1&article=1003&context=leg\\_res](https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com.tr/&httpsredir=1&article=1003&context=leg_res) [Accessed 15 May 2018].

<sup>75</sup> Historytoday.com. (2018). *What was the Congress of Vienna? | History Today*. [online] Available at: <https://www.historytoday.com/stella-ghervas/what-was-congress-vienna> [Accessed 28 May 2018].

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

territorial transfers in Scandinavia.<sup>78</sup> During the 19<sup>th</sup> and 20<sup>th</sup> centuries, remarkable rise in number of consulates showed the need for a more definite legal framework, especially concerning the consular service and the legal status of consulates.<sup>79</sup> And thus, revolving changes in global interests concerning the social, political, and economic activity brought forward a new defiance for the consular institution; the protection of citizens and the gatekeeping of their interests.<sup>80</sup> However fruitful endeavours at the codification of diplomatic and consular law on an international scale appeared only after the International Law Commission of the United Nations embraced the subject in the middle of the 20<sup>th</sup> century.<sup>81</sup>

In 1949, the United Nations International Law Commission contemplated about including the consular intercourse and immunities to the working agenda of itself.<sup>82</sup> The debate about consular intercourse did not officially start until 1958.<sup>83</sup> The draft set of rules came out from the Commission which were later split into four parts as consular intercourse and immunities, consular privileges and immunities, legal status of honorary consuls and their privileges and immunities, and general provisions, and, followed by commentaries, submitted to Member States for examination at different steps of the debate.<sup>84</sup> Therefore, the Commission added more extensive verdicts and infused some new articles, before temporarily adopting the draft articles and commentaries.<sup>85</sup> The 71 draft articles which were basis for the Vienna Convention on Consular Relations (hereinafter will be referred as VCCR) were then submitted to the United Nations General Assembly for information intents and

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<sup>78</sup> Ibid.

<sup>79</sup> Legal.un.org. (2018). *United Nations Audiovisual Library of International Law*. [online] Available at: <http://legal.un.org/avl/ha/vccr/vccr.html> [Accessed 14 May 2018].

<sup>80</sup> Ibid.

<sup>81</sup> *Diplomatic & Consular Law: Research Guide*, op. cit.

<sup>82</sup> *United Nations Audiovisual Library of International Law*, op. cit.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid, at. p.2

the extensive number of States decided that they should form the base of a multilateral mechanism by codifying consular law.<sup>86</sup> With an idea about codifying a treaty on the subject, the Commission suggested that the United Nations General Assembly assemble an international conference of diplomats in March 1963.<sup>87</sup> The United Nations Conference on Consular Relations was held in Vienna, Austria, from 4 March to 22 April 1963 and was attended by representatives of ninety-five States.<sup>88</sup> After discreet examination of the text of the International Law Commission, the final version was arranged for submission to the plenary.<sup>89</sup> On 24 April 1963, the Conference adopted and opened for signature the Vienna Convention on Consular Relations, the Optional Protocol concerning Acquisition of Nationality and the Optional Protocol concerning the Compulsory Settlement of Disputes.<sup>90</sup> And finally on 19 March 1967, the Convention and both Optional Protocols came into force. However, as a conclusion of VCCR following key issues in consular law have been covered;

- The procedure for appointment and recognition of consular officers of a sending State,
- Cooperation of their work in the receiving State,
- The immunities held in a receiving State by consular officers and by the sending State for its activities.<sup>91</sup>

By 2013, 176 states were party to the VCCR, the most recent state being Brunei in May of 2013. The VCCR had largely accomplished in contributing a uniform and mutually agreeable

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<sup>86</sup> Ibid, at. p.2

<sup>87</sup> Ibid, at. p.2

<sup>88</sup> Ibid, at. P.2

<sup>89</sup> Ibid, at. P.2

<sup>90</sup> Ibid, at. p.2

<sup>91</sup> Quigley, John Bernard, Vienna Convention on Consular Relations: In Retrospect and into the Future (May 9, 2014). Southern Illinois University Law Journal, Volume 38, 2013; Ohio State Public Law Working Paper No. 251. Available at SSRN: <https://ssrn.com/abstract=2435151> or <http://dx.doi.org/10.2139/ssrn.2435151>

set of regulations for consular relations.<sup>92</sup> States seeking to withdraw from VCCR provisions on peculiar issues in relation to peculiar states have been able to do so by bilateral consular treaties.<sup>93</sup> This choice, which to a certain degree is incompatible with the original aim of uniformity, has been found beneficial by certain states on certain issues.<sup>94</sup> Thus, while the VCCR contributes a uniform set of rules, it is not a restriction.<sup>95</sup> Chinese Treaty between the US and the China can be hold as an example.

#### **b. Article 36 of the Vienna Convention on Consular Relations**

In general meaning a consular officer is an officer of the country which he/she has been sent by. Consular officer has obligations to do and to do not which can be counted as; providing information, advice and consular assistance, issuing emergency travel document if the citizen of the country he/she has been sent by lose his/her passport, contacting the relatives or friends of the citizen of the country he/she has been sent by if the citizen needs emergency funds for his repatriation or other emergency expenses, notifying the next-of-kin of the citizen in the events of getting injured abroad, arrest or detention and visiting the citizen who has been arrested or imprisoned, and monitor that due process under the judicial system of the country he/she has been sent by is accorded to him or her, helping to obtain a list of officially registered local lawyers and translation services where this is available, assisting in the arrangements for the return of the remains of a deceased citizen in the event of his/her demise to the country he/she has been sent by, assisting in the arrangements for the return of personal belongings of a deceased citizen, helping the citizen

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

during emergencies such as natural disasters or civil disorder.<sup>96</sup> And a consular officer can not; pay for the medical, hospital, legal, accommodation, travel or other bills, provide loans or cashing the cheques of the citizen, post bails or pay the fines on the behalf of the citizen, provide legal advice or initiate court proceedings on the behalf of the citizen, act as the guarantor or sponsor of the citizen, work as spy on behalf of the country he/she has been sent to.<sup>97</sup> However, considering the range of application of the VCCR article 36, obligation of the receiving state is to inform foreign national detainees about consular access.<sup>98</sup> While arrangements of many treaties, including most of the arrangements of the VCCR, are to be resolved by central government agencies, the VCCR provision on consular access for a jailed sending-State national needs the work of local authorities.<sup>99</sup> For example, in the United States, the Department of State works with local authorities to encourage fulfilment of the agreement.<sup>100</sup> However, many foreign nationals are not briefed upon arrest about consular access. This misstep then causes hardships lodged in domestic courts by foreign nationals.<sup>101</sup> A foreign national who is condemned of a crime may cite the lack of information as a factor undermining the legality of the conviction, but courts should still be cautious to overturn a conviction for this reason.<sup>102</sup>

### III. Germany V. United States of America

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<sup>96</sup> Mfa.gov.sg. (2018). *What the Consular Officer can or cannot do, and information for Singaporean Travellers in New Zealand*. [online] Available at: [https://www.mfa.gov.sg/content/mfa/overseasmission/wellington/consular\\_services/consular\\_officer.html](https://www.mfa.gov.sg/content/mfa/overseasmission/wellington/consular_services/consular_officer.html) [Accessed 15 Jun. 2018].

<sup>97</sup> Ibid.

<sup>98</sup> Quigley, John Bernard, *Vienna Convention on Consular Relations: In Retrospect and into the Future* (May 9, 2014). *Southern Illinois University Law Journal*, Volume 38, 2013; *Ohio State Public Law Working Paper No. 251*. Available at SSRN: <https://ssrn.com/abstract=2435151> or <http://dx.doi.org/10.2139/ssrn.2435151>

<sup>99</sup> Ibid.

<sup>100</sup> U.S. DEP'T OF STATE, *CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM* (2003), available at [http://travel.state.gov/pdf/CNA\\_book.pdf](http://travel.state.gov/pdf/CNA_book.pdf).

<sup>101</sup> *Vienna Convention on Consular Relations: In Retrospect and into the Future*, op. cit.

<sup>102</sup> Ibid.

### a. Historical Background for the La Grand Case

The US authorities found themselves for the second time within three years before the ICJ coping with the death penalty enforced on foreign nationals in the United States with the case of the Walter and Karl La Grand brothers, who had been jailed for committing murder and several other crimes in connection with an attempted bank robbery in 1982 in Arizona, US.<sup>103</sup> During the attempted robbery, Ken Hartsock, the bank manager, was murdered and Dawn Lopez, a bank employee, was repeatedly stabbed and almost killed. The brothers were born out of wedlock in Germany to a same mother of German nationality and different fathers of U.S. nationality.<sup>104</sup> Walter was born on 26 January 1962 and Karl on 10 October 1963.<sup>105</sup> A third U.S. citizen serviceman stationed in Germany with the U.S. Army, Masie LaGrand, subsequently married their mother and adopted Walter, Karl, and their half-sister.<sup>106</sup> Masie LaGrand brought his German wife and three adopted children to the United States in February 1967.<sup>107</sup> At that time, Walter was five years old and Karl almost three-and-half.<sup>108</sup> The brothers never returned to Germany except to live in a U.S. military housing complex associated with the U.S. Army base in Mannheim, Germany, for about five months in 1974.<sup>109</sup> They were largely brought up in the United States after living in Germany for five and three years in their early lives.<sup>110</sup> Pre-sentence reports expose the knowledge on the part of the

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<sup>103</sup> Tams, Christian J., LaGrand Case (Germany v. United States of America) (June 3, 2009). Available at SSRN: <https://ssrn.com/abstract=1413893> or <http://dx.doi.org/10.2139/ssrn.1413893>

<sup>104</sup> Icj-cij.org. (2018). *INTERNATIONAL COURT OF JUSTICE LAGRANDE CASE (Germany v. United States of America) MEMORIAL OF THE FEDERAL REPUBLIC OF GERMANY Volume I (Text of the Memorial) 16 September 1999*. [online] Available at: <http://www.icj-cij.org/files/case-related/104/8552.pdf> [Accessed 19 May 2018].

<sup>105</sup> Ibid.

<sup>106</sup> Icj-cij.org. (2018). *INTERNATIONAL COURT OF JUSTICE LAGRANDE CASE (GERMANY V. UNITED STATES OF AMERICA) ----- COUNTER-MEMORIAL SUBMITTED BY THE UNITED STATES OF AMERICA 27 MARCH 2000*. [online] Available at: <http://www.icj-cij.org/files/case-related/104/8554.pdf> [Accessed 19 May 2018].

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

Arizona authorities of the German citizenship of both Walter and Karl LaGrand.<sup>111</sup> Reports of 22 and 23 April 1982 dealing with an earlier incident, and reports of 2 April 1984 dealing with the crimes committed in Marana each contain the information '*Citizen of Germany - resident alien*'. Undeniably, the US authorities had failed to notify the La Grand brothers of their right, protected by article 36 (1) of the Vienna Convention on Consular Relations, to acquire consular assistance during the subsequent criminal tribunal.<sup>112</sup> Advocates of the brothers failed to raise the violation of the Vienna Convention or to approach the German consulate on their own initiative. On 14 December 1984, both brothers were sentenced to death for first degree murder and to concurrent jail sentences for the other crimes. Thus, the German nationals were detained, tried and sentenced to death without being advised of their right to consular assistance, as guaranteed to them by Article 36 (1) (b), of the 1963 Vienna Convention on Consular Relations. Neither the authorities of the State of Arizona nor the brothers nor their advocates briefed the German Consulate General in Los Angeles or any other German representative about their situation. Later tries to re-open the proceedings with help of the German consulate were dropped because of a procedural rule of American domestic law, '*procedural default doctrine*' which is a procedural concept followed by the U.S. Federal Courts.<sup>113</sup> The procedural default applies in two conditions.<sup>114</sup> Firstly, when a claimant does not exhaust his/her state remedies because the claimant fails to properly present a controversy to the state courts, the federal district court must treat the issue as procedurally defaulted.<sup>115</sup> Secondly, the rule grants that federal courts will not

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<sup>111</sup> Ibid.

<sup>112</sup> Tams, Christian J., LaGrand Case (Germany v. United States of America) (June 3, 2009). Available at SSRN: <https://ssrn.com/abstract=1413893> or <http://dx.doi.org/10.2139/ssrn.1413893>

<sup>113</sup> Ibid.

<sup>114</sup> US Legal, I. (2018). *Procedural Default Rule Law and Legal Definition | USLegal, Inc.* [online] Definitions.uslegal.com. Available at: <https://definitions.uslegal.com/p/procedural-default-rule/> [Accessed 18 May 2018].

<sup>115</sup> Ibid.

examine a claim procedurally defaulted under state law when the last state court to examine the claim plainly and specifically expresses that its judgment rests on a procedural bar, and the bar presents an autonomous and acceptable state ground for denying relief.<sup>116</sup> Several interventions were made by the President and the Chancellor of the Federal Republic of Germany appealed to the President of the United States, and the later on also to the Governor of Arizona.<sup>117</sup> Foreign Minister Fischer and Minister of Justice Däubler-Gmelin raised the problem with their respective counterparts in the United States Administration and with the Governor of the State of Arizona.<sup>118</sup> Demarches were attempted by the German Ambassador to the United States.<sup>119</sup> A later demarche followed on behalf of the European Union.<sup>120</sup> Both the German Ambassador and the German Consul-General in Los Angeles made clear the German position to the Board of Executive Clemency of the State of Arizona on the days earlier to the execution of the brothers.<sup>121</sup> In his second letter to United States Secretary of State Albright dated 22 February 1999, the German Foreign Minister, Joschka Fischer, channelled the problem of a violation of the Vienna Convention - to no avail.<sup>122</sup> A definite Memorandum of the German Government was confined in that letter. On 24 February 1999 Karl La Grand was executed, and the execution of his brother was scheduled for 3 March 1999. In 2 March 1999, the German government registered with the ICJ a submission for provisional measures.<sup>123</sup>

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<sup>116</sup> Ibid.

<sup>117</sup> *icj-cij.org*. (2018). *INTERNATIONAL COURT OF JUSTICE LAGRAND CASE (Germany v. United States of America) MEMORIAL OF THE FEDERAL REPUBLIC OF GERMANY Volume I (Text of the Memorial) 16 September 1999*. [online] Available at: <http://www.icj-cij.org/files/case-related/104/8552.pdf> [Accessed 19 May 2018].

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

## **b. Application to the International Court of Justice**

As it is mentioned earlier, efforts of the Germany and meetings between two parties stood useless and ineffective. Negotiations between parties did not give any fruits and thus, Germany applied to the ICJ with an urgent request for the indication of provisional measures, seeking from the Court to indicate that the United States should take *“all measures at its disposal to ensure that [one of its nationals, whose date of execution had been fixed at 3 March 1999] [was] not executed pending final judgment in the case . . .”*. On 3 March 1999, the Court delivered an Order for the indication of provisional measures obliging the United States of America, among other things, to *“take all measures at its disposal to ensure that [the German national] [was] not executed pending the final decision in [the] proceedings”*.<sup>124</sup>

## **c. Claims**

### **1. Claims of Germany**

- The United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations;
- Germany shall be entitled to reparation and compensation for the execution of the Karl LaGrand by the USA;

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<sup>124</sup> Icj-cij.org. (2018). *Latest developments | LaGrand (Germany v. United States of America) | International Court of Justice*. [online] Available at: <http://www.icj-cij.org/en/case/104> [Accessed 19 May 2018].

- The criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
- The United States should restore the status quo ante in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and
- The United States should provide Germany a guarantee of the non-repetition of the illegal acts.

## **2. Claims of The United States of America**

- Germany should accept the rightful executions of the LaGrand brothers;
- Germany shall not ever bring any case against the United States concerning the domestic laws of the United States and by that especially in the cases concerning the procedural default;
- Germany should accept all crimes of the LaGrand brothers without any provision;
- The United States should not be obliged to provide any compensation;
- Germany should accept the consequences of acting late on LaGrand case.

## **B. APPLICABLE LAW**

### **I. Treaties and Conventions**

#### **a. Optional Protocol concerning the Compulsory Settlement of Disputes Done at Vienna on 24 April 1963**

##### **1. Article I**

*“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.”<sup>125</sup>*

**b. Vienna Convention on Consular Relations Done at Vienna on 24 April 1963**

**1. Article 36-Communication and contact  
with nationals of the sending State**

*“1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:*

*(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;*

*(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;*

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<sup>125</sup> Legal.un.org. (2018). [online] Available at: [http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963\\_disputes.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf) [Accessed 2 Jun. 2018].

*(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.*

*2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended"*

## **II. Domestic Law of the United States**

### **a. Procedural Default**

Congress extended the writ of habeas corpus to the claims of state petitioners in 1867.<sup>126</sup> This act was part of a great shift in the American federal system, a shift that displaced the states as the primary protectors of constitutional rights.<sup>127</sup> "As a result of the new structure of law that emerged in the post-Civil War era-and especially of the Fourteenth Amendment, which was its centrepiece-the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established."<sup>128</sup> The change was an especially

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<sup>126</sup> Dest, S. (2018). *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*. [online] Chicagounbound.uchicago.edu. Available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com.tr/&httpsredir=1&article=4605&context=uclev> [Accessed 2 Jun. 2018].

<sup>127</sup> Ibid.

<sup>128</sup> *Mitchum v Foster*, 407 US 225, 238-239 (1972).

pronounced one for the federal judiciary which, as a result of the structural reversal, became the primary tool for vindicating federal rights.<sup>129</sup>

A procedural default occurs in the habeas corpus context when a state prisoner has "exhaust[ed] his state remedies without obtaining any decision on the merits of his federal constitutional claim because he has failed to comply with state procedural rules on how the claim must be raised."<sup>130</sup> Such defaults usually involve traditional "make it or waive it" defences, such as contemporaneous objection rules, in which appeals are forfeited if not made in a timely fashion.<sup>131</sup> The procedural default/habeas corpus issue has not lent itself easily to doctrinal analysis since its resolution, as characterized by the Supreme Court, is thought necessarily to involve a conflict between two important governmental interests: providing a federal forum for the vindication of constitutional rights and reinforcing the procedural integrity of state criminal justice systems.<sup>132</sup>

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<sup>129</sup> Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 65 (MacMillan, 1928)

<sup>130</sup> Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 17A *Federal Practice and Procedure: Jurisdiction* §4266 at 433 (West, 2d ed 1988).

<sup>131</sup> *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*. Op, cit.

<sup>132</sup> *Ibid.*

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