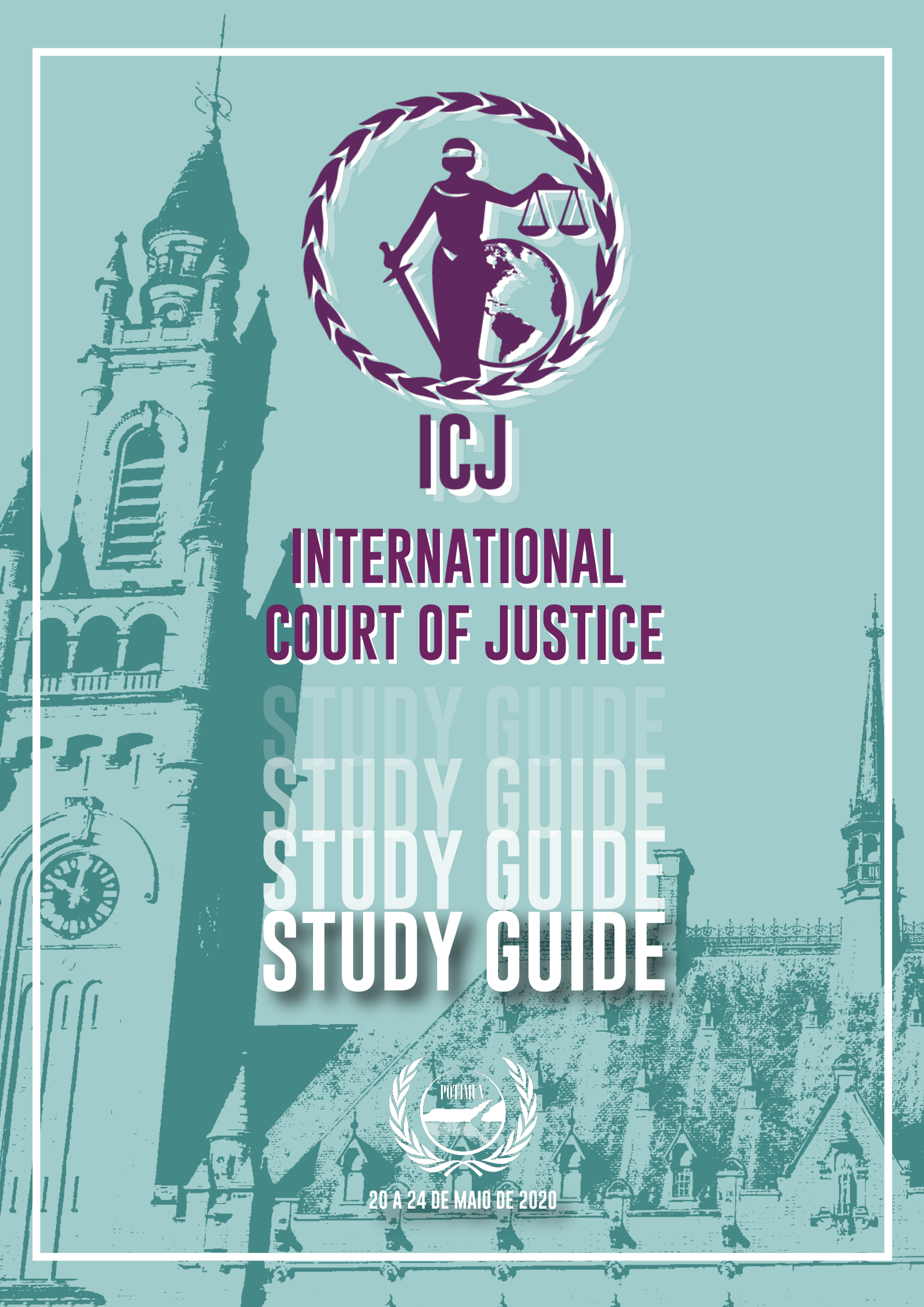

ICJ

INTERNATIONAL COURT OF JUSTICE

STUDY GUIDE

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POTIMUN

20 A 24 DE MAIO DE 2020

III MODELO POTIGUAR DAS NAÇÕES UNIDAS
ICJ – INTERNATIONAL COURT OF JUSTICE

STUDY GUIDE

BUREAU	Filipe Dantas de Gois Isabella Oliveira de Menezes Júlia Rodrigues Cano Louise Serrano Bezerra Marina Fernandes Fontes de Andrade Pedro Augusto Costa Vale Rodrigo Mendonça Medeiros
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COVER ART	Talitta Oliveira Cancio dos Santos

NATAL/RN
2020

MODELO POTIGUAR DAS NAÇÕES UNIDAS
INTERNATIONAL COURT OF JUSTICE

STUDY GUIDE

ICJ'S BUREAU

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CARTA DO SECRETARIADO

É com imensa felicidade que o Secretariado da III POTIMUN felicita toda a comunidade acadêmica e dá as boas-vindas às delegadas e delegados que aceitaram dividir conosco um pouco do carinho, amor e trabalho envolvidos no Modelo Potiguar das Nações Unidas. Esperamos que todo o cuidado empregado na realização deste belíssimo evento se traduza em momentos únicos e inesquecíveis.

Em 2020, nosso modelo de simulação está de cara e nomes novos, refletindo nosso desejo de ampliar perspectivas e reivindicar espaços de aprendizado acadêmico inclusivos, dinâmicos e potiguares. É nesse sentido que a POTIMUN apresenta nesta edição grande diversidade de temáticas, um leque de assuntos importantes para a sociedade, a qual carece cada vez mais de diplomacia, diálogo, cooperação e desenvolvimento mútuo.

Nesse contexto, agradecemos a toda a equipe que fez nossos dias de simulação possíveis com muita dedicação e entrega a este projeto tão lindo. O trabalho de vocês nos mostrou o quanto cada pessoa é importante e que, em conjunto, somos mais fortes nos momentos de dificuldade e nos empecilhos que surgem pelos caminhos da vida. Nosso muito obrigado a cada um e uma que fizeram a família POTIMUN crescer.

Por fim, o presente Guia de Estudos é fruto da dedicação de uma grande equipe, que se esforçou para oferecer a melhor experiência acadêmica para vocês, senhoras e senhores delegadas e delegados, razões da nossa existência. Nada seríamos sem a confiança e o apoio de vocês ano após ano, e desejamos que todos e todas possam se sentir acolhidos e abraçados pela nossa família.

Assim, nossas mais sinceras boas-vindas!

Com amor,

Secretariado da III POTIMUN

LIST OF ABREVIATIONS AND ACRONYMS

ICC	International Criminal Court
ICJ	International Court of Justice
IME	*Instituto de los Mexicanos en el Exterior*
ITLOS	International Tribunal for the Law of the Sea
LN	League of Nations
PCIJ	Permanent Court of International Justice
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNSC	United Nations Security Council
USA	United States of America
VCDR	Vienna Convention on Diplomatic Relations
VCCR	Vienna Convention on Consular Relations

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1 INTRODUCTION

Honorable delegates,

This guide aims to bring an introductory comprehension of this court's cases to its participants. For that, it focuses on the summary of the cases to be simulated, on the creation of the simulated organ and on the function of the committee's delegations.

Concerning the International Law that bases the foundation of the ICJ, this study document intends to introduce you to the subject in an academic approach, demonstrating the reasoning of the original argumentation and also the performance expected from this court's delegates.

With that in mind, III POTIMUN brings upon the Brazilian academic community the opportunity to simulate one of the most important judicial international organs: The International Court of Justice. Such court will address two very relevant cases: Avena and Other Mexican Nationals (Mexico v. United States of America), a case in which fifty-four Mexican nationals supposedly had their right to consular assistant neglected and the Relocation of The United States Embassy from Tel Aviv to Jerusalem (Palestine v. United States of America), a contemporary and ongoing case.

We believe this aspect of International Law is very profitable for the study of the subject, and not well enough tapped. Under this perspective, this guide brings not only a detailed analysis of the cases in question, but also of International Law doctrine and historical context. We hope this guide is useful for the understanding of the peculiarities of the cases and helps to develop the argumentation of all the litigants.

Moreover, after thorough academic research of the Court's Statute, international treaties, literature, and the study of the most important international legal doctrine, this Study Guide aims at an impartial analysis of the cases, so that the attorneys and judges can absorb the essential knowledge to the development of this committee. Although, it is necessary to encourage you to exceed your research over the limits of this guide, so that everyone can master the subject that will be addressed during the days of the simulation.

Furthermore, the first chapter addresses the origin and jurisdiction of the International Court of Justice, the subsequent chapter analyses the supposedly violated articles, and the two latter ones deals with the material and legal analysis of the actual cases.

In addition to that, brief final considerations are responsible for fixing the acquired knowledge of this study guide, where you can find annexed important documents for the simulation. Its reading is fundamental, so that everyone is familiar to the necessary procedures.

With that being said, we wish all a good study and research and we offer assistance dealing with any eventual question. Finally, we hope that by the end of the simulation, we can observe and analyze facts under this court's scope and study the law instruments argued during trial, then, we can fix in our minds the ideal of justice and equality the ICJ preaches as one of the legal representants of the United Nations.

2 THE ESTABLISHMENT OF THE INTERNATIONAL COURT OF JUSTICE IN THE INTERNATIONAL LAW

With the development of the international relations between states in the beginning of the twentieth century, the world found itself in need of a judicial body able to apply methods for the pacific settlement for international disputes. In this regard, the Covenant of the League of Nations (LN) provided, in 1920, the establishment of the Permanent Court of International Justice (PCIJ), aiming to enable the clarification of a number of aspects of international law, and contribute to its development (INTERNATIONAL COURT OF JUSTICE, 2019).

The PCIJ, working under its competence, dealt, between 1922 and 1940, with 29 contentious cases and 27 advisory opinions. However, World War II brought serious consequences to the organ operation, causing a period of inactivity, forcing the world nations to adopt a new judicial organ to mediate international conflicts. In this approach, simultaneously with the establishment of the United Nations (UN), the International Court of Justice (ICJ) was founded with its Statute attached to the publication of the Charter of the United Nations (INTERNATIONAL COURT OF JUSTICE, 2019).

2.1 Creation of the Court

After World War II and the subsequent reformulation of the world geopolitical scenario, the main international organizations underwent a reform of their structures. The LN, after the failure to ensure the international security and the guarantee of common interests, was extinct to make room for the creation of a new organ with more comprehensive scope to the new world order in force (ACCIOLY; CASELLA, 2016, p. 97, our translation).

Therefore, consideration needed to be given to the future of the Court and to the creation of a new international political order. In this perspective, the United States of America (USA) and the United Kingdom (UK) declared themselves in favor of the re-establishment of an international court after the War. The idea included the advices from jurists from 11 countries, reporting that the statute of the new court should be based on that of the PCIJ, and that the acceptance of the jurisdiction of the new court should not be compulsory (INTERNATIONAL COURT OF JUSTICE, 2019).

To improve the premature idea, a meeting was subsequently convened in Washington, in April 1945, of a committee of jurists representing 44 States. The committee was founded to prepare a draft statute for the future international court of justice for subsequent appreciation

by other interested in the new legal organ foundation and in the publication of the Charter of the United Nations. Thereby, with the later publication of the Charter, the PCIJ met for the last time in October of 1945 deciding to transfer its archives to the new International Court of Justice, which inherited the Peace Palace as host of its activities (INTERNATIONAL COURT OF JUSTICE, 2019). These are the reasons why we can explain that the creation of the Court represented the culmination of a long process of developing methods for the pacific settlement of international disputes.

2.2 Legal competence

The Statute of the ICJ enumerates the legal competence of the Court in its chapter II[1]. At first, it must be pointed that the ICJ has only competence to judge conflicts and give advisory opinions to states, who will decide about it after requesting and receiving relevant information about such organizations, as shown in the article 34[2]. Since the PCIJ, the competence of the most important Court in the world is restricted to only act in cases between States.

As said before, the ICJ has jurisdiction to act in contentious cases and giving advisory opinions. In contentious cases, which the conflict object is a litigation dispute, the Court is not limited to judge only cases between State parties to the Statute, as regulates the article 35, which determines that:

> **Article 35.**
> 1. The Court shall be open to the states parties to the present Statute.
> 2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.
> 3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court (INTERNATIONAL COURT OF JUSTICE, 1946).

In this regard, in similar cases to the "Relocation of the United States Embassy" (Palestine v. United States)[3], which the applicant is a non-member State of the UN, the party must declare in the memorial submitted to the court the acceptance of the jurisdiction of the ICJ. In general, the Court must set special conditions and procedures to get the competence

[1] Which, in turn, is composed by the articles 34, 35, 36, 37 and 38 of the Statute.
[2] Article 34 (1): "Only states can be parties in cases before the Court." (INTERNATIONAL COURT OF JUSTICE, 1946).
[3] See chapter 5.

recognizing declaration from a non-member State that submits a litigation to the organ. Also, when a UN non-member State is a party to a case, the Court will fix its contribution towards the Court's expenses (MAZZUOLI, 2015, p. 1180, our translation).

Article 35 also determines the equality between UN member and non-member States of in the treatment in the Court. Once the Court's jurisdiction has been accepted by the State, there must be no obstacle to its exercise. That being said, it will be able to receive requests from all the State parties to the Statute, always respecting the special provisions contained in treaties in force and, above all, never putting parties in position of inequality before the Court (INTERNATIONAL COURT OF JUSTICE, 1945).

Seeing in these terms, article 36 sets out the jurisdiction of the ICJ, explaining the matters that can be considered and judged by the legal body. As such, the Statute specifies the competence in matter vested to the Court, addressing the delimitation of the tribunal's performance of judging (ACCIOLY; CASELLA 2016, p. 166, our translation).

With that in mind, it is necessary to analyze the article 36:

> **Article 36.**
> 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;
> 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 (INTERNATIONAL COURT OF JUSTICE, 1946).

Therefore, it is important to emphasize that the jurisdiction of the Court embraces all cases that were submitted by the parties and mainly the ones provided for the UN Charter or in treaties and conventions in force. In this connection, State parties to this Statute may declare that they recognize as compulsory, *ipso facto*[4] and without special agreement, towards other State accepting the same obligation, legal disputes involving a treaty's interpretation; anything concerning international law; any fact who may violate an international obligation; and a reparation to be made in result of an international obligation's breach. Else, in case of a dispute about the Court's jurisdiction, it is still matter that should be decided by the Court. These declarations shall be delivered to the Secretary-General of the UN, who is responsible for sending copies of it to the parties and to the Court's Registrar (INTERNATIONAL COURT OF JUSTICE, 1945).

Most of the cases with this matter – alleged violations of conventions – refer to the Vienna Conventions[5] of 1961, 1963 and 1969, which deal respectively with diplomatic relations, consular relations and the law of treaties. The latter was responsible to transferring to the Court the responsibility to judge cases of treaties violations where other methods, as arbitration, can no longer be applied (MAZZUOLI, 2015, p. 347, our translation).

The ICJ is responsible for the ensurance of the principle of *pacta sunt servanda*[6] in international law, judging the cases of violation of international conventions. This brocade, established in the article 26 of the Vienna convention on the law of treaties, guides the Court's actions, giving it permission to supervise the efficiency of these treaties (MAZZUOLI, 2015, p. 329, our translation).

Furthermore, whenever a treaty or convention in force call a jurisdiction instituted by the League of Nations or the Permanent Court of International Justice, as involving the parties who are integral part of this Statute, it should be given priority to be submitted to the International Court of Justice[7] (INTERNATIONAL COURT OF JUSTICE, 1945).

2.2.1 Sources applied in conflict resolution

[4] From latin, "by there very fact".

[5] See chapter 3.

[6] From latin, "agreements are to be kept".

[7] Article 37 of the Statute: "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice." (INTERNATIONAL COURT OF JUSTICE, 1946).

Seeing that, the law sources which must be taken into consideration to structure the Court's understanding in every case are appointed in article 38. With that in mind, it must be analyzed:

> **Article 38.**
> 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*, if the parties agree thereto (INTERNATIONAL COURT OF JUSTICE, 1945).

In this discussion, it is relevant to mention: the fonts are divided in real and formal. The first one mentions fonts that are true, fundamental. The second, fonts that were positivized to the objective law and shows to the law in the scope that already exists, whom were accepted and adopted by the public power. Therefore, examples of real fonts would be the general principles of law and of formal fonts, treaty and international customs, for example. Also, in general, there is no hierarchical position between the formal and material fonts, but only a functional enumeration to help the international judge while deciding about a case that is within their competence (ACCIOLY; CASELLA, 2012, p. 145, our translation). Thus, an international custom has the power to derogate from a treaty, as well as being derogated by a treaty.

Besides that, it is necessary to bring light to treaties, which are a normative kind of legal science that aims to formalize the subjection of a State to a regulation, through the *pacta sunt servanda* rule, established by the 1969 Vienna Convention, regarding the influence of the joint development of International Law. In consequence, it is recognized that the importance of treaties not only as international law's font, but also as a source to encourage the international cooperation in solving problems and a way to offer a bigger legal security in the relation between its subjects (CARREAU; BICHARA, 2015, p. 135-137, our translation).

Still about the article 38, it is essential to emphasize that it was born before the modern State, on former times, customs used to be the only font of the international law. However, after the advent of other sources, customs acquired a second position after the treaties, being more applied in countries that still adopt the common law, instead of those who prefer the civil law (CARREAU; BICHARA, 2015, p. 311-312, our translation). According to Accioly (2012, p.

153, our translation), customs are a result of all the acts followed by a country, in other words, those acts that were repeated over quite a prolonged period of time. Hence, in the ICJ's opinion, customs must be respected by all States as if they were a judicial obligation. That can be proved by the North Sea Continental Shelf case (1969), when it was also decided that the passage of a short period of time is not a setback for the development of new rules of international law.

As another real source of the international law, article 38 mentions the possibility to apply "the general principles of law recognized by civilized nations". The objective of the inclusion of this source of international law is, according to Accioly (2016, p.174, our translation) to expand the judge's sphere of action, enabling the Court to include the domestic legislation's[8] principles to its opinion. In general, the principles of law are the essential rules that originated the secondary rules of technique and application (RIPERT, 1933, p. 576-577). However, the ICJ, as the PCIJ has done before, has been very cautious about it, giving more priority to the other sources appointed in the Statute.

Moreover, the Court may also use judicial decisions and "the teachings of the most highly qualified publicists of the various nations" as subsidiary fonts for the application of law in a judicial conflict. It is important to mention that the expression "judicial decisions" means not only the ICJ's and PCIJ's decisions, but also sentences from other tribunals as the International Criminal Court (ICC), the *ad hocs* tribunals established by the United Nations Security Council (UNSC) for the former Yugoslavia and for Rwanda[9], the International Tribunal for the Law Of the Sea (ITLOS). Also, reputable national tribunals from countries all over the world can be considered (ACCIOLY; CASELHA, 2016, p. 179, our translation).

Furthermore, the article 38 also mentions that the Court has the power to judge a case *ex aequo et bono*, if the parties agree thereto. It means that the judge can decide a case on their convictions and beliefs. It is relevant to note that this source can only be used as later option and only if the parties agree to its use (ACCIOLY; CASELHA, 2016, p. 143, our translation).

At last, the Statute does not establish a hierarchy between the fonts indicated in article 38, but functionally enumerate the international judge's operational script in your decision (ACCIOLY; CASELHA, 2016, p. 143, our translation).

2.3 Organization and procedures

[8] As said in the article 38, "[...] recognized by the civilized nations".

[9] The *ad hocs* tribunals for the Yugoslavia and Rwanda was established in the 1990s to judge the main suspects of practicing war crimes in these countries. The expression *ad hoc* in the judicial language means something created for a particular purpose, not planned before it happens. (ACCIOLY; CASELHA, 2016, p. 392).

As said before, the International Court of Justice, seated in the Hague, Netherlands, is the principal judicial organ of the United Nations. Established in 1945 by the Charter of the United Nations, is responsible not only for solving legal disputes submitted under its jurisdiction by States, but also for providing advisory opinions on legal questions that were authorized by the UN. That being said, first, it is substantial to understand how this organ works, whom is it formed by and what are the procedures to propose a problem to it (INTERNATIONAL COURT OF JUSTICE, 2019).

2.3.1 Organization

The ICJ has a self-statute that disposes about its own structure and procedures. In the Chapter I of this document, it is laid down that the Court shall be constituted by a body of independent judges, which are elected regardless of their nationality from among people of high moral character and may have the qualifications required in their respective countries for being appointed to the highest judicial officers, or should be jurisconsults and have a competence recognized in international law, according to article 2 (UNITED NATIONS, 1945).

In the following, in agreement with article 3, it is established that the body in debate shall be composed by fifteen members, being forbidden two of them be nationals of the same State and considering that a person who has nationality of more than one State will be deemed as a national of the one where he usually exercises civil and political rights (UNITED NATIONS, 1945).

Moreover, these members may be elected by the General Assembly and by the Security Council from a list of people who were nominated by the national groups in the Permanent Court of Arbitration. Otherwise, in case of UN's Members who were not represented in the Court of Arbitration, candidates shall be nominated by national groups responsible for this purpose by their government and should respect the same conditions prescribed by the Convention of The Hague of 1907 for the pacific settlement of international disputes. And in case that a State which is a party to the present Statute, but isn't a Member of UN, can still participate of the election, as long as it respects special agreement or, in the absence of this, what was stipulated by the General Assembly upon recommendation of the Security Council, conforming to article 4 (UNITED NATIONS, 1945).

The only one of the six principal UN organs who is not located in New York, the Court, as was said before, is composed by 15 judges, also called "Members", which are elected by the United Nations General Assembly and the Security Council and assisted by a Registry, its administrative organ (INTERNATIONAL COURT OF JUSTICE, 2019). In this approach, it is

important to mention that, until this year, this organ had five Brazilian judges, being the judge Antônio Augusto Cançado Trindade – born in Belo Horizonte, Ph. D. in International Law by the University of Cambridge (UK) and re-elected at February 2018 – currently engaged (INTERNATIONAL COURT OF JUSTICE, 2019).

Furthermore, it is required that the Secretary-General of the UN addresses, at least three months before the election's date, a written request to the Members of the Permanent Court of Arbitration and to the members of the national groups aforesaid, inviting them to promote the nomination of people who are qualified to accept the duties of being a member of the court. It is forbidden that any group nominate more than four people, in which not more than two of them shall be of their own nationality and the number of candidates nominated must be less than the double of seats to be filled, as reported by article 5 (UNITED NATIONS, 1945).

Before recommending any nominations, it is essential that each national group had consulted its main court of justice, its legal faculties and schools of law, and its national academies and sections responsible of law's study, including the international area, as stated in article 6 (UNITED NATIONS, 1945). The list containing those people who were indicated shall be prepared by the Secretary-General, in alphabetical order, and submitted not only to the General Assembly, but also to the Security Council and the two last bodies mentioned will proceed independently of one another to elect the Court's Members, in consonance with articles 7 and 8 (UNITED NATIONS, 1945).

In this regard, to be elected, the candidates should obtain an absolute majority of votes in both of the organs at the same time, being the vote of the Security Council appointed without distinction between permanent and non-permanent Security Council's members and considering the age as a tiebreaker criteria. If there are any seats remaining to be filled after the first election, it should be held a second meeting with this purpose and if still necessary, a third one, pursuant to articles 10 and 11 (UNITED NATIONS, 1945).

Besides that, if, after the third meeting there are still unfilled seat(s), a joint conference consisting of six members should be held, being three from the General Assembly and three from the Security Council, aiming to choose by the vote of an absolute majority one name to be submitted to both bodies (General Assembly and Security Council) for their acceptance. In case this conference is unsatisfactory, all the members who were already elected will select the ones to fill the vacant among those candidates who were voted in these meetings, in line with article 12 (UNITED NATIONS, 1945).

Likewise, the Court's members shall be elected for nine years and may be re-elected, being five judges from the first election for a mandatory of three years and the other five, for a period of six years. Those certain time will be set against a lot to be drawn by the Secretary-General after the first election. For this procedure, in turn, it is required that, initially, the Secretary-General, until one month of the occurrence of the vacancy, submit the invitations and, then, the Security Council will fix the election's date. Also, it is forbidden that any member of the Court pursues another function, whether political or administrative, or engage in other professional occupation. As well, the members are also not allowed to act as agent, counsel or advocate in any case that has previously participated as agent, counsel or advocate for one of the parties, or as part of a commission of enquiry or any other capacity, as reported by articles 13 to 17 (UNITED NATIONS, 1945).

Regarding Court members, it is also worth mentioning the following: a member will only be dismissed if, in the unanimous opinion of the others members, he/she does not fill all the required conditions anymore and all the members of the Court, while engaged on the Court's business, will enjoy diplomatic privileges and immunities, as established by articles 18 and 19 (UNITED NATIONS, 1945). After being chosen and before taking up his duties, every member must participate in a solemn declaration where he/she will swear to exercise their powers impartially and conscientiously, in consonance with article 20 (UNITED NATIONS, 1945).

Beyond that, the Court is responsible for electing its President and Vice-President, which have a mandate of three years, can be re-elected and shall reside at the Court's seat, currently based in The Hague. Also, the Court should nominate its Registrar and other officers' necessaries and all its Members should be bound, unless they are on leave, illness that prevented for attending or other serious reasons explained to the President, just as indicated by articles 21 to 23 (UNITED NATIONS, 1945).

In relation to the Court, it is relevant to emphasize that this organ shall sit, except when expressly provided in the Statute, and the number of judges available to constitute the Court do not be reduced to eleven judges, being nine the minimum quorum to constitute the Court, in agreement with article 25 (UNITED NATIONS, 1945). Despite this, the Court can, periodically, form one or more chambers, composed of three or more judges, under the Court's provisions, to deal with specials categories of cases, such as labor, transit, communications or any other specific situation. In this last point, the number of judges depends of the approval of the parties and the case can be determined by the chambers if the parties request so, as article 27 indicates (UNITED NATIONS, 1945).

Therefore, a chambers' judgment about the issues of articles 26 and 29 is considered as being rendered by the Court, which can convene elsewhere than at The Hague. Aiming to speedy the business' resolution, the Court can annually form a chamber composed of five judges and two replacing judges to hear the parties' request and summarily solve the cases, considering what was declared by articles 27 and 29 (UNITED NATIONS, 1945).

In other words, the Court usually performs its duties as a full Court (composed by a quorum of nine judges, excluding the *ad hoc* judges), but, when necessary, it may also form a temporary or permanent chamber. With this in mind, it is relevant to explain that the Court has three types of chambers: The Chamber of Summary Procedure, any Chamber composed by three judges to deal with certain categories of cases (in accordance with article 26 (1) of the present Statute); and any Chamber to solve particular cases, also known as *ad hoc* Chambers (in concern with article 26 (2) of the ICJ's Statute). The first type is annually composed and comprising five judges, including the President, the Vice-President and two substitutes, with the purpose of speeding the business' dispatch (accordingly to the article 29) (INTERNATIONAL COURT OF JUSTICE, 2019)

About this last Chamber, it should be stressed that the first one was formed in 1982, in the case concerning *the Delimitation of the Maritime Boundary in the Gulf of Maine Area*, involving Canada and the United States. As well, remembering that every Chamber must have five members, the Chamber in the case previously said was formed by four Members of the Court and one judge *ad hoc* chosen by the other party. Besides, no such Chamber is active now (INTERNATIONAL COURT OF JUSTICE, 2019).

Moreover, the Court is attended by three committees: Budgetary and Administrative Committee; Rules Committee and Library Committee. The first one is responsible for the administrative decisions and is composed by the President, Vice-President and four or five other judges who are elected triennially. The second is in charge of advising the Court on procedural issues and working methods. The last one supervises the library's Programme of acquisitions and its modernization, having as the currently chairman the Brazilian judge Antônio Trindade (INTERNATIONAL COURT OF JUSTICE, 2019).

At last, article 31 establishes that if the judges have the same nationality as the parties, they can still sit in the case before the Court, but if the Court includes upon the Bench a judge that has the nationality of one of the parties, the other party may choose a person to sit as a judge, preferably, among the people who were nominated as candidates before in articles 4 and 5. As well, if the Court do not nominate a person of the nationality of the parties, both the parties

can proceed choosing a judge (as was provided in article 2). All these article's provisions will be applied in cases involving articles 26 and 29. Also, if there are many parties interested in the same question, they will represent a single party and all the judges who had been chosen for one of the parties must equally follow this Statute, especially the articles 2, 17, 20 and 24 (UNITED NATIONS, 1945).

Explaining in another way, under article 31, second and third paragraphs, if a State party does not have a judge of its nationality on the case's bench, it may choose a person to sit as an *ad hoc* judge in that particular case, respecting what is set by the Statute. Those *ad hoc* judges must do the same solemn declaration as an elected Member of the Court, they do not have to have the same nationality of the State that designates them, and they take part of the case on terms of complete equality as their colleagues. It is important to observe too that the composition of the Court may sometimes vary, being 16 or 17 if there are judges *ad hoc*. However, once the Court has been constituted for a given phase of a case, its composition should remain unchanged (INTERNATIONAL COURT OF JUSTICE, 2019).

It is equally relevant to underscore that Antônio Trindade, Brazilian, was a judge in *the Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) and José Sette-Camara, also a Brazilian judge, in *the Territorial Dispute* (Lybyan Arab Jamahirya v. Chad). Despite all the advantages offered by the chambers, its use remains exceptional and their formation requires the consent of both parties (INTERNATIONAL COURT OF JUSTICE, 2019).

2.3.2 Procedures

Relative to the procedures, the Chapter III of Statute of the International Court of Justice sets forth the official languages are French and English, then, if the parties agree, all the process can be entirely in one of those two languages, including the sentence. However, article 39 provides that one party can request the Court to continue with the procedure adopting a different language than those two (UNITED NATIONS, 1945).

Besides that, this Statute also defines that to bring cases before the Court, the Registrar[10] should be notified about the special agreement or by a written application which, in both cases, must present the dispute's subject and the parties. Afterward, the Registrar should communicate

[10] The Registrar of the International Court of Justice is responsible for all departaments and divisions of the Registry. The Registrar's role is threefold: judicial, diplomatic and administrative. It.s up to him manage the proceedings in cases before the Court, be present in person at meetings of the Court and of Chambers, maintain relations with the press, represent the Court at meetings of the competente financial organs of the United Nations, among other functions (INTERNATIONAL COURT OF JUSTICE, 2019).

immediately the application to all concerned and notify yet not only the United Nations, but also any other State(s) entitled to appear, conforming settled by article 40 (UNITED NATIONS, 1945).

Additionally, the Court is empowered to indicate any provisional measures, if it considers necessary and the parties must be represented by agents, having, before the Court, the assistance of counsel or advocates, which will enjoy the privileges and immunities that are necessary to exercise their duties, as declared by articles 41 and 42 (UNITED NATIONS, 1945).

Furthermore, in agreement with article 43, the process shall consist of two parts: written and oral. The first one encompasses the communication to the Court and to the memorials' parties, counter-memorials, replies and any documents in support. Those communications shall be made through the Registrar, within the time fixed by the Court and a certified copy of each document presented by one of the parties must be communicate to the other (UNITED NATIONS, 1945).

The second, still accordingly to the article aforementioned and along with article 45, oral proceeding, will consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates, which will be under control of the President, the Vice-President or the senior judge present, respectively, in case the previous is unable to preside (UNITED NATIONS, 1945). To notice people who are not agents, counsel and advocates, the Court must apply directly to the States' government of the territory which has been served and this same procedure must be applied whenever it is necessary to procure evidence on the spot, as revealed by article 44 (UNITED NATIONS, 1945).

Moreover, taking into account what was mentioned in articles 46 to 48, it is relevant to declare: these hearings shall be public, unless the Court decides adversely or the parties demand to be private. As well, it should be made minutes of each hearing that must be signed by the Registrar and the President, becoming alone the only authentic minute. The Court must make arrangements connected with presenting the evidences, conduct the case and decide the form and time of the parties' allegations (UNITED NATIONS, 1945).

Likewise, as reported by articles 49 to 52, the Court can request the agents to produce any document to clarify doubts, even before the beginning of the hearing. In addition, the Court can entrust any individual, body, bureau, commission or other organization selected to carry out an enquiry or give an expert opinion. In the hearing, all the questions will be directed to the witnesses and experts under the Court's conditions after the end of the specified time to purpose

proofs, the Court may refuse to accept a new one, unless the other party consents (UNITED NATIONS, 1945).

With this in mind, it is substantive to mention the content of the following articles. According to article 53 of the Statute in debate, if one of the parties does not appear before the Court, or do not defend its case, the other can call upon the Court to decide in favor of its request. Further, after the agents, counsel and advocates present the case, the President will declare the hearing is closed. Then, in line with article 54, the Court will deliberate privately, and its decision remains secret. All these questions must be decided by the majority of judges present in the procedure and, in case of equality of votes, the President or judges who operates in his place has the casting vote, as stated in article 55 (UNITED NATIONS, 1945).

Also, it is laid down the judgment must clearly bring all the reasons that justified its decision, as mentioned by article 56 (UNITED NATIONS, 1945) and if there is not an unanimous opinion of the judges, any of them can express its separate opinion, in line with article 57 (UNITED NATIONS, 1945). Thereafter, the judgment will be signed by the President and the Registrar and, then, must be read in open court, after notified the agents, as expressed by article 58 (UNITED NATIONS, 1945).

In this connection, it is necessary to emphasize that the judgment uttered by the Court has binding force only between the parties and in what concerns of that particular case, as stated in article 59 (UNITED NATIONS, 1945). In parallel, the judgment is final, without appeal and if there is still any event of dispute concerning to its meaning or scope, the Court will be responsible to solve it, in agreement with article 60 (UNITED NATIONS, 1945). However, the application for revision must be made until six months of discovering new facts and may not be made after a lapse of ten years counted from the judgment's date. This procedure should be opened by a judgment of the Court focusing on the existence of the new fact, which must be a decisive factor and that was unknown at the moment the judgment was given, unless the lack of knowledge was motivated by negligence, pursuant to article 61 (UNITED NATIONS, 1945).

Just as, when a state considers that the judgment may affect its interest of legal nature, it can submit a request to the Court, and it will deliberate about what was submitted, according to article 62 (UNITED NATIONS, 1945). Whenever it involves the construction of a convention, the Registrar must be immediately notified and if this State uses its right, the final judgment will equally be binding upon it, as reported by article 63. Finally, unless the Court decides in other way, each party must pay its own costs, just as suggested by article 64 (UNITED NATIONS, 1945).

Referring to the advisory opinions, it is relevant to stress: The Court is empowered to give an advisory opinion on any legal question as long as the body who made a request is in accordance with the United Nations or this last Organ authorizes it. This request must be delivered by a written request, followed by all the documents necessary to light up the question, in consonance with article 65 (UNITED NATIONS, 1945).

Consequently, settled by article 66, the Registrar will notify all the States entitled to appear under the Court, which will be opened to receive written or to hear oral statements relating to the question, within the fixed time, and those States who were present, can comment on the others' statements. At the end, the Registrar must communicate the written statements to States and organizations that submitted similar points (UNITED NATIONS, 1945).

After the Secretary-General, the representatives of UN's Members and others concerned have been informed, the Court will deliver its advisory opinions in an open court. And to all the decisions, the Court must be guided by the provisions of the present Statute which are applied in contentious cases, as ascertained by articles 67 and 68 (UNITED NATIONS, 1945).

Finally, as reported by articles 69 and 70, about amendments, it is important to reinforce: in general, the amendments to this present Statute must be submitted to the same procedure as the one provided by the Charter of the United Nations and the Court is enabled to propose written amendments to the Secretary-General (UNITED NATIONS, 1945).

3 THE VIENNA CONVENTIONS OF 1961 AND 1963

Initially, to better understand what is behind the case of *Avena and Other Mexican Nationals* and also the case of the *Relocation of United States Embassy to Jerusalem*, it is important to delve in some principles of International Law, especially those about diplomatic and consular relations, which can be found in Vienna Conventions of 1961 and 1963 and in customary International Law. Both Conventions have codified existing laws and have established different ones (SHAW, 2008, p. 752).

Therefore, the Right of diplomatic and consular relations is called Right of Legation and, as the International Law, it is not new. Since the earliest days, diplomacy has been an important mechanism to promote the interests of the States and an instrument to reach peaceful solutions for the disputes between Nations. Moreover, it has been helpful in the process of developing commercial activities (BUENO, FREIRE, OLIVEIRA, 2017).

In Classical doctrine, as The Law of People (1758) of Emer de Vattel, the protection of nationals has started to become one of the objectives among the functions of diplomatic mission. Seeing that, it is possible to say that International Law is making efforts to place the individual as the object of diplomatic matter and not just as its subject (BUENO, FREIRE, OLIVEIRA, 2017).

Another relevant point to mention, before focusing specifically in Vienna Conventions of 1961 and 1963, is that every Sovereign State has the right to send and receive diplomatic or consular representatives. This is a faculty that unfolds into two correlative rights: Active Right of Legation (*jus activum*), that is the right of sending diplomatic or consular agents, and the Passive Right of Legation (*jus passivum*), that is the right of receiving these agents (BROWLIE, 1997, p. 367-386).

To complement this brief introduction about Right of Legation, it is substantial to mention two treaties that might be helpful in the study of diplomatic and consular relations, which are the Convention on the Privileges and Immunities of the United Nations (1946) and the Vienna Convention of 1975. About this last Convention, called Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, it is important to say that it is not yet into force, but despite that, governs the status and functions of missions and delegations of States to international organizations and conferences.

3.1 Vienna Convention on Diplomatic Relations of 1961 (VCDR)

This Convention came into force in 1964 and has the main goal of emphasizing the necessity of diplomatic privileges and immunities to better conduct international relations as well as define who is the character of the diplomatic mission responsible for representing a State (SHAW, 2008, p. 752).

In its preamble, the Convention refers to diplomatic relations since the earliest days, remembering, in certain way, that people of all Nations have always recognized the figure of the diplomat. Besides that, the preamble of the VCDR much resembles the purposes of the Charter of United Nations as the "sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among Nations". *In verbis*:

> The States Parties to the present Convention,
> Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,
> Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
> Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
> Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,
> Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

One of the main important parts of the VCDR is what is established in article 2, which is the principle of Mutual Consent. This principle says that is necessary mutual consent by the receiving State and the sending State to set a diplomatic mission. To establish this mission, article 4 holds the procedures to validate the diplomatic matters. The receiving State has autonomy to accept or not the agent of the diplomatic mission and, if accepted, makes an act called *agrément*[11] to identify the people and allow the entry (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

[11] This term is used internationally and does not have a proper definition for English.

Furthermore, as established in article 9, there is an institute called *persona non grata*[12] that can be used by the State to declare that it is not accepting the appointment of one or more components of the diplomatic mission (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

The Convention established what are diplomatic missions and their purposes, which can be found in article 3 (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961). Between these purposes, the most relevant are the mission of represent the interests of the sending State at the receiving State; respect the interests of the sending State, and collect information about political, economic and social life of the receiving State.

Moreover, the diplomatic mission is not only composed by diplomatic agents, but also by their family members and technical members, as established in article 1. Article 14, as well as article 1, talks about the people involved in the diplomatic mission and establishes certain hierarchy among diplomats (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

Withal, article 22 declares the inviolability of the mission's premises and that agents of the receiving State are not to enter them without the consent of the mission (SHAW, 2008, p. 754). Another duty from the receiving State is, beyond the protection of the premises, also its protection from intrusion, damage or impairment of its dignity (SHAW, 2008, p. 754). However, this inviolability cannot be confused with extraterritoriality, because differently from common sense, embassies as well as consulates, do not constitute part of the Sending State's territory. Now, as a duty of the sending State, it is important to say that those premises must not be used in an incompatible way with the mission's functions (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

In addition, the Vienna Convention on Diplomatic Relations has yet some articles about immunities and privileges, which are articles 31 and article 34, respectively. The diplomatic agent enjoys immunity from criminal jurisdiction of the receiving State and from its civil and administrative jurisdiction, except for some situations established in the VCDR:

> (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) An action relating to

[12] From the Latin, *persona non grata* is a polite way to say that a person is not welcome in a place. (MAZZUOLI, 2015, p. 612).

> any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

Besides that, as declared in article 34, privileges are courtesies given to the diplomatic agents by not subjecting them to certain internal rules. As examples of these privileges, article 34 mentions "A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal". (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

Lastly, articles 43 to 45 establish the conditions to the end of the mission, that are: when the receiving State refuses to recognize a diplomatic agent as a member of the mission (*persona non grata*) or when the mission ends, for example, by the break of relations between the sending State and the receiving State (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

3.2 Vienna Convention on Consular Relations of 1963 (VCCR)

This Convention has entered into force in 1967, establishes who is the consular representative, which are their main functions in the receiving State and points the objective of cooperation between Nations. As said by Malcolm N. Shaw, in the sixth edition of his book called International Law (2008):

> Consuls represent their state in many administrative ways, for instance, by issuing visas and passports and generally promoting the commercial interests of their state. They have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime (SHAW, 2008, p. 772).

Comparing to diplomatic agents, consular representatives do not have the same degree of immunity from jurisdiction and, to offer administrative assistance and protection to the nationals from the sending State in the receiving State (article 1), must have an authorization called *exequatur*[13] (article 12) – that is equated to the *agrément*. (VIENNA CONVENTION ON CONSULAR RELATIONS, 1963).

Article 31 of VCCR declares that, as in the VCDR, "consular premises shall be inviolable" and may not be entered without consent by the authorities of the receiving State.

[13] As *agrément*, this term is used internationally and does not have a proper definition for English.

Regarding consent, it is relevant to mention that, as established by article 2, “consular relations between states take place by mutual consent”.

Furthermore, article 36 says that consular officers shall be free to communicate with nationals of the sending State and they also must have the same freedom to do so. If a national requests, the authorities of the receiving State have to inform consular post of the sending State of any detention or arrest. There are some relevant cases in International Law related to this article that can be cited as forms of exemplification of those functions of consular officers: Breard case (Paraguay v. United States of America), LaGrand case (Germany v. United States of America) and Avena case (Mexico v. United States of America). These cases will be better explained in the next section of this Study Guide.

Ending the summary of the main Convention points, article 41 establishes that consular agents cannot be arrested or detained except in case of a grave crime and following a decision by the judicial authority. Moreover, article 43 emphasizes that their immunity from jurisdiction is restricted in criminal and civil matters to acts done in the official exercise of consular functions (SHAW, 2008, p. 774). Paragraph 2, however, says that:

> 2. The provisions of paragraph 1 of this article shall not, however, apply in respect of a civil action either: 18 (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft (VIENNA CONVENTION ON CONSULAR RELATIONS, 1963).

4 CASE A: AVENA AND OTHER MEXICAN NATIONALS (MEXICO V. THE UNITED STATES OF AMERICA)

Ever since 1942, the United States and Mexico have had bilateral consular agreements "because of their geographic proximity and the frequent inter-state travel of their respective citizens" (INTERNATIONAL COURT OF JUSTICE, 2003). In 1965, Mexico ratified the Vienna Convention on Consular Relations with the objective of strengthening the protection of Mexican nationals abroad. In 1969 it was the United States' turn to ratify said convention, pressured by the international community. In the following years, Mexico developed a number of programs aiming the enhancement of the work of its consular officials, such as the Program of Legal Consultation and Defense for Mexicans Abroad, from 1986, and the Mexican Capital Legal Assistance Program in the United States, established in 2000 (ACEVES, 2004).

On 9 January 2003, Mexico brought before the International Court of Justice, claims concerning fifty-four separated cases of Mexican nationals that were arrested and convicted to death sentence. These defendants were sentenced according to United States' criminal proceeding in the states of California, Texas, Illinois, Arizona, Arkansas, Florida, Nevada, Ohio, Oklahoma and Oregon (MEXICO, 2003).

Avena and Other Mexican Nationals (Mexico v. United States of America), hereafter 'Avena Case', puts Mexico in dispute with the United States of America. According to Mexico, when American authorities arrested and sentenced the Mexican nationals without notifying them of their right to consular assistance, they breached Article 36 of the Vienna Convention on Consular Relations, which both countries are parties (MEXICO, 2003).

In the meantime, Mexico outsourced its claims against the USA, it also requested for provisional measures[14] to be established by the Court. It was suggested that the United States should take all measures necessary to ensure that no Mexican national was executed and no action was taken that might prejudice the rights of Mexico or its nationals, until new decisions of the ICJ (INTERNATIONAL COURT OF JUSTICE, 2003).

The case brought by Mexico was very similar to other cases brought against the United States before the ICJ years before, such as the Breard case (Paraguay v. United States of America), and the LaGrand case (Germany v. United States of America), where in both of them,

[14] A provisional measure is the term that the International Court of Justice uses to describe a procedure roughly equivalent to an interim order (which can be either a temporary restraining order or a temporary directive order) in national legal systems (INTERNATIONAL COURT OF JUSTICE, 2019).

a Paraguayan national and two German nationals, respectively, were sentenced to death and executed without being granted their rights to consular assistance defined on the VCCR. The main difference between these and the Avena case is that in the latter, all the defendants were still alive (MEXICO, 2003).

Furthermore, after hearing the Parties on the provisional measures in public hearings held on 21 January 2003, on the 5th of February of the same year, the Court made an Order regarding the three defendants who were currently in the death row: Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, all facing executions in the next six months. The Order decided that the United States would have to freeze their cases and guarantee they were not executed until the final judgement in these proceedings, once their executions "would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico". The Order also obliged the US to "inform the Court of all measures taken in implementation of [that] Order" (INTERNATIONAL COURT OF JUSTICE, 2003).

4.1 The Convention's allegedly violated articles

Concerning the violation of the Vienna Convention, it is important to highlight the articles that were supposedly breached by the United States. In its memorial[15] of the case, Mexico focuses on exposing the violation not just of the Vienna Convention[16], but also of the individual rights of the Mexican nationals in all fifty-four cases (MEXICO, 2003).

Originally, it is necessary to expose the importance of the case known as Avena and other Mexican nationals for the Mexican diplomatic relations and its way to see and apply International Law. It is well known that Mexico, as an immigrant-sending country and with limited evidence of returning migration, has one of the biggest and efficient politics of protection of its nationals, through consular assistance, of the world. Such politic is applied in the USA, which is the main country of destiny of Mexican immigrants. The *Instituto de los Mexicanos en el Exterior*[17] (IME), provides consular protection activities to build the social and human capital of its immigrants (LEGLARON, 2010).

> For decades, Mexico has provided consular assistance to its nationals traveling in the United States. In 1942, Mexico and the United States entered into a bilateral consular agreement "because of their geographic proximity and the

[15] For further details, see: https://www.icj-cij.org/files/case-related/128/8272.pdf.
[16] See chapter 3.
[17] Institute for Mexicans Abroad.

> frequent inter-state travel of their respective citizens." In 1965, Mexico ratified the Vienna Convention in order to supplement its bilateral consular agreements and to provide additional protection to Mexican nationals traveling abroad. In 1986, Mexico developed the Program of Legal Consultation and Defense for Mexicans Abroad in order to improve the work of its consular officials in representing the interests of Mexican nationals, particularly in legal proceedings. (ACEVES, 2004).

In 2003, Mexico presented this litigation with the USA before the International Court of Justice. The Court has competence upon all the States that had ratified the Charter of United Nations[18] and the Court's Statute[19] (UNITED NATIONS, 1963).

According to the first article of the VCCR (1963, p. 3): "The present Convention applies to treaties between States". Considering that, despite not being a treaty containing any considered human rights, the Vienna Convention is an important mechanism to ensure due criminal proceedings. Therefore, knowing that the United States and Mexico had accepted this treaty, including its optional protocol concerning consular relations, automatically, both countries have made a statement on the international plane that they did consent to be bound by this treaty, giving the ICJ full competence to judge this case (VIENNA CONVENTION ON CONSULAR RELATIONS, 1963).

It is relevant to mention that in 1996, seven years before the Avena case, Mexican representatives consulted another international court, the Inter-American Court of Human Rights[20], to ask this Court's opinion regarding if the right of consular assistance, contemplated on the VCCR, could be characterized as a human right. The Inter-American Court took an opinion that was in agreement with Mexican arguments on the Avena case. According to the Court, this right could be acknowledged as an extension of the human rights, giving Mexico an important international support on this ICJ's case. As follows:

> In Advisory Opinion OC-1 6/99, that Court held that failure to respect the right to consular assistance established by Article 36(l)(b) of the Vienna Convention would prejudice the due process rights of foreign nationals such that the imposition of capital punishment under such circumstances would violate the human right not to be deprived of life arbitrarily. That violation, the Court Sound, gives rise to international responsibility and the obligation to provide reparations (MEXICO, 2003, p. 71).

[18] It was the document that funded the United Nations, organ that was responsible to substitute the League of Nations, right after World War II.

[19] As stated on chapter XIV of United Nations Charter, the Statute of the International Court of Justice is an integral part of UN's Charter. Therefore, the ICJ shall function in accordance with the provisions of its Statute.

[20] A judicial institution that promotes the respect of human rights in America together with the Inter-American Commission on Human Rights, making up the human rights protection system of the Organization of American States, and ruling cases that has a violation of those rights by a State (MAZZUOLI, 2015, p. 993).

Therefore, the International Court of Justice had already taken two very similar cases to the Avena one, being them: Vienna Convention on Consular Relations ("Paraguay v. United States of America")[21], in 1998, and LaGrand case ("Germany v. United States of America")[22], in 1999, both consisting on the violation of the Vienna Convention on Consular Relations. In the first one, Paraguay alleged that the authorities of the state of Virginia (USA) had arrested and sentenced Angel Francisco Breard, a Paraguayan national, to death sentence without notifying him of his right of consular protection (INTERNATIONAL COURT OF JUSTICE, 1998). The same happened in Germany's case against the USA, where two brothers, named Karl and Walter LaGrand, also suffered from consular rights violations by the authorities of the state of Arizona (INTERNATIONAL COURT OF JUSTICE, 2001).

On both aforementioned cases, one of the first actions taken by the Court after receiving the cases was establishing provisional measures. These measures aimed to protect the rights of both parties and, therefore, avoid irreparable damage that could harm the process itself, until new pronouncements of the ICJ. Consequently, to assure the commitment of the States involved, the Court reinforced their obligation to fulfill their duties – the provisional measures. However, the USA did not comply with the Court's demands in neither of these cases, in fact, when they were ordered to freeze the execution of the Paraguayan and German nationals, they executed them (MEXICO, 2003).

In Paraguay's case, the charges were dropped after the execution of Breard (INTERNATIONAL COURT OF JUSTICE, 1998). In the other hand, even after the LaGrand's execution, Germany just modified their complaints before the ICJ, alleging, then, that the United States violated International Law when they failed to accomplish the provisional measures. With that in mind, on June 27, 2001, the International Court of Justice ruled in favor of Germany, refusing all the United States's arguments. The Court recognized the violation not

[21] On 3 April 1998, Paraguay instituted proceedings against the United States of America for "violations of' the Vienna Convention on Consular Relations", allegedly committed by the United States. In Paraguay's Application, it is stated that in 1992 thc authorities of Virginia arrested a Paraguayan national, Mr. Angel Francisco Breard, who was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court in 1993, without having been informed of his rights under Article 36, subparagraph 1 (b), of the Vienna Convention (INTERNATIONAL COURT OF JUSTICE, 2019).

[22] On 2 March 1999, the Federal Republic of Germany filed an Application instituting proceedings against the United States of America for violations on the Vienna Convention on Consular Relations. According to Germany, the United States, by not informing the German nationals Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 (b) of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals. under Articles 5 and 36 paragraph I of the said Convention (INTERNATIONAL COURT OF JUSTICE, 2019).

only of the Vienna Convention, but also of its own provisional measures (INTERNATIONAL COURT OF JUSTICE, 2001).

Furthermore, speaking specifically of the Avena case, while in the case of Paraguay and Germany only one and two nationals were affected, respectively, fifty-four mexican nationals had, supposedly, their consular rights violated in Avena. This shows a huge increase on violations to the VCCR and establish a pattern on the United States' conduct (MEXICO, 2003). As it can be seen as follows:

> Thus, this case comes to the Court in a fundamentally different posture than did LaGrand, and for the most basic of reasons: while the nationals who were the subject of Germany's application had been executed prior to the rendering of the Court's judgment, the nationals that Mexico here seeks to protect remain alive. In LaGrand, the Court had occasion to provide a definitive interpretation of the substantive rights of the sending State and its nationals under Article 36, and the corresponding obligations of the receiving State under that Article. As a result, Mexico's case rests on the substantive foundation laid by the Court in LaGrand. But here, the Court will also have an opportunity to prescribe the full range of relief to which a State aggrieved by Article 36 violations is entitled, in a situation in which the nationals who are the subject of the proceeding remain in a position to benefit from that relief. (MEXICO, 2003, p. 1)

As usual, the International Court of Justice, granting Mexico their claim, instituted provisional measures. These were constituted on the command to freeze the fifty-four executions of the Mexican nationals entangled in the Avena case, until new pronouncements. It is important to say that this was a strong claim from Mexico's party due to the finality of protecting their nationals' lives and providing them their rights, which, they allege, were violated (MEXICO, 2003). In this way:

> Provisional measures are therefore clearly justified in order both to protect Mexico's paramount interest in the life and liberty of its nationals and to ensure the Court's ability to order the relief Mexico seeks. Indeed, the Court's indications of provisional measures in the Case Concerning the Vienna Convention and the LaGrand case unequivocally support Mexico's right to provisional measures here. (INTERNATIONAL COURT OF JUSTICE, 2003, p. 3)

In Mexico's opinion, the alleged violation of the consular rights of the fifty-four Mexican nationals that never had their American citizenship recognized consists of a complete discordance with the Mexican consular protection policy of its immigrants. In accordance with their theses, the American right to criminally sanction an individual who had committed unlawful acts is not being questioned, neither their use of the death penalty, which Mexico is

completely against in their system, but the possible lack of notifications of the inmates' consular rights, which use was supposed to be an option for the defendants (MEXICO, 2003).

Ever since 1976, when capital punishment was re-introduced in the United States, Mexico has been carefully monitoring the cases of Mexican nationals facing the death penalty. In Mexico's point of view, this monitoring[23] goes in accordance with their commitment to the protection of their nationals, and to their proper defense. Seeing that the numbers of Mexican nationals convicted to death sentence were, continuing, becoming very high, Mexico put its efforts on the inspection of the respect of their nationals rights to consular assistance, observing repeated violations to article 36 and, consequently, increasing resources to their defense (MEXICO, 2003). In this way, Mexico declared:

> Put simply, Mexico contends that when a State acts to take human life through the application of law in a criminal proceeding, it should scrupulously conform its own conduct to the dictates of legal noms to which it l-las consented to be bound - including, as here, Article 36 of the Vienna Convention. And when the State fails in that obligation - as here, the United States has - it should provide fully effective relief in the fonn of new proceedings that conform to those dictates (MEXICO, 2003, p. 1).

As a result of this allegation, Mexico claims that the defense of the fifty-four nationals was directly affected, because if their right to consular assistance were really accomplished, they would have better instruments of defense. Considering that, a better defense could result on extenuating circumstances of their penalties, which could even avoid such severe punishment as established (MEXICO, 2003).

Thus, according to the Mexican representative, the VCCR was specifically violated on article 36, when the United States sentenced the fifty-four Mexican nationals to death sentence, without allowing Mexico to provide them consular protection and assistance (MEXICO, 2003). In its turn, article 36 concerns the communication and contact between a consul and nationals of its country. Therefore, it settles that authorities of the receiving State must inform detained or arrested foreign nationals of their right to contact their national consul, without delay.

In the international law, this article is seen as very important, due to its protection of a proper defense and due process, establishing an interrelated regime designed to facilitate the implementation of the system of consular protection. According to this, being notified of their facultative right to consular assistance, they, possibly, have access to various defense

[23] In September 2000, Mexico formed the Mexican Capital Legal Assistance Program, which is the sole capital legal assistance program established by a foreign government in the United States (MEXICO, 2003).

instruments, which they would not have had in lack of notification (ACCIOLY, CAROSELHA, 2016, p. 355, our translations). Into this perspective, VCCR declares:

> **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 (VIENNA CONVENTION ON CONSULAR RELATIONS, 1963).

At first, the United States breached Article 36 (1), when it allegedly failed in their obligation to notify Mexican nationals of their rights under the Vienna Convention without delay. Therefore, actions potentially prejudicial to the rights of the foreign national could not be taking without the notification (MEXICO, 2003).

Moreover, Mexico alleged that the foreign nationals are especially vulnerable during custody. According to them, the notification of the right of consular protection should have been made without delay[24], because the greatest potential for abuse by authorities exists at the time of initial custody and detention. Considering that, once arrested, the foreigners would find themselves "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures" (MEXICO, 2003).

> In surn, there can be no dispute that none of the objectives of Article 36, 1, b, can be achieved with appropriate effect (*effet utile*) unless compliance takes place literally "without delay," in other words, immediately and prior to any interrogation (MEXICO, 2003, p. 85).

[24] To be effective, notification "without delay" requires that the competent authorities provide the contemplated consular notification prior to any act potentially detrimental to the rights of the foreign nationals, such as interrogation (MEXICO, 2003, p. 3).

Besides, article 36 (2) was also violated, in Mexico's opinion. According to them, the United States put its municipal[25] law and its judicial findings in supremacy, over article 36, thus violating fundamental individual rights of the Mexican nationals. Giving that, the United States' elevation of its municipal law over treaties, consists on a breach not only of the Vienna Convention on Consular Relations, but also of international law (MEXICO, 2003, p. 88).

> To permit a State's laws and regulations to impair or diminish rights conferred by the Convention would defeat the object and purpose of Article 36(2) and violate the fundamental principle of international law that no state may invoke its municipal law or internal structure to excuse or justify failure to obey international law (MEXICO, 2003, p. 88).

In conclusion, Mexico seeks for US to take responsibility for the alleged violation of all fifty-four Mexican nationals, based on the direct transgression of article 36 of the Vienna Convention on Consular Relations. As it were aforementioned, the protection of their nationals is one of the Mexican deepest concerns and, the presentation of the Avena and other Mexican nationals case before the ICJ is a statement that they do not intend to allow, anymore, the suppose constant violation of the Mexicans rights.

4.2 The USA legal defense

Referring to the United States' defense, its major arguments are those of sovereignty, the material impossibilities and complication on identifying one's nationality and the defense of its judicial system and due process of law.

In a national case, *United States v. Calderon-Medina*, a case of re-entry following deportation, the Ninth Circuit Court of Appeals of the United States established that, besides the preamble of the VCCR stating that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States", article 36 of the aforementioned convention granted benefits to foreign nationals and implicitly concluded that, without proof of prejudice, the right to consular protection was not so fundamental and its deprivation does not automatically turn the proceedings unfair (UNITED STATES OF AMERICA, 1979).

In most subsequent cases, courts ruled that a violation of an alien's[26] right to communicate with consul is not fundamentally unfair (UNITED STATES OF AMERICA,

[25] Municipal law are the acts made by the legislature authority of a state, applicable to that state alone. Whereas municipal law controls between individuals within a state and between the individuals and the state, the international law is largely concerned with relations among States.

[26] According to Cambridge (2019): a person who lives in a country but is not a citizen.

1989, 1994). Most courts understand that in cases where the Council would not have provided any information that the defendants attorneys did not have or could have obtained, there is no prejudice and therefore no violation of rights (INTERNATIONAL COURT OF JUSTICE, 2003). The Second Circuit Court of Appeals has even expressly rejected the notion that rights granted by a treaty could be equated with fundamental constitutional or statutory rights:

> The privilege of communication with consular officials is not a fundamental right derived from the Constitution or federal statutes, such as the right to counsel, but is merely a provision created by agency regulations.... Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process (UNITED STATES OF AMERICA, 1994).

Moreover, it is necessary to state the complexity of Mexico's claims: the case it has brought into the Court consists of fifty-four separate and independent criminal cases, with little or no correlation between them, other than that every one of them involve persons originally sentenced to capital punishment. Even the nationality issue is not unanimous: at least one of the cases involved an US citizen and the other alleged Mexican nationals failed to make their nationality known to the competent authorities (INTERNATIONAL COURT OF JUSTICE, 2003).

Nevertheless, in the cases where the arrested person's nationality is unknown, no obligation can be due, and because of its extremely diverse population, it is not possible for a law enforcement officer to assume one is not a United States national based only upon extrinsic factors.

> In a country where persons of Hispanic descent serve in Congress, in high-ranking Executive Branch positions, and as Governors, where they sit as federal and state judges, serve as Ambassadors, Generals and Admirals, and as law enforcement officers at al1 levels, to "look Hispanic", to speak with an accent, or to carry a Hispanic surname does not in any way indicate that a particular individual is not a citizen of the United States. (UNITED STATES OF AMERICA, 2003)

Therefore, the cases where the US can be entitled for not providing the notification of the right to consular assistance are those where the Mexican nationality are known. With that being said, in most cases of arrest, US citizenship may be taken for granted regardless of any stereotype. The officer's initial main concern is to protect the public and investigate the circumstances of the crime, only after that, the identification of the person arrested is taken into account. In addition, even at this stage, the identification of a person for law enforcement

purposes does not necessarily include nationality information. Moreover, enforcement of immigration law is mainly a federal government responsibility, not that of the states (INTERNATIONAL COURT OF JUSTICE, 2003).

Nonetheless, most US citizens do not carry any documentation of citizenship, as persons born in the United States may never actually obtain a citizenship document, because the United States has no national identity card system. Most people carry documents such as a driver's license, which is issued to both citizens and non-citizens and serves as identification and residency indication, not citizenship or nationality. Furthermore, foreign nationals, especially those who are illegally in the United States, for fear of being handed over to the immigration authority, may not have with them documents showing their nationality. If a non-American citizen is arrested and claims to have US citizenship it would take a considerable amount of time to learn that the claim is false.

Furthermore, each and every one of the cases have their unique facts and have been trialed under the US legal system, which grants the due process of law, as stated in the country's constitution on the 5th amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, (...) nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law" (UNITED STATES OF AMERICA, 1788).

Moreover, 14th amendment:

> "(...) nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (UNITED STATES OF AMERICA, 1788).

In addition, United States criminal judicial systems provide full due process guarantees despite one's nationality and regardless of the legality or illegality of a foreign national's presence in the United States. These guarantees exceed the requirements of international law and consist of but are not limited to representation by legal counsel; adequate language interpretation; an objective understanding of the proceedings. Every person taken into custody has their right not to incriminate themself notified in a language they can understand (INTERNATIONAL COURT OF JUSTICE, 2003).

That being said, the United States has strongly intensified its efforts to comply with the obligations appointed by the VCCR especially posterior to the Court's decision in *LaGrand*, to

the extent that Mexican consular officers have even expressed concern that they will be overwhelmed with notifications (INTERNATIONAL COURT OF JUSTICE, 2003).

5 CASE B: THE RELOCATION OF THE UNITED STATES EMBASSY TO JERUSALEM (PALESTINE V. THE UNITED STATES OF AMERICA)

Generally, it is not common for a small, struggling country to fight against a big and powerful one, especially if one of the parties is the United States of America. The Palestine, however, chose to institute proceedings against the U.S. at the International Court of Justice in 28 September 2018. The subject in dispute is the relocation of the USA embassy in Israel to the Holy City of Jerusalem (INTERNATIONAL COURT OF JUSTICE, 2018).

The Palestinian move in the ICJ made the USA Security Adviser, John Bolton, extremely furious, as he stated that the United States "would not sit idly by as baseless politicized claims are brought against us", not least by the "so-called State of Palestine" (RAMPTON, 2018).

The ICJ would be considered the appropriate place for this supposedly risky proceeding, because it is one of the few institutions that recognizes the sovereign equality of States, no matter how long or small, or powerful or weak, they may be (KATTAN, 2018).

Before addressing the case itself, it is important to have in mind that the Holy City of Jerusalem is endowed with unique spiritual, religious and cultural dimensions. Because of that matter, the United Nations continues to adopt numerous resolutions that aim to protect and preserve the City's unique and special status, as the United Nations General Assembly adopted the Partition Plan in resolution 181 to protect it (UNITED NATIONS, 1947).

As mentioned, the discussion concerned is over the President Donald Trump's decision to recognize Jerusalem as the capital of Israel and to relocate the USA embassy from Tel Aviv to that city, announced on 6 December 2017. The argument used by the Palestinian to institute the proceeding is that the USA has not established its embassy to Israel on territory of the receiving state, as assured by the Vienna Convention on Diplomatic Relations, but in Jerusalem, that has a special and distinct status in international law, as the 1947 UN Partition Plan established a special regime to that city (KATTAN, 2018). Still, on 14 May 2018, the United States of America inaugurated its Embassy in the Holy City of Jerusalem (MACFARLANE, 2018)

Jerusalem, besides being the Holy City to three of the main religions in the world (Christianity, Judaism, and Islamism), is also the symbol of one of the biggest sovereignty

conflicts in Middle East, which has been lasting decades: the dispute between Israel and Palestine. To Jewish people, Jerusalem is eternally part of the State of Israel. But the Arab people tell a different story: Jerusalem is the capital of the non-official State of Palestine, where they are the majority of the city's population (SIMONI, 2017). This is the reason why the relocation of the US embassy in Israel from Tel Aviv to Jerusalem has such a big impact: it sends an explicit message that the United States recognizes the Holy City as part of Israel, deeply and personally offending the population.

At the end of its Application submitted to the ICJ, Palestine "requests the Court to declare that the relocation, to the Holy City of Jerusalem, of the United States embassy in Israel is in breach of the Vienna Convention". Besides, the Application states that the relocation is also a breach of the other rules of general international law referred by the Convention, including rights reiterated by the Court's Advisory Opinion of 4 July 2014 (INTERNATIONAL COURT OF JUSTICE, 2018).

Thus, it further requests the Court "to order the United States of America to withdraw the diplomatic mission from the Holy City of Jerusalem and to conform to the international obligations flowing from the Vienna Convention". Finally, the Applicant "asks the Court to order the United States of America to take all necessary steps to comply with its obligations, to refrain from taking any future measures that would violate its obligations and to provide assurances and guarantees of non-repetition of its unlawful conduct" (INTERNATIONAL COURT OF JUSTICE, 2018). However, the United States is not under the obligatory jurisdiction of the Court since it withdrew from the Court's general jurisdiction in 1986 (LIPTAK, 2005) meaning the country will only apply the lawsuit outcome if they want to.

One of the main discussions about this matter is the fact that, in order to assess whether Palestine can access the ICJ or not, the Court will have to decide whether Palestine is a state. That is according to the article 34 (2) of the Court's Statute, which provides that "Only states may be parties in cases before the Court." Palestine is currently recognized by 137 States, but some States such as Israel, United States, Switzerland, Canada, South Korea, Japan, Australia, and New Zealand, among others, do not. The current standing of Palestine at the International Court of Justice is merely contentious, given that it is not a member of the United Nations, but only a non-member observer state, although having submitted an application for membership in November 2011 (UNITED NATIONS SECURITY COUNCIL, 2011). Only United Nations member states are parties to the ICJ Statute (UNITED NATIONS, 1945).

So accordingly, the ICJ will have to decide whether Palestine is a State for the purposes of its own Statute, before it considers questions of jurisdiction, admissibility and merits of the case. It will be difficult for the USA to claim that Palestine is not a State for the purposes of customary international law, if the ICJ concludes otherwise. Were the Court to reach this conclusion, Palestine could still claim victory, however, if in rendering its decision, the Court were to decide that Palestine is indeed a State (KATTAN, 2018).

However, given that there is no doctrine of precedent in international law, it is also possible that the ICJ could reverse this judgment and rule in Palestine's favor. It will be depending on what arguments Palestine's lawyers will make. This is the first time the Palestinian leadership has taken up a case at the ICJ on its own initiative. On one previous occasion, Palestine appeared before the ICJ following a vote at the UN General Assembly requesting an Advisory Opinion from the organ. Then, Palestine needed the support of the Arab bloc at the General Assembly. Given the divisions in the Arab world, Palestine's leaders have chosen to go on this time (KATTAN, 2018).

5.1 The Convention's allegedly violated articles

Palestine contests and reaffirms the responsibility for from the Vienna Convention on Diplomatic Relations that the diplomatic mission of a sending State should be stipulated on the territory of the receiving State. According to Palestine, the special status of Jerusalem about this particular transition brings several consequences in relocation of United States Embassy in Israel to Jerusalem, allegedly constituting a breach of the VCDR. As basis for the Court's jurisdiction, the Requester invokes article 1 of the Optional Protocol to the Vienna Convention concerning the Compulsory Settlement of Disputes. It notes that Palestine acceded to the Vienna Convention on 2 April 2014 and to the Optional Protocol on 22 March 2018, whereas the United States of America is a party to both these instruments since 13 November 1972 (KATTAN, 2018).

In brief, Palestine argues that various articles of the VCDR, especially article 3 thereof, require that the functions of the diplomatic mission be performed in the receiving state, which means that the mission must be established in the receiving state. In this perspective, Jerusalem is not Israeli territory, and, therefore, moving the embassy there meant that it was not established in the receiving state. Ergo, the main argument of the defense is because of these facts presented there was due violation of the VCDR (SAYEJ, 2018).

Palestine's vindication runs headlong into the ICJ's longstanding *Monetary Gold*[27] jurisprudence. When the state proclaims that Jerusalem is not Israel's territory, clearly noticed the existence (or not) of the rights of Israel vis-a-vis that territory, and It would not allow to the ICJ's determination of these rights. Whether the Monetary Gold principle is exposed more narrowly or more broadly, a case such as this one – which implicitly requires the definition of a rivalry about territorial sovereignty – is precisely the type of case that must be captured by that principle (KATTAN, 2018).

The Vienna Convention on Diplomatic Relations shows in more detail the articles being refuted, such as:

> **Article 3.**
> 1. The functions of a diplomatic mission consist, inter alia, in:
> (a) Representing the sending State in the receiving State;
> (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
> (c) Negotiating with the Government of the receiving State;
> (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
> (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

It is clear from the article that one of the main actions of a diplomatic assignment consists in "representing the sending State in the receiving State". The terminology of subparagraph is unmistakable and leaves no doubt on the evidence that the authentic function of any diplomatic mission should be performed on the territory of the receiving State. On occasion that, out of the four other roles of diplomatic missions enumerated in article 3 of the VCDR, two functions are to be performed "in the receiving State" (INTERNATIONAL COURT OF JUSTICE, 2019).

In Palestine's case this is legitimate with regards to subparagraph (b), touched base with the consisting in "protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law", in the same way as with compliments to subparagraph (d) which keep that one of the functions of a diplomatic mission consists in "ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State". The one and only function

[27] The Monetary Gold principle is widely recognized as preventing the International Court of Justice from deciding a case between two parties where the legal interests of a third State take center stage. The principle takes its name and much of its authority from the 1954 judgment in the Monetary Gold case (INTERNATIONAL COURT OF JUSTICE, 2019).

of a diplomatic mission that are not expressly required to be implement “in the receiving State” are the negotiation function of subparagraph (c) and the promotion of friendly relations with the receiving State mentioned in subparagraph (e).

In this manner the capability “in the receiving State” is not only used in article 3 of the VCDR. However, it is also possible to observe that it is present in twelve other provisions of the Convention. This climax happens as a result of the fact that the diplomatic mission of a sending State must be entrenched on the territory of the receiving State. Therefore, the fact that the sending State can only establish a diplomatic mission on the territory of the receiving State is confirmed by article 21, of the Convention, which provides that:

> **Article 21.**
> 1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
> 2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

In this regard, the present article can be analyzed as a diplomatic mission that may have to operate various functions on the territory of the receiving State. Although, there are fair impediment to the behavior of such a mission, both under the Vienna Convention on Diplomatic Relations and general international law to which the Convention refers. Performing a brief and subtle comparison with the article 3 which it reaffirms that afford further condition for the diplomatic mission of the sending State in performing specific functions that are expressly required to be performed “in the receiving State” (INTERNATIONAL COURT OF JUSTICE, 2019).

Along these lines, when a diplomatic mission defends the interests and the nationals of the sending State in the receiving State, it may and must only do so “within the limits permitted by international law” as stated in subparagraph (b). Equivalent, when a diplomatic mission confirms conditions and advancements in the receiving State, should only use “all lawful means” as required by subparagraph (d) (INTERNATIONAL COURT OF JUSTICE, 2019).

Besides these specific limitations, article 41 (3) of the Convention maintains a broad limitation and groundwork for the action and ambition of a diplomatic mission. This article reads hence:

> **Article 41.**
> […]

> 3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreement in force between the sending and the receiving State (VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961).

It is halcyon from the raised provisions that the Convention on Diplomatic Relations applied the sending State to set a diplomatic mission "in the receiving State" to satisfy its functions and requests that this responsibility performs its employment while concerning the rule of law, mainly international law (INTERNATIONAL COURT OF JUSTICE, 2019).

5.2 The USA legal defense

The Palestine, as known, reached for the jurisdiction of the Court based on Article 1 of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (1961), to which Palestine acceded on 22 March 2018. On 2 November 2018, the United States informed the Court, through a letter, of the communications it had submitted to the Secretary-General of the United Nations in 2014 and 2018, declaring that the State did not consider itself to be in a treaty relationship with the Applicant under the Vienna Convention or the Optional Protocol.

By another letter of the same date, the USA informed the Registrar that it would not participate in the proposed meeting to be held on 5 November 2018 by the President with the representatives of the parties, in order to investigate their views with regard to questions of procedure in the case. The International Court of Justice fixed the time-limit of 15 May 2019 for the Memorial of the State of Palestine and 15 November 2019 for the Counter-Memorial of the United States of America (INTERNATIONAL COURT OF JUSTICE, 2018).

The final decision to relocate the embassy is given to president Donald Trump, but since 1995 the US Congress has approved a resolution that institutes the transfer, even if it wasn't sanctioned before. The president had, until then, to waiver the transfer every six months. It came to a moment in which Trump did not, so the embassy was officially transferred (SIMONI, 2017). This position aligns with the American policy of anti-terrorism, often generalized against ethnic groups who follow the religion of Islam.

While analyzing this case, it's essential to bear in mind the long and uneasy relationship between the United States and the International Court of Justice. Following the World War II, the United States accepted generally the Court's jurisdiction (DONOGHUE, 2011). But the country withdrew from the Court's general compulsory jurisdiction in 1986, after the Court

ruled in favor of Nicaragua, yet it continued to accept its jurisdiction under about 70 specific treaties, frequently covering subjects such as navigation, terrorism, narcotics, and copyright (LIPTAK, 2005). More recently, for an example, the USA has increased its engagement with the ICJ regarding individuals who are facing the death penalty in the country. The American Judge of the ICJ, Joan E. Donoghue, has said that "the United States is making considerable efforts to come into compliance, despite serious obstacles within its own constitutional system", and that "it's a love-hate relationship" (DONOGHUE, 2011).

Therefore, it is possible to imply that the United States will deal with this specific scenario concerning the dispute instituted by the Palestinian the same way it historically did in previous cases: relying on its own legal and jurisdictional system to supremely defend its interests.

6 CONCLUSIONS

After the reading of this guide, we hope that the initial content has been clearly set and able to direct to the real purpose of the Court. Therefore, the main goal of this study guide is to give the basic information about the organ and the cases, enabling the delegates to build their argumentative base on what was exposed. This document, made from an intense study and research, has this purpose.

It is important to mention that the study of the delegates for the cases should never be restricted to this guide. We encourage the search for new sources that can fully support an intricate argumentative logic for the days of the simulation. That being said, it is very important to emphasize the availability of all the directors to resolve any doubts that may have remained.

In general, it must be pointed that the ICJ has the legal competence to judge cases such as those described before. This means that, not necessarily, the result of the discussions will be the same as the real judgement. It will be up to delegates to build a solid and effective argumentative basis alongside with proof for their claims, which will convince the judges of what is being disputed.

We hope that at the end of the simulation, the importance of the International Court of Justice to international law can be observed, as well as the importance of the correct application of justice among nations through the correct use of diplomacy and law.

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