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# Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights

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## Abstract

*Article 36 of the Vienna Convention on Consular Relations identifies consular information as an individual right that foreign nationals possess when arrested or detained abroad. The difficulties encountered by these persons, however, when they seek to vindicate that right before domestic courts has become dramatically visible in the cases of foreigners on death row in the United States. In recent years, three such cases have reached the International Court of Justice (ICJ), two of which were fully litigated. In LaGrand and Avena, the ICJ ordered review and reconsideration where Article 36 rights had been violated and the legal process was already exhausted. Unfortunately, the implementation of these judgments in the United States left much to be desired. The majority opinion in the recent Supreme Court decision in Sanchez-Llamas v. Oregon, with its abrasive treatment of the ICJ, forms an unfortunate culmination point of this trend. On the other side of the Atlantic, the German Bundesverfassungsgericht fortunately steered a very different course. Contrary to their US counterparts, the German judges had no difficulty in subordinating their jurisprudence to the decision of a competent international court. Thus, the German judges were prepared, under certain circumstances, to afford ICJ decisions a strong guiding force, even where Germany was not a party to the respective cases. The present article compares the striking differences of ‘consideration’ afforded to the ICJ’s jurisprudence on Article 36 by the Supreme Court of the United States and the Bundesverfassungsgericht respectively.*

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## Introduction

More than three years after the International Court of Justice (ICJ) handed down its decision in the *Avena* case,<sup>1</sup> and eight years after Germany and the United States first clashed before the Court in *LaGrand*,<sup>2</sup> the implementation of the Vienna Convention on Consular Relations (VCCR), specifically its Article 36<sup>3</sup> dealing with a foreign national's right to be informed of his right to contact his consulate when arrested or detained, is still a hotly debated issue.

At times literally a matter of life and death (a large number of Article 36 claims are raised by foreign inmates facing the death penalty in the United States), this issue has attracted the attention of numerous scholars and advocates on both sides of the Atlantic.<sup>4</sup> For a long time, the commentary naturally focused on the United States: it was there that all the cases that have been brought before the ICJ relating to the interpretation of Article 36 VCCR originated, and all the cases that have to date come before the Court on the issue have concerned individuals in US prisons. Yet, the implementation record of the United States with respect to the *Avena* decision is deplorable and the fate of many of the Mexican individuals whose rights were at issue in *Avena*<sup>5</sup> is unclear. However, all the parties to the Convention, not only the United States, are under a duty to implement the Convention in accordance with the ICJ's interpretation expounded in *LaGrand*<sup>6</sup> and refined in *Avena*.<sup>7</sup> This is no easy task for domestic judiciaries which, especially in criminal cases, tend to covet their national régimes from 'intrusion' by norms of public international law.

<sup>1</sup> *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12.

<sup>2</sup> *LaGrand Case (Germany v. United States of America)* [2001] ICJ Rep 466.

<sup>3</sup> The right is expressed in Art. 36(1)(b), of the Vienna Convention in the following terms: '[i]f he [the person arrested] 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 also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph ...': Vienna Convention on Consular Relations, Art. 36, 4 Apr. 1963, 21 UST 77, 596 UNTS 261 (hereinafter Vienna Convention).

<sup>4</sup> See, e.g., Simma and Hoppe, 'From LaGrand and Avena to Medellín—A Rocky Road Toward Implementation', 14 *Tulane J Int'l & Comp L* (2006) 7; Pulkowski, 'Testing Compliance Theories: Towards the United States Obedience of International Law in the Avena Case', 19 *Leiden J Int'l L* (2006) 511, issue 2; Quigley, 'Toward More Effective Judicial Implementation of Treaty-Based Rights', 29 *Fordham Int'l LJ* (2006) 552; Ostrovsky and Reavis, 'Rebus Sic Stantibus: Notification of Consular Rights after Medellín', 27 *Michigan J Int'l L* (2006) 657; Le Mon, 'Post-Avena Application of the Vienna Convention on Consular Relations by United States Courts', 18 *Leiden J Int'l L* (2005) 215; Paulus, 'From Neglect to Defiance? The United States and International Adjudication', 15 *EJIL* (2004) 783, at 784, 796; Carter, 'Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration under the Vienna Convention on Consular Relations: Avena and other Mexican Nationals', 25 *Michigan J Int'l L* (2003) 117; Sir Robert Jennings, 'The LaGrand Case', 1 *Law and Practice of International Courts and Tribunals* (2002) 13.

<sup>5</sup> *Avena Case*, *supra* note 1.

<sup>6</sup> *LaGrand Case*, *supra* note 2.

<sup>7</sup> *Avena Case*, *supra* note 1.

The present article takes up the two recent decisions from the two states which originally faced each other in the *LaGrand* case,<sup>8</sup> Germany and the United States, in order to introduce their respective approaches and to offer an analysis of the degree of implementation of the ICJ's decisions in the two systems. The picture I offer will, however, remain a snapshot. While I highlight some of the complex domestic law questions raised by the efforts to implement the Convention in Germany and the United States, it will be for future research to explore these in the necessary depth and detail to suggest new approaches and potential solutions.

Section 1 will start with a short refresher on the Vienna Convention jurisprudence of the ICJ as it developed from a 'false start' in *Breard*<sup>9</sup> to *LaGrand*<sup>10</sup> and finally *Avena*.<sup>11</sup> Section 2 will take stock of the implementation of the ICJ decisions in the United States and Germany prior to the most recent decisions. Section 3 will then compare the approaches reflected in *Sanchez-Llamas*,<sup>12</sup> and will examine the recent decision of the German *Bundesverfassungsgericht* in the consolidated cases decided on 19 September 2006<sup>13</sup> in terms of its compliance with the ICJ jurisprudence. Specifically, I will compare the two strands of jurisprudence on several key issues, including whether the Vienna Convention does in fact create individual rights that can be relied upon before a domestic tribunal, whether suppression of statements as a remedy may be appropriate for a violation of an individual's Article 36 right to consular notification, and the status of ICJ judgments in the domestic legal order.

## 1 The Vienna Convention before the ICJ – A Refresher

The ICJ's jurisprudence on the Vienna Convention is by now inextricably linked with the name *LaGrand*. The case, relating to the execution of two German brothers in the state of Arizona, attracted both media and scholarly attention due to its special mix of factual and procedural factors: on the one hand, the case was filed only a few hours before the execution of Walter *LaGrand*, prompting the ICJ to rule *proprio motu* on a request for provisional measures, a first in the history of the Court. The case dealt with the fate of two individuals, rather than a more 'anonymous' group of victims as is common in many cases addressed by the Court, potentially making it easier to identify with the victims. Political factors, such as the US stance on the death penalty, certainly also played a role. In sum, the case seemed to epitomize the hope that public international law might come to the aid of an individual in danger, to decide over his or her life or death.<sup>14</sup>

<sup>8</sup> *LaGrand Case*, *supra* note 2.

<sup>9</sup> In the first ICJ case on the matter, concerning a Paraguayan national, Angel *Breard*, Paraguay withdrew the case after *Breard* was executed: see *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)* [1998] ICJ Rep 248.

<sup>10</sup> *LaGrand Case*, *supra* note 2.

<sup>11</sup> *Avena Case*, *supra* note 1.

<sup>12</sup> *Sanchez-Llamas v. Oregon*, 126 S Ct. 2669 (2006).

<sup>13</sup> BVerfG, 2 BvR 2115/01 of 19 Sept. 2006 (hereinafter Vienna Convention Decision).

<sup>14</sup> Of course this hope was crushed as soon as Walter was executed despite the ICJ's ordering provisional measures to the contrary.

However, *LaGrand* was neither the first, nor the last, case on the subject to come before the ICJ: it was the case of the Paraguayan national Angel Breard that first reached the Court. Breard had been tried and sentenced to death in the state of Virginia in 1993. He had not been advised of his rights under Article 36 until 1996, at which point his state-level appeals had already been exhausted. While the state of Virginia never denied the violation of Breard's Article 36 rights, none of the appeals he filed after having been informed of those rights succeeded. Finally, in 1998, with Breard's execution date rapidly approaching, Paraguay filed suit against the United States for breach of the Vienna Convention, and in that same application asked the ICJ to order provisional measures requiring that the United States should urge the state of Virginia to halt Breard's execution pending a final decision by the ICJ. The United States, at the time a party to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes,<sup>15</sup> had to face the challenge. Within a few days, the Court held oral hearings and ordered provisional measures to the effect that the United States 'take all measures at its disposal' to ensure that Angel Breard would not be executed before the Court had a chance to rule on the matter. On 14 April 1998 Breard's simultaneous appeal to the Supreme Court was denied on the grounds that he had procedurally defaulted<sup>16</sup> any claim based on the Vienna Convention by not raising it in the state court proceedings. In dictum, the Supreme Court, discussing whether Article 36 created individual rights, stated that this would 'arguably' be the case, a phrase that was to be quoted in many decisions to follow. Breard was executed the same day. Paraguay initially decided to continue the ICJ proceedings against the United States, but shortly before its memorial was due to be submitted asked the Court to remove the case from its docket.<sup>17</sup>

*LaGrand* was thus the first of two Vienna Convention cases to reach a judgment on the merits (the other being the *Avena* case).<sup>18</sup> For the purposes of the present article, a short overview of the two cases will suffice.<sup>19</sup>

In 1982, Arizona State Police arrested two brothers, Karl and Walter LaGrand, after they attempted an armed bank robbery during which they murdered an employee and severely wounded another. Both were German nationals, having been born in

<sup>15</sup> Art. 1 of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, 18 Apr. 1961, 596 UNTS 487, 21 UST 325, reads as follows:

[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the court by an application made by any party to the dispute being a Party to the present Protocol.

As we shall see below, the United States withdrew from the Optional Protocol on 7 Mar. 2005.

<sup>16</sup> For an explanation of the procedural default rule see *infra* note 33 and accompanying text.

<sup>17</sup> In a similar case, the Canadian citizen Joseph Stanley Faulder was executed on 17 June 1999 in Texas despite an order of provisional measures issued by the Inter-American Commission on Human Rights seeking to halt his execution. Yet, in this case, the government of Canada did not pursue any international law remedies.

<sup>18</sup> *Avena Case*, *supra* note 1.

<sup>19</sup> For an in-depth discussion of the two cases see Simma and Hoppe, *supra* note 4.

Germany to a German mother. However, the Arizona Superior Court tried and sentenced them to death without the brothers having been informed of their right to consular assistance.<sup>20</sup> It was not until 1992 that the German authorities became aware of the situation. Germany subsequently took extensive steps to save the brothers' lives. Yet, the state of Arizona executed Karl LaGrand on 24 February 1999. On 2 March 1999, the day before Walter LaGrand's execution date, Germany submitted an application and a request for provisional measures to the ICJ. Within less than 24 hours, the ICJ indicated provisional measures, namely that the 'United States should take all measures at its disposal to ensure that Walter LaGrand [is] not executed pending the final decision' of the ICJ.<sup>21</sup> Walter LaGrand was nevertheless executed on 3 March 1999. Germany continued to pursue the case. In its judgment of 27 June 2001, the ICJ held that the United States had breached its obligations to Germany and to Karl and Walter LaGrand under the Vienna Convention by not informing the brothers of their rights under the Convention and by not allowing 'review and reconsideration' of their convictions and sentences.<sup>22</sup> It furthermore held that, where US courts sentence German nationals to severe penalties without respecting their rights under Article 36, paragraph 1(b) of the Convention, 'the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention'.<sup>23</sup>

While decisions of the ICJ are only binding between the parties to a case,<sup>24</sup> the decision was of obvious significance to other states parties to the Convention which faced similar conduct on the part of the United States to the detriment of their nationals. Mexico, whose nationals represent the largest foreign inmate population in US prisons, found itself confronted with a multitude of cases similar to that of the LaGrand brothers. Hence, on 9 January 2003, Mexico instituted proceedings before the ICJ to address the situation of some 50 of its nationals who had all been sentenced to death in the United States and whose rights under Article 36, paragraph 1(b), had not been respected.<sup>25</sup>

In its Judgment of 31 March 2004, the ICJ held that by not informing the Mexican nationals of their rights and by not notifying the Mexican authorities, the United States had breached its obligations under Article 36 of the Convention.<sup>26</sup> With regard to three individuals whose sentences had already become final, the ICJ held that the United States had violated its obligation to provide review and reconsideration

<sup>20</sup> See *State v. LaGrand*, No. CR-07426, Minute Entry (Pima County Superior Ct, 2 Mar. 1999).

<sup>21</sup> *LaGrand Case*, *supra* note 2, 9 at 16 (Order of 3 Mar. 1999—Request for the Indication of Provisional Measures).

<sup>22</sup> *LaGrand Case*, *supra* note 2, at 475.

<sup>23</sup> *Ibid.*, at 513.

<sup>24</sup> ICJ President Guillaume, however, stressed in his Declaration appended to the *LaGrand* judgment that there could not be an *a contrario* interpretation with respect to nationals of other states: *ibid.*, at 517. The ICJ then made the substance of this Declaration an integral part of the *Avena* judgment: *Avena Case*, *supra* note 1, at 69–70.

<sup>25</sup> *Ibid.*, at 17.

<sup>26</sup> *Ibid.*, at 53–54.

of their convictions and sentences as set out in the *LaGrand* judgment.<sup>27</sup> The ICJ further held that where the convictions and sentences had not yet become final, and in future cases, review and reconsideration undertaken by the US judiciary was to be the appropriate remedy for breaches of the Convention.<sup>28</sup> It was this ‘review and reconsideration’ requirement that placed the responsibility of dealing with violations of Article 36 rights with the national judiciaries.

## 2 Vienna Convention Claims in Germany and the United States – What Has Happened So Far?

Let us now move to the main focus of our inquiry: the implementation of the ICJ’s jurisprudence on the Vienna Convention in domestic judicial systems, namely the United States and Germany. In the following, I will first offer some background on the evolution undergone by Vienna Convention based claims in Germany and the United States respectively. This will provide sufficient grounding for the subsequent step of our inquiry: the comparison of the most recent judgments by the Supreme Court of the United States and the *Bundesverfassungsgericht*.

The implementation experience in Germany and the United States looks quite different at the outset: on the one hand, the United States, having been the direct addressee in both cases adjudicated on the merits by the ICJ, faced more immediate pressure to implement those judgments. The sheer number of cases in which a violation of the Vienna Convention was raised was impressive, with more than 100 cases brought in domestic courts after the ICJ cases had been decided. In Germany, on the other hand, there were no pertinent cases dealing with Article 36 other than the ones I shall discuss here. However, I will also take a look at the decisions implementing the *Görgülü*<sup>29</sup> judgment of the ECtHR, which provides important functional background for the German Vienna Convention decisions.

### *A Out of Many None? – Implementation of LaGrand and Avena in the United States*

Basically, there has been no implementation of Article 36 rights to speak of, with the exception of very few cases, most prominently that of Osvaldo Torres in Oklahoma.<sup>30</sup>

<sup>27</sup> *Ibid.*, at 57. With respect to those three individuals the ICJ had earlier passed provisional measures: see *Avena Case*, *supra* note 1 (Order of 5 Feb. 2003—Request for the Indication of Provisional Measures).

<sup>28</sup> *Ibid.*, at 70.

<sup>29</sup> App. No. 74969/01, *Görgülü*, judgment of 26 Feb. 2004; The Bundesverfassungsgericht handed down four decisions to ensure implementation: BVerfG, 2 BvR 1481/04 of 14 Oct. 2004, 111 BVerfGE 307 (hereinafter *Görgülü I*); BVerfG, 1 BvR 2790/04 of 28 Dec. 2004 (hereinafter *Görgülü II*); BVerfG, 1 BvR 2790/04 of 28 Jan. 2005 (hereinafter *Görgülü III*); BVerfG, 1 BvR 2790/04 of 10 June 2005 (hereinafter *Görgülü IV*).

<sup>30</sup> *Torres v. Mullin*, 540 US 1035 (2003); *Torres v. Oklahoma*, No. PCD-04-442, slip op. (Ct. Crim. App., 13 May 2004), reprinted in 43 ILM (2004) 1227, at 1229; *Torres v. State*, 120 P 3d 1184 (2005).



As the individual cases have already been treated in depth elsewhere,<sup>31</sup> I will confine my observations to a quick tour of the arguments routinely relied on by courts to deny redress for violation of Article 36 rights. This will be followed by a few remarks on the *Medellin*<sup>32</sup> case and the events surrounding it, including the US withdrawal from the Optional Protocol to the Vienna Convention. With few exceptions, courts in the United States relied on one or more of the following arguments, and denied review and reconsideration of violations of Article 36 rights or refused to grant remedies: first, courts tended to hold that Article 36 would not create individual rights that could be raised in a domestic court. Second, courts continued to apply the procedural default rule in its various state and federal formulations. Third, courts often short-circuited the process of review and reconsideration by holding that there would simply be no remedy for such a claim even if an Article 36 right existed, obviating the need for any further judicial action. All of these arguments stand in clear contrast with the ICJ's reasoning and decisions in *LaGrand* and *Avena*.

Regarding the first argument, both *LaGrand* and *Avena* clearly demand that where an individual's Article 36 rights have been violated, the person concerned must be afforded the possibility to bring a claim in a domestic court, resulting in 'review and reconsideration' of his judgment and sentence. The purpose of this review and reconsideration is to assess whether the individual in question was in fact prejudiced by the violation of his or her Article 36 rights. Most courts reached their decisions without even citing *LaGrand* or *Avena*, let alone engaging with the decisions on a theoretical level.

The procedural default rule,<sup>33</sup> in its various state and federal formulations, represents the second of the arguments that has been routinely used to throw out claims for review and reconsideration based on Article 36 of the Vienna Convention. US state courts on all levels simply continued to apply their respective state procedural default rules to reject Article 36 claims.<sup>34</sup> On the federal side, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), in conjunction with the Supreme Court's jurisprudence on the point, served to dismiss *habeas corpus* claims based on Article 36 in similar fashion.<sup>35</sup>

Lastly, to complete our tour of counter-arguments to Article 36 claims, mention must be made of the approach of jumping directly to the question of which remedies could be awarded if prejudice should indeed be found in the course of the review and reconsideration. By stating that there would be no remedy, courts routinely avoided the actual process of review and reconsideration. Obviously, this procedure in no way complies with the requirements set out by the ICJ, as a review and reconsideration that cannot award *any* remedy at all, cannot in the sense of the *Avena* decision be 'effective'.

<sup>31</sup> See, e.g., Simma and Hoppe, *supra* note 4.

<sup>32</sup> *Medellin v. Dretke*, 125 S Ct 2088, 2089 (2005).

<sup>33</sup> The rule stands for the principle of procedural law that a defendant who did not raise a claim at trial cannot raise it in subsequent appeals, state or federal—the claim is lost or in legalese 'defaulted'.

<sup>34</sup> For a detailed overview of this case law see Simma and Hoppe, *supra* note 4.

<sup>35</sup> A more detailed analysis of these aspects can be found in Ostrovsky and Reavis, *supra* note 4.

Against this background, the Supreme Court's decision to grant certiorari in the *Medellin* case in late 2004 fuelled the remaining hopes of Article 36 advocates. However, on 28 February 2005, shortly before oral arguments were scheduled to take place, President Bush issued a 'Memorandum for the Attorney General', which ordered the state courts in which the trials of the *Avena* defendants had taken place to 'give effect to the decision' of the ICJ in *Avena*.<sup>36</sup> A few days later, on 7 March 2005, the United States denounced the Optional Protocol to the Convention. The White House meant business: the existing cases addressed by the ICJ were thus to be wound up in state courts, and presumably no others would ever follow given that the ICJ's basis for jurisdiction had been taken away. This, however, can in no way abrogate the obligation of the United States as clarified by the ICJ's rulings in *LaGrand* and *Avena*, where it held that should nationals of Germany or Mexico respectively nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, 'the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention'.<sup>37</sup> While this prospective element of the relief formally only addressed German and Mexican nationals, the ICJ stressed that no *a contrario* interpretation is possible, so the duty must extend to nationals of other states, too.<sup>38</sup>

The waters having been muddied by this government strategy, the Supreme Court did proceed to hold oral hearings in *Medellin*, but then went on to dismiss the case as improvidently granted, due to its suddenly much more complicated posture. However, the 5-4 decision to dismiss *Medellin* was accompanied by no less than three dissenting opinions supporting the argument that US courts should interpret Article 36 in accordance with the ICJ holdings in *LaGrand* and *Avena*.

Having thus retraced the rather grim picture of non-implementation of the ICJ's jurisprudence on the Vienna Convention in the United States, let us now shift to the German experience in that regard.

<sup>36</sup> The text of the memorandum reads as follows: '[t]he United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (*Mexico v. United States of America*) (*Avena*), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

[Signature]', available at: <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

<sup>37</sup> *LaGrand Case*, *supra* note 2, at para. 128(7); *Avena Case*, *supra* note 1, at para. 153 (11).

<sup>38</sup> *Avena case*, *supra* note 1, at para. 151. See also *supra* note 23.



## B The German Experience – The Principle of Openness for International Law and the Implementation of ECtHR Decisions

While there has been no significant German jurisprudence on the issue since *LaGrand* and *Avena* with the exception of the decisions I shall discuss below, the *Vienna Convention Decision* can be viewed as a continuation of cases dealing with the implementation of ECtHR judgments by German courts.<sup>39</sup> A prior decision by the 2. *Senat* of the *Bundesverfassungsgericht*,<sup>40</sup> the first in what should become the somewhat famous *Görgülü* series of cases addressing the implementation of a decision of the ECtHR provides interesting parallels.<sup>41</sup> The *Görgülü* case dealt with the right of a father to make contact with his child born out-of-wedlock. The mother had given the child up for adoption, and the father sought the right to contact with his son through court proceedings. Having failed to secure this right through the German court system, he finally took his case to the ECtHR.<sup>42</sup> The ECtHR found in favour of the plaintiff and decided that the adoption finalized against his will and the denial of his right to contact with his son constituted a violation of Article 8 of the European Convention on Human Rights (ECHR). After a lower court failed to implement the decision, the case was appealed to the *Bundesverfassungsgericht*.

The *Oberlandesgericht Naumburg* had failed to implement the ECtHR decision in *Görgülü*,<sup>43</sup> and instead stated that such decisions would only bind Germany as a state but not its organs. Thus, the lower court had reasoned, the effect of such judgments would remain confined to the remedies awarded.<sup>44</sup> This interpretation did not fare well with the *Bundesverfassungsgericht*: the 2. *Senat*, referring to the openness of the Basic Law to public international law, found that Articles 25 and 59 para. 2 of the Basic Law serve to integrate general international law (here: custom and general principles), giving it precedence over non-constitutional federal laws, and treaty law at the level of non-constitutional federal laws. At the same time, the Court cautioned that there is no general precedence of public international law over German domestic law, and expressed its continued adherence to a dualist perspective of the relationship between international law and domestic law.<sup>45</sup> The Court illustrated the scope of this principle by pointing out that, (only) as an exception, it would be possible for the legislature in accordance with this principle to disregard international law. Yet this

<sup>39</sup> For an early contemplation of the implementation of ECHR judgments in *dictum* see Frowein, 'Anmerkung zur Pakelli-Entscheidung des Bundesverfassungsgerichts (commentary and reprint of the decision)' [1986] *ZAÖRV* 286, available at: [http://www.zaoerv.de/46\\_1986/46\\_1986\\_2\\_b\\_286\\_294.pdf](http://www.zaoerv.de/46_1986/46_1986_2_b_286_294.pdf).

<sup>40</sup> The *Bundesverfassungsgericht* is divided into two *Senate* (panels), which are further subdivided into *Kammern* (chambers). For a short overview of its organization see the court's website at <http://www.bundesverfassungsgericht.de/en/organization/organization.html>.

<sup>41</sup> See *Görgülü I*, *supra* note 28; *Görgülü II*, *supra* note 28 (ordering provisional measures); *Görgülü III*, *supra* note 29 (rejection of challenge to order of provisional measures); *Görgülü IV*, *supra* note 28 (merits); At present there is an official translation only of *Görgülü I*, which is available at: [http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014\\_2bvr148104en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html).

<sup>42</sup> App. No. 74969/01, *Görgülü*, *supra* note 29.

<sup>43</sup> *Ibid.*

<sup>44</sup> See *Görgülü I*, *supra* note 29, at para. 17.

<sup>45</sup> See *ibid.*, at paras 33–34.

exception only applies if such action constitutes the only possibility to avoid a violation of fundamental principles of the constitution.<sup>46</sup> Moreover, as regards the interpretation of legislative acts by the courts, there is no *lex posterior* exception to this rule.<sup>47</sup>

On the interpretation of treaty law by international courts, the *Görgülü I* decision speaks of a duty of German courts to afford consideration to decisions of the ECtHR, but limits this duty to decisions in cases to which Germany is a party.<sup>48</sup> However, the Court also cautioned that not only the failure to consider, but also the schematic application of, ECtHR judgments against higher-ranking norms could violate fundamental rights. As regards the content of the duty to afford due consideration, the Court expounded a high standard worth quoting:

As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the ECHR, for example because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions, in particular also the fundamental rights of third parties. ‘Take into account’ means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the ECHR must be taken into account in making a decision: the court must at least duly consider it.<sup>49</sup>

So far so good. However, concerns have been raised that the *1. Senat* of the *Bundesverfassungsgericht* could have a different take on the matter. The opinions of that court in the later decisions in *Görgülü II* and *IV*,<sup>50</sup> dealt with an order of provisional measures and the subsequent decision on the merits after a lower court again failed to implement the ECtHR decision. There, a chamber of the *1. Senat* cites *Görgülü I* (which had been decided by the *2. Senat*), and offered an interesting, arguably different perspective. The decisions both employ (identical) language that seems more restrained than that quoted from *Görgülü I* above.

It is outside the scope of this article to analyse these formulations in detail. Yet, on its face this different formulation does not look incompatible with the interpretation of the duty to afford consideration as explained there.<sup>51</sup> It will remain an interesting subject of study to track whether future decisions by the respective Senate or chambers thereof will confirm this impression or rather expose a difference in interpretations between them.

With this background in mind, I turn now to the most recent cases: *Sanchez-Llamas*, and the *Vienna Convention Decision*.

<sup>46</sup> See *ibid.*, at para. 35.

<sup>47</sup> See *ibid.*, at para. 48.

<sup>48</sup> See *ibid.*, at para. 39. In this regard the *Vienna Convention Decision*, which I will discuss below, seems to afford the ICJ a special, more fundamental role, in that even decisions in cases to which Germany was not a party are held to give rise to a duty to afford due consideration (‘take into account’). This will be an interesting subject for study, especially should this interpretation come up again in a decision of one of the *Senate* or the court in full.

<sup>49</sup> See the translation of *ibid.*, *supra* note 41, at para. 62.

<sup>50</sup> *Görgülü II, IV*, both *supra* note 29.

<sup>51</sup> *Görgülü II, supra* note 29, at para. 28; *Görgülü IV, supra* note 29, at para. 34.

### 3 The Status Quo of Implementation: A Comparison of Judicial Reasoning

#### A The Facts and Procedural History

##### 1 Sanchez-Llamas

The recent Supreme Court decision regarding Article 36 rights addressed the consolidated cases of two petitioners: Moises Sanchez-Llamas, a Mexican national, was sentenced to a prison term in Oregon after having shot at a police officer in a gun battle. After his arrest and having been read his *Miranda* rights, he had made incriminating statements regarding the shootout. However, by the time of his trial he had become aware of his Vienna Convention rights and presented a motion to suppress his statements to the police on the grounds that his Article 36 rights had been violated. The state court denied that motion and Sanchez-Llamas was convicted and sentenced to prison. The Oregon Court of Appeals affirmed the judgment. The State Supreme Court also affirmed, concluding that Article 36 did not create rights to consular access or notification that a detained individual can enforce in a judicial proceeding. The defendant in the second case, Mario Bustillo, a Honduran national, received a prison term in Virginia for killing a man with a baseball bat. Bustillo was initially not informed of his rights under the Vienna Convention. His conviction and sentence were affirmed on appeal. He then filed a habeas petition in the state court arguing, for the first time, that authorities had violated his right to consular notification under Article 36. The court dismissed that claim as procedurally barred because Bustillo had failed to raise it at trial or on appeal. The Virginia Supreme Court found no reversible error.

##### 2 The Bundesverfassungsgericht's Vienna Convention Decision

Shifting to the German decision, the consolidated cases giving rise to the constitutional complaints before the *Bundesverfassungsgericht* involve two different sets of facts: four defendants were arrested following a murder in the red light milieu. One of them, a Turkish national, was subsequently arrested for the murder itself, while the other three defendants (a German and two Serbo-Montenegrins) were arrested for having ordered or instigated the hit. Neither upon his arrest nor at his arraignment was the Turkish main defendant informed of his rights under the Vienna Convention. At trial, he availed himself of his right to remain silent, and the court relied *inter alia* on his statements to the police to convict him.<sup>52</sup> The defendant did not specifically raise the violation of his Article 36 rights at trial. The main defendant and the other three

<sup>52</sup> The Court groups the defendants and claimants in the constitutional case using a combination of Roman and Arabic numerals to address their different positions and resulting constitutional claims separately. It is beyond the scope of this article to track the decision at that level of detail. Yet it deserves mentioning that one of the wrinkles so addressed is that the German and Serbo-Montenegrin claimants were actually claiming a derivative right to have the statement of the Turkish main defendant excluded, in a 'fruit of the poisonous tree' fashion, meaning that evidence that was obtained in violation of the law could never be legally introduced, no matter against whom (the German claimant could of course never claim an Art. 36 right himself).

defendants were sentenced to life in prison for murder and instigation to commit murder, respectively.<sup>53</sup>

In its decision of 7 November 2001, the *Bundesgerichtshof* (BGH) rejected the appeals of the defendants. The court held that, while Article 36 would indeed entail an individual right that could be relied on by a foreign national before a domestic court, this norm would, however, not contemplate the protection of the foreign national from his own careless statements to the police made before making contact with the respective consulate or before being notified of his rights under Article 36. Rather, Article 36 would seek to avoid a situation such that an accused could simply disappear in custody without anyone noticing. As the right to counsel and to remain silent would sufficiently protect the accused, any further protective effect of Article 36 would unfairly privilege a foreign accused. Hence, the BGH held that suppression of the statements of the accused would not be available as a remedy.<sup>54</sup>

The fifth claimant, a Turkish national, had been arrested in the aftermath of a robbery during which a struggle ensued, resulting in the death of the victim as a pistol accidentally discharged. The defendant was convicted to a prison term of 11 years. He was at no point prior to his trial advised of his rights under the Vienna Convention and did not specifically raise the issue at the initial trial.<sup>55</sup>

On appeal, he challenged his conviction *inter alia* relying on the violation of his Article 36 rights. In the course of the appeal, the *Generalbundesanwalt* (Attorney General) submitted a brief urging the BGH to deny the claim, arguing that Article 36 should be interpreted restrictively in that it would not protect the accused from statements he may have carelessly made to the authorities before making contact with his consulate or before having been advised of his rights under Article 36. The BGH denied the appeal, citing the Attorney General's position.<sup>56</sup>

## **B Status of ICJ judgments: The Duty to (Respectfully) Consider**

Faced with the ICJ's decisions in *LaGrand* and *Avena*, both the US Supreme Court and the *Bundesverfassungsgericht* had to grapple with the question of the degree to which the holdings of the ICJ interpreting an international treaty were binding on domestic courts.<sup>57</sup> I will discuss their respective approaches in turn.

### *1 Identifying the Respective Duty*

In the United States, the logical starting point, the Supremacy Clause of the US Constitution, mandates that 'all Treaties made, or which shall be made under the Authority

<sup>53</sup> *Vienna Convention Decision*, *supra* note 13, at paras 22–24.

<sup>54</sup> BGH, Judgment of 7 Nov. 2001, 5 StR 116/01, at 3–5.

<sup>55</sup> *Vienna Convention Decision*, *supra* note 13, at paras 27–29.

<sup>56</sup> BGH, Judgment of 29 Jan. 2003, 5 StR 475/02.

<sup>57</sup> This question is not to be confused with the status of the treaty itself in the domestic legal order. In Germany and the US a treaty has the status of a federal law, as acknowledged in the respective decisions: see *Vienna Convention Decision*, *supra* note 13, BVerfG at 53, *Sanchez-Llamas*, *supra* note 12, Breyer J., dissenting, at 9.

of the United States, shall be the supreme Law of the Land',<sup>58</sup> and thus binding on the Supreme Court as is the constitution. The majority acknowledges this, as well as the self-executing status of the Vienna Convention.<sup>59</sup> The Court thus begins with its own interpretation of the Convention, rather than that expounded by the ICJ. Picking up on a passage contained in an *amicus curiae* brief, the Supreme Court goes to great length to refute the contention that the United States could be 'obligated to comply with the Convention, as interpreted by the ICJ'.<sup>60</sup> Unfortunately, the decision is replete with general arguments as to the limited precedential value of ICJ judgments, such as their bindingness only between the parties to a case, among others. Yet, the Optional Protocol,<sup>61</sup> arguably delegating the power to interpret the Convention, is only afforded very limited space in discussing whether it could serve as grounds for such a duty. In fact, it is only addressed to note that '[w]hatever the effect of *Avena* and *LaGrand* before [the US] withdrawal, it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States'.<sup>62</sup> This, as Justice Breyer had remarked in the *Torres certiorari* case, still 'fails to answer the question whether the I.C.J. has been granted the authority, by means of treaties to which the United States is a party, to interpret the rights conferred in the Vienna Convention'.<sup>63</sup> Thus, having rejected a broader duty to follow the ICJ's interpretation in *LaGrand* and *Avena*, the Supreme Court still found that the decisions deserved the 'respectful consideration ... due an interpretation of an international agreement by an international court'.<sup>64</sup> I will discuss the content of this 'respectful consideration' below after a look at the *Bundesverfassungsgericht*'s position on the issue of the bindingness of the ICJ's decisions.

The *Bundesverfassungsgericht* in its *Vienna Convention Decision* for its part actually discusses right at the outset both the Opinion of the Supreme Court in *Sanchez-Llamas* and the Dissenting Opinion of Justice Breyer (which I will touch on below), which stressed the need to reflect in the 'respectful consideration' due to the ICJ the need for uniform treaty interpretation and the authority granted to the ICJ under the Optional Protocol to interpret the Vienna Convention.<sup>65</sup> The *Bundesverfassungsgericht* stresses a constitutional duty of German courts to take notice of and to take into account pertinent decisions of the competent international courts.<sup>66</sup> This duty also applies to the jurisprudence of the ICJ on consular rights. While the Basic Law does not mandate primacy of international law *per se*, its principle of openness towards international law extends to decisions of competent international courts based on the constituting

<sup>58</sup> Constitution of the United States, Art. VI.

<sup>59</sup> *Sanchez-Llamas*, *supra* note 57, at 11.

<sup>60</sup> *Ibid.*, at 18 (citing Brief for ICJ experts at 11)(emphasis in original).

<sup>61</sup> See *supra* note 15 and accompanying text.

<sup>62</sup> *Sanchez-Llamas*, *supra* note 57, at 20–21.

<sup>63</sup> *Torres v. Mullin*, 124 S Ct. 562 (Mem), 540 US 1035 (2003) (Breyer, J., dissenting).

<sup>64</sup> *Sanchez-Llamas*, *supra* note 57, at 20–21 (citing *Breard v. Greene*, 523 US 371, 375 (1998)).

<sup>65</sup> *Vienna Convention Decision*, *supra* note 13, at paras 20–21.

<sup>66</sup> *Ibid.*, at para. 54.

treaty.<sup>67</sup> This duty to afford consideration, the German *Berücksichtigungspflicht*, is thus conceptually very close to the ‘respectful consideration’ requirement faced by US courts. Yet, as one can gather from the present case, the extent and effect that such a duty represents in practice is very different. This can be assessed by looking at the handling of the respective duties by the Supreme Court and the *Bundesverfassungsgericht*.

## 2 *The Scope and Content of the Respective Duties*

Let us start with the US approach: in *Sanchez-Llamas*, the Opinion of the Court does not fill the consideration requirement with much substance, and respect cannot be understood too literally in the context of the decision. Crucially, the Court states that the ICJ’s reasoning overlooks the importance of procedural default rules in an adversarial system, rendering its interpretation of Article 36 inconsistent with the basic framework of such a system.<sup>68</sup> This finding leads the Court to reject the interpretation of the ICJ, resulting in the Supreme Court’s own interpretation of the Vienna Convention.<sup>69</sup> The duty to afford ‘respectful consideration’ thus seems reduced to a duty to take note of the respective decision. The Court is free to review the decision and to disagree with it. If this is the case, it is under no further obligation to consider it, and in the case at hand there was no attempt to align the two interpretations.<sup>70</sup> While the Opinion of the Court sorely disappoints in this respect, Justice Breyer’s dissent, joined in this respect by Justices Souter and Stevens,<sup>71</sup> offers some consolation in that it proposes a more substantive and less confrontational view of ‘respectful consideration’ of ICJ judgments. The dissent offers three arguments that urge closer consideration of ICJ judgments, specifically where the interpretation of the Vienna Convention is at issue: the first argument presented is that a need for uniformity in treaty interpretation as an important judicial goal urges such respectful consideration as ‘the ICJ’s position as an international court charged with the duty to interpret numerous international treaties (including the Convention) provides a natural point of reference for national courts seeking that uniformity’.<sup>72</sup> Secondly, Justice Breyer points out the considerable expertise of the ICJ in treaty interpretation,<sup>73</sup> and the fact that both the Supreme Court and lower courts have routinely looked for ICJ guidance in that field.<sup>74</sup> Lastly, the dissent criticizes the Opinion of the Court as being unprecedented in creating a conflict with a treaty interpretation by the ICJ, which is portrayed as artificially created by an unfair reading of the ICJ decisions, and urges that instead the duty to afford ‘respectful consideration’ should be implemented by trying to find wherever possible a reading of the ICJ interpretation that can be harmonized with the Supreme Court’s own

<sup>67</sup> The Court discusses the examples of the ECHR and the ICC: *ibid.*, at paras 55–56.

<sup>68</sup> *Sanchez-Llamas*, *supra* note 57, at 21–22.

<sup>69</sup> See, e.g., *ibid.*, at 23.

<sup>70</sup> See *ibid.*, Opinion of Justice Breyer, at 23.

<sup>71</sup> Ginsburg J. joined the dissent only as to its Part II, dealing with the issue whether the Convention gives rise to individual rights enforceable in a domestic court.

<sup>72</sup> *Sanchez-Llamas*, *supra* note 57, Breyer J., dissenting, at 20.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, at 21–22 (providing two full pages of references).



jurisprudence and relevant domestic norms.<sup>75</sup> Unfortunately, this broader and more cooperative understanding of the duty to afford respectful consideration only found the support of a minority of three Justices.

The *Bundesverfassungsgericht*, on the other hand, much more used to decisions being appealed to the European level and then entering the German legal order again, attributes much greater weight to its duty to afford consideration. As we have already seen above, the *Görgülü I*<sup>76</sup> decision mandates that a court can never ignore the decision of a competent court, and it has to explicate and justify its reasoning if it decides not to follow that decision. Moreover, where the competent court is charged with the interpretation of a treaty provision, the adoption of a competing interpretation seems very hard to justify on this standard. This does not mean, as the *Bundesverfassungsgericht* judges in *Vienna Convention Decision* observed, that a German court will always implement a decision of a competent international court. While this will be the case in the great majority of scenarios, a competing norm of higher rank (for instance, a conflicting constitutional norm) could lead a court to decide otherwise.

Specifically, the Court recalls its earlier decisions on the subject of the openness of the Basic Law towards international law, from which it derived the duty of national courts to consider the decisions of international courts created by treaty.<sup>77</sup> The duty to take into consideration does not attach to all norms of public international law, but only to those reflected in the *Grundgesetz* in Articles 23–26 (European Union, delegation of powers, and the role of public international law), Article 1 para. 2 (human rights), and Article 16 para. 2 line 2 (extradition to an international court). A decision of a German court dealing with these fundamental rights can be appealed to the *Bundesverfassungsgericht*; the claimant has to allege that the respective court defied or neglected to consider a decision of a competent international court.<sup>78</sup> In the cases before the Court, the specific right in question is the right to a fair trial (Article 2.1 *Grundgesetz*) in combination with the principle of the rule of law. The *Bundesverfassungsgericht* held that the BGH decisions violated these constitutional rights of the claimants by construing the provisions of Article 36 1 b 3 contrary to the ICJ's interpretation, without properly taking the latter into account.<sup>79</sup>

Based on the principle of openness of the *Grundgesetz* towards public international law, the Court again, as it did in the *Görgülü* cases, stresses the constitutional duty of German courts to take notice of and to take into account pertinent decisions of the competent international courts.<sup>80</sup> This duty also applies to the jurisprudence of the ICJ on consular rights. While the *Grundgesetz* does not mandate primacy of international law *per se*, its openness towards public international law extends to decisions of competent international courts based on the constituting treaty.

<sup>75</sup> *Ibid.*, at 23–24.

<sup>76</sup> *Vienna Convention Decision*, *supra* note 13.

<sup>77</sup> *Ibid.*, at para. 43.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, at para. 48.

<sup>80</sup> *Ibid.*, at para. 54.

The Court elaborates that decisions of the ICJ are to be implemented in German domestic law at least where they concern individual rights, as is the case in the *LaGrand* and *Avena* decisions. However, they do not directly displace German legal norms. Yet, at a minimum, German courts have a constitutional duty to take notice of and to take into account decisions of the ICJ in cases in the area of consular rights, where Germany is a party to the respective case.<sup>81</sup> However, this duty does not stop there. Wherever Germany has submitted to the interpretive jurisdiction of the ICJ or another competent international court, the duty to afford consideration ('take into account') applies. Specifically in the case of the Vienna Convention, the *Bundesverfassungsgericht* reasons that based on the openness of the *Grundgesetz* towards public international law, decisions of the ICJ on the Vienna Convention develop 'guiding force', in German *normative Leitfunktion*, due to the ICJ's authority in the interpretation of the treaty, even where Germany was not a party to the specific case. The prerequisite for such guiding force remains, however, that Germany recognizes the competence of the Court on the subject, for instance, by way of treaty (as in the case of the Optional Protocol to the Convention) or by way of a unilateral declaration.<sup>82</sup>

Hence, in those cases, and specifically in the case of the Vienna Convention, German courts have a duty to take notice of and to take into account the jurisprudence of the ICJ on the subject when construing the treaty's provisions.

Still, one could argue, as had already been criticized in the aftermath of the *Görgülü* case, that such a duty may be mushy and in practice lacking the necessary teeth. Yet, some aspects of the *Bundesverfassungsgericht's* judgment seem to suggest otherwise. Discussing the BGH decision of 7 November, the Court finds that the BGH did not introduce 'fundamental rights of third persons or other constitutional norms'<sup>83</sup> that would have necessitated a different conclusion than that of the ICJ. If this can be taken as an illustration of the rank of argument that would be expected to justify a deviation from a decision of a competent international court, it becomes clear that the Court is hanging the bar rather high. Moreover, it becomes apparent that this decision, rendered by a chamber of the 2. *Senat* (*Görgülü I* had been decided by the 2. *Senat* in full, see *supra* Section 2B), employs again more sweeping language as regards the duty to implement decisions of international courts and specifically the ICJ. As already pointed out, it will be important to track the evolution of this jurisprudence, including the potential differences between the 1. and 2. *Senat* in more detail in the future.

### *C Does the Vienna Convention Create Individual Rights?*

The question whether the Vienna Convention creates individual rights, while important, was less central to either of the decisions. As we have seen, the Supreme Court simply refused to decide it. If at all, it seems that there might have been the potential

<sup>81</sup> *Ibid.*, at para. 60.

<sup>82</sup> *Ibid.*, at para. 61.

<sup>83</sup> *Ibid.*, at para. 69.

for a majority of the Justices to answer the question in the affirmative (Justice Ginsburg and the three dissenters explicitly stated their affirmative views), which may have been avoided by the majority's compromise to just cut out the issue and to retreat to the indefinite *Breard* language.<sup>84</sup> On the German side, the BGH, i.e. the federal court the *Bundesverfassungsgericht* had vacated, acknowledged in its decisions of 7 November 2001 and 29 January 2003 that the Vienna Convention does indeed create individual rights.<sup>85</sup> The lack of initiative on the part of the Supreme Court has, of course, much worse implications for the continuing jurisprudence of lower courts at the state and federal levels in the United States, as they continue to be free to quash actions based on the Vienna Convention by simply holding that the Convention does not create individual rights, as already outlined in Section 2A above.

### D Suppression as a Remedy

The second question accepted by the Supreme Court for *certiorari* in *Sanchez-Llamas* concerned whether a failure to notify a foreign detainee of his rights under the Vienna Convention results in the suppression of his statements to police. The Court took up the question whether the Supremacy Clause would compel it to create a remedy in state courts. The Court held to the contrary: in the case of individuals in state courts, the majority argues, this only holds where the respective treaty explicitly or implicitly provides for a specific remedy. The Court proceeds to hold that the Vienna Convention does not provide for such a remedy, and that state practice around the world would point the same way.<sup>86</sup> As already pointed out above, the Supreme Court interpreted the Convention on its own, without deference to the ICJ's interpretation of it. The majority's negative answer is regrettable from the point of view of the petitioners. Nevertheless, from the simple viewpoint of trying to reconcile the Supreme Court decision with *LaGrand* and *Avena*, there is arguably no conflict: taking the ICJ word for word, it did not hold more than that there has to be a meaningful remedy for Article 36 violations. The choice of which remedy this would ultimately be was expressly 'left to the United States'. Yet, the conclusion by the Supreme Court is regrettable inasmuch as it goes beyond the call of the question to actually rule that suppression of a statement made to authorities will never be an appropriate remedy for a violation of a defendant's Article 36 rights.<sup>87</sup> While it is certainly true that suppression of a statement is a

<sup>84</sup> The dissenting opinion penned by Breyer J. emphatically affirms that Art. 36 creates individual rights: '[w]here language, the interpretation of the treaty taken separately or together so strongly point to an intent to confer enforceable rights upon an individual, I cannot find in the simple fact of the Executive Branch's contrary view sufficient reason to adopt the Government's interpretation of the Convention': *Sanchez-Llamas*, *supra* note 57, Breyer J., dissenting, at 15.

<sup>85</sup> BGH, Judgment of 7 Nov. 2001, *supra* note 54; BGH, Judgment of 29 Jan. 2003, *supra* note 56. The court, however, then proceeded in each case to hold that the rights would not be meant to protect the individual from statements he made to the police.

<sup>86</sup> *Sanchez-Llamas*, *supra* note 57, at 12.

<sup>87</sup> *Ibid.*, Opinion of the Court, at 8–15.

far-reaching measure, there may well be cases where no other remedy can appropriately redress the violation.<sup>88</sup>

On the German side, we have already seen above that the BGH had held in its decisions giving rise to the constitutional complaints that suppression would not be a remedy available for violations of the Vienna Convention, as such a remedy would not be contemplated by the protective function of the Convention. The *Bundesverfassungsgericht*, however, held that the BGH's interpretation that Article 36 would not concern the position of the accused in the criminal trial would be contrary to the ICJ's interpretation, according to which a violation of the individual's right to consular notification would give rise to a duty on the part of the violating state to allow review and reconsideration of the resulting judgment and sentence.<sup>89</sup> However, the *Bundesverfassungsgericht* also stressed that suppression of a statement is not a necessary remedy for all violations of Article 36.<sup>90</sup> The *Bundesverfassungsgericht* accordingly held that the BGH will have to consider the remedy for this violation of the claimants' constitutional right. Furthermore, the BGH will have to reassess, based on a construction of Article 36 that properly takes into account the ICJ's decisions in *LaGrand* and *Avena*, whether the claimants' convictions and sentences were in error; and, if so, award the appropriate remedy.<sup>91</sup>

### E Some Necessary Qualifications

To ensure a proper perspective regarding the two decisions, several issues unique to the respective cases should be kept in mind. Regarding the US Supreme Court, it is important to recall that it faced a decision that seemingly could have shaken up a pillar of its judicial system, namely the application of procedural default rules in general, even if formally only state procedural default rules were at issue. This was further complicated by the difficult dynamic between the federal and state judiciaries in the United States. Setting aside the state procedural default rules at issue in *Sanchez-Llamas* would have carried the connotation of federal meddling in state affairs. This is not to say that such interference would have been undue, or that it would necessarily give rise to much protest. Yet, a fair comparison of the German and US approaches must acknowledge that the *Bundesverfassungsgericht* simply did not face any such challenge, and is much more used to implementing decisions emanating from outside the German legal order, as in the case of decisions of the ECtHR or the ECJ.

Regarding the case decided by the *Bundesverfassungsgericht*, it is important to note that the import of the decision may be somewhat limited by two circumstances: on the one hand, it was decided by a chamber, the First Chamber of the Second Senate. As such it has the same binding force as all other judgments of the *Bundesverfassungsgericht* decided by a *Senat* or even the *Plenum*, and cannot be appealed. Yet the decision by a chamber connotes that it was not a 'fundamental issue' which would otherwise

<sup>88</sup> Cf., *ibid.*, Breyer J., dissenting, at 30.

<sup>89</sup> *Vienna Convention Decision*, *supra* note 13, at paras 68–69.

<sup>90</sup> *Ibid.*, at para. 68.

<sup>91</sup> *Ibid.*, at paras 70–74.

have been decided by a *Senat*, as Chambers can only decide constitutional complaints that are ‘manifestly well founded’.<sup>92</sup> While this circumstance may pose a certain risk that a future judgment by a *Senat* would differ from the present decision, the decision was unanimous and the composition of the chamber very balanced,<sup>93</sup> further strengthening the import of the chamber’s decision.

## Conclusion

The two decisions will certainly not be the last word in the ongoing debate and judicial activity about the proper implementation of the Article 36 rights of foreign nationals in the judicial systems of the parties to the Vienna Convention. They rather offer snapshots of where this development stands in two such systems – the United States and Germany, the parties which clashed in the first fully litigated case on the subject before the ICJ. In these snapshots, several dialogues become apparent: on the one hand, we find a dialogue between the ICJ and the national judiciaries that are charged with the implementation of the ICJ’s judgments. Alas, in *Sanchez-Llamas* this dialogue resembles more a *dialogue de sourds* than a fruitful conversation. Yet, even there it becomes apparent in the dissenting opinion of Justice Breyer that such a dialogue could be fruitful. Moreover, we should not forget that the issue of the Convention creating individual rights that can be enforced in domestic courts was only decided on a 5:4 majority, and that Justice O’Connor, who recently left the Supreme Court, had signalled in *Medellin* a different course. The *Bundesverfassungsgericht*, on the other hand, was more receptive, and the dialogue thus more fruitful. Much also depends on the right timing. Whilst as things unfolded Justice Breyer could only cite the (now reversed) decision of the *Bundesgerichtshof* and the *Bundesverfassungsgericht* could only cite a dissent of Justice Breyer, things may have turned out differently if the German case had been decided first. This speculation aside, we thus observe a second level of judicial discourse, namely between parties to the Convention, in this case Germany and the United States. By citing and considering the decisions of other judiciaries, national judiciaries can contribute to the uniform interpretation of the Convention guided by the ICJ, which is crucial for the continued success of the treaty and the rights of foreign nationals facing arrest or detention around the world.

In practical terms, the United States will still face many challenges based on the Vienna Convention in the not too distant future, especially since Texan courts recently refused to comply with President Bush’s order to afford the Mexican nationals whose rights had been adjudicated in *Avena* review and reconsideration in accordance with the ICJ decision in that case.<sup>94</sup> In Germany, a renewed decision by the

<sup>92</sup> For a quick overview of the organization of the BVerfG in English see <http://www.bundesverfassungsgericht.de/en/organization/organization.html>.

<sup>93</sup> Two of the judges, Di Fabio and Landau, are regarded as more conservative, while Hassemer could be seen as more ‘progressive’. Judge Hassemer is also highly regarded as an expert in criminal law.

<sup>94</sup> *Ex parte Medellin*, \_\_\_ SW 3d \_\_\_, 2006 WL 3302639 (Texas Crim. App. 2006).

*Bundesgerichtshof* will have to assess whether the respective claimants had been prejudiced by a violation of their Article 36 rights and, if so, clarify whether and when suppression of statements is an appropriate remedy. Surely, other cases will follow now that the *Bundesverfassungsgericht* has paved the way. Until then, at least one positive effect of the ongoing litigation around the world on the Vienna Convention, even if disappointing in the case of the United States, remains: with increased popular knowledge and awareness in the judicial professions about the Convention one hopes that, if nothing else, violations of Article 36 rights of foreign nationals, often due to simple ignorance of the law on the part of the authorities, will decline.