DEVELOPMENTS

Avena and *Sanchez-Llamas* Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations

*By Jana Gogolin**

A. Introduction

Much attention has been given to a series of decisions by the U.S. Supreme Court regarding the effects of the decisions of the International Court of Justice interpreting the Vienna Convention on Consular Relations.[1] On 19 September, 2006, the German *Bundesverfassungsgericht* (BVerfG - German Federal Constitutional Court), has made its first judgment on the issue.[2] The decision is significant for international law and even more specifically for U.S. jurists: Its outcome differs significantly from the U.S. Supreme Court decisions.

Article 36 para. 1 b of the Vienna Convention on Consular Relations (hereinafter "VCCR") obliges the authorities of a member state to inform a foreign national detainee about the detainee's right to notify his or her consular post about the arrest, without delay.[3] This duty is often ignored and as a consequence many arrested individuals in various member states are not able to receive support from their consular posts. This raises the question of the impact of such omissions on a subsequent conviction.

The International Court of Justice has addressed this question in two important decisions: In LaGrand, it held that the violation of the duty to inform violates a right of the detainee to be notified without delay, as well as a right of his home

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[1] *See* Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006); Medellin v. Drake, 544 U.S. 660 (2005); Beard v. Greene, 523 U.S. 371 (1998).

[2] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, (Sept. 19, 2006) *available at* http://www.bundesverfassungsgericht.de/ entscheidungen/rk20060919_2bvr211501.html.

[3] *See* Vienna Convention on Consular Relations (hereinafter "VCCR") art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

state, which it is deprived "of the possibility […] to render the assistance provided for by the Convention to the individuals concerned."[4] In Avena, the Court affirmed this decision, adding that the notification has to occur upon the individual's detention, but not necessarily upon his examination.[5] A violation of Article 36 para. 1 b of the VCCR requires a review and reconsideration of both the conviction, and the sentence in this case.[6] An individual has to have a procedure "which guarantees that full weight is given to the infringement of his rights [as] set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration."[7] No domestic rule can exclude the possibility of such a review.[8]

US Courts have drawn relatively narrow consequences for US law. The US Supreme Court held that while the interpretation by the ICJ requires "respectful consideration," its implementation is still governed by the procedural rules of the forum state.[9] Under U.S. law, a claim usually cannot provide relief in federal courts unless it has been raised previously in state courts.[10] In addition, the Supreme Court denied any possible causal relationship between the violation of the VCCR and the conviction.[11] Even after the ICJ judgments, the Supreme Court rejected any reconsideration of its interpretation of the VCCR, arguing that the judicial power rests in one Supreme Court and that the power includes the interpretation of treaties under the U.S. Constitution.[12] Therefore, it rejected any binding effect or enforceability of ICJ decisions in U.S. courts.[13] However, it did not rule on the question of whether the VCCR grants judicially enforceable rights.[14]

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[4] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 515 (June 27).

[5] Case concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 29, 71 (Mar. 31).

[6] *LaGrand*, 2001 I.C.J. at 496-97.

[7] *Id.; Avena*, 2004 I.C.J. at 56- 57, 65.

[8] *LaGrand*, 2001 I.C.J. at 496-97; *Avena*, 2004 I.C.J. at 56- 57, 65. Therefore, the U.S. procedural default rule was rejected.

[9] Beard v. Greene, 523 U.S. 371, 375 (1998).

[10] *Id.* at 377. Furthermore, it rejected an exception based on the "alleged novelty" of the claim.

[11] *Id.*

[12] Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2672 (2006) (citing U.S. CONST. art. III, §§ 1, 2). *See also* Curtis Bradley, *Sanchez-Llamas v. Oregon*, 100 Am. J. Int'l L. 882 (2006).

[13] *Sanchez-Llamas*, 126 S.Ct. at 2673.

[14] *Id.* at 2671.

While the judgments of the ICJ against the United States did not cover the petitioners in former decisions, Medellin was one of the "other nationals" in Avena.[15] The United States was therefore under the direct obligation to implement the judgment with regard to Medellin.[16] For that reason, President G. W. Bush wrote a memorandum rejecting any direct effect of the judgments of the ICJ, stating instead that, the U.S. is "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."[17] Therefore, the Supreme Court rejected the habeas corpus relief of the petitioner, *inter alia*, because of the ongoing proceedings in the Texas Court of Criminal Appeals, which were based partly on the aforementioned memorandum.[18] In the meantime, the Texas Court decided against petitioner Medellin rejecting any binding effect of the memorandum as well.[19]

The German Constitutional Court has now taken a different route. In a decision of 19 September 2006, it held that German Courts are under a constitutional obligation to take into account the interpretation of the competent international courts in regards to treaties.[20] This obligation is only limited by the Constitution, e.g. by a violation of Basic Rights or an exceeding of its powers.[21]

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[15] *See* Case concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

[16] Statute of the International Court of Justice, art. 60, June 26, 1945 Date, 59 Stat. 1031, 1055 (statute).

[17] Brief for the United States as Amicus Curiae Supporting Respondent at 9, Medellin v. Drake, 544 U.S. 660 (2005) (No. 04-5928), *available at* www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-5928.mer.ami.pdf. Furthermore, the United States has also withdrawn from the Optional Protocol concerning the Compulsory Settlement of Disputes in order to avoid further judgment. Announcement, U.S. State Department, All Consular Notification Requirements Remain in Effect (last visited March 9, 2007), *available at* http://travel.state.gov/news/ news_2155.html.

[18] Medellin v. Drake, 544 U.S. 660, 666-67 (2005).

[19] *Ex parte* Medellin, 206 S.W.3d 584 (2006).

[20] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 22 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[21] *Id.*

B. The Decision[22]

The facts in the German case are very similar to those with which US courts had to deal. The first complainant is a German domiciliary of Turkish nationality arrested and charged with murder. The police notified him of his right to remain silent and his right to an attorney of his choice, but not of his rights under Article 36 of the VCCR, although the police and the presiding judge knew his nationality.[23] The complainant remained silent during the trial and was convicted based, among other things, on the records of his police interrogation. His accomplices, also complainants in this case, were also convicted based on the same evidence. His appeals to ordinary courts, which were based, *inter alia,* on the violation of Article 36 of the VCCR, were unsuccessful. The Bundesgerichtshof (BGH - Federal Court of Justice), as the final instance for criminal matters, rejected the appeal holding that the notification requirement under Article 36 of the VCCR, *inter alia,* does not grant any additional protection for the individual.[24] It also rejected any possible influence on the outcome of the case.[25] Although the BGH cited judgments by the ICJ, it did not apply them when interpreting the issues before it.[26] Neither did it distinguish its interpretation from the ICJ's,[27] nor did it justify its decision to divert from previous ICJ decisions in constitutional normative terminology: third party rights or other constitutional rights.[28] Therefore, after exhausting all appeals, the complainants filed a complaint of unconstitutionality (*Verfassungsbeschwerde)* to the BVerfG.[29] They claim that due to the missing instructions about the rights under the

[22] The outline and discussion of the decision is limited to the problems regarding Article 36 of the VCCR. Other claims, which were rejected, are only mentioned insofar as they are important for the discussion. *See* Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, paras. 38-43 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[23] The *Strafprozeßordnung* (StPO – German Criminal Procedure Code) in section 136, paragraph 1, requires this information explicitly. Under StPO section 163a, paragraph 4, these instructions have to be given "during the accused's first examination by officials in the police force." *Compare* Miranda v. Arizona, 384 U.S. 436 (1966) (establishing "Miranda warnings" under U.S. law).

[24] Bundesgerichtshof (BGH - Federal Court of Justice), 5 StR 116/01, (Nov. 7, 2001), http://www.bundesgerichtshof.de.

[25] *Id.*

[26] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 69 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[27] *Id.*

[28] *Id.*

[29] Under article 93, paragraph 1, sentence 4a of the *Grundgesetz* (GG - Basic Law/Constitution), individuals can file complaints of unconstitutionality against the public authorities based on a claim of

Convention the records were improperly obtained and must, therefore, be excluded as evidence and furthermore, since the judgment in their case is based on such records, it must be reversed.[30]

The BVerfG considers this complaint "*offensichtlich begründet*" (obviously justified).[31] Since the interpretation of the Federal Court of Justice contradicts the one of the ICJ without any justification, the BGH has violated its obligation under the Basic Law to apply ICJ decisions regarding the Convention.[32] This gives rulings by the ICJ an important role in German law.

C. Legal Background

I. The Impact of International Treaties

1. The Status of the Convention under the GG

In Germany, ratified international treaties, such as the VCCR, have the status of federal law (Basic Law, Article 59 para. 2, sentence 1), and courts must apply them, pursuant to Article 20 para. 3, the same way as they apply federal law.[33] The Constitutional Court states that Article 36 of the VCCR is specific enough to be applied directly by the prosecuting authorities; that this norm should be regarded as "self-executing."[34] Its standards are therefore directly relevant for any German criminal trial.[35] Therefore, courts need to apply and interpret the notification requirements under Article 36 of the VCCR in the same way as they apply and interpret the German criminal procedure code. Since criminal procedure is regulated by federal law, the VCCR has the same status as the Criminal Procedure Code in Germany.[36]

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violations of their basic rights or of one of the enumerated rights. GRUNDGESETZ (GG – Basic Law/Constitution) art. 93, para.1, sentence 4a, German translation *available at* http://www.oefre.unibe.ch/law/lit/the_basic_law.pdf.

[30] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 34 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[31] *Id.* at para. 42 (regarding their complaint under Article 36 of the VCCR).

[32] *Id.* at para. 63.

[33] In effect since Oct. 7, 1971.

[34] *Id.* at para. 53. "The BVerfG quotes…" quotes the dissenting opinion of Justice Breyer in *Sanchez-Llamas v. Oregon,* 126 S.Ct. 2669 (2006).

[35] *See id.* at paras. 52-53.

[36] *See* GRUNDGESETZ (GG – Basic Law/Constitution) art. 74, para. 1, sentence 1.

This does not mean that violations of the VCCR can be challenged before the Federal Constitutional Court. The final interpretation authority with regard to federal statutes remains with the highest court in civil and criminal matters, the Federal Court of Justice. Although the BVerfG hears complaints regarding the unconstitutionality of statutes and/or the application of statutes by courts, its only standard of review is its interpretation of the Constitution.[37] In the United States, on the other hand, the judicial power of the Supreme Court extends to claims based on the Constitution and on federal law, including international treaties (which have the status of federal law under the US Constitution).[38]

In order to challenge the application and/or the disregarding of the law before the BVerfG successfully, the complainants need to claim that this is also an infringement of their constitutional rights. A somewhat complicated construction makes those claims possible:
Under Article 20 para. 3 of the Basic Law: "the executive and the judiciary are bound by law and justice."[39] The misapplication and/or disregarding of federal law can therefore constitute a violation of the Constitution. An individual cannot rest a claim on a violation of the said Article 20 para. 3 alone, but may invoke Article 2 para. 1 of the Basic Law, which protects the individual against infringements of his rights without legal basis. Thus, a violation of Article 20 para. 3 (i.e. an infringement of law and justice), is perceived to interfere with an individual's liberty and therefore to violate Article 2 para.1. Based on the combination of Articles 2 para. 1 and 20 para. 3 of the German Basic Law, the BVerfG has developed a fair trial doctrine, especially for criminal trials, even though the German Constitution does not specifically mention such a doctrine.[40] The fair trial principle serves mainly as a guideline for the legislature when regulating the procedure of courts and as a guideline for the interpretation of those rules by the judiciary; it does not substitute the application of specific statutes. Regarding the specific implementation and regulation of this doctrine, the Court defers to the legislature: the fair trial doctrine is implemented by the national criminal procedure code and by ratified international treaties.[41] Therefore, the notification requirement

[37] *Id.* at art. 93, para. 1, sentence 4a.

[38] U.S. CONST. art. III, § 2.

[39] GRUNDGESETZ (GG – Basic Law/Constitution) art. 20, para. 3.

[40] BVerfGE 38, 105 (111); BverfGE 57, 250 (274-275); BverfGE 86, 288 (317); *see* Erich Samson, *The Right to a Fair Criminal Trial in German Criminal Proceedings Law*, *in* THE RIGHT TO A FAIR TRIAL 513-32 (David Weissbrodt & Rüdiger Wolfrum eds., 1998).

[41] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, paras. 51-52 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

under Article 36 para. 1 b of the VCCR is also an implementation of the fair trial doctrine under the German Basic Law. A disregarding of the requirements under the VCCR constitutes, therefore, an infringement of the right to a fair trial.[42] Consequently, this construction makes it possible to bring claims before the BVerfG based indirectly on a violation of an international treaty although the treaty is not part of its standard of review. But to maintain its restricted standard of review, the BVerfG only examines whether the lower courts totally disregarded or grossly misapplied these treaties or laws; it rejects any notion to be another appellate instance.

In comparison, under the U.S. constitution, international treaties, like the Vienna Convention on Consular Relations, are defined as the "Supreme Law of the Land."[43] But its effect remains open, because the Supreme Court did not make a full decision on whether Article 36 para. 1 b of the Convention confers an individual right.[44]

2. Effects of the ICJ Decision on German Domestic Law

The issue in this case was the role in German law not of the VCCR, but of ICJ decisions on its interpretation. The contradicting interpretations of the VCCR between the ICJ and the U.S. Supreme Court illustrate this issue very well. Several times, the ICJ has ruled against the United States without achieving any effective results: The U.S. Supreme Court has repeatedly held that there is no violation of the rights under the Convention despite the ICJ decisions.[45] In other words, the U.S. Supreme Court does not recognize a binding effect of ICJ decisions in the United States, but merely refers to them with "respectful consideration."[46] It acknowledges the ICJ decisions to a degree, but not as authoritative and binding.[47]

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[42] *See id.* at para. 52.

[43] U.S. CONST. art. VI.

[44] *See* Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2677-78 (2006). *See also* Bradley, *supra* note 12, at 885-888.

[45] *See Sanchez-Llamas*, 126 S.Ct. 2669; Medellin v. Drake, 544 U.S. 660 (2005); Beard v. Greene, 523 U.S. 371 (1998).

[46] *Beard*, 523 U.S. at 375.

[47] Without accepting any binding effect of the ICJ decisions, President George W. Bush tried to achieve compliance with the ICJ decisions by writing a memo ordering the Courts to do so. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 9, Medellin v. Drake, 544 U.S. 660 (2005) (No. 04-5928). A recent decision rejected any binding effect of the memo. *See ex parte* Medellin, No. AP-75207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006).

The German Federal Constitutional Court provides a comparative analysis with a very different outcome. It starts its analysis by emphasizing the *Völkerrechtsfreundlichkeit* of the Basic Law (i.e., the favorable status of international law under the German Basic Law), and uses this as a guideline for its decision and its interpretation of the relevant articles.[48] Yet *Völkerrechtsfreundlichkeit* goes further than "respectful consideration" and amounts to an overarching commitment of the German Basic Law towards international law and governs the whole judgment. The BVerfG emphasizes the constitutional obligation of the German authorities to promote international cooperation (see Article 24) as a policy rationale.[49] The VCCR itself does not confer jurisdiction over disputes arising under it to the International Court of Justice, rather it is the Optional Protocol.[50]

The BVerfG points out that the decisions of international criminal courts are binding on German courts pursuant to Article 16 of the Basic Law.[51] Although the rights under Article 36 of the VCCR have some effect on the domestic criminal trial, the ICJ is not an international criminal court in this sense.

Therefore, an obligation to consider the ICJ decisions can only follow from the status of the Optional Protocol.[52] The Court emphasizes that since Germany ratified the Optional Protocol, it has the same status in Germany as the VCCR itself.[53] By ratifying the Optional Protocol, Germany agreed to comply with it, which includes the obligation to follow the decisions of the ICJ.[54] Furthermore, German authorities are obliged to avoid conflicts with international law, as much as possible.[55]

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[48] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 43 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[49] *Id.* at para. 54.

[50] Optional Protocol concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

[51] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 56 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[52] *Id.* at paras. 58-59. The Court leaves open whether article 36 of the VCCR is a human right in terms of GG article 1, paragraph 2.

[53] As federal law pursuant to article 59, paragraph 2 of the GG; Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 57 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[54] *Id.* at para. 60.

[55] *Id.; compare* The Charming Betsy Canon in U.S. law, established in Murray v. The Charming Betsy, 6 U.S. 64 (1804).

The important question is to what extent and in which cases such an obligation exists for German courts. Under international law, ICJ decisions have "no binding force except between the parties and in respect of that particular case."[56] Although the ICJ acknowledges that its decisions affect internal legal systems of the state-parties when it comes to norms that protect individual rights.[57] The BVerfG makes clear that ICJ decisions cannot overrule final domestic decisions and thereby rejects the argument that the effect of ICJ decisions can be decided by international law only.[58]

Therefore, it is necessary to analyze the German Basic Law to decide to what extent and in which cases an obligation for the German courts exists to follow an interpretation of the competent international court.

When Germany is a party to an actual dispute, the BVerfG acknowledges that German courts are inextricably bound by the ICJ decision in general.[59] This obligation does not follow from the ICJ Statute alone, but from the commitment of the German Basic Law to international treaties, and to their interpretations as made by competent international courts.[60]

When Germany is not a party to a given dispute, as is the case here, it is not bound by the ICJ decision under international law. Nonetheless, even States which are not a party to a given case, have to view ICJ decisions as guidelines, since the ICJ has the authority to interpret the Convention, as expressed in every decision it makes.[61] This authority follows from the acceptance of the compulsory jurisdiction of the ICJ in regard to these matters and as a result of the general commitment of the Basic

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[56] Statute of the International Court of Justice, art. 59, June 26, 1945 Date, 59 Stat. 1031, 1055 (statute); *see also* U.N. Charter art. 94, para. 1.

[57] In *Case concerning Avena and other Mexican Nationals*, the ICJ held that the clemency procedure is not in accordance with the requirements under article 36, paragraph 2 of the VCCR. A judicial review has to be open for the accused claiming a violation of article 36 of the VCCR. Case concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 29, 66 (March 31).

[58] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 59 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[59] *Id.* at para. 60.

[60] *Id.* As defined by article 59, paragraph 2 (together with article 20, paragraph 3) of the GG. GRUNDGESETZ (GG – Basic Law/Constitution) art. 59, para. 2, art. 20, para. 3

[61] *Id.* at para. 61 (following from the acceptance of the compulsory jurisdiction of the ICJ); *See also Avena*, 2004 I.C.J. at. 69.

Law towards international law.[62] Furthermore, the significance of the decisions also follows from the institutional status of the ICJ as the "principal judicial organ" of the United Nations, under Article 92 of the UN Charter. Finally, if states are to avoid judgments against them, they must comply with decisions against other states, since the ICJ will likely be consistent in its interpretation of the VCCR.[63] Therefore the German constitution sets an obligation upon German courts to take into account decisions of the ICJ even when Germany is not a party to the actual dispute.[64] The BVerfG establishes that the ICJ decisions serve as an orientation for courts, which necessarily includes a discussion of the relevant decisions and compelling reasons to deviate from them.[65] In the end, one of the rationales of rendering jurisdiction to international courts is to ensure uniformity in the interpretation of the law, which can only be fully accomplished when such decisions result in compliance.[66]

As a result, there is an obligation to conform to the decisions of international tribunals when (a) the Federal Republic of Germany is a party to the relevant international treaty, (b) it accepts the jurisdiction of the relevant international court, and (c) no superior law, like the German constitution, is violated by the implementation of a given competent international court decision.[67] The binding effect of decisions of international courts extends "to all state bodies and in principle imposes on them an obligation to terminate a continuing violation of [International Law] and create a situation that complies with [the relevant law] within the scope of their jurisdiction and without violating the binding force of statute and law."[68] This means that the Federal Court of Justice (BGH) was, in this case, constitutionally obliged to consider and apply decisions of the ICJ with regards to the Convention.[69]

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[62] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 61 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[63] *See also id.*

[64] *Id.* at para. 62.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] BVerfGE 111, 307 (329). (regarding the European Court of Human Rights); Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 55 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[69] *Id.*

Obviously, this obligation under the German Basic Law is more than mere "respectful consideration" or comity. It is an obligation that follows directly from the German constitution and requires a justification for non-compliance with the decisions of the competent international courts. In this regard, the German BVerfG gives more weight to the decision of the Executive and Legislative branches to accept the jurisdiction of an international court than the U.S. Supreme Court.

II. The Right to a Fair Trial

US Courts ignored the ICJ's request for a review with the argument that the ICJ has no jurisdiction over domestic procedure.[70] By contrast, the BVerfG gives the ICJ decisions a broader role. It holds that the BGH has violated its obligations under the German Constitution when it (a) interpreted Article 36 para 1 b of the VCCR in a way that stands in conflict with the interpretation of the ICJ, and (b) this divergent interpretation is not required by the German Constitution.[71]

An interpretation of Article 36 of the VCCR, in this case, was necessary to establish whether or not the records of this interrogation were excluded as evidence.[72] Under German law, improperly obtained evidence is excluded only when the violated criminal procedure norm influences the status of the accused in the procedure.[73] The Federal Court of Justice examined the scope of protection awarded by Article 36 of the VCCR, and rejected an exclusion of such evidence in this case.[74] Furthermore, it rejected any obligations for police officer under Article 36 para. 1 b of the VCCR.[75] This is in contrast to the ICJ decisions after which Article 36 para. 1 b of the VCCR is an individual right that an individual can invoke directly against the receiving state.[76] The rationale is connected with the purpose behind Article 36 which is to ensure that a detainee is able to receive the support of one's home

[70] Sanchez-Llamas v. Oregon, 126 S.Ct. 2669 (2006); Beard v. Greene, 523 U.S. 371 (1998).

[71] BVerfGE 111, 307 (329); Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 63 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[72] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 64 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[73] *Id.*

[74] Bundesgerichtshof (BGH – Federal Court of Justice), 5 StR 116/01, (Nov. 7, 2001), http://www.bundesgerichtshof.de.

[75] *Id.* It did so by narrowly defining "competent authorities" under article 36 of the VCCR.

[76] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27); *see also* Case concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 35 (Mar. 31).

country.[77] Article 36 para. 1 of the VCCR "therefore establishes an interrelated régime" that fully ensures protection to a foreign national pursuant to the ICJ.[78] It directly affects the defense possibilities of an accused.[79] Furthermore, the duty to inform a detainee of his right to contact a consular authority applies to all competent prosecuting state authorities, including the questioning police officers.[80]

Such obligation to notify by an authority under Article 36 of the VCCR is invoked by and from the moment in which the competent authorities know and/or have a reason to believe, that the detainee is a foreign national.[81] If not earlier, normally, this will coincide with the time of the arrest, when the authorities typically question the detainee for personal details.[82] It is not necessarily connected with the first or the beginning of an interrogation.[83] This stands in contrast to the required notification of the accused about his right to remain silent and his right of an attorney, which has to take place before the first interrogation.[84] This difference has to be taken into account when deciding about the exclusion of evidence in this case, especially in what respect his right to remain silent is concerned.[85]

Another interesting issue was whether foreigners residing mainly in the receiving state are to be excluded from the protection of the Convention as is the case here. The BVerfG rejects this teleological reduction of Article 36 para.1 b of the VCCR and establishes that the clear language of the Convention requires only the fulfillment of the "formal" criteria of nationality on behalf of a plaintiff in such cases.[86] Any other finding would directly run contradictory to the ICJ decision in its

[77] *LaGrand*, 2001 I.C.J. at 494. But article 36 of the VCCR does not grant the detainee any rights against his home state. This has to be examined in every case.

[78] *Id.*

[79] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 65 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[80] *Id.*

[81] *Avena*, 2004 I.C.J. at 44.

[82] *Id.*

[83] *Id.* at 29, 71.

[84] Strafprozeßordnung (StPO – German Criminal Procedure Code), § 136, para. 1, § 163a, para. 4.

[85] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 71 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[86] *Id.* at para. 66.

"LaGrand" judgment, which gave no consideration at all to the fact that the German convicts resided mainly in the United States.[87]

The ICJ further held, in regard to the legal consequences of such a violation, that when an individual cannot use his procedural rights to its full extent, due to a lack of consular support, that the individual's right has been violated to an extent that calls for a review of the criminal holding in such cases.[88] Although the exclusion of the evidence is not automatic, the individual has to have a possibility for review.[89] The BGH denied this possibility to the complainants.[90] Thus, the interpretation of the Federal Court of Justice contradicts the one of the ICJ without any justification for it.

The end result therefore, according to this argument, is that the complaint of unconstitutionality based on the right to a fair trial was successful in this case.

III. Consequences of the Violation of the German Constitution

Even given a successful complaint of unconstitutionality, the question of the consequences of such an infringement, is still left open. Since the BVerfG is not the final instance for the interpretation of federal statutes,[91] it remands the case to the BGH for further decision, consistent with its guidelines, taking into account the relevant ICJ decisions.[92] As the competent court, the Federal Court of Justice has the authority to decide whether the verdicts against the complainants are based on premises of procedural faults, and which legal consequences result from such, if so.[93] Thus, the Federal Court of Justice will examine whether the complainants'

[87] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) (The decision does not mention the claim).

[88] *Id.*

[89] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 68 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de; Andreas Paulus, *Anmerkung zum BGH Beschluß vom 7 November 2001 (Comment to the Federal Court of Justice Judgment of 7 November 2001)*, 23 STRAFVERTEIDIGER (StV) 58 (2003).

[90] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 68 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[91] *See* under C.I.1.

[92] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 70 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de. This is true as long as the BGH has still some discretion for its decision, as it does here.

[93] *Id.*

convictions are based on the procedural error.[94] The Federal Court of Justice has to reverse the convictions only, if otherwise the procedural error would be without any consequences.[95]

This raises the problem of fitting the ICJ decisions into German criminal procedure. The BGH has developed a consistent practice regarding the exclusion of improperly attained evidence.[96] Under German law, there is no full-fledged exclusionary rule; not every piece of evidence has to be struck down because of the means in which it is obtained.[97] Rather, a balancing of the involved interests is used.[98]

This practice can be applied to Article 36 of the VCCR, but modifications are necessary.[99] Generally, the notification requirement under Article 36 has a functional overlap with the information requirements in regard of the right to remain silent and to consult with an attorney under German procedural law as the consular post can support its national especially in this regard. These principles can be used for the VCCR as well, taking into account the differences. But unlike the information about the right to consult with an attorney under Section 136 para. 1 of the German Criminal Procedure Code, the obligation under Article 36 of the VCCR arises with the arrest of the individual and not "at the commencement of the first examination."[100] Therefore the German law is, in this regard, identical with the Miranda Warnings under U.S. law, which are also due at the commencement of the first examination.[101]

Finally, the question arises whether the other complainants are protected as well.[102] As the ICJ has established, Article 36 of the VCCR, is primarily focused on foreign

[94] In accordance with StPO, section 337. The BVerfG held that there has to be a causal relationship between the possible procedural error and the conviction, which might be difficult in this case.

[95] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 76 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de. For example, because of the special difficulty in proving the causal relationship.

[96] *Id.* at para. 71.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Case concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 48-49 (Mar. 31).

[101] Miranda v. Arizona, 384 U.S. 436 (1966).

[102] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 74 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

nationals in a country of an arrest/detention other than their country of origin.[103] The purpose of this norm is to protect a foreign national, since he is generally weaker in his legal and psychological position, compared to a native citizen.[104] Therefore, the issue requires an interpretation of the scope of protection of the norm.[105]

The most important question will be whether the procedural error has been forfeited. Generally speaking, a procedural error is forfeited, when the complainants do not raise the claim during the trial in the first instance.[106] The complainants must object the introduction of evidence during their trial, in order to gain standing to invoke Article 36 of the VCCR.[107] An introduction of evidence that goes unchallenged will not suffice, as a general evidentiary matter.[108] It is comparable with the U.S. procedural default rule, after which a claim is forfeited when it has not previously been raised in State courts.[109] It seems likely that the Federal Court of Justice, to achieve compliance with the ICJ decisions,[110] will not apply this rule; rather it will review the conviction, limited to the issue, if the judgment was based on the violation of the notification requirement.[111]

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[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] Andreas Paulus, *Anmerkung zum BGH Beschluß vom 7 November 2001 (Comment to the Federal Court of Justice Judgment of 7 November 2001)*, 23 STRAFVERTEIDIGER (StV) 57, 60 (2003).

[107] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, para. 73 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de (referencing StPO section 63a, paragraph 4, sentence 1 and section 136, paragraph 2).

[108] *Id.*

[109] *See* under A.

[110] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 496-97 (June 27); Case concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 56-57, 65 (Mar. 31).

[111] Andreas Paulus, *Anmerkung zum BGH Beschluß vom 7 November 2001 (Comment to the Federal Court of Justice Judgment of 7 November 2001)*, 23 STRAFVERTEIDIGER (StV) 60 (2003).

D. Some Comparative Remarks

I. Citation of the U.S. Supreme Court

The decision stands in an obvious relation to the parallel U.S. cases. The petitioner in the comparable proceedings before the U.S. Supreme Court referred to the proceedings in the German Federal Constitutional Court.[112] Now, in turn, the BVerfG cites the relevant U.S. Supreme Court decision.[113] Remarkably, Justice Breyer's dissent in the Sanchez-Llamas Supreme Court decision is the only part of the U.S. judgment that the BVerfG quotes to support its reasoning. The BVerfG uses this dissent in order to underline the "self-executing" character of the Vienna Convention within the German national legal system.[114] Thus, the Court refers to a U.S. Supreme Court decision without giving its majority opinion any precedential value. Rather, the Court quotes the U.S. judgment just like secondary material as appropriate to interpreting issues related to international law. This suggests a subtle critique of the position held by the majority in the US Supreme Court, a dissent in the transnational discourse of courts.

II. The Civil Law / Common Law Divide

Does the divergence lie in different procedural systems? In *Sanchez-Llamas*, the U.S. Supreme Court argues that the LaGrand decision of the International Court of Justice "is inconsistent with the basic framework of an adversary system,"[115] especially in regard of procedural default rules:

> Such a system relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. Procedural default rules generally take on greater importance in an adversary system than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other Convention signatories. Under the ICJ's reading of 'full effect,'

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[112] Reply Brief for Petitioner Moises Sanchez-LLamas, Sanchez-Llamas v. State of Oregon, 126 S.Ct. 2669 (2006) (No. 04-10566).

[113] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 2115/01, paras. 19-20 (Sept. 19, 2006), http://www.bundesverfassungsgericht.de.

[114] *Id.* at para. 53.

[115] Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2673 (2006).

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> Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication, such as statutes of limitations and prohibitions against filing successive habeas petitions. This sweeps too broadly, for it reads the 'full effect' proviso in a way that leaves little room for the clear instruction in Article 36(2) that Article 36 rights 'be exercised in conformity with the laws ... of the receiving State.'[116]

Since even the suspect's rights under Miranda are subject to procedural default rules, it rejects therefore the interpretation of the ICJ.[117] This would mean that Avena can be binding only on civil law countries.

The question is whether the Supreme Court is correct with its assumption. First of all, it is doubtful whether procedural problems legitimate the ignorance of a decision by the ICJ. Even the Supreme Court states it would grant an exception to the procedural default rules if the treaty requires it and the International Court of Justice interpreted it as a requirement of the treaty.[118] The comparison to the Miranda warnings cannot convince here, because no rule like Article 36 para. 2 of the VCCR is applicable in those cases.

Perhaps more important is a lesson arising from the BVerfG decision. Procedural default rules are important also in civil law countries like Germany. Exceptions are only granted in very limited circumstances.[119] They are not available for the German equivalent of the U.S. American Miranda warnings without any further reason. Also, restrictions on the possibility of filing appeals are not unknown to the German civil law system. Rather the German system has an interest in avoiding lengthy proceedings through all instances. It requires, therefore, the accused to raise his or her claims as early as possible. But despite of these limitations imposed by the German criminal procedure law, it is able to react flexibly on the requirements of Article 36 of the VCCR as interpreted by the ICJ and so avoids putting Germany in violation of its obligations under International Law. In contrast, the Supreme Court's reasoning cannot explain why U.S. law is unable to

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[116] *Id.*

[117] *Id.* (referencing Miranda v. Arizona, 384 U.S. 436 (1966)).

[118] *Id.*

[119] Andreas Paulus, *Anmerkung zum BGH Beschluß vom 7 November 2001 (Comment to the Federal Court of Justice Judgment of 7 November 2001)*, 23 STRAFVERTEIDIGER (StV) 60 (2003).

react flexibly in these cases. Therefore, the assumption of the U.S. Supreme Court cannot convince here and it cannot justify the divergent interpretation of the U.S. Supreme Court.

E. Conclusion

This judgment does not come as a grand surprise to German lawyers. Its significance lies in the uniqueness of the German approach, when compared to the U.S. Supreme Court judgments on ICJ related issues, and in its divergent approach to it.

It remains to be seen what impact the judgment might have. Certainly, this judgment shows much respect towards the ICJ, and to Germany's obligations under International Law, while at the same time reaffirming the prior status of the German constitution. It may provide valuable lessons for other countries for a more receptive and flexible treatment of ICJ decisions than that shown by courts in the United States.