

## The U.S. and German Interpretations of the Vienna Convention on Consular Relations: Is Any Constitutional Court Really Cosmopolitan?

Peter A. Heinlein

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Law Commons](#)

---

### Recommended Citation

Peter A. Heinlein, *The U.S. and German Interpretations of the Vienna Convention on Consular Relations: Is Any Constitutional Court Really Cosmopolitan?*, 25 Md. J. Int'l L. 317 (2010).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol25/iss1/15>

This Notes & Comments is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## COMPARATIVE CASE NOTE

# The U.S. and German Interpretations of the Vienna Convention on Consular Relations: Is Any Constitutional Court Really Cosmopolitan?

PETER A. HEINLEIN<sup>†</sup>

---

On September 19, 2006, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) considered two important questions with respect to the Vienna Convention on Consular Relations (VCCR): whether the VCCR is self-executing<sup>1</sup> and whether German courts have a constitutional obligation to take into account a competent international court's interpretation of a treaty.<sup>2</sup> The *Bundesverfassungsgericht* answered yes to both questions.<sup>3</sup>

About one and a half years later in *Medellin v. Texas*,<sup>4</sup> a sharply

---

<sup>†</sup> Editor-in-Chief, *Maryland Journal of International Law* 2009–10; J.D., University of Maryland School of Law, May 2010.

1. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 19, 2006, 2 BvR 2115/01, para. 53 (F.R.G.) [hereinafter BVerfG Case], available at [http://www.Bundesverfassungsgericht.de/entscheidungen/rk20060919\\_2bvr211501.html](http://www.Bundesverfassungsgericht.de/entscheidungen/rk20060919_2bvr211501.html).

2. *Id.* para. 48.

3. *Id.* The *Bundesverfassungsgericht* asserted in dictum that the VCCR is a self-executing treaty. Its resolution on Germany's constitutional obligations was a holding.

4. 552 U.S. 491 (2008).

divided U.S. Supreme Court<sup>5</sup> did not resolve the question of whether the VCCR is self-executing<sup>6</sup> but found that U.S. courts must give only “respectful consideration” to the interpretation of a treaty rendered by a competent international court.<sup>7</sup>

This Note aims to underscore and explain the contrast between the U.S. Supreme Court’s purportedly narrow view of international law and the “more cosmopolitan approach” of the *Bundesverfassungsgericht*.<sup>8</sup>

Part I provides a brief overview of the two primary cases under consideration, the *Bundesverfassungsgericht* case and *Medellín v. Texas*. Part II sets out some of the important legal background to the cases, namely the VCCR and its Optional Protocol; two decisions of the International Court of Justice (ICJ), *LaGrand* and *Avena*; and two decisions of the U.S. Supreme Court, *Breard v. Greene* and *Sanchez-Llamas v. Oregon*. Part III describes the respective approaches of the *Bundesverfassungsgericht* and the U.S. Supreme Court on three closely related issues: whether the VCCR is self-executing, whether the ICJ’s judgment on a VCCR claim is binding on domestic courts, and whether a domestic court must follow the ICJ’s interpretation of the VCCR. Part IV suggests that the courts reached different conclusions on these issues because they applied different law—not because they have different dispositions toward international law.

## I. THE CASES

### A. *The Bundesverfassungsgericht Case*

The appellant,<sup>9</sup> a Turkish national, was arrested on suspicion of

---

5. Both *Medellín*, 552 U.S. at 496, and *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 335 (2006), featured a majority opinion written by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito; a concurrence in the judgment by Justices Stevens and Ginsburg, respectively; and a principal dissent written by Justice Breyer, joined in *Medellín* by Justices Souter and Ginsburg and in *Sanchez-Llamas* by Justices Stevens, Souter, and, in part, Ginsburg.

6. 552 U.S. at 506 n.4.

7. *Id.* at 513 n.9 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

8. Frederic L. Kirgis, *International Law in the American Courts—The United States Supreme Court Decides to Enforce the I.C.J.’s Avena Judgment Relating to a U.S. Obligation Under the Convention on Consular Relations*, 9 GERMAN L.J. 619, 637 (2008).

9. For the sake of simplicity, this Note considers only the facts relating to the first appellant. Thus, the analysis reads as if there were only one appellant in the case, though in fact there were several. Also, since the appellant is not mentioned in

murder pursuant to a warrant issued by the local court of Braunschweig.<sup>10</sup> At the time of his arrest, the police—who were aware that the suspect was a Turkish national—notified him of his rights to remain silent and to an attorney but not of his right under Article 36 of the VCCR<sup>11</sup> to contact the Turkish consulate.<sup>12</sup> The custodial judge<sup>13</sup> informed the accused only of his rights under the rules of German criminal procedure.<sup>14</sup>

At trial, the defendant availed himself of his right to remain silent.<sup>15</sup> The court found the defendant guilty on the basis of, among other things, his statements to police during interrogation.<sup>16</sup> The regional court sentenced the defendant to life in prison.<sup>17</sup>

In a decision on November 7, 2001, the German Federal Court of Justice (*Bundesgerichtshof*) rejected as unsubstantiated the Turkish national's final criminal appeal.<sup>18</sup> The *Bundesgerichtshof* explained that foreign criminal defendants are guaranteed sufficient protection by the right to a defense attorney and the *Aussagefreiheit*—that is, the right of the accused to either remain silent or make a statement.<sup>19</sup> Additional protection, according to the *Bundesgerichtshof*, would afford the foreign criminal defendant an unjustified privilege compared to other criminal defendants.<sup>20</sup>

Having exhausted all criminal appeals, the Turkish national appealed his case to the *Bundesverfassungsgericht*, claiming that the *Bundesgerichtshof* had violated its constitutional duty to take into

---

the case by name, this Note refers to him by his status in the various stages of his legal proceedings.

10. BVerfG Case, *supra* note 1, para. 22.

11. The VCCR requires the competent authorities of the receiving state to inform the foreign detainee without delay of his right to communicate with the consular post of his state of origin. Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 [hereinafter VCCR].

12. BVerfG Case, *supra* note 1, para. 22.

13. The custodial judge (*Haftrichter*) generally presides over the defendant's arraignment.

14. BVerfG Case, *supra* note 1, para. 22. Specifically, the judge informed the accused of his rights pursuant to § 136 Abs. 1 Satz 2 StPO. *Id.*

15. *Id.* para. 24.

16. *Id.*

17. *Id.* para. 23.

18. *Id.* para. 26.

19. *Id.*

20. *Id.*

account the ICJ's interpretation of Article 36 in the *LaGrand* and *Avena* cases.<sup>21</sup>

#### B. *Medellín v. Texas*

José Ernesto Medellín, one of the Mexican nationals named in the ICJ's *Avena* decision, was convicted and sentenced in Texas state court for murder.<sup>22</sup> Relying in part on the ICJ's decision in *Avena*, Medellín filed for a writ of habeas corpus.<sup>23</sup> The Texas Court of Criminal Appeals dismissed the application as an abuse of the writ under state law, finding that Medellín had violated state procedural-default rules by raising his Article 36 claim for the first time on appeal.<sup>24</sup>

The U.S. Supreme Court granted certiorari to determine whether the ICJ's decision in *Avena* constitutes directly enforceable domestic law in U.S. state courts.<sup>25</sup>

### II. LEGAL BACKGROUND

#### A. *The Vienna Convention on Consular Relations & Its Optional Protocol*

The VCCR was drafted in 1963 to “contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems.”<sup>26</sup> Article 36 of the VCCR explains the circumstances under which a foreign national has a right to contact and communicate with the consulate of his home state. Article 36(1)(b) states that, when a national of one country is detained by the authorities of another, the authorities must both notify the consulate of the detainee's home state if the detainee so requests and inform the detainee without delay of his rights to contact and communicate with his home consulate.<sup>27</sup> The United States ratified

---

21. *Id.* para. 34.

22. *Medellín v. Texas*, 552 U.S. 491, 498 (2008).

23. *Id.*

24. *Id.*

25. *Id.* This Note does not discuss the other issue in *Medellín*, namely whether the President's Memorandum independently requires states to provide review and reconsideration of the claims of the fifty-one Mexican nationals named in *Avena* without regard to state procedural-default rules. *Id.*

26. VCCR, *supra* note 11, 21 U.S.T. at 79, 596 U.N.T.S. at 262; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006).

27. VCCR, *supra* note 11, 21 U.S.T. at 101, 596 U.N.T.S. at 292; *Sanchez-Llamas*, 548 U.S. at 338–39.

the VCCR in 1969.<sup>28</sup>

In the same year, the United States also ratified the Optional Protocol to the VCCR, which provides that “[d]isputes arising out of the interpretation or application of the [VCCR] shall lie within the compulsory jurisdiction of the International Court of Justice . . . .”<sup>29</sup> Although the United States had thus consented to the compulsory jurisdiction of the ICJ on matters arising out of the VCCR, the United States withdrew from the Optional Protocol on March 7, 2005, subsequent to the ICJ’s decision in *Avena*.<sup>30</sup>

### B. *The ICJ Decisions and Their Implications*

#### 1. The *LaGrand* and *Avena* Cases

The *LaGrand* case involved two German nationals living in the United States. Karl and Walter LaGrand were arrested on suspicion of armed robbery and murder, convicted, and sentenced to death by the Arizona state courts.<sup>31</sup> At trial, the LaGrands’ court-appointed counsel neither contacted the German consular authorities nor raised the issue of noncompliance with Article 36.<sup>32</sup> Before Germany filed a complaint against the United States in the ICJ, Karl LaGrand was executed on February 24, 1999.<sup>33</sup> On March 2, 1999, the ICJ issued an order to the United States to “take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in [the ICJ] proceedings.”<sup>34</sup> Despite this order, Walter LaGrand was executed on March 3, 1999.<sup>35</sup>

The ICJ held in *LaGrand* that, where law-enforcement authorities have failed to notify a foreign detainee of his right to contact and communicate with his home consulate and the foreign detainee is subsequently convicted and sentenced to a severe penalty, the receiving state must provide “review and reconsideration” of the conviction and the sentence by means of the state’s own choosing,

---

28. VCCR, *supra* note 11, 21 U.S.T. at 77, 596 U.N.T.S. at 261.

29. Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488.

30. *Medellín v. Texas*, 552 U.S. 491, 500 (2008).

31. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 475 (June 27).

32. *Id.* at 476.

33. *Id.* at 478.

34. *Id.* at 479.

35. *Id.* at 479–80.

taking into account the violation of Article 36.<sup>36</sup>

The *LaGrand* judgment thus “broke new ground” in two respects.<sup>37</sup> First, the ICJ had never before asserted that a state could be held accountable for failing to comply with the VCCR in the administration of the state’s criminal laws.<sup>38</sup> Second, the ICJ directed a sovereign state to incorporate into its domestic legal system a “specific new procedural step”—namely “review and reconsideration”—but left the means of carrying out this order to the discretion of the state.<sup>39</sup> By allowing the United States this flexibility, the ICJ substantially increased the likelihood that the United States would bring its conduct into compliance with the ICJ’s interpretation of the VCCR.<sup>40</sup> Indeed, a compliance order leaving the United States no discretion might have incited the United States to simply withdraw from the VCCR and disclaim its accompanying consular obligations.

In *Avena*, Mexico filed a claim against the United States in the ICJ arguing that the United States had failed to notify fifty-four Mexican nationals of their rights under Article 36 of the VCCR.<sup>41</sup> Mexico further argued that the United States was required to take the steps “necessary and sufficient” to ensure that the provisions of its municipal law gave “full effect” to the purposes of Article 36.<sup>42</sup> The ICJ agreed, holding that the United States had committed “internationally wrongful acts” in failing to notify the Mexican detainees and the Mexican consular posts and that the remedy to “make good” these violations was review and reconsideration of each Mexican national’s case by a U.S. court “with a view to ascertaining” whether the Article 36 violation “caused actual prejudice” to the defendant.<sup>43</sup>

The ICJ reasoned that the defendants may have procedurally defaulted their claims at least in part because the American

---

36. *Id.* at 514.

37. Jacob Katz Cogan, *AALS Panel—The Avena Case at the International Court of Justice (Mexico v. United States)—Arguments of the United States*, 5 GERMAN L.J. 385, 386 (2004).

38. *Id.*

39. *Id.*

40. *Id.*

41. Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 20–21 (Mar. 31).

42. *Id.* at 20.

43. *Id.* at 59–60.

authorities had failed to notify them of their rights under Article 36.<sup>44</sup> In such a situation, application of procedural-default rules violates Article 36 because it prevents full effect from being given to the Article's purposes.<sup>45</sup>

## 2. The Implications of *LaGrand* and *Avena*

The United States' argument before the ICJ in both *LaGrand* and *Avena* can be summarized as follows: the ICJ lacked the jurisdiction to pronounce on matters of U.S. domestic law.<sup>46</sup> In particular, the United States asserted that U.S. courts have the final say on whether to apply procedural-default rules in domestic criminal proceedings.<sup>47</sup> The ICJ disagreed, explaining that, while the application of procedural-default rules is not itself a violation of Article 36, "[t]he problem arises" when such application prevents a detainee from exercising his Article 36 rights.<sup>48</sup>

Article 36(2) of the VCCR provides that the consular rights protected in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which [those] rights . . . are intended."<sup>49</sup>

The United States argued that the ICJ was essentially "play[ing] the role of ultimate court of criminal appeal in national criminal proceedings . . ." <sup>50</sup> On this theory, while Article 36(1) may create judicially enforceable rights, these rights—just like the rights protected under the U.S. Constitution—must nevertheless be asserted within the framework of U.S. criminal procedure.

In contrast, the ICJ maintained that, pursuant to Article 36(2), it necessarily has the jurisdiction to examine the actions of U.S. courts "in the light of international law"; otherwise the ICJ would be unable

---

44. *Id.* at 57.

45. *Id.*

46. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 485 (June 27); *Avena*, 2004 I.C.J. at 33.

47. *LaGrand*, 2001 I.C.J. at 485. In *Avena*, the ICJ understood U.S. procedural-default rules to mean that "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*." 2004 I.C.J. at 56.

48. *Avena*, 2004 I.C.J. at 56 (citing *LaGrand*, 2001 I.C.J. at 497).

49. VCCR, *supra* note 11, 21 U.S.T. at 101, 596 U.N.T.S. at 274.

50. *LaGrand*, 2001 I.C.J. at 485.

to determine whether the United States had violated the VCCR.<sup>51</sup> Thus, according to the ICJ, the international legal rights created by the VCCR supersede the domestic legal requirements of U.S. criminal procedure.

How severe were these violations of the rights created by Article 36(1) of the VCCR? On one hand, one might judge the importance of a right based on whether it has attained the status of an international human right. On the other hand, one might take a more practical approach and focus on whether the right is enforceable.

Both Germany and Mexico asserted that the right to consular protection was a human right; but as two commentators explain, Mexico might have done better not to have forced the issue.<sup>52</sup> Germany and Mexico had good reason to make the claim, for the Inter-American Court of Human Rights had noted in a 1999 advisory opinion that “Article 36 of the Vienna Convention on Consular Relations . . . is part of the body of international human rights law.”<sup>53</sup> In *LaGrand*, the ICJ limited itself to the narrow issue of whether the United States had violated Article 36(1) of the VCCR. Having answered this question in the affirmative, the ICJ declined to pronounce on whether the right to consular assistance is a fundamental human right.<sup>54</sup> Former ICJ President Sir Robert Jennings applauded the ICJ’s exercise of judicial restraint, commenting that “all international lawyers should give heartfelt thanks” for the court’s forbearance.<sup>55</sup>

In *Avena*, however, neither Mexico nor the ICJ observed the wisdom of the Latin phrase *si tacuisses, philosophus mansisses*.<sup>56</sup> Rather, Mexico pushed the ICJ to declare that the right to consular

---

51. *Avena*, 2004 I.C.J. at 30.

52. Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellin—a Rocky Road Toward Implementation*, 14 TUL. J. INT’L & COMP. L. 7, 11–12 (2005).

53. I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of Oct. 1, 1999, Series A no. 16, at 64, [http://www.corteidh.or.cr/docs/opiniones/seriea\\_16\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf); Simma & Hoppe, *supra* note 52, at 12.

54. *LaGrand*, 2001 I.C.J. at 514.

55. Sir Robert Jennings, *The LaGrand Case*, 1 L. & PRAC. INT’L CT. & TRIBUNALS 13, 27 (2002); Simma & Hoppe, *supra* note 52, at 12.

56. Simma & Hoppe, *supra* note 52, at 12. The Latin phrase, attributed to the fifth-sixth century philosopher Boethius, means, “if you had been silent, you would have remained a philosopher.”

assistance is a fundamental human right, even though the court had already declined to decide the issue on nearly identical facts in *LaGrand*.<sup>57</sup> The ICJ, for its part, failed to exercise the restraint for which it was commended after *LaGrand*. Indeed, the court “shut the door rather forcefully”<sup>58</sup> on the claim that consular rights have attained the status of international human rights, noting that, though it need not decide the issue, neither the text nor the object and purpose of the VCCR, nor any indication in the preparatory work,<sup>59</sup> supports this assertion.<sup>60</sup>

Although Mexico’s overzealous approach may have backfired, perhaps the status of the rights is not as important as one might think. “What matters,” write the aforementioned commentators, “is that one has an individual right that one can assert and which is enforceable in the domestic courts of the receiving State, not whether [the] right is of an otherwise elevated or universal nature.”<sup>61</sup>

### C. *U.S. Supreme Court Decisions in the Context of International Law*

#### 1. *Breard v. Greene* and *Sanchez-Llamas v. Oregon*

In 1998—before both *LaGrand* and *Avena*—the U.S. Supreme Court held in *Breard v. Greene* that a Paraguayan national’s failure to raise an Article 36 claim in Virginia state court prevented him from raising the claim in a subsequent federal habeas corpus proceeding.<sup>62</sup> The per curiam opinion in *Breard* famously (or infamously) declared that, while the interpretation of an international treaty by a competent international court is entitled to “respectful consideration,” “it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”<sup>63</sup>

*Sanchez-Llamas v. Oregon* arose in part from the arrest and conviction of Mario Bustillo, a Honduran national, for first-degree

---

57. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 20 (Mar. 31); Simma & Hoppe, *supra* note 52, at 12.

58. Simma & Hoppe, *supra* note 52, at 13.

59. The ICJ used the term *travaux préparatoires*, which translates from the French as “preparatory work.”

60. *Avena*, 2004 I.C.J. at 61; Simma & Hoppe, *supra* note 52, at 13.

61. Simma & Hoppe, *supra* note 52, at 13.

62. 523 U.S. 371, 375 (1998) (per curiam).

63. *Id.*

murder.<sup>64</sup> After Bustillo's conviction and sentence were affirmed on appeal, a Virginia state court rejected as procedurally barred Bustillo's claim on habeas review—that he had been denied his Article 36 right to consular notification—because Bustillo had failed to raise that claim at trial or on appeal.<sup>65</sup>

In the U.S. Supreme Court, Bustillo argued that the Justices should reconsider the Court's procedural-default holding in *Breard* in light of the ICJ's decisions in *LaGrand* and *Avena*.<sup>66</sup> Chief Justice Roberts noted the argument of several *amici* that the United States is obligated to comply with the ICJ's interpretation of the VCCR.<sup>67</sup> Nevertheless, the Court adhered to its prior holding in *Breard* that procedural-default rules apply to treaty claims “no less” than to claims arising out of the U.S. Constitution itself.<sup>68</sup>

## 2. An International-Law Perspective on *Sanchez-Llamas*

In *Sanchez-Llamas*, the U.S. Supreme Court addressed for the first time the domestic effect of a binding judgment by an international tribunal.<sup>69</sup> Thus, the Court had the opportunity to consider the merits of what one international-law scholar has termed a “new world court order.”<sup>70</sup> The new world court order describes a relationship between domestic courts and international tribunals whereby domestic courts “act independently to comply with international tribunal judgments with little or no interference by the legislative or executive branches of a nation's government.”<sup>71</sup>

The *Sanchez-Llamas* Court, however, not only rejected the proposition that it was bound by the ICJ's judgments but also asserted that U.S. courts need not follow the ICJ's interpretations of the VCCR.<sup>72</sup>

It is important to understand this ruling in perspective. Was the

---

64. 548 U.S. 331, 340–41 (2006).

65. *Id.* at 341–42.

66. *Id.* at 353.

67. *Id.*

68. *Id.* at 360 (quoting *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam)).

69. Julian Ku, *Sanchez-Llamas v. Oregon: Stepping Back from the New World Court Order*, 11 LEWIS & CLARK L. REV. 17, 18 (2007).

70. *Id.* See also Julian Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006).

71. Ku, *supra* note 69, at 18.

72. *Sanchez-Llamas*, 548 U.S. at 348; Ku, *supra* note 69, at 18.

## 2010] IS ANY CONSTITUTIONAL COURT REALLY COSMOPOLITAN? 327

U.S. Supreme Court sharply divided on this issue—politically, ideologically, or otherwise? Was the Court’s decision, albeit on a novel point of law, a significant departure from its prior international jurisprudence? Did the Court act boldly and broadly in so holding, or did it wisely confine itself to the issue at hand?

First, although the U.S. Supreme Court was politically and ideologically divided in *Sanchez-Llamas*, it unanimously refuted the new-world-court-order contention that the Court was obligated to adhere to the ICJ’s judgments, even if those judgments contravened U.S. Supreme Court precedent or the view of the U.S. executive branch.<sup>73</sup> In fact, “[n]ot one justice endorsed or adopted” the philosophy of the new world court order.<sup>74</sup> Therefore, at least as far as the narrow issues involved in *Sanchez-Llamas* are concerned, the Court’s stance on international judicial comity cannot fairly be characterized as one reflecting the closed-mindedness of an arch-conservative, five-member majority.

Second, critics of the *Sanchez-Llamas* majority should bear in mind that the executive and legislative branches of the United States have a “well-established” power to violate or refuse to comply with international legal obligations, including those arising out of ratified treaties.<sup>75</sup> For example, the U.S. Supreme Court asserted in the 1888 case of *Whitney v. Robertson*, which involved a self-executing trade agreement with the Dominican Republic, that, if a statute and a self-executing treaty are inconsistent, “the one last in date will control the other.”<sup>76</sup> This is the so-called “last-in-time rule.”<sup>77</sup>

Similarly, while the Court stated in *The Paquete Habana* in 1900 that “[i]nternational law is part of our law,” it also suggested that customary international law may be superseded by a controlling act of the executive branch.<sup>78</sup> Thus, “[g]iven the long tradition of non-judicial enforcement of international tribunal judgments and the actual non-judicial mechanisms for enforcement contained in the ICJ system itself [e.g., the UN Security Council], the Court wisely gave

---

73. Ku, *supra* note 69, at 18.

74. *Id.* at 28.

75. *Id.* at 26.

76. 124 U.S. 190, 194 (1888). *See also* Ku, *supra* note 69, at 26.

77. Ku, *supra* note 69, at 26.

78. 175 U.S. 677, 700 (1900). *See also* Ku, *supra* note 69, at 26. While Ku considers Justice Gray’s suggestion about executive acts to be a holding, the statement may reasonably be read as mere dictum.

greater weight to the executive branch” than to the judgment of the ICJ.<sup>79</sup>

Finally, although the aforementioned international-law scholar supports much of the Court’s decision in *Sanchez-Llamas*, he suggests that its brief analysis of the status of ICJ judgments “leaves much to be desired.”<sup>80</sup> This is important, the scholar stresses, because the United States is party to a number of other tribunal systems and treaties that, like the VCCR, confer jurisdiction on the ICJ.<sup>81</sup> The scholar’s principal complaint is that Chief Justice Roberts’ majority opinion failed to provide a detailed analytical framework to assist courts, practicing attorneys, and academics in assessing the status of international-tribunal judgments.<sup>82</sup>

Clarity is certainly a virtue in any court opinion, and it is the special duty of the U.S. Supreme Court to provide guidance to lower courts and the legal community. But it is equally important for the Court to limit itself, as it did in *Sanchez-Llamas*, to the particular issues dispositive to the case at hand. Especially in the often-unchartered territory of international law, this Note takes the position that the Court should proceed at the slow and steady pace of the common law, avoiding overbroad pronouncements in anticipation, rather than resolution, of a given case.

### III. REASONING

Part III explains the respective approaches of the *Bundesverfassungsgericht* and the U.S. Supreme Court on three closely related issues: whether the VCCR is self-executing,<sup>83</sup> whether the ICJ’s judgment on a VCCR claim is binding on domestic courts,<sup>84</sup> and whether a domestic court is required to follow the ICJ’s interpretation of the VCCR.<sup>85</sup>

#### A. *Whether the VCCR Is Self-Executing*

The *Bundesverfassungsgericht* declared in no uncertain terms that Article 36 of the VCCR requires no lawmaking for its execution but

---

79. Ku, *supra* note 69, at 26.

80. *Id.* at 24.

81. *Id.* at 19.

82. *Id.* at 18–19.

83. *See infra* Part III.A.

84. *See infra* Part III.B.

85. *See infra* Part III.C.

rather is “self-executing.”<sup>86</sup> The court explained that Article 36, which occupies the status of federal law in Germany, contains provisions that are directly relevant to German criminal procedure, including preliminary proceedings—particularly when the accused is a foreign national of a signatory country to the VCCR.<sup>87</sup> Therefore, the *Bundesverfassungsgericht* reasoned, the norm established by Article 36 is sufficiently definite to be applied directly by German law-enforcement officials.<sup>88</sup>

In *Medellin*, however, the U.S. Supreme Court declined to reach the question of whether the VCCR is self-executing, explaining that the narrow question on review was whether the *Avena* judgment is binding on domestic courts.<sup>89</sup> Nevertheless, in an illustration of the Court’s division on these issues,<sup>90</sup> Justice Breyer wrote for three other justices in his *Sanchez-Llamas* dissent that “it is common ground” that the VCCR is self-executing.<sup>91</sup> In a jab to the *Sanchez-Llamas* majority, the *Bundesverfassungsgericht* cited this statement from Justice Breyer’s dissent alongside its own conclusion that the VCCR is a self-executing treaty.<sup>92</sup>

B. *Whether an ICJ Judgment on a VCCR Claim Is Binding on Domestic Courts*

The *Bundesverfassungsgericht* made clear that German public authorities are constitutionally bound by the ICJ’s decision on a VCCR claim in a case to which Germany is a party.<sup>93</sup> This is true, however, only where Germany has voluntarily submitted to the ICJ’s jurisdiction. Indeed, the *Bundesverfassungsgericht* stated that, if Germany had not ratified the Optional Protocol, the court would not have been required by the German Basic Law (*Grundgesetz*) to consider the ICJ’s decisions on claims arising out of the VCCR.<sup>94</sup> As noted above, the United States withdrew from the Optional Protocol

---

86. BVerfG Case, *supra* note 1, para. 53.

87. *Id.*

88. *Id.*

89. 552 U.S. 491, 506 n.4 (2008).

90. *See supra* note 5.

91. 548 U.S. 331, 372 (2006).

92. BVerfG Case, *supra* note 1, para. 53.

93. *Id.* para. 60. *See also* Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 1062, 3 Bevans 1179, 1190 [hereinafter ICJ Statute].

94. BVerfG Case, *supra* note 1, para. 60. *See also* ICJ Statute, *supra* note 93, 59 Stat. at 1062, 3 Bevans at 1190.

on March 7, 2005, subsequent to the ICJ's decision in *Avena*.<sup>95</sup>

Although the *Bundesverfassungsgericht* concluded in accordance with Article 59 of the ICJ Statute<sup>96</sup> that the binding effect of an ICJ judgment applies only between the parties and in respect of the particular case,<sup>97</sup> the *Bundesverfassungsgericht* also suggested that ICJ decisions may have a domestic legal effect beyond the confines of Article 59 of the ICJ Statute.<sup>98</sup> Based on the ICJ's determination in *Avena* that "the clemency process, as currently practised within the United States criminal justice system," is "not sufficient in itself to serve as an appropriate means of 'review and reconsideration,'"<sup>99</sup> the *Bundesverfassungsgericht* stated that decisions of the ICJ have domestic legal effect when, as in the case of the Turkish national, individual rights are at issue.<sup>100</sup> Thus, as a matter of German constitutional law, ICJ judgments may have some domestic legal authority even with respect to cases to which Germany is not a party.

The *Bundesverfassungsgericht* makes clear, however, that ICJ judgments do not overrule domestic judgments.<sup>101</sup> Therefore, the precise manner by which the judgments take legal effect cannot be determined solely on the basis of international law.<sup>102</sup>

In *Medellin*, the U.S. Supreme Court found that, of the Optional Protocol, the United Nations Charter, and the ICJ Statute, none "creates binding federal law in the absence of implementing legislation . . ."<sup>103</sup> And "because it is uncontested that no such legislation exists," the *Avena* judgment does not constitute "automatically binding domestic law."<sup>104</sup>

However, the Court did not decide the question of whether the binding force of an ICJ judgment—like an ICJ interpretation—

---

95. See *supra* note 30 and accompanying text.

96. The ICJ Statute organizes the composition and the functioning of the International Court of Justice. See ICJ Statute, *supra* note 93.

97. BVerfG Case, *supra* note 1, para. 59. See also ICJ Statute, *supra* note 93, 59 Stat. at 1062, 3 Bevens at 1190.

98. BVerfG Case, *supra* note 1, para. 59. See also ICJ Statute, *supra* note 93, 59 Stat. at 1062, 3 Bevens at 1190.

99. Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 66 (Mar. 31).

100. BVerfG Case, *supra* note 1, para. 59.

101. *Id.*

102. *Id.*

103. *Medellin v. Texas*, 552 U.S. 491, 506 (2008).

104. *Id.*

warrants only “respectful consideration.”<sup>105</sup> Finding this issue “not clear,” Chief Justice Roberts wrote in dictum that “nothing suggests” that the ICJ considers its judgments enforceable in the domestic courts of VCCR signatory nations.<sup>106</sup> Furthermore, the fact that the United States may conduct the required review and reconsideration by means of its own choosing, together with the ICJ’s “mere suggestion” that the “judicial process” is the best means of providing such review, confirms that domestic enforceability is not “part and parcel of an ICJ judgment.”<sup>107</sup>

*C. Whether a Domestic Court Must Follow the ICJ’s Interpretation of the VCCR*

The *Bundesverfassungsgericht* stated that German courts are constitutionally required to consider ICJ decisions on VCCR claims.<sup>108</sup> In this case, the court found that the *Bundesgerichtshof* had violated the *Grundgesetz* because its interpretation of Article 36(1)(b) of the VCCR contradicted that of the ICJ in *LaGrand* and *Avena*.<sup>109</sup> The *Bundesverfassungsgericht* summarized the inconsistency as follows.

In contrast to the *Bundesgerichtshof*, the ICJ determined that Article 36(1) creates a subjective right to consular support, effectively recognizing the individual’s right to defend himself.<sup>110</sup> All law-enforcement officials, including the arresting police in the preliminary proceedings, are required to inform individuals of this right.<sup>111</sup> By international law, a violation of these rights calls for review of the defendant’s sentence.<sup>112</sup> The purpose of the notification requirement in Article 36(1)(b) is to enable the individual to enjoy the support provided for in Article 36(1)(c).<sup>113</sup>

The *Bundesverfassungsgericht* explained that, as a matter of German constitutional law, a failure to adequately consider an ICJ decision violates the claimant’s constitutional right to a fair process in accordance with the freedom-of-action provision of the

---

105. *Id.* at 513.

106. *Id.*

107. *Id.*

108. BVerfG Case, *supra* note 1, para. 48.

109. *Id.*

110. *Id.* para. 65.

111. *Id.*

112. *Id.*

113. *Id.*

*Grundgesetz*<sup>114</sup> and the principle of due process.<sup>115</sup> The constitutional right to a fair process is derived not only from the norms of German criminal procedure but also from principles of international law.<sup>116</sup> Indeed, the respect for international law (*Völkerrechtsfreundlichkeit*) inherent in the *Grundgesetz* requires that German courts interpret the *Grundgesetz* as consistently as possible with Germany's international legal obligations.<sup>117</sup> The *Bundesverfassungsgericht* thus directed the *Bundesgerichtshof* to determine on remand the consequences of the constitutional violation on the Turkish national's criminal proceedings.<sup>118</sup>

The U.S. Supreme Court reaffirmed in *Medellin* that U.S. courts must give only "respectful consideration" to the interpretation of a treaty rendered by a competent international court.<sup>119</sup> The U.S. Constitution provides that the "judicial Power of the United States," which extends to treaties, is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>120</sup> This judicial power includes the duty "to say what the law is."<sup>121</sup> As Chief Justice Roberts explained in *Sanchez-Llamas*, for treaties to be given effect as federal law in the U.S. legal system, determining their meaning as a matter of federal law must remain "emphatically the province and duty of the judicial department,"

---

114. GRUNDGESETZ [GG] [Constitution] art. 2(1). The so-called freedom-of-action (*Handlungsfreiheit*) provision of the *Grundgesetz* states that "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." *Id.*

115. BVerfG Case, *supra* note 1, para. 48.

116. *Id.* para. 52. Pursuant to the *Grundgesetz*, "[t]reaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law." GG art. 59(2).

117. BVerfG Case, *supra* note 1, para. 54. U.S. jurisprudence contains a similar doctrine, the *Charming Betsy* Canon, which provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). The canon was discussed in neither *Sanchez-Llamas* nor *Medellin*, however, presumably because it applies to a court's interpretation of an act of Congress rather than a treaty.

118. BVerfG Case, *supra* note 1, para. 48.

119. 552 U.S. 491, 513 n.9 (2008) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

120. U.S. CONST. art. III, §§ 1, 2.

121. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006).

headed by the one Supreme Court established by the U.S. Constitution.<sup>122</sup>

With respect to the VCCR in particular, Chief Justice Roberts reasoned that neither the structure nor the purpose of the ICJ suggests that its interpretations were “intended to be conclusive” on U.S. courts.<sup>123</sup> Indeed, Article 59 of the ICJ Statute provides that ICJ decisions have “no binding force except between the parties and in respect of that particular case.”<sup>124</sup> Thus, a majority of the Supreme Court found in *Sanchez-Llamas* and reaffirmed in *Medellin* that there is “little reason” to think that the ICJ’s interpretations of the VCCR are binding on U.S. courts.<sup>125</sup>

#### IV. ANALYSIS

The *Bundesverfassungsgericht* and the U.S. Supreme Court have expressed different viewpoints on whether the VCCR is self-executing,<sup>126</sup> whether the ICJ’s judgment on a VCCR claim is binding on domestic courts,<sup>127</sup> and whether a domestic court is required to follow the ICJ’s interpretations of the VCCR.<sup>128</sup> Part IV highlights two key points that may put the courts’ decisions into better perspective.

First, the *Bundesverfassungsgericht* explained that ICJ decisions serve to orient signatory states to the ICJ’s authoritative understanding of the VCCR and thus can help the states to avoid future violations of the treaty.<sup>129</sup> But the ICJ’s interpretations of the VCCR *must* serve as a normative guideline for German courts because, by ratifying the Optional Protocol, Germany has submitted to the compulsory jurisdiction of the ICJ.<sup>130</sup> The United States, on the other hand, withdrew from the Optional Protocol.<sup>131</sup> As a result, Chief Justice Roberts considers it “doubtful” that U.S. courts should give “decisive weight” to the interpretations of the ICJ when the United States no longer recognizes that tribunal’s jurisdiction with respect to

---

122. 548 U.S. at 353–54 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

123. *Sanchez-Llamas*, 548 U.S. at 354.

124. ICJ Statute, *supra* note 93, 59 Stat. at 1062, 3 Bevans at 1190.

125. *Sanchez-Llamas*, 548 U.S. at 355. *See also Medellin*, 552 U.S. at 518.

126. *See supra* Part III.A.

127. *See supra* Part III.B.

128. *See supra* Part III.C.

129. BVerfG Case, *supra* note 1, para. 61.

130. *Id.* para. 60.

131. *See supra* note 30 and accompanying text.

claims arising out of the VCCR.<sup>132</sup>

Second, procedural-default rules play a more significant role in an adversarial system, such as that of the United States, than in the inquisitorial legal system characteristic of Germany and many of the other VCCR signatory states.<sup>133</sup> In an inquisitorial system, the magistrate—a representative of the state—may be held accountable for the failure to raise a legal issue.<sup>134</sup> In an adversarial system, however, this responsibility generally rests with the individual parties themselves.<sup>135</sup> Thus, not only was the United States not required to adopt the ICJ's interpretation of the VCCR; that interpretation was, at least to a majority of the U.S. Supreme Court, "inconsistent with the basic framework of [the] adversary system."<sup>136</sup>

As Justice Stevens explained in his *Medellin* concurrence, "One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation."<sup>137</sup> Hence, in *Medellin*—where "the honor of the Nation [was] balanced against [only a] modest cost of compliance"<sup>138</sup> and the entire U.S. Supreme Court agreed with President George W. Bush "that breach [of the VCCR] will jeopardize the United States' 'plainly compelling' interests in 'ensuring the reciprocal observance of the [VCCR], protecting relations with foreign governments, and demonstrating commitment to the role of international law'"<sup>139</sup>—the Court did well to respect our federal structure of government and the constitutional separation of powers.

This analysis suggests that both the *Bundesverfassungsgericht* and the U.S. Supreme Court were reasonable in their interpretations and applications of the law. Their decisions are not inconsistent but rather differ on account of the law that each court had to consider.

## V. CONCLUSION

One commentator has written that the U.S. Supreme Court has

---

132. *Sanchez-Llamas*, 548 U.S. at 355.

133. *Id.* at 357.

134. *Id.*

135. *Id.*

136. *Id.*

137. 552 U.S. 491, 536 (2008) (Stevens, J., concurring in the judgment).

138. *Id.* at 537 (Stevens, J., concurring in the judgment).

139. *Id.* (Stevens, J., concurring in the judgment) (quoting *Id.* at 524).

## 2010] IS ANY CONSTITUTIONAL COURT REALLY COSMOPOLITAN? 335

effectively “reinforce[d] U.S. insularity in a world of norms and institutions that can only function effectively if the United States participates willingly and complies with its international obligations.”<sup>140</sup> That may well be true. But the commentator may be mistaken in concluding that, while in recent years the executive branch has “marched to its own tune” in the international arena, now the U.S. Supreme Court has “quite unnecessarily joined in.”<sup>141</sup> It was the executive branch that withdrew the United States from the Optional Protocol after the ICJ’s judgment in *Avena*, not the federal judiciary.<sup>142</sup> Thus, despite exhortations that our Supreme Court adopt a “more cosmopolitan approach,”<sup>143</sup> this Note takes the position that a court can be only as cosmopolitan as reasonable interpretation and application of the law permits.

---

140. Kirgis, *supra* note 8, at 637.

141. *Id.*

142. *Medellín*, 552 U.S. at 500.

143. Kirgis, *supra* note 8, at 637.