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## COMMENT

### International Law: *Valdez v. State of Oklahoma* and the Application of International Law in Oklahoma\*

#### I. Introduction

“This court has before it a unique and serious matter involving novel legal issues and international law.”<sup>1</sup> The Oklahoma Court of Criminal Appeals chose these words to describe *Valdez v. State of Oklahoma*,<sup>2</sup> a case in which a Mexican national argued for postconviction relief from the death penalty on the basis of Article 36 of the Vienna Convention on Consular Relations (VCCR),<sup>3</sup> to which the United States is a party. Significantly, *Valdez* made the Oklahoma Court of Criminal Appeals one of the first state courts to address Article 36 since the International Court of Justice (ICJ) decided *Germany v. United States of America (LaGrand)*,<sup>4</sup> in which the ICJ interpreted the controversial provision.

Briefly stated, Article 36 grants foreign nationals the right to contact their consulate if they are arrested or detained in a foreign country.<sup>5</sup> Such notification allows the consulate to provide legal assistance to the foreign national, who may speak another language or be unfamiliar with the foreign nation’s legal system. As might be expected, local authorities sometimes fail to comply with Article 36. In the United States, such failures have prompted foreign nationals to file appeals based on what they consider to be a judicially enforceable right created by Article 36. However, U.S. courts have dismissed such appeals on the basis that Article 36 fails to create an individual,

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\* The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

The author would like to thank his wife for her patience and support and Professor Peter F. Krug for his advice and encouragement.

1. John Greiner, *Mexican National Granted Indefinite Stay of Execution*, DAILY OKLAHOMAN, Sept. 11, 2001, at 1A.

2. 2002 OK CR 20, 46 P.3d 703 (*Valdez II*).

3. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262 [hereinafter Vienna Convention].

4. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. (June 27), at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>.

5. Vienna Convention, *supra* note 3, art. 36, 21 U.S.T. at 100-01, 596 U.N.T.S. at 292, 294.

judicially enforceable right.<sup>6</sup> Furthermore, procedural default rules often prevent courts from reviewing Article 36 claims because the foreign national fails to raise the issue at the trial level or in prior appeals.<sup>7</sup> An obvious “catch-22” results: foreign nationals cannot raise timely Article 36 claims if they are not notified of their Article 36 rights until after trial.

Gerardo Valdez confronted Oklahoma’s procedural default rule in *Valdez* when he asserted his Article 36 rights before the Oklahoma Court of Criminal Appeals.<sup>8</sup> In asserting his rights, Valdez benefitted from the *LaGrand* decision, in which the ICJ interpreted Article 36 as (1) conveying an individual, judicially enforceable right to foreign nationals and (2) barring the use of the procedural default rule to prevent a court from reviewing a challenge to a conviction or sentence.<sup>9</sup> Valdez relied primarily on *LaGrand* and argued that its interpretation was binding on the Oklahoma Court of Criminal Appeals.<sup>10</sup> The court rejected Valdez’ arguments,<sup>11</sup> citing a 1998 U.S. Supreme Court decision upholding the application of the *federal* procedural default rule in adjudicating Article 36 claims.<sup>12</sup>

The *Valdez* decision contributes to the overarching issue of how international law, or, as in this case, a decision by an international tribunal, becomes part of domestic law. To address the question, we must first look to our domestic system and determine to what extent it allows the incorporation of international law. In the U.S. federalist system, this issue becomes more complex. We must consider how an individual state should address a question of international law that has not been conclusively determined at the federal level, and the role state sovereignty plays. Furthermore, we must consider whether a state court has the authority to give judicial deference to an ICJ decision or incorporate international law into its state constitution.

This comment focuses on the aspects of international law presented by *Valdez*. It first seeks to explain Valdez’ contentions and the court’s reasoning for ultimately rejecting them. Second, it comments on the future possibilities of addressing Article 36 in Oklahoma as an individual state within the federal system. To do so, some background is first necessary. Therefore, Part II describes Article 36 and its pertinent provisions. Parts III, IV, and V explain the law prior to *Valdez* at the federal, state, and international levels. Part VI provides a statement of the *Valdez* case followed by an analysis of the court’s

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6. See *infra* Part III.B.

7. See *infra* Part III.D.

8. *Valdez v. State*, 2002 OK CR 20, ¶ 10, 46 P.3d 703, 706 (*Valdez II*).

9. See *infra* Part V.B.2.

10. *Valdez II*, ¶ 10, 46 P.3d at 706.

11. *Id.* ¶ 23, 46 P.3d at 709.

12. *Breard v. Greene*, 523 U.S. 371, 375-79 (1998).

reasoning in Part VII. Finally, Part VIII addresses the future of Article 36 in Oklahoma. Parts IX and X conclude with policy implications and recent developments.

Before moving on, it is important to note that *Valdez*' significance lies in its adjudication at the state level. If Article 36 is to have substantial impact on foreign nationals in the future, this effect must occur at the state level. Indeed, state sovereignty may provide the best avenue for addressing the issue.

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

In 1969 the United States ratified the VCCR,<sup>13</sup> which established a framework for the exercise of consular functions in foreign States and sought to "contribute to the development of friendly relations among nations."<sup>14</sup> Article 36 is one of several provisions that govern the manner in which the host nation, or receiving State, interacts with the foreign nation, or sending State, and its nationals.<sup>15</sup> Paragraph 1(a) delineates the general freedoms that the consulate and its nationals enjoy, stating that "consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State."<sup>16</sup>

Article 36 also specifically addresses the "rights" of the foreign nationals when arrested or detained by the receiving State. Article 36, Paragraph 1(b) states:

[I]f [the foreign national] 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.<sup>17</sup>

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13. Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L. L. 565, 568 (1997).

14. Vienna Convention, *supra* note 3, pmbi., 21 U.S.T. at 79, 596 U.N.T.S. at 262.

15. *See generally* Vienna Convention, *supra* note 3.

16. *Id.* art. 36(1)(a), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

17. *Id.* art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292 (emphasis added).

The court in *Valdez* tackled the controversial question of whether Article 36, paragraph 1(b) creates an *individual* right so that foreign nationals may invoke Article 36 rights at trial.<sup>18</sup>

Article 36 also addresses the rights of the foreign consulate. Paragraph 1(c) provides that consular officers shall have the right to visit and communicate with nationals of the sending State in custody and to arrange for their legal representation.<sup>19</sup> However, Article 36 clearly provides that the consulate should not take such action if the foreign national “expressly opposes such action.”<sup>20</sup>

The question remains as to how foreign nationals’ Article 36 rights should be protected in the receiving State. Paragraph 2 of the Article requires that these rights are to be carried out “*in conformity with the laws and regulations of the receiving State*, subject to the proviso, however, that the said laws and regulations *must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.*”<sup>21</sup> This provision has played a key role in the application of procedural default rules to bar Article 36 claims in the United States. However, the ICJ has interpreted this same provision to bar use of procedural default rules when they prevent foreign nationals from challenging their convictions or sentences. Parts III, IV, and V discuss these differing interpretations in the context of federal, state, and international law prior to *Valdez*.

### III. Federal Law Prior to *Valdez*

This part focuses on the U.S. federal interpretation of Article 36 and explains the majority view where one exists. It is subdivided into the major principles that direct application of Article 36 in the United States.

#### A. *The VCCR Is a Self-Executing Treaty and Is Directly Applicable to Federal, State, and Local Governments*

The VCCR is a self-executing treaty.<sup>22</sup> Generally, self-executing treaties carry two connotations in the United States.<sup>23</sup> First, self-executing treaties apply directly to domestic legal systems, thereby becoming binding domestic

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18. *Valdez v. State*, 2002 OK CR 20, ¶ 22, 46 P.3d 703, 709 (*Valdez II*).

19. Vienna Convention, *supra* note 3, art. 36(1)(c), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

20. *Id.*

21. *Id.* art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292, 294 (emphasis added).

22. S. EXEC. REP. NO. 91-9, app. at 5 (1969).

23. Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (stating that “[t]he term ‘self-executing’ has two distinct meanings in international law”).

law without any congressional implementation.<sup>24</sup> Second, courts often interpret self-executing treaties as conferring enforceable individual rights on private citizens.<sup>25</sup>

However, both characteristics cannot always be assumed with regard to self-executing treaties. Indeed, Restatement (Third) of Foreign Relations Law asserts that deeming a treaty self-executing is different from deeming the treaty one that creates individual rights.<sup>26</sup> Therefore, a self-executing treaty applies directly to domestic law but fails to necessarily create judicially enforceable individual rights.

There seems to be no question that the VCCR is a self-executing treaty in the sense that it is directly applicable — creating binding obligations upon the United States without any congressional implementation. Senate Executive Report 91-9, which recommended that the Senate ratify the VCCR, states in its appendix that the VCCR is self-executing and does not require any congressional implementation or additional legislation.<sup>27</sup> In addition to case law,<sup>28</sup> State Department documents provide further evidence of the VCCR's self-executing nature. In 1998, the State Department published a manual for police use entitled "Consular Access and Notification," in which it addressed the U.S. obligations to foreign nationals.<sup>29</sup> Part Five of the manual also makes clear that the VCCR is self-executing and can be carried out through existing powers of the "executive, law enforcement, and judicial authorities."<sup>30</sup> In

24. Self-executing treaties

are able to operate automatically within the domestic sphere, without the need for any municipal legislation, while the [non-self-executing treaties] require enabling acts before they can function inside the country and bind the American courts. Self-executing treaties apply directly within the United States as part of the supreme law of the land, whereas those conventions deemed not self-executing are obliged to undergo a legislative transformation and until they do so they cannot be regarded as legally enforceable against American citizens or institutions.

MALCOLM N. SHAW, *INTERNATIONAL LAW* 121 (1991).

25. *Republic of Paraguay*, 949 F. Supp. at 1274 (stating that "the term 'self-executing' also denotes a treaty that confers rights of action on private individuals").

26. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987).

27. S. EXEC. REP. NO. 91-9, app. at 1, 5.

28. *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1124 n.1 (C.D. Ill. 1999) (*Chaparro-Alcantara I*) (stating that "[t]he parties do not dispute that the Vienna Convention is a 'self-executing' document — the treaty has the force of law without enabling legislation"); *Republic of Paraguay*, 949 F. Supp. at 1274 (stating that the VCCR is self-executing in the sense that it "does not require implementing legislation before becoming federal law").

29. U.S. DEP'T OF STATE, *CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND OTHER LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM* (1998), [http://www.travel.state.gov/consul\\_notify.html](http://www.travel.state.gov/consul_notify.html).

30. *Id.* pt. 5.

addition, the document clearly states that the VCCR obligations bind federal, state, and local governments under the Supremacy Clause of the U.S. Constitution.<sup>31</sup> Therefore, Oklahoma must comply with Article 36.

### *B. Individual Rights Under the VCCR — No Clear Answer*

While the VCCR clearly applies directly to the United States, the controversial question remains whether Article 36 creates enforceable individual rights.<sup>32</sup> Caselaw runs the spectrum from denying any possibility of individual rights<sup>33</sup> to holding that Article 36 confers individual rights.<sup>34</sup> Somewhere in the middle stands a wide array of cases that considers foreign citizens' Article 36 claims, thereby assuming that the citizens possess an individual right, but never directly resolving the issue.<sup>35</sup>

Despite this confusion, the State Department maintains a clear position. In August 1999, the First Circuit, with regard to *United States v. Li*,<sup>36</sup> requested the State Department's opinion on whether the VCCR creates individual,

31. *Id.*

32. *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) ("Those courts that have faced the issues before us have come to divergent conclusions as to whether the Vienna Convention . . . bestow[s] any rights upon individuals, as opposed to states.").

33. *Republic of Paraguay*, 949 F. Supp. at 1274 (stating that the VCCR is not self-executing in the sense that it "confers rights of action on private individuals").

34. *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) ("The Vienna Convention is a self-executing treaty — it provides rights to individuals rather than merely setting out the obligations of signatories. The text emphasizes that the right of consular notice and assistance is the citizen's.") (citations omitted); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) ("In sum, the language of the VCCR, coupled with its 'legislative history' and subsequent operation, suggest that Article 36 of the Vienna Convention was intended to provide a private right of action to individuals detained by foreign officials."); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999) (*Chaparro-Alcantara I*) (holding that "[defendants] have an individual right to consular notification under Article 36 which in turn grants them standing to object to a violation of that provision").

35. *United States v. Chaparro-Alcantara*, 226 F.3d 616, 621 (7th Cir. 2000) (*Chaparro-Alcantara II*) ("It is sufficient for present purposes to assume that such an individual right is created by the Convention . . ."); *Chaparro-Alcantara I*, 37 F. Supp. 2d at 1125 (citing *Villafuerte v. Stewart*, 142 F.3d 1124 (9th Cir. 1998) (entertaining a claim of a violation of the Convention without discussing the standing issue); *United States v. Salas*, No. 98-4374, 1998 WL 911731, at \*3 (4th Cir. Dec. 31, 1998) (same); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (same); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1096 (S.D. Cal. 1998) (same); *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) (same); *Mami v. Van Zandt*, No. 89-CIV-0554 (TPG), 1989 WL 52308, at \*1 (S.D.N.Y. May 9, 1989) (same)).

36. 206 F.3d 56 (1st Cir. 2000).

judicially enforceable rights.<sup>37</sup> The State Department unequivocally answered: “[t]he VCCR . . . establish[es] state-to-state rights . . . . They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular officials is derivative of the sending state’s right to extend consular protection to its nationals when consular relations exist between the states concerned.”<sup>38</sup> Thus, the State Department has interpreted Article 36 as providing no judicial remedy to foreign nationals when U.S. authorities fail to comply with it. Of course, this interpretation works against foreign nationals such as Valdez, who base their appeals on the Article.

*C. The VCCR Does Not Create U.S. Constitutional Rights: Murphy v. Netherland*

Clearly, the U.S. federal government has been extremely reluctant to conclude that Article 36 creates individual rights for foreign nationals. Likewise, federal courts have clearly stated that Article 36 fails to create a right under the U.S. Constitution. In *Murphy v. Netherland*,<sup>39</sup> the Fourth Circuit convicted a Mexican national of murder-for-hire and conspiracy to commit capital murder and sentenced him to death in Virginia.<sup>40</sup> Per writ of habeas corpus in federal court, Murphy raised for the first time the claim that he was never notified of his Article 36 rights.<sup>41</sup> The Eastern District of Virginia held the claim procedurally barred because Murphy failed to raise it in state court.<sup>42</sup> Thereafter, Murphy filed with the court for a certificate of

37. Letter from State Department, to James K. Robinson, Assistant Attorney General, U.S. Department of Justice 1 (Oct. 15, 1999), <http://www.state.gov/documents/organization/7111.doc>.

38. *Id.* attachment A.A-1. Attachment A, subsection 1, in response to question 1 supplies “the State Department’s exact position on the question whether such treaties may be invoked by defendants in criminal cases.” *Id.* attachment A.A-1. The State Department also replied,

The incidental reference to individual rights in Article 36 of the VCCR . . . is not intended to imply the existence of a judicially enforceable individual right that can be raised by the individual as a basis for relief in the context of a country’s criminal justice system. Looking at the text of the VCCR, its negotiating history, and the practice of states under the VCCR (*i.e.*, looking at the accepted tools of treaty interpretation), we see no intent to change the criminal justice processes of the member states, much less to create individual rights that would require the suppression of evidence (a remedy that is not common to criminal justice systems outside the United States).

*Id.* attachment A.A-4.

39. 116 F.3d 97 (4th Cir. 1997).

40. *Id.* at 98.

41. *Id.* at 99.

42. *Id.*



appealability, which is required for appeal after a denial of habeas corpus relief.<sup>43</sup>

To receive certificates of appealability, petitioners must show a substantial denial of constitutional rights.<sup>44</sup> The Fourth Circuit held that, regardless of whether the VCCR creates individual rights, it absolutely fails to create *constitutional* rights.<sup>45</sup> Furthermore, equating treaty law with federal statutory law, the court reasoned that just as a state's violation of a federal statute does not violate the federal constitution, a state's violation of a treaty does not equate to a violation of a constitutional right.<sup>46</sup> Therefore, because Murphy failed to show even the *existence* of a constitutional right under Article 36, the court held that he had failed to substantially demonstrate the *denial* of a constitutional right.<sup>47</sup> This holding has precluded the granting of such constitutional remedies as suppression of evidence or dismissal of an indictment at the federal level to foreign nationals when they have asserted their Article 36 rights.

#### *D. Breard v. Greene: Article 36 Is Subject to the Procedural Default Rule*

Clearly, foreign nationals face a difficult task in attempting to assert Article 36 as grounds for appellate relief. U.S. courts question the very validity of claiming Article 36 rights and refuse to grant any constitutional remedies when violations occur. However, the procedural default rule, which prevents an individual from raising a new claim when he could have done so in earlier proceedings, has proven to be the greatest hurdle in asserting Article 36 protection at the state or federal level. At the federal level, the rule bars consideration of Article 36 claims when foreign nationals fail to raise such claims at trial or in state court. However, the conflict between the rule and Article 36 is readily apparent in the language of the Article, which provides that whatever rights are created by Article 36 are to be carried out "in conformity with the laws and regulations of the receiving State" *as long as* those laws and regulations give "full effect" to Article 36.<sup>48</sup> In confronting this issue in *Breard v. Greene*,<sup>49</sup> the U.S. Supreme Court upheld application of the federal procedural default rule to Article 36 claims.<sup>50</sup>

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43. *See id.* (citing 28 U.S.C. § 2253 (1994)).

44. *Id.* (citing 28 U.S.C. § 2253(c)(2) (1994)).

45. *Murphy*, 116 F.3d at 100.

46. *Id.*

47. *See id.* at 99-100.

48. Vienna Convention, *supra* note 3, art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292, 294.

49. 523 U.S. 371 (1998).

50. *Id.* at 375-76.

At the federal level, in federal habeas corpus proceedings, 28 U.S.C. § 2254, as amended by the Antiterrorism and Federal Death Penalty Act of 1996 (AEDPA),<sup>51</sup> implements the rule by requiring the denial of a writ of habeas corpus unless the applicant has exhausted available state remedies.<sup>52</sup> Specifically, in the case where an individual raises an entirely new factual claim such as an Article 36 claim, § 2254 prohibits an evidentiary hearing unless the individual can show (1) a new constitutional rule upon which the claim is based, or (2) “a factual predicate that could not have been previously discovered through the exercise of due diligence.”<sup>53</sup>

Despite its seeming strictness, the procedural default rule is not absolute.<sup>54</sup> Regardless of § 2254, federal courts may consider a claim if the individual can show (1) “cause for the default,” and (2) “actual prejudice as a result of the alleged violation of federal law.”<sup>55</sup> Alternatively, federal courts may consider a procedurally defaulted claim if the individual can show that “failure to consider the claim will result in a fundamental miscarriage of justice.”<sup>56</sup>

In *Breard v. Netherland*, the federal court in the Eastern District of Virginia applied § 2254 in considering the conviction of Angel Breard, a Paraguay citizen. In 1994, the Virginia Supreme Court had affirmed Breard’s first-degree murder conviction and death sentence.<sup>57</sup> Per writ of habeas corpus, Breard sought federal relief, where he raised for the first time his claim that Virginia officials had failed to notify him of his Article 36 rights.<sup>58</sup> Applying § 2254, the federal court held that Breard had procedurally defaulted on his claim because he had failed to raise it in state court.<sup>59</sup> Furthermore, the court held that Breard could not show cause for the default.<sup>60</sup> The Fourth Circuit affirmed,<sup>61</sup> and Breard sought a writ of certiorari from the U.S. Supreme Court.<sup>62</sup>

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51. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (codified at 28 U.S.C. § 2254 (2000)).

52. 28 U.S.C. § 2254(b)(1)(A) (2000).

53. *Id.* § 2254(e)(2)(A)(i)-(ii). In addition, § 2254 requires the individual to show that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” *Id.* § 2254(e)(2)(B).

54. *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996).

55. *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

56. *Id.* (quoting *Coleman*, 501 U.S. at 750).

57. *Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994).

58. *Netherland*, 949 F. Supp. at 1263.

59. *Id.*

60. *Id.* The court held that Virginia’s “failure to comply with the Vienna Convention did not prevent Breard’s counsel from raising the issue during state proceedings.” *Id.*

61. *Breard v. Pruett*, 134 F.3d 615, 621 (4th Cir. 1998).

62. *Breard v. Greene*, 523 U.S. 371, 373 (1998).

In an attempt to circumvent the procedural default rule, Breard argued before the Court that the VCCR trumps the procedural default rule because the former is the supreme law of the land.<sup>63</sup> The Court rejected this argument for two reasons.<sup>64</sup> First, the Court held that international law recognizes that a state's procedural rules govern a treaty's implementation in that state, unless the treaty expressly provides to the contrary.<sup>65</sup> Furthermore, the Court cited Article 36, paragraph 2 for the specific assertion that rights under the Article should be implemented according to forum state law.<sup>66</sup> Second, the Court reasoned that U.S. treaties have no greater status than constitutional provisions or congressional acts, and that the procedural default rule applies to both.<sup>67</sup> The Court stated that "an Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."<sup>68</sup>

Applying this later-in-time rule to Breard's case, the Court noted that the U.S. ratified the VCCR in 1969 but that in 1996 Congress enacted the AEDPA and amended 28 U.S.C. § 2254.<sup>69</sup> Because the Court observed that Congress had enacted the AEDPA subsequent to ratification of the VCCR and prior to Breard filing his claim, the Court held that § 2254 could bar a claim based on the violation of Article 36 rights.<sup>70</sup> Therefore, the Court held that the VCCR fails to trump the federal procedural default rule and that Breard's claim was procedurally defaulted.<sup>71</sup>

In addition, the Court reasoned that, even if Breard had properly established the VCCR violation, he could not have shown that the violation had any impact on the trial's outcome because he had pled not guilty and testified at

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63. *Id.* at 375.

64. *Id.*

65. *Id.*

66. *Id.* The Court stated:

This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

*Id.* (quoting Vienna Convention, *supra* note 3, art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292, 294).

67. *Id.* at 376.

68. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

69. *Id.*

70. *Id.* The Court stated: "Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be. This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him." *Id.*

71. *Id.* at 375-76.

his trial against advice of counsel.<sup>72</sup> The Court found any assertion that VCCR compliance would have affected Breard's actions at trial to be more speculative than prejudice claims courts consistently reject.<sup>73</sup>

#### IV. Oklahoma Law Prior to Valdez

In line with the federal courts, Oklahoma courts have not granted Article 36 relief. Oklahoma's Article 36 jurisprudence consists only of three appellate decisions from the late 1990s in which the Oklahoma Court of Criminal Appeals consistently denied postconviction relief or reversal. Significantly, the courts issued these decisions prior to *LaGrand*, a decision which Valdez relied upon heavily.<sup>74</sup>

##### A. *Al-Mosawi v. State of Oklahoma*

In *Al-Mosawi v. State of Oklahoma*,<sup>75</sup> the Oklahoma Court of Criminal Appeals indirectly addressed the VCCR. In this decision, the court convicted Al-Mosawi, an Iraqi national, of first-degree murder and sentenced him to death.<sup>76</sup> Al-Mosawi applied for postconviction relief,<sup>77</sup> asserting that his appellate counsel had been ineffective in failing to raise the State's violation of his VCCR rights.<sup>78</sup> Specifically, he contended that the State failed to notify him of his right to contact the Iraqi consulate.<sup>79</sup> Deciding the case in March 1998 prior to the U.S. Supreme Court's decision in *Breard v. Greene*, the Oklahoma Court of Criminal Appeals held that his counsel's conduct was not "unreasonable under prevailing professional norms," reasoning that there is "no obligation to raise all available non-frivolous issues."<sup>80</sup>

##### B. *Martinez v. State of Oklahoma*

The Oklahoma Court of Criminal Appeals dealt more directly with Article 36 of the VCCR in *Martinez v. State of Oklahoma*.<sup>81</sup> Martinez, a Cuban national, directly appealed both his first-degree murder conviction and death sentence.<sup>82</sup> Among the several grounds that he asserted for reversal, Martinez

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72. *Id.* at 377.

73. *Id.*

74. *Valdez v. State*, 2002 OK CR 20, ¶ 10, 12, 46 P.3d 703, 706-07 (*Valdez II*).

75. 1998 OK CR 18, 956 P.2d 906.

76. *Id.* ¶ 1, 956 P.2d at 908.

77. *Id.*

78. *Id.* ¶ 4, 956 P.2d at 909.

79. *Id.* ¶ 4 n.6, 956 P.2d at 909 n.6.

80. *Id.* ¶ 5, 956 P.2d at 909.

81. 1999 OK CR 33, 984 P.2d 813.

82. *Id.* ¶ 1, 984 P.2d at 817.

claimed that the State violated his Article 36 rights because it should have applied the VCCR as the supreme law of the land.<sup>83</sup> Citing *Breard v. Greene*, the court denied Martinez' claim because he had failed to show that he attempted to exercise his Article 36 rights, failed to raise the issue at trial, and failed to show prejudice as a result of the violation.<sup>84</sup>

### C. *Flores v. State of Oklahoma*

In *Flores v. State of Oklahoma*,<sup>85</sup> the Oklahoma Court of Criminal Appeals directly addressed Article 36 in the context of Flores' contentions for exclusion of evidence because of an Article 36 violation.<sup>86</sup> Flores, a Mexican national, directly appealed his first-degree murder conviction and death sentence.<sup>87</sup> Specifically, Flores contended that the trial court erred in admitting evidence gathered during his arrest and subsequent police statement, during which the State failed to inform Flores of his Article 36 rights.<sup>88</sup> Applying *Breard* and *Murphy*, the court equated violation of a treaty with violation of a federal statute and reasoned that relief could be granted only if (1) a statutory violation were shown and (2) prejudice resulted from the violation.<sup>89</sup> Despite the existence of an Article 36 violation, the court denied reversal because Flores failed to show prejudice resulting from this lack of notification.<sup>90</sup> The court based this finding on Flores' failure to show that he misunderstood his *Miranda* rights or the nature of his arrest.<sup>91</sup> Furthermore, the court found that Flores failed to show that he would have acted differently or would have received greater protection if he had been advised of his right to contact the Mexican consular post regarding his arrest.<sup>92</sup>

In the above cases, the court of criminal appeals applied only state law and granted petitioners no relief under Article 36. However, *LaGrand* opened a new door for the more concrete assertion that foreign nationals *do* have

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83. *Id.* ¶ 6, 984 P.2d at 818.

84. *Id.* ¶ 9, 984 P.2d at 819.

85. 1999 OK CR 52, 994 P.2d 782.

86. *Id.* ¶ 14, 994 P.2d at 785.

87. *Id.* ¶ 1, 994 P.2d at 783.

88. *Id.* ¶ 14, 994 P.2d at 785. Based in part on the Article 36 violations, Flores filed a pre-trial motion to suppress the evidence gathered at the time of his arrest. Furthermore, Flores objected to the evidence at trial. *Id.* ¶ 15, 994 P.2d at 785-86.

89. *Id.* ¶¶ 17-18, 994 P.2d at 786. The court cited the U.S. Supreme Court's decision in *Breard v. Greene* for the assertion that "[a]cts of Congress are on full parity with treaties"; the court cited *Murphy* for the assertion that "rights under a treaty and rights under a federal statute are not the equivalent of constitutional rights." *Id.* ¶ 17, 994 P.2d at 786.

90. *Id.* ¶ 19, 994 P.2d at 786.

91. *Id.*

92. *Id.*

individual rights to consular assistance and that procedural default rules cannot interfere when these rights are violated.

### V. *International Law Prior to Valdez*

In 1999 and 2001, respectively, the Inter-American Court of Human Rights (ICHR) and the ICJ — two international tribunals — interpreted Article 36. This part provides a synopsis of their interpretations, focusing on the ICJ's decision in *LaGrand* that Valdez relied upon so heavily before the Oklahoma Court of Criminal Appeals. Both of these courts interpreted Article 36 contrary to federal case law and the State Department's position.

#### A. *Inter-American Court of Human Rights*

In 1999, at the request of the United Mexican States, the ICHR issued an advisory opinion entitled "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law."<sup>93</sup> The Court rendered three holdings pertinent to *Valdez*. First, the Court ruled that Article 36 confers the individual rights of consular communication and information upon arrested foreign detainees<sup>94</sup> and that these rights are individually enforceable in State courts without the sending State's involvement.<sup>95</sup> The Court recognized that its interpretation constituted a departure from traditional State-to-State notions of international law but reasoned that Article 36 clearly establishes such rights.<sup>96</sup> Furthermore, the Court concluded that, while the VCCR's preamble states that it is not meant "to benefit individuals,"<sup>97</sup> this language referred only to those individuals performing consular functions<sup>98</sup> and did not preclude the existence of individual rights. Second, the Court ruled that Article 36 forms part of the minimum due process guarantees established by the International Covenant on Civil and Political Rights (ICCPR)<sup>99</sup> in Article 14.<sup>100</sup> By connecting Article 36 to the ICCPR, the Court explicitly linked the Article to human rights law.<sup>101</sup> Third, the Court held that when a State fails to comply with Article 36 requirements, two major

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93. Advisory Opinion OC-16/99, Inter-Am. C.H.R. 487, OEA/ser. L./V/III.47, doc. 6 (2000).

94. *Id.* ¶¶ 82, 84.

95. *Id.* ¶¶ 89, 97.

96. *Id.* ¶ 80.

97. Vienna Convention, *supra* note 3, pmb., 21 U.S.T. at 79, 596 U.N.T.S. at 262.

98. Advisory Opinion OC-16/99, Inter-Am. C.H.R. 487, ¶ 74.

99. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

100. Advisory Opinion OC-16/99, Inter-Am. C.H.R. 487, ¶¶ 122, 124.

101. *Id.* ¶ 109.

consequences occur: (1) prejudice to due process guarantees,<sup>102</sup> and (2) if the arresting state imposes the death penalty, a “violation of the right not to be ‘arbitrarily’ deprived of one’s life” as described in Article 6 of the ICCPR.<sup>103</sup>

Thus, the ICHR provided further grounds for foreign nationals to argue that Article 36 creates individual, judicially enforceable rights. Furthermore, by connecting Article 36 to due process rights, the court seemed to provide an avenue for petitioners in the United States to claim the traditional remedies of suppression of evidence or dismissal of an indictment. Despite the clear relevance of the ICHR opinion, Valdez relied primarily on the ICJ’s decision in *LaGrand*. Unlike the ICHR advisory opinion, with *LaGrand*, the ICJ issued an actual judgment binding on the United States. The *Valdez* court had to decide just how binding *LaGrand* truly was.

### *B. The International Court of Justice: The LaGrand Case*

In 2001, the ICJ interpreted Article 36, ruling that it confers individual rights and that procedural default rules cannot bar consideration of Article 36 claims. As such, the ICJ’s decision directly conflicts with the U.S. Supreme Court’s decision in *Breard v. Greene*, forming a major point of contention in *Valdez*.

#### *1. Facts and Procedural History*

The *LaGrand* case involved the first-degree murder convictions of two German nationals in Arizona. The failure of local authorities to notify the German nationals of their Article 36 rights sparked not only a series of federal appeals, but also an international dispute between the United States and Germany that the ICJ ultimately resolved. *LaGrand* was pivotal for Valdez, who relied heavily upon it before the Oklahoma Court of Criminal Appeals, which became one of the first courts — state or federal — to consider the decision.

In *Lagrand*, Walter and Karl LaGrand, German nationals, were convicted of first-degree murder and sentenced to death in Arizona.<sup>104</sup> After being denied habeas corpus relief in federal district court, the LaGrand brothers appealed to the Ninth Circuit,<sup>105</sup> where they raised for the first time the claim that Arizona officials failed to notify them of their Article 36 rights.<sup>106</sup> The Ninth Circuit held that, although it was undisputed that Arizona failed to

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102. *Id.* ¶ 137.

103. *Id.* (quoting ICCPR, *supra* note 99, art. 6, 999 U.N.T.S. at 174).

104. *State v. LaGrand*, 733 P.2d 1066 (Ariz. 1987); *State v. LaGrand*, 734 P.2d 563 (Ariz. 1987).

105. *LaGrand v. Lewis*, 883 F. Supp. 451 (D. Ariz. 1995).

106. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998).

notify them of their Article 36 rights, the claim was procedurally defaulted because they failed to raise it in any state proceeding.<sup>107</sup> Furthermore, the court held that the LaGrands could not show sufficient cause for not applying the procedural default rule nor could they sufficiently show actual prejudice resulting from the Article 36 violation.<sup>108</sup>

Despite Germany's efforts to stay Karl LaGrand's execution, Arizona executed him on February 24, 1999.<sup>109</sup> On March 2, 1999, Germany filed an action against the United States in the ICJ seeking the issuance of a provisional measure to stay Walter LaGrand's execution scheduled for March 3, 1999.<sup>110</sup> On March 3, 1999, the ICJ issued the requested provisional measure, stating that "[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."<sup>111</sup> On the same day, Germany also filed an action in the U.S. Supreme Court to enforce the provisional measure against the United States and the Governor of Arizona.<sup>112</sup> However, the Supreme Court denied the relief due to "tardiness of the pleas and the jurisdictional barriers they implicate."<sup>113</sup> The Arizona governor allowed the execution to proceed, and the State executed Walter LaGrand.

On June 27, 2001, the ICJ decided *LaGrand*.<sup>114</sup> In the case, Germany sought three declarations pertinent to *Valdez*. First, Germany argued that the United States violated international legal obligations under Article 36 of the VCCR by failing to notify the LaGrand brothers of their Article 36 rights.<sup>115</sup> Second, Germany argued that the United States violated Article 36 by applying domestic law in such a way as to thwart the fully intended effect of

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107. *Id.* at 1261.

108. *Id.* at 1261-62.

109. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J., ¶ 26 (June 27), at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>. Germany's opposition was based on its general opposition to capital punishment and the Article 36 violation. *Id.*

110. *Id.* ¶ 30.

111. *Id.* ¶ 32.

112. *Germany v. United States*, 526 U.S. 111, 111 (1999).

113. *Id.* at 112. In regard to Germany's action against the United States to enforce the ICJ's provisional measure, the Court reasoned that "the United States [had] not waived its sovereign immunity." *Id.* Furthermore, the Court stated that "[i]t is doubtful that Art. III, § 2, cl. 2, provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul." *Id.* In regard to Germany's action against the Governor of Arizona, the court reasoned that "a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles." *Id.*

114. *LaGrand Case*, 2001 I.C.J. (June 27), at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>

115. *Id.* ¶ 12.



Article 36 rights.<sup>116</sup> Third, Germany sought a declaration from the ICJ requiring the United States to provide assurances that it would not repeat such violations and that in future death penalty cases, it would “provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.”<sup>117</sup>

## 2. *The ICJ’s Holdings*

First, the ICJ held that the United States violated Article 36 of the VCCR in failing to notify the LaGrands of their rights and that no prejudice must be shown for a state to violate Article 36.<sup>118</sup> The court found that Article 36 creates *individual rights* and that the LaGrand brothers’ rights had been violated.<sup>119</sup> Of course, this statement was critical to Article 36 claimants in U.S. courts because courts prior to *LaGrand* had failed to provide a clear answer on this issue. Furthermore, in theory this holding granted foreign nationals the right to invoke Article 36 before domestic courts.

Second, the court held that “[u]nder these circumstances,” the United States’ application of the procedural default rule undermined the full effect of the rights granted under Article 36, thereby violating paragraph 2 of Article 36.<sup>120</sup> The court reasoned that the application of the rule “prevented [the Ninth Circuit] from attaching any legal significance to the fact, *inter alia*, that the violation . . . prevented Germany . . . from retaining private counsel . . . and otherwise assisting in [the LaGrands’] defence as provided for by the Convention.”<sup>121</sup> However, the ICJ noted that the procedural default rule itself does not violate Article 36, stating that

[t]he problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information “without delay,” thus preventing the person from seeking and obtaining consular assistance from the sending State.<sup>122</sup>

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116. *Id.*

117. *Id.*

118. *Id.* ¶¶ 74, 77.

119. *Id.* ¶ 77.

120. *Id.* ¶ 91 (alteration in original).

121. *Id.*

122. *Id.* ¶ 90.

Finally, the court held that in similar future cases, if the United States breaches Article 36 obligations, it must “allow the review and reconsideration of the conviction” in light of the United States’ violation of Article 36 rights, and “sentence by taking account of the violation of the rights set forth in the Convention.”<sup>123</sup> The court made clear that the method of such review is left to the United States.<sup>124</sup> This begs the question whether the state clemency proceedings provided for Valdez provided sufficient review and reconsideration under *LaGrand*.

Clearly, the ICJ rulings contravened the decisions of *Breard v. Greene* and *LaGrand* and thereby provided Valdez a new argument in seeking Article 36 relief. Valdez’ reliance on the ICJ decision presented the Oklahoma Court of Criminal Appeals with a complicated issue centering on the impact of ICJ decisions in state courts.

#### *VI. Statement of the Case: Valdez v. State of Oklahoma*

Unlike previous decisions addressing Article 36 claims in Oklahoma, *Valdez* presented the Oklahoma Court of Criminal Appeals with *LaGrand*, a decision contradictory to U.S. international case law. Therefore, the case forced the court to decide not only the fate of Gerardo Valdez, but also the difficult issue of how and to what extent the international legal system impacts Oklahoma.

#### *A. Facts and Procedural History*

In April 1989, Gerardo Valdez, a Mexican citizen, murdered Juan Barron, whom he had met in a bar.<sup>125</sup> The murder occurred when, after returning to Valdez’ home, Valdez threatened Barron with a gun and physically assaulted him.<sup>126</sup> According to Valdez’ testimony, Valdez believed homosexuality was a sin, and he was attempting to “help Barron understand the error of his ways.”<sup>127</sup> When Barron began fighting back, Valdez shot him twice in the head, pistol-whipped him in the side of the head, and finally ended Barron’s life by slitting his throat with a kitchen knife.<sup>128</sup> Valdez burned Barron’s body in his backyard.<sup>129</sup>

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123. *Id.* ¶ 125.

124. *Id.*

125. *Valdez v. State*, 1995 OK CR 18, ¶ 2, 900 P.2d 363, 368 (*Valdez I*).

126. *Id.* ¶ 3, 900 P.2d at 368.

127. *Id.* ¶ 4, 900 P.2d at 368.

128. *Id.* ¶ 3, 900 P.2d at 368.

129. *Id.*

On July 24, 1989, Oklahoma police searched Valdez' home pursuant to a search warrant and read Valdez his *Miranda* rights.<sup>130</sup> Valdez accompanied the police to the station, where they again issued Valdez the *Miranda* warnings.<sup>131</sup> Valdez denied any involvement in the murder.<sup>132</sup> Later that day, Valdez confessed to the killing.<sup>133</sup> The authorities again read him his *Miranda* warnings and arrested him.<sup>134</sup>

On July 26, 1989, the Grady County Sheriff's Office contacted the U.S. Immigration and Naturalization Service (INS) to assist in the investigation because it involved a Mexican national.<sup>135</sup> By the INS agent's account, his role was to ensure that the language barrier did not hinder the investigation and any potential criminal prosecution.<sup>136</sup> However, neither the INS nor local authorities notified Valdez of his Article 36 right to contact the Mexican consulate.<sup>137</sup>

A jury in the District Court of Grady County, Oklahoma, convicted Valdez of first-degree murder and sentenced him to death.<sup>138</sup> The Oklahoma Court of Criminal Appeals affirmed the decision in March 1995, and the U.S. Supreme Court denied Valdez' petition for certiorari.<sup>139</sup> After the Oklahoma Court of Criminal Appeals denied Valdez' original application for postconviction relief, the U.S. District Court for the Western District of Oklahoma denied Valdez' petition for habeas relief.<sup>140</sup> The Tenth Circuit affirmed in July 2000.<sup>141</sup> Finally, on April 16, 2001, the U.S. Supreme Court denied Valdez' final petition for a writ of certiorari.<sup>142</sup> On April 23, 2001, the Oklahoma Court of Criminal Appeals set Valdez' execution date for June 19, 2001.<sup>143</sup>

Throughout the appellate process, authorities failed to notify Valdez of his right to contact the Mexican consulate and failed to notify the Mexican government of Valdez' arrest, conviction, and sentence until April 19, 2001.<sup>144</sup> Upon learning of Valdez' predicament, the Mexican government hired its own

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130. *Id.* ¶ 13, 900 P.2d at 370.

131. *Id.* ¶ 15, 900 P.2d at 370.

132. *Id.*

133. *Id.* ¶ 16, 900 P.2d at 370-71.

134. *Id.* ¶ 22, 900 P.2d at 370.

135. *Id.* ¶ 23, 900 P.2d at 372.

136. *Id.*

137. Valdez v. State, 2002 OK CR 20, ¶ 6, 46 P.3d 703, 705 (*Valdez II*).

138. *Valdez I*, ¶ 1, 900 P.2d at 368.

139. Valdez v. Oklahoma, 516 U.S. 967 (1995); *Valdez I*, ¶ 1, 900 P.2d at 368.

140. Valdez v. Ward, 219 F.3d 1222, 1227 (10th Cir. 2000).

141. *Ward*, 219 F.3d at 1245.

142. Valdez v. Gibson, 532 U.S. 979 (2001).

143. *Valdez II*, ¶ 2, 46 P.3d at 704.

144. *Id.* ¶ 6, 46 P.3d at 705.

attorney, investigators, and neuropsychologists to investigate Valdez' background and to mount a new defense.<sup>145</sup> On June 6, 2001, the state Pardon and Parole Board heard new evidence gathered by the new defense team concerning head injuries suffered by Valdez as a child and as an adult. One of these injuries had "damaged his brain's left frontal lobe."<sup>146</sup> The Board voted to commute the death sentence to life without parole, and Frank Keating, Governor of Oklahoma, granted a thirty-day stay of execution to consider the matter.<sup>147</sup>

Despite the Board's recommendation and Mexican President Vicente Fox's request to reduce Valdez' sentence, Governor Keating denied clemency on July 20, 2001, and the Oklahoma Court of Criminal Appeals set the new execution date for August 30, 2001.<sup>148</sup> Before the scheduled execution, however, Governor Keating again stayed the execution to allow Mexico time to pursue other legal avenues.<sup>149</sup> Thereafter, Valdez filed a second application for postconviction relief under Oklahoma's Uniform Post-Conviction Relief Act (UPRA),<sup>150</sup> and the Oklahoma Court of Criminal Appeals stayed the execution pending the outcome of the proceedings.<sup>151</sup>

Under the Oklahoma UPRA, the Oklahoma Court of Criminal Appeals may not consider the merits of a subsequent application for postconviction relief until it makes a threshold determination as to whether title 22, section 1089 of the Oklahoma Statutes applies.<sup>152</sup> Section 1089, Oklahoma's procedural default rule, provides that a defendant's claims are procedurally defaulted

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145. Raymond Bonner, *Mexican Killer Is Refused Clemency by Oklahoma*, N.Y. TIMES, July 21, 2001, at A8.

146. Bob Doucette, *Board Votes to Commute Sentence*, DAILY OKLAHOMAN, June 7, 2001, at 1A.

147. *Valdez II*, ¶ 2, 46 P.3d at 704; Doucette, *supra* note 146, at 1A.

148. *Valdez II*, ¶ 2, 46 P.3d at 704; Diane Plumberg Clay, *Governor Opts Not to Block Execution*, DAILY OKLAHOMAN, July 21, 2001, at 1A. Governor Keating acknowledged the Article 36 violation but based his decision on his conclusion that the violation had no prejudicial effect on the guilty verdict or sentence. *Id.*

149. *Valdez II*, ¶ 2, 46 P.3d at 704; Brooke A. Masters, *U.S. Deprived Mexican of Fair Trial, Appeal Says; Death Row Inmate Wasn't Told He Could Enlist His Country's Aid; Okla. Case Could Set Precedent*, WASH. POST, Aug. 23, 2001, at A8.

150. 22 OKLA. STAT. §§ 1080-1089 (2001).

151. *Valdez II*, ¶ 3, 46 P.3d at 704-05. Valdez also filed a "Motion for Evidentiary Hearing and Discovery, an Application for Special Admission of Non Resident Attorneys, and a Motion for Leave to File Amicus Curiae Brief from the Government of Mexico." *Id.* ¶ 3, 46 P.3d at 705. The court directed the state to "file a Response to Petitioner's Second Application for Post-Conviction Relief, granted the Motion of the Mexican Government to file an Amicus brief, granted the Applications for Special Admission of Non Resident Attorneys, . . . and established a briefing schedule." *Id.*

152. 22 OKLA. STAT. § 1089(D)(8) (2001).

unless sufficient facts establish that the claims on appeal were not and “could not have been presented” in prior proceedings because the claim’s factual or legal basis was unavailable.<sup>153</sup> A legal basis was unavailable if (1) the applicant could not have reasonably formulated the legal basis from a final decision by the U.S. Supreme Court, a U.S. court of appeals, or a state appellate court, or (2) the legal basis is a new constitutional rule given retroactive effect by the U.S. Supreme Court or a state appellate court.<sup>154</sup> A factual basis is unavailable if not ascertainable despite reasonable diligence.<sup>155</sup>

Valdez’ second application for postconviction relief constituted the first time that he raised Oklahoma’s failure to comply with Article 36,<sup>156</sup> thus implicating section 1089.<sup>157</sup> Against this statutory and procedural background, Valdez framed his arguments and the Oklahoma Court of Criminal Appeals considered the matter.<sup>158</sup>

### *B. Court’s Analysis and Holdings*

Valdez proposed four grounds for relief: that (1) *LaGrand* bound the Oklahoma Court of Criminal Appeals and required it to provide relief for Oklahoma’s violation of Article 36; (2) Valdez did not have to show prejudice; (3) Oklahoma’s admitted Article 36 violation entitled Valdez to challenge his conviction and sentence; and, (4) Valdez was “entitled to a new trial.”<sup>159</sup> These four propositions are combined into two issues below. The Court rejected Valdez’ Article 36 arguments but granted relief on other grounds. This subpart focuses on the court’s possibly misplaced reliance on *Breard v. Greene* and discusses issues that should have been raised. With such questions raised, Part VIII discusses possibilities for the future.

#### *1. Whether the Oklahoma Court of Criminal Appeals Was Bound by LaGrand*

For *LaGrand* to apply to Valdez’ plea for postconviction relief, he had to persuade the court that the ICJ’s holdings in *LaGrand* constituted binding precedent on the United States. In support of this claim, Valdez made six arguments: (1) that U.S. ratification of the Optional Protocol to the VCCR and the U.N. Charter acknowledges compliance with ICJ decisions; (2) that principles of *stare decisis* made the decision binding; (3) that principles of

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153. 22 OKLA. STAT. § 1089(D)(8) (2001).

154. *Id.* § 1089(D)(9)(a)-(b).

155. *Id.* § 1089(D)(9).

156. *See Valdez II*, ¶ 10, 46 P.3d at 706.

157. *Id.* ¶ 5, 46 P.3d at 705.

158. *Id.* ¶ 11, 46 P.3d at 707.

159. *Id.* ¶ 10, 46 P.3d at 706.

issue preclusion made the decision binding; (4) that principles of *pacta sunt servanda* made the decision binding; (5) that applying *LaGrand* to some foreign nationals and not to others would violate the equal protection clause of the U.S. Constitution; and (6) that refusing to apply *LaGrand* to *Valdez* because *Valdez* is not German created a non-uniform result.<sup>160</sup>

Upon this foundation, *Valdez* argued that, under the Supremacy Clause of the U.S. Constitution and article I, section I of the Oklahoma Constitution,<sup>161</sup> U.S. treaties become Oklahoma law.<sup>162</sup> Thus, by equating the VCCR to federal statutes, *Valdez* argued that the VCCR supersedes any Oklahoma law with which it conflicts.<sup>163</sup> Furthermore, *Valdez* argued that, because the United States is bound by *LaGrand*, the decision constitutes the “rule of decision” for the Oklahoma Court of Criminal Appeals.<sup>164</sup>

Accordingly, *Valdez* asserted that *LaGrand*'s holding prohibited Oklahoma from applying its procedural default rule because such application prevented him from challenging his conviction and sentence on the basis of Oklahoma's admitted Article 36 violation.<sup>165</sup> Furthermore, *Valdez* argued that the ICJ's holding simply restated Article 36(2) — that domestic laws must give full effect to the purposes of Article 36.<sup>166</sup>

Anticipating opposition on the basis of the U.S. Supreme Court's decision in *Breard*, *Valdez* contended that *Breard* failed to control for four primary reasons. First, *Valdez* argued that the Court decided *Breard* in the context of an ICJ provisional order which bore no relationship to the facts in *Valdez*.<sup>167</sup> Second, *Valdez* argued that *Breard* was both a per curiam opinion and a decision denying certiorari, both of which decreased the decision's precedential value.<sup>168</sup> Third, *Valdez* argued that *Breard* did not expressly decide whether Article 36 confers individual rights, nor “whether state procedural default rules may bar consideration of an Article 36 claim not previously raised in the courts.”<sup>169</sup> Finally, *Valdez* argued that *Breard*

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160. *Id.* ¶ 16, 46 P.3d at 707-08.

161. Article I, section 1 of the Oklahoma Constitution provides: “The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.” OKLA. CONST. art. I, § 1.

162. Second Application for Post-Conviction Relief at 42, *Valdez v. State of Oklahoma*, 2002 OK CR 20, 46 P.3d 703 (No. PCD-2001-1011) [hereinafter Second Application].

163. *Id.*

164. *Id.* at 42-43.

165. *Id.* at 56.

166. *Id.*

167. *Id.* at 43 n.23.

168. *Id.*

169. *Id.* (emphasis added).

addressed the federal procedural default statute and the “later-in-time rule,” a rule which applies only in the context of treaties and federal statutes.<sup>170</sup>

In response to Valdez’ arguments, the State of Oklahoma contended that it was not bound by *LaGrand*. This contention centered on two primary points: the nature of the ICJ and U.S. federalism. First, the State argued that the ICJ’s nature rendered *LaGrand* nonbinding. Citing Article 59 of the Statute of the International Court of Justice, the State asserted that the ICJ’s rulings are binding only between the parties to the specific case decided by the ICJ.<sup>171</sup> Furthermore, the State argued that Mexico is not a party to the Optional Protocol and, therefore, could not bring Valdez’ case before the ICJ.<sup>172</sup>

Second, the State specifically referred to *Beard v. Greene* in arguing that, (1) regardless of whether the United States submitted to the ICJ’s jurisdiction in *LaGrand*, and (2) regardless of the fact that the ICJ’s ruling prohibited use of the procedural default rule in some cases, under American federalism, the court must follow “clear decisions of the United States Supreme Court on federal questions.”<sup>173</sup> The State acknowledged that treaties constitute the supreme law of the land but countered that the “the Supremacy clause does not convert violations of treaty provisions into violations of constitutional rights.”<sup>174</sup>

In addition, the State argued that the ICJ is a “non-Article III court” and cited *Committee of U.S. Citizens Living in Nicaragua v. Reagan*<sup>175</sup> for the proposition that although the United States may violate international law by contravening an ICJ decision, such a violation does not give standing to a private individual as a basis for relief.<sup>176</sup> Accordingly, the State argued that *Breard* controlled the issue and allowed use of the procedural default rule in the context of Article 36 violations.

Upon weighing these arguments, the Oklahoma Court of Criminal Appeals held that it is not bound by *LaGrand*.<sup>177</sup> The court seemingly grounded this decision in the federalist nature of the U.S. governmental system. The court stated that “[f]or this Court to decide the ICJ’s ruling overrules a binding decision of the United States Supreme Court and affords a judicial remedy to

170. *Id.*

171. Response to Second Application for Post-Conviction Relief at 35, *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703 (No. PCD-2001-1011) [hereinafter Response to Second Application].

172. *Id.* at 36.

173. *Id.* at 33-34.

174. *Valdez v. State*, 2002 OK CR 20, ¶ 18, 46 P.3d 703, 708 (*Valdez II*).

175. 859 F.2d 929 (D.C. Cir. 1988).

176. Response to Second Application, *supra* note 171, at 35 (quoting *U.S. Citizens Living in Nicaragua*, 859 F.2d at 934).

177. *Valdez II*, ¶ 22, 46 P.3d at 709.

an individual for a violation of the Convention would interfere with the nation's foreign affairs and run afoul of the U.S. Constitution."<sup>178</sup> Accordingly, the court applied Oklahoma's procedural default rule, concluding that "until such time as the supreme arbiter of the law of the United States changes its ruling, its decision in *Breard* controls this issue."<sup>179</sup>

## 2. Whether *LaGrand* Created New Law Under Oklahoma's Procedural Default Rule

As an alternative to his main argument, Valdez argued that, even if Oklahoma applied its procedural default statute, his claim arose under "a new legal basis" as defined by title 22, section 1089 of the Oklahoma Statutes.<sup>180</sup> Valdez based this assertion on his assumption that *LaGrand* bound the court and created a legal basis for his claim that "could not have been reasonably formulated" in his original application for postconviction relief.<sup>181</sup> Specifically, Valdez contended that two of the ICJ's holdings formed a new legal basis because (1) Article 36 creates individual rights, and (2) procedural default rules may not be applied when they prevent accused from challenging their convictions or sentences on the basis of an Article 36 violation.<sup>182</sup>

As to his first assertion, Valdez argued that he could not have previously asserted his individual rights under Article 36 because no court "ha[d] ever authoritatively interpreted Article 36 as giving rise to an individually enforceable right," and that reasonable diligence could not have uncovered such authority.<sup>183</sup> As to his second assertion, Valdez contended that the ICJ's prohibition of the procedural default rule's application was the first of its kind.<sup>184</sup>

The State countered Valdez' arguments by contending that Valdez could have reasonably formulated them prior to his first application for postconviction relief.<sup>185</sup> First, the State asserted that several courts previously had addressed the issue of whether Article 36 conferred individual rights prior to Valdez' first application for postconviction relief.<sup>186</sup> Second, the State argued that the U.S. Supreme Court and U.S. courts of appeals had issued

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178. *Id.* ¶ 23, 46 P.3d at 709.

179. *Id.* ¶ 22, 46 P.3d at 709.

180. *Id.* ¶ 10 n.17, 46 P.3d at 706 n.17.

181. 22 OKLA. STAT. § 1089(D)(8)-(9) (2001).

182. Second Application, *supra* note 162, at 59.

183. *Id.* at 59-60.

184. *Id.* at 60.

185. *Valdez II*, ¶ 21, 46 P.3d at 709.

186. Response to Second Application, *supra* note 171, at 21; *Valdez II*, ¶ 21, 46 P.3d at 709.



many decisions concerning the status of treaty law as the supreme law of the land under the Supremacy Clause.<sup>187</sup>

The Oklahoma Court of Criminal Appeals held that *LaGrand* failed to create a new legal basis for Article 36 claims and also failed to create a new rule of constitutional rights for two reasons. First, with regard to Valdez' asserted individual rights, the court held that Valdez could have raised the Article 36 violation in prior proceedings and even prior to *LaGrand*.<sup>188</sup> In so doing, the court cited Oklahoma cases in which Article 36 violations had been raised.<sup>189</sup> The court reasoned that, while the ICJ decision arguably created individual rights under the VCCR and barred the application of the procedural default statute, the individual-rights issue had been addressed for many years by numerous courts across the nation.<sup>190</sup> Second, with regard to the ICJ's prohibition of the procedural default rule's application in certain circumstances, the court reiterated that *Breard v. Greene* controlled the procedural default issue and allowed procedural default statutes to play a role in the regulation of laws governing Article 36 rights.<sup>191</sup>

### C. Oklahoma Court of Criminal Appeals' Final Decision

Ultimately, the Oklahoma Court of Criminal Appeals remanded the case for resentencing by citing "its power to grant relief" when a miscarriage of justice occurs.<sup>192</sup> Despite denying Valdez relief on the basis of his international law arguments, the court found an exception to the procedural default rule "on the ground that it would appear no factual basis of the Petitioner's prior medical problems was ascertained by prior trial or appellate counsel before the filing of Petitioner's prior appeals."<sup>193</sup> Applying this exception, the court reviewed Valdez' application.

Despite having considered the claim in prior appeals, the court attributed the failure to discover the prior medical evidence to ineffective assistance of counsel.<sup>194</sup> The court justified its review of trial counsel's performance on the grounds that it had not been specifically presented with claims that trial counsel missed pertinent evidence concerning Valdez' social, mental, and health background and had failed to inform Petitioner that he could receive

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187. Response to Second Application, *supra* note 171, at 22.

188. *Valdez II*, ¶ 21, 46 P.3d at 709.

189. These cases were *Flores v. State*, 1999 OK CR 52, 994 P.2d 782, *Martinez v. State*, 1999 OK CR 33, 984 P.2d 813, and *Al-Mosawi v. State*, 1998 OK CR 18, 956 P.2d 906.

190. *Id.* ¶ 22, 46 P.3d at 709.

191. *Id.*

192. *Id.* ¶ 28, 46 P.3d at 711.

193. *Id.* ¶ 24, 46 P.3d at 710.

194. *Id.* ¶ 27, 46 P.3d at 710.

assistance from his consulate.<sup>195</sup> The court stated that it “cannot have confidence in the jury’s sentencing determination and affirm its assessment of a death sentence where the jury was not presented with very significant and important evidence bearing upon Petitioner’s mental status and psyche at the time of the crime.”<sup>196</sup> In its final analysis, the court granted relief on the basis of its power to remedy a miscarriage of justice.<sup>197</sup> Such reasoning prompted Presiding Judge Gary L. Lumpkin’s dissent. Judge Lumpkin agreed that Valdez’ Article 36 claim was previously available but dissented as to the majority’s review of trial counsel’s performance on grounds that it had already been raised and rejected.<sup>198</sup> Judge Lumpkin viewed the majority’s decision as disregarding the rule of law, affirming that “[t]his Court should not make political decisions; it should bind itself to applying the law.”<sup>199</sup>

### VII. Analysis of Valdez

The Oklahoma Court of Criminal Appeals became one of the first state courts to address Article 36 of the VCCR after *LaGrand*. *Valdez*, therefore, serves as an initial answer to the question of how the United States and individual states will deal with Article 36 post-*LaGrand*. Furthermore, *Valdez* adds to the overarching question of how international law, and, in this case, how decisions of international courts, affect the U.S. judicial system. Noting the importance of *Valdez* before the Oklahoma Court of Criminal Appeals actually rendered the decision, one author commented that “the Oklahoma Court of Criminal Appeals clearly has signaled the seriousness of the VCCR issue and the significance of *LaGrand* as an important new factor in the legal landscape.”<sup>200</sup>

The significance of a state court deciding *Valdez* cannot be overstated. Logically speaking, foreign nationals will most often receive notice of their Article 36 rights through local and state authorities. Likewise, foreign nationals will most likely raise Article 36 claims in state courts, especially in *LaGrand*’s aftermath. Therefore, states may play the most vital role in determining Article 36’s impact and the ICJ’s interpretation of its provisions. Moreover, states may be best suited to deal with these issues. For example, a state legislature might incorporate ICJ determinations into state law.

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195. *Id.*

196. *Id.*

197. *Id.* ¶ 28, 46 P.3d at 710.

198. *Id.* ¶¶ 1-2, 46 P.3d at 711 (Lumpkin, J., dissenting).

199. *Id.* ¶ 7, 46 P.3d at 712 (Lumpkin, J., dissenting).

200. Howard S. Schiffman, *The LaGrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in the U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099, 1121 (2002).

Furthermore, a state court might incorporate Article 36 rights into the state constitution's due process clause. This line of reasoning might provide a better framework for analyzing the ICJ's interpretation of Article 36 than attempting to determine whether ICJ rulings bind state courts. More importantly, such reasoning emphasizes state sovereignty in determining how to adjust to the impact of international law. In sum, this Comment contends that, while states must not disregard U.S. international obligations and authoritative decisions of the ICJ, states must begin their analysis by determining what the U.S. system allows and proceed from there.

#### *A. Whether LaGrand Is Binding on State Courts May Not Be the Issue*

The United States is indisputably bound by *LaGrand* for two reasons. First, as a party to the Charter of the United Nations, the United States agreed to comply with ICJ decisions in any case to which it is a party.<sup>201</sup> In fact, U.S. failure to comply with *LaGrand* would grant Germany the right to request that the U.N. Security Council give the judgment effect.<sup>202</sup> Second, as part of the VCCR, the Optional Protocol Concerning the Compulsory Settlement of Disputes makes clear that the ICJ has compulsory jurisdiction over disputes concerning the interpretation or application of the VCCR.<sup>203</sup> However, the binding nature of ICJ decisions is limited. Article 59 of the Statute of the International Court of Justice affirms that ICJ decisions can only bind parties respecting their particular case.<sup>204</sup> Applying Article 59 to *LaGrand* would mean that ICJ rulings apply only in the application of Article 36 to specific, decided cases involving the United States and Germany. Therefore, arguing that *LaGrand* binds state courts is difficult at best. State courts' understandable aversion to holding that ICJ rulings are binding further increases this difficulty.

Additionally, Article III of the U.S. Constitution may affect whether ICJ decisions bind U.S. courts in cases other than those pending before the ICJ. Article III relates that "[t]he judicial Power of the United States, shall be vested in *one* supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>205</sup> Thus, on its face, Article III clearly grants the power to affect the United States judicially to only one U.S. court.

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201. See U.N. CHARTER art. 94, para. 1.

202. *Id.* para. 2.

203. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. I, 21 U.S.T. 325, 326, 596 U.N.T.S. 487, 488.

204. Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1031, 1055, T.S. No. 993, 3 Bevens 1153, 1179.

205. U.S. CONST. art. III, § 1.

This limitation raises major concerns as to whether the Constitution even allows the United States to submit to the jurisdiction of an international tribunal if the effect will be such that the tribunal's decisions overrule the U.S. Supreme Court.<sup>206</sup>

As such, Valdez may have been more successful contending for the reception of *LaGrand* in Oklahoma through such avenues as judicial deference to the ICJ or incorporation into the Oklahoma Constitution. However, the argument may have proven fruitless because of the Oklahoma Court of Criminal Appeals' reliance on *Breard* for application of the Oklahoma procedural default statute. This reliance, of course, precluded the court's consideration of these issues.

### *B. Does Breard Preclude a State's Consideration of Article 36 and LaGrand?*

The Oklahoma Court of Criminal Appeals framed the issue in *Valdez* as whether to follow the ICJ or the U.S. Supreme Court. Expressing fear that the former path would interfere with U.S. foreign affairs and violate the U.S. Constitution, the court ultimately concluded that *Breard* tied its hands and chose the latter path.<sup>207</sup> However, whether *Breard* has such an effect is debatable. First, *Breard*'s procedural stance and application of federal law call into question its applicability to a state case such as *Valdez*. Second, the more general issues of federalism and state sovereignty raise further questions that state courts should address when considering ICJ rulings.

#### *1. Specific Characteristics of Breard as Applied to Valdez*

*Breard*'s applicability to *Valdez* is questionable for five reasons. First, the Supreme Court's procedural stance at the time it issued the opinion raises problems. Second, the Supreme Court applied federal habeas corpus law in *Breard*, whereas the Oklahoma Court of Criminal Appeals applied Oklahoma's broader postconviction relief statute. Third, the Supreme Court failed to determine in accordance with Article 36(2) whether the federal procedural default statute gives full effect to Article 36 rights. Fourth, the Supreme Court failed to state definitively whether Article 36 confers individual rights. Finally, the Supreme Court applied the "later-in-time" rule in *Breard* to the federal procedural default statute, which has no application to Oklahoma's state procedural default statute. Each of these issues are addressed below.

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206. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 891-900 (2000).

207. *Valdez v. State*, 2002 OK CR 20, ¶ 22, 46 P.3d 703, 706 (*Valdez II*).

On the issue of procedural stance, *Breard v. Greene* is a per curiam decision<sup>208</sup> decided on an accelerated timetable because of the Commonwealth of Virginia's decision to set Breard's execution date for the same date that it issued the opinion.<sup>209</sup> Justice Souter dissented on these very grounds, stating that "the international aspects of this case provide an additional reason for adhering to our established Rules and procedures. . . . I respectfully dissent from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character."<sup>210</sup> Justice Breyer's dissent echoed this same sentiment: "Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court's Rules provide for ordinary cases."<sup>211</sup>

Furthermore, because the Supreme Court denied certiorari in *Breard*, the decision carries less weight than it would have if the Supreme Court had actually heard the case. In *Teague v. Lane*,<sup>212</sup> the Supreme Court ruled that petitioners cannot "benefit from the rule announced" in a case denying certiorari.<sup>213</sup> Citing other Supreme Court case law, the *Teague* Court also clarified that denials of certiorari do not adjudicate the merits of the case<sup>214</sup> and do not carry precedential value.<sup>215</sup>

Second, the Supreme Court applied the *federal* procedural default statute, which differs significantly from the Oklahoma statute. As explained above, the Oklahoma statute provides two avenues whereby an applicant may establish a legal basis that was unavailable prior to the original postconviction relief application.<sup>216</sup> However, the federal statute provides only one avenue for establishing a new legal basis — the applicant must show that the claim relies upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."<sup>217</sup> Therefore, the Oklahoma Court of Criminal Appeals' strict reliance on *Breard* is questionable because the Supreme Court had no opportunity to consider whether *LaGrand* created a new legal basis other than new constitutional law.

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208. *Breard v. Greene*, 523 U.S. 371, 372 (1998).

209. *Id.* at 379; Valdez argued these points in his Second Application for Post-Conviction Relief. Second Application, *supra* note 162, at 43 n.23.

210. *Greene*, 523 U.S. at 380.

211. *Id.* at 381.

212. 489 U.S. 288 (1989).

213. *Id.* at 296. Valdez made this argument in his Second Application for Post-Conviction Relief. Second Application, *supra* note 162, at 43 n.23.

214. *Teague*, 489 U.S. at 296 (citing *United States v. Carver*, 260 U.S. 482, 490 (1923)).

215. *Id.* (citing *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950)).

216. *See supra* Part III.D.

217. 28 U.S.C. § 2254(e)(2)(A)(i) (2000).

A third reason that *Breard* may be inapplicable arises from the Supreme Court's questionable interpretation of Article 36. The Supreme Court held that, as a general principle of international law, the forum state's procedural rules govern the treaty's implementation in that respective state.<sup>218</sup> For support, the Court cited Article 36(2), which provides that the right to consular access and notification "shall be exercised in conformity with the laws and regulations of the receiving State" provided that those laws give "full effect . . . to the purposes for which the rights accorded . . . are intended."<sup>219</sup> However, the Supreme Court failed to determine whether the federal procedural default statute, in fact, gives full effect to Article 36. Such a determination is critical in determining compliance not only with *LaGrand*, but also with the treaty itself.

In addition, the Supreme Court failed to state definitively whether Article 36 confers individual rights, holding only that Article 36 "arguably confers on an individual the right to consular assistance following arrest."<sup>220</sup> The ICJ, on the other hand, clearly found that Article 36 actually confers individual rights. The issue is critical for two reasons. First, if a detained foreign national has an individual right to consular notification and assistance, the right is judicially enforceable. Second, the ICJ's ruling constituted the first authoritative ruling on the matter and answers a question long disputed in the United States.

Finally, the Supreme Court applied the "later-in-time" rule to Article 36, holding that the AEDPA controls because Congress enacted it after the VCCR.<sup>221</sup> The later-in-time rule hinges on the principle that treaty law equates with a U.S. federal statute. Therefore, the "later-in-time" rule fails to apply to Oklahoma's state procedural default statute. In fact, according to the later-in-time rule, Article 36 trumps any conflicting state statutes.

Ultimately, the Oklahoma Court of Criminal Appeals relied on *Breard* for the *general* principles that U.S. law, whether state or federal, governs the implementation of any rights conferred by Article 36 and that governing legislation may include the procedural default statutes.<sup>222</sup> However, it seems that *Breard* does not enjoy a solid foundation, especially in state court after the *LaGrand* decision.

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218. *Breard v. Greene*, 523 U.S. 371, 375 (1998).

219. Vienna Convention, *supra* note 3, art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292, 294.

220. *Id.* at 376.

221. *Id.*

222. *See supra* Part IV.B.1.

2. *Questions of Federalism: Does the Federalist Nature of the U.S. Legal System Actually Require Adherence to Breard and Preclude Application of LaGrand in State Courts?*

Rather than determining whether *Breard* bound the Oklahoma Court of Criminal Appeals in its consideration of the application of *LaGrand*, it might be better to consider whether the Oklahoma Court of Criminal Appeals would violate U.S. Supreme Court precedent if it chooses to accept Valdez-type arguments in the future and apply *LaGrand*. Likewise, it might be useful to consider whether any federal precedent would prevent an Oklahoma trial court, faced with an Article 36 claim today, from deferring to the ICJ's interpretation. These issues require analysis focusing on the structure of the U.S. legal system rather than on international perception of whether the ICJ decision controls.

The Supreme Court and federal government have provided some evidence that state courts possess the authority to determine the level of deference that they give to the ICJ. Just before the *Breard* decision, Paraguay sought a provisional order from the ICJ to stay *Breard*'s execution until the ICJ determined whether his Article 36 rights had been violated.<sup>223</sup> The ICJ issued the order requiring the United States to take all available measures to stay the execution until the ICJ had considered the matter.<sup>224</sup> However, the Supreme Court deferred to the Governor of Virginia, maintaining that it lacked the power to stay *Breard*'s execution. The Court stated that "[i]f the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him."<sup>225</sup> Granted, an ICJ provisional order was not considered definitively binding at the time of the *Breard* decision.<sup>226</sup> However, briefs filed by the State Department and Justice Department argued that, even if the ICJ order were binding, the U.S. Supreme Court lacked the authority to compel Virginia to comply with the order and stay the execution.<sup>227</sup> More recently, in February 2003, the ICJ considered issuing a provisional order to stay the U.S. executions of three Mexican nationals in *Mexico v. United States of America*.<sup>228</sup> Opposing the

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223. *Id.* at 374.

224. *Id.*

225. *Id.* at 378.

226. *Id.* at 374, 378; *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. ¶¶ 98, 110 (June 27), at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (making clear that *LaGrand* constitutes the first time that the ICJ has expressly ruled on the binding nature of provisional orders).

227. Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 562 (1999).

228. Case Concerning the Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 128 (Feb. 5). As of February 5, 2003, the Mexican nationals were awaiting capital punishment

order's issuance, the United States argued that a provisional order "would drastically interfere with United States sovereign rights and implicate important federalism interests."<sup>229</sup> Furthermore, U.S. attorney Elihu Lauterpacht was recently paraphrased as stating that "staying executions in state prisons might be unenforceable for the U.S. federal government."<sup>230</sup>

These statements indicate the federal government's concern not only for international obligations, but also for ensuring that international law comports with domestic law in a manner that does not violate the U.S. Constitution or U.S. federalism. While the two situations described in *Breard* and *Mexico* entail federal enforcement of ICJ decisions at the state level, both also indicate that state sovereignty allows for the reception of ICJ decisions without federal interference. This indicates that *Breard* should not have prevented the Oklahoma Court of Criminal Appeals from considering the applicability of *LaGrand* in Oklahoma.

### *C. The Court Ultimately Granted Valdez Review on a Factual Basis — But the Reasoning Is Faulty*

While this comment focuses on the international law issues present in *Valdez*, it is worth noting how the court ultimately granted review of Valdez' case and the problems with its reasoning. Title 22, section 1089 of the Oklahoma Statutes allows courts to grant relief if a legal or factual basis were previously unavailable.<sup>231</sup> While the court chose not to recognize *LaGrand* as creating a new legal basis, the court granted review under section 1089 on grounds that Valdez presented a new factual basis.

The statute provides that a factual basis is unavailable if it "was not ascertainable through the exercise of reasonable diligence."<sup>232</sup> However, despite this language, the *Valdez* court placed emphasis on its conclusion that Valdez' prior medical problems were not *ascertained* by prior counsel.<sup>233</sup> The court apparently stretched the language of section 1089 because the test focuses not on whether certain facts were actually *discovered*, but whether they were *discoverable* through reasonable diligence. The court briefly addressed this concern and attempted to resolve it on the basis that Valdez' trial counsel lacked sufficient funds to properly investigate Valdez' past and that counsel believed no additional funds were available due to his

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in Texas and Oklahoma. Toby Sterling, *World Court Orders U.S. to Stay Executions of 3 Mexicans*, AP ONLINE, Feb. 5, 2003.

229. *Mexico v. United States*, 2003 I.C.J. 128, ¶ 47.

230. Sterling, *supra* note 228, at A3.

231. 22 OKLA. STAT. § 1089(D)(8)-(9) (2001).

232. *Id.* § 1089(D)(9) (emphasis added).

233. *Valdez v. State*, 2002 OK CR 20, ¶ 24, 46 P.3d 703, 710 (*Valdez II*).



inexperience.<sup>234</sup> Therefore, the court found an exception to section 1089 when inexperienced and ineffective trial counsel fails to discover a factual basis which prejudices the accused.<sup>235</sup>

Ultimately, the court granted relief on the combined grounds of ineffective assistance of counsel and the resulting miscarriage of justice.<sup>236</sup> It should be noted that Valdez had raised an ineffective assistance of counsel defense on prior appeals as well.<sup>237</sup> The court distinguished this prior claim of ineffective assistance by reasoning that it had not been specifically presented with the claim that trial counsel failed to present evidence of Valdez' background.<sup>238</sup> In the final analysis, the court decided the case based on a questionable reading of section 1089 and then granted relief on an already adjudicated claim based on the court's subjective power to rule that a "miscarriage of justice" had occurred.<sup>239</sup>

### VIII. Possible Future Alternatives

Assuming that *Breard* does not preclude reliance on *LaGrand*, Oklahoma has great discretion in determining whether and how to apply the ICJ ruling. Several possibilities exist, and none requires consideration of whether *LaGrand* is binding. Thus, states can incorporate *LaGrand* into their legal structure as part of their respective state law rather than international law.

#### A. The Political Question Doctrine

Considering possibilities for the incorporation of *LaGrand* requires an understanding that courts could follow the *Valdez* decision and decline to give effect to *LaGrand*. However, courts might be better served to reject *LaGrand* on such grounds as the political-question doctrine rather than reliance on *Breard*. The political-question doctrine asserts that the U.S. Constitution's structure combined with practical considerations prevent the courts from deciding certain issues, especially those that involve international relations.<sup>240</sup> In addition, the doctrine embodies the principle that the legislative and executive branches are better equipped to determine foreign policy.<sup>241</sup> The Oklahoma Court of Criminal Appeals briefly reached this issue, expressing its

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234. *Id.* ¶ 25, 46 P.3d at 710.

235. *Id.* ¶ 26, 46 P.3d at 710.

236. *Id.* ¶ 28, 46 P.3d at 710.

237. *Id.* ¶ 27, 46 P.3d at 710.

238. *Id.*

239. *Id.* ¶ 28, 46 P.3d at 710.

240. Sandra Day O'Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 14-15 (Thomas M. Franck & Gregory H. Fox eds., 1996).

241. *Id.* at 14.

concern that adherence to *LaGrand* would disrupt U.S. foreign affairs and violate the U.S. Constitution.<sup>242</sup> However, such a ruling may unnecessarily defer to Congress and the President. The Oklahoma legislature might be able to take more direct action.<sup>243</sup>

### B. Legislative Action

Enacting legislation that gives effect to Article 36 rights may be the most sensible step towards remedying the persistent interpretative problems plaguing the provision.<sup>244</sup> Such legislation could require law enforcement officials to notify foreign detainees of their right to contact their respective consulates. Some states, such as California,<sup>245</sup> have already adopted such measures,<sup>246</sup> which require law enforcement officials to inform foreign nationals of their right to contact their consulate within two hours of being arrested, booked, or detained.

Florida also has enacted legislation giving some effect to Article 36. Florida Statute Chapter 288.816 requires the Secretary of State to formulate rules that “[e]stablish a system of communication to provide all state and local law enforcement agencies with information regarding proper procedures relating to the arrest or incarceration of a foreign citizen.”<sup>247</sup> Such legislation could constitute one step toward including Article 36 rights within the *Miranda* rights.<sup>248</sup> While legislative action appears to be a simple solution, it creates further constitutional concerns. The major concern is whether the inclusion of Article 36 rights within the *Miranda* warnings means that an Article 36 violation equates to a constitutional violation requiring dismissal of an indictment or evidence suppression.

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242. *Valdez II*, ¶ 23, 46 P.3d at 709.

243. See *infra* Part VIII.B-D.

244. See *supra* Part VII.B.2 for a discussion of problems arising from interpretation of Article 36.

245. Schiffman, *supra* note 200, at 1130.

246. California enacted a statute requiring

every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country. . . . If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.

CAL. PENAL CODE § 834c(a)(1) (2000).

247. FLA. STAT. ch. 288.816(2)(f) (2001).

248. Schiffman, *supra* note 200, at 1130.

*C. Judicial Action — Deference to the ICJ and Incorporation of LaGrand into the Oklahoma Constitution*

Even if *LaGrand* is not binding on the Oklahoma Court of Criminal Appeals as a matter of law and *Breard* does not preclude reliance on *LaGrand*, the Oklahoma Court of Criminal Appeals could still effectuate the ICJ's rulings through judicial deference to the ICJ or by incorporating *LaGrand* into the Oklahoma Constitution. Simple deference to the ICJ on interpretation of international treaties offers several advantages, including assistance in ensuring justice, uniformity, and correct interpretation of international law.<sup>249</sup> Furthermore, state courts should understand that the ICJ typically renders conservative decisions.<sup>250</sup> Such understanding could alleviate the inherent concerns over deferring to an international tribunal.

Another possibility arises from the judicial incorporation of *LaGrand* into the Oklahoma Constitution. Clearly, federal courts have resisted granting Article 36 rights the same level of constitutional import as *Miranda* rights receive under the U.S. Constitution.<sup>251</sup> However, this does not prevent Oklahoma from giving such effect to Article 36 under its state constitution. Article II, section 7 of the Oklahoma Constitution states that “[n]o person shall be deprived of life, liberty, or property without due process of law.”<sup>252</sup> The Inter-American Court of Human Rights has specifically linked Article 36 rights to the International Covenant on Civil and Political Rights’ minimum due process guarantees.<sup>253</sup> Likewise, incorporation of treaty principles is not unthinkable at the state or federal level, especially when they involve human rights norms.<sup>254</sup> Thus, incorporation of Article 36 into the due process clause of the Oklahoma Constitution might be an option. Advantages would include

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249. Sarita Ordonez & David Reilly, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 240, at 370.

250. *Id.*

[I]t should be emphasized that the I.C.J. is a conservative body and often shies away from progressive interpretations of controversial doctrines. Judicial restraint has always been a hallmark of the Court as evidenced by the fact that the Court applies well-established principles of international law and does not invent its own law.

*Id.* (citations omitted).

251. *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997).

252. OKLA. CONST. art. II, § 7.

253. *See supra* Part V.A.

254. *See generally* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001).

the expansion of due process in Oklahoma and the recognition of the United States' international obligations at the state level.

Section 1089 may provide an avenue for such incorporation. As explained above, the Oklahoma Court of Criminal Appeals may consider an application for postconviction relief if the petitioner argues a previously unavailable legal basis.<sup>255</sup> The Oklahoma Court of Criminal Appeals found, in essence, that *LaGrand* failed to affect the availability of Valdez' claim that Article 36 creates individual rights because the same assertion had been raised in Oklahoma and in courts across the country. However, the court appeared to discount *LaGrand's* impact. Before *LaGrand*, no clear authority existed to reinforce the notion that Article 36 creates individual rights. Considering the authoritative nature of the ICJ's interpretation, *LaGrand* possibly created a new legal basis, and the *Valdez* court could have incorporated it as a new rule of constitutional law. More importantly, no court had held that procedural default rules may not be applied if they prevent petitioners from challenging their convictions and sentences. The ICJ clearly established that in cases such as *LaGrand*, especially those cases involving the death penalty, courts may not apply procedural default rules.<sup>256</sup> Certainly, this ruling constituted a new legal basis because no U.S. courts have held similarly. Regrettably, reliance on *Breard* precluded the court from further consideration of this matter when, in fact, closer consideration of Article 36(2) should have prompted the court to consider whether Oklahoma's procedural default statute fully effectuates the purposes of Article 36.

#### *D. Compliance Through Clemency Proceedings*

In *LaGrand*, the ICJ stated that violation of Article 36 rights in the United States warrants "review and reconsideration" in light of Article 36 reconsiderations.<sup>257</sup> The court failed to precisely define "review and reconsideration," and this omission seems purposeful. In fact, the ICJ asserted that review and reconsideration can be accomplished in various forms and that the United States must be given the option to choose what form it will take.<sup>258</sup>

Clemency proceedings might provide sufficient review and reconsideration.<sup>259</sup> In Valdez' case, the state Pardon and Parole Board certainly considered the effect of the VCCR violations when it heard evidence from Valdez' newly hired team of lawyers and physicians. In fact, the Board voted to commute Valdez'

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255. 22 OKLA. STAT. § 1089(D)(9)(a)-(b) (2001).

256. See *infra* Part V.B.2.

257. *LaGrand* Case, (F.R.G. v. U.S.), 2001 I.C.J. ¶ 125 (June 27), at <http://www.icj-cij.org/icjwww/idocket/igusframe.htm>.

258. *Id.*

259. Schiffman, *supra* note 200, at 1131.

death sentence.<sup>260</sup> Furthermore, although Governor Keating ultimately denied the clemency, his letter to Mexican President Vicente Fox reflected the ICJ's requirement. The governor wrote that "I am satisfied that an appropriate *review and reconsideration* of the conviction and sentence of Mr. Valdez have occurred."<sup>261</sup> Likewise, Executive Order 2001-24 denying clemency stated the governor had "thoroughly *reviewed and reconsidered* the arguments and evidence presented in this case."<sup>262</sup>

More recently, the United States argued before the ICJ in *Mexico v. United States of America* that the United States believes that clemency proceedings provide sufficient review and reconsideration of Article 36 claims to comply with *LaGrand*: "We . . . have made a conscious choice to focus our efforts on clemency proceedings for providing the review and reconsideration [the ICJ] called for in *LaGrand*."<sup>263</sup> The Oklahoma Court of Criminal Appeals failed to consider this possibility, which might have allowed the court to give some effect to the ICJ judgment while maintaining complete compliance with state law and preserving a sense of state sovereignty. Again, its overreliance on *Breard* seems to have precluded such consideration.

### IX. Policy Implications — Reciprocity

Traditionally, treaty enforcement has been based upon the rule of reciprocity. In other words, States comply with treaties to ensure other States' compliance with treaties. This principle has served as the basis for many arguments that the United States' failure to enforce Article 36 may work to the detriment of American citizens abroad.<sup>264</sup> Indeed, at least one judge on the Oklahoma Court of Criminal Appeals has expressed such concern. In his concurring opinion in *Flores*, Judge Chapel stated,

In my judgment, the decision of this Court in this case, and the decision of the United States Supreme Court [referring to *Breard*] puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials. Why should Mexico, or any other

260. Doucette, *supra* note 146, at 1A.

261. Letter from Frank Keating, Governor of Oklahoma, to President Vicente Fox Quesada, President of Mexico 1 (July 20, 2001) (emphasis added) (on file with author).

262. Okla. Exec. Order No. 2001-24 (July 20, 2001) (emphasis added) (on file with author).

263. Case Concerning the Avena and Other Mexican Nationals (*Mex. v. U.S.*), 2003 I.C.J. 128, ¶ 37 (Feb. 5).

264. See Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 184 (1999); Schiffman, *supra* note 200, at 1129; Rebecca E. Woodman, *International Miranda? Article 36 of the Vienna Convention on Consular Relations*, 70 J. KAN. B. ASS'N 41, 42 (2001).

signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases.<sup>265</sup>

Federal judges have expressed the same concern. In *Breard v. Pruett*, in which the Fourth Circuit affirmed the denial of Breard's writ of habeas corpus, Judge Butzner stated in his concurring opinion that

[t]he protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world . . . Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity . . . ."<sup>266</sup>

Finally, in 1979, the United States argued before the ICJ that Article 36 creates individual rights in *United States v. Iran*,<sup>267</sup> the case involving the Iranian hostage crisis. The Inter-American Court of Justice noted this fact in its Advisory Opinion, stating that "the United States linked Article 36 of the Vienna Convention on Consular Relations with the rights of the nationals of the sending State."<sup>268</sup>

This evidence of U.S. concern for Americans traveling abroad signals the need to give further effect to Article 36 at the state and federal levels, whether or not *LaGrand* is considered binding. Not only is the safety of American citizens a concern, but also the United States, as a nation that prides itself as an adherer to the rule of law, cannot afford to enter into binding treaties and then fail to enforce them effectively.

#### *X. Recent Developments: The VCCR and the State of Illinois*

The Oklahoma Court of Criminal Appeals decided *Valdez* in May 2002. In September 2002, an Illinois federal court considered *LaGrand*'s impact after the Illinois Supreme Court denied relief to a Polish national who claimed violation of his Article 36 rights. The Illinois Supreme Court denied relief on procedural

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265. *Flores v. State*, 1999 OK CR 52, ¶ 4, 994 P.2d 782, 788 (Chapel, J., concurring).

266. *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (quoting *Hilton v. Guyot*, 159 U.S. 113, 228 (1895)).

267. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

268. *Advisory Opinion OC-16/99, Inter-Am. C.H.R. 487, OEA/ser. L./V/III.47, doc. 6, ¶ 75 (2000).*

grounds. The developments in this case are provided as a contrast to the Oklahoma Court of Criminal Appeals' decision in *Valdez*.

*A. Madej I: State Proceedings — Illinois' Procedural Default Rule Precludes Consideration of Madej's Article 36 Rights*

In 1982, an Illinois trial court convicted and sentenced Gregory Madej, a Polish national, to death for murder and other crimes.<sup>269</sup> In 1998, Madej sought relief by filing a petition with the trial court under the Illinois Code of Civil Procedure, which allows a petitioner to seek relief if he files a petition no more than two years after the judgment.<sup>270</sup> The trial court denied relief, and Madej appealed to the Illinois Supreme Court in 2000, approximately one year prior to *LaGrand*.<sup>271</sup> Obviously, the time limitation barred Madej's petition because he filed for relief approximately fourteen years too late.<sup>272</sup> However, Madej argued in part that the state failed to notify him of his Article 36 rights and that "reliance on a state procedural rule to bar an action violates international law."<sup>273</sup>

The Illinois Supreme Court disagreed. Regarding Article 36(2), the court held that, "[b]ecause the treaty specifically states that the forum court's rules and regulations will govern, we have no basis to conclude that the reasonable limitation period violates international law."<sup>274</sup> Furthermore, the court stated that Madej had not shown how Illinois law fails to give full effect to Article 36.<sup>275</sup> Ultimately, the court affirmed Madej's conviction and death sentence.<sup>276</sup>

*B. Federal Court Proceedings*

Madej then filed a writ of habeas corpus in federal court.<sup>277</sup> Madej made the same claims, but the federal court also denied him relief. The Northern District of Illinois held that "this court again finds that Madej's Vienna Convention claim is procedurally defaulted because the state court clearly relied on a state procedural bar as an independent basis for its denial of relief."<sup>278</sup> Ultimately, the court granted Madej's petition concerning his death sentence and ordered

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269. *People v. Madej*, 739 N.E.2d 423, 425 (Ill. 2000).

270. *Id.* at 426.

271. *Id.* at 425.

272. *Id.*

273. *Id.* at 426.

274. *Id.* at 428.

275. *Id.*

276. *Id.* at 429.

277. *United States ex rel. Madej v. Gilmore*, No. 98-C-1866, 2002 WL 370222, at \*1 (N.D. Ill. Mar. 8, 2002).

278. *Id.* at \*10.

resentencing, but did so based on his Sixth Amendment — not Article 36 — rights.<sup>279</sup>

Madej next filed with the same court a motion to alter or amend the judgment.<sup>280</sup> Madej sought in part a new trial and sentencing hearing on the basis of the state's Article 36 violations. Madej brought the *LaGrand* decision to the court's attention and requested it to amend its judgment based on this ICJ decision.<sup>281</sup> In response, the court rendered three important holdings. First, the court held that *LaGrand* "conclusively determines that Article 36 . . . creates individually enforceable rights, resolving the question most American courts (including the Seventh Circuit) have left open."<sup>282</sup> Second, the court held that *LaGrand* prohibits strict reliance on procedural default rules for Article 36 violations.<sup>283</sup> Responding to the State of Illinois' argument that *Breard* controls the issue, the court stated that "*Breard* does not withstand close scrutiny."<sup>284</sup> The court reasoned that *LaGrand* undermined a major premise of *Breard* — that procedural default rules give full effect to the purposes of Article 36.<sup>285</sup> The court reasoned that "[t]he I.C.J. has now declared that those rules do interfere with giving full effect to the purposes of the treaty."<sup>286</sup> The court also noted that *Breard* "was decided on an accelerated timetable without full briefing and consideration" and that it was a per curiam decision, thus concluding that *Breard* is entitled to less "precedential authority."<sup>287</sup>

Despite the court's criticism of *Breard*, the court based its third holding on what seemed to be an afterthought in *Breard*. The Supreme Court stated in *Breard* that "[e]ven were *Breard*'s Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."<sup>288</sup> The federal court viewed this statement in *Breard* as a blueprint for analyzing Article 36 violations.<sup>289</sup> On this basis, the court held that to gain relief for a VCCR violation, petitioners must show (1) that their VCCR rights were violated; and (2) that the violation materially affected the outcome of their trial or sentencing proceeding.<sup>290</sup> Applying this

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279. *Id.* at \*38.

280. *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 969 (N.D. Ill. 2002).

281. *Id.* at 978.

282. *Id.* at 979.

283. *Id.* at 978-79.

284. *Id.* at 979.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Breard v. Greene*, 523 U.S. 371, 377 (1998).

289. *Schomig*, 223 F. Supp. 2d at 979.

290. *Id.* at 980.



test to *Madej*, the court found that violation of *Madej*'s Article 36 rights failed to affect his trial's outcome, but may have affected the outcome of his sentencing proceeding.<sup>291</sup> However, because the court had already granted relief on that basis in the prior proceeding, it considered the issue moot.<sup>292</sup> Ultimately, the court granted *Madej*'s motion to alter or amend the judgment based on the Vienna Convention and *LaGrand* but denied relief.<sup>293</sup>

The federal court's decision indicates much deference to the ICJ based on *LaGrand*. However, an important footnote at the end of the opinion creates further difficulty. The footnote states,

If the Court did not deem the issue moot, the inquiry would not necessarily end with granting Petitioner relief. Because the issue presents itself on habeas corpus, the Court would have to grapple with the threshold question of retroactivity. Since there is no clear Supreme Court precedent about remedies for Vienna Convention violations, it is unlikely that this, or any other Court could premise relief on this basis.<sup>294</sup>

The court received another chance to address the issue when the State of Illinois filed a second motion to reconsider and asked the court to disregard the ICJ.<sup>295</sup> The court reiterated its holdings, stating that the ICJ's interpretation bound the United States and the court itself because the United States had ratified the Optional Protocol.<sup>296</sup> The court further declared that "no court can credibly hold that the Vienna Convention does not create individually enforceable rights."<sup>297</sup> Regarding whether relief might have been granted on the Vienna Convention claim alone, the court stated that "it is extremely doubtful at this point that a federal habeas court could premise relief on a Vienna Convention violation," citing 28 U.S.C. § 2254 as limiting habeas corpus relief to federal law violations of federal law as determined by the U.S. Supreme Court.<sup>298</sup>

### *C. Implications for the Oklahoma Court of Criminal Appeals*

*Madej* highlights two major problems with *Valdez*. First, reliance on *Breard* for the conclusion that procedural default rules are valid without further

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291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 980 n.13.

295. *Madej v. Schomig*, No. 98-C-1866, 2002 WL 31386480, at \*1 (N.D. Ill. Oct. 22, 2002).

296. *Id.*

297. *Id.*

298. *Id.* at \*2.

consideration of their effect on the accused's Article 36 rights may be questionable. Second, the Oklahoma Court of Criminal Appeals failed to consider the constitutional issues regarding whether the ICJ's judgment automatically takes effect in U.S. courts.

Clearly, the federal court's decision in *Madej*, while deferring heavily to the ICJ's interpretation of the VCCR, indirectly reflects concern over the interplay between international law and domestic law. The court definitively states that Article 36 creates individually enforceable rights and prohibits strict reliance on procedural default rules. However, in the end, a petitioner raising an alleged Article 36 violation has no relief because no conclusion has been reached as to the proper remedy for an Article 36 violation. This result indirectly reflects concern over whether Article 36 violations rise to the level of U.S. constitutional violations. Reliance on constitutional conflicts and the federalist nature of the U.S. legal system may have provided better rationale for denying Valdez' claims in the Oklahoma Court of Criminal Appeals.

### *XI. Conclusion*

Unquestionably, the Oklahoma Court of Criminal Appeals faced a difficult issue in *Valdez*. The court probably ruled correctly in denying that *LaGrand* is binding on Oklahoma courts, and certainly, that *LaGrand* is binding on state courts is a difficult argument to make. Of course, though, this is not the only issue. The federalist nature of the United States might grant states the power to incorporate ICJ decisions, especially in the absence of a federal position. Therefore, the issue may be better phrased as whether Oklahoma should follow *LaGrand*. Furthermore, the court clearly hesitated to address the issue, and its reliance on *Breard* precluded such considerations. The court could have given a more reasoned decision if it relied more heavily on domestic-law issues and the constitutional concerns surrounding the integration of international norms and judicial decisions into domestic law. Certainly, Article 36 violations will continue to confront state courts, and the principles espoused in this comment may provide useful avenues for the incorporation of *LaGrand* if states desire to exercise their sovereignty in that manner.

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