

7. The Vienna Convention on Consular Relations: Recent Developments

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I. Introduction

The Vienna Convention on Consular Relations (“Vienna Convention”) was adopted in 1963 to facilitate the work of consular officials. Vienna Convention on Consular Relations, April 24, 1963, 21 UST 77, TIAS No. 6820. Article 36 of the Vienna Convention provides that foreign nationals must be notified of their right to communicate with consular officials when they are detained by law enforcement officials. If a foreign national requests consular assistance, law enforcement officials are required to notify the appropriate consulate. The purpose of these provisions is twofold. They allow member states to monitor the well-being of their nationals, and they provide foreign nationals with access to consular officials.

In June 2001, the International Court of Justice (“ICJ”) issued a ruling interpreting the Vienna Convention and the requirements of Article 36. In the *LaGrand* case, the ICJ held that the United States violated the Vienna Convention when Arizona officials failed to notify two German nationals of their right to consular assistance.¹ The ICJ found that the Vienna Convention creates individual rights and that the procedural default rule could not be used to prevent consideration of Vienna Convention violations.²

Despite U.S. ratification of the Vienna Convention, federal and state law enforcement officials often disregard their obligation to

inform detained foreign nationals of their right to seek consular assistance.³ In many cases, foreign nationals have been sentenced to death with no opportunity to receive consular assistance at the pretrial, trial, or sentencing stages. While U.S. courts routinely find that the obligation to provide consular notification was disregarded, they refuse to provide any remedy for this Vienna Convention violation.

Two recent cases, however, reached a somewhat different outcome. Both cases involved foreign nationals who were not informed of their right to seek consular assistance and were subsequently convicted and sentenced to death. In both cases, the defendants challenged their convictions, arguing that their Vienna Convention rights were violated. In both cases, the defendants were granted new sentencing hearings. While the Vienna Convention was not dispositive, it played a prominent role in each case.

II. Valdez v. State of Oklahoma

In 1990, Gerardo Valdez was convicted of murder in Oklahoma and sentenced to death. Despite being a Mexican citizen, Valdez was never informed of his right to communicate with Mexican consular officials. Valdez never raised the Vienna Convention violation during his direct appeal nor did he raise it through post-conviction hearings.

In April 2001, the State of Oklahoma scheduled Valdez’s execution for June 19, 2001. At this point, a relative of Valdez notified the Mexican government of the scheduled execution. This was the first time that the Mexican government learned of Valdez’s conviction and death sentence. The Mexican government immediately retained legal and medical experts to assist Valdez. An investigation revealed that Valdez had experienced head injuries in his youth. Several medical tests confirmed the existence of brain damage. This information was provided to the

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Oklahoma Pardon and Parol Board, which was then considering a clemency petition.

On June 6, 2001, the Oklahoma Pardon and Parol Board voted to recommend clemency. Its decision was based, in part, on the Vienna Convention violation and the newly discovered medical evidence. While Governor Frank Keating granted Valdez a thirty-day stay of execution on June 18, 2001 to consider the clemency petition, he ultimately denied the petition.⁴ On August 17, 2001, however, Governor Keating granted Valdez a second thirty-day stay of execution in order to provide Valdez with the opportunity to pursue additional legal appeals. According to Governor Keating, the stay of execution was granted “because of the complicated questions of international law which have been presented by this case.”⁵

On August 22, 2001, Valdez filed a second Application for Post-Conviction Relief with the Oklahoma Court of Criminal Appeals. He raised four grounds for relief: (1) This Court must follow the decision of the International Court of Justice in *LaGrand* and provide relief on the basis of Oklahoma's admitted violation of his rights under Article 36 of the Vienna Convention on Consular Relations; (2) Mr. Valdez is entitled to relief regardless of proof that Oklahoma's violation of Article 36 was prejudicial; (3) This Court must afford Mr. Valdez a full and fair opportunity to challenge his conviction and sentence on the basis of Oklahoma's admitted violation of Article 36; and (4) Mr. Valdez is entitled to a new trial. The Mexican Government submitted an *amicus* brief in support of Valdez's request for a new trial or, at a minimum, for a new sentencing hearing. The *amicus* brief argued that the Vienna Convention and the ICJ's *LaGrand* ruling were binding on the United States and applied to Oklahoma pursuant to the Supremacy Clause of the U.S. Constitution.

With Governor Keating's second stay of execution set to expire, the Oklahoma Court of Criminal Appeals granted Valdez an indefinite

stay of execution. In a brief statement, the Court indicated it needed additional time to consider the “unique and serious matter involving novel legal issues and international law.”⁶

On May 1, 2002, the Oklahoma Court of Criminal Appeals issued its decision in the *Valdez* case, granting the second Application for Post-Conviction Relief and remanding the case for resentencing. *Valdez v. State of Oklahoma*, 2002 Okla. Crim. App. LEXIS 23 (2002).

First, the Court examined Valdez's Vienna Convention claim. Valdez argued that the June 2001 decision of the International Court of Justice in the *LaGrand* case represented a change in the law governing Vienna Convention cases and that this decision was clearly unavailable to him in earlier proceedings. Thus, Valdez argued that the Court should follow the reasoning of the *LaGrand* case and ensure that full effect is provided to individual victims of Vienna Convention violations. *Id.* at *16-*17.

In response, the Court determined that its power to apply intervening changes in the law to post-conviction applicants was limited by the Oklahoma Capital Post-Conviction Procedure Act. Under the Act, a defendant seeking to overturn a prior ruling due to an intervening change in the law must establish that the change in the law was unavailable at the time of the direct appeal or original application. Thus, an intervening change in the law could only be used to secure relief at the post-conviction stage if the legal basis for the claim was unavailable earlier. The Court held that the *LaGrand* decision did not constitute a change in the law. The legal basis for the claim – the Vienna Convention violation – was available to Valdez at the time of his first application for post-conviction relief. In addition, the U.S. Supreme Court had indicated in *Breard v. Greene* that the Vienna Convention did not bar application of the procedural default rule. *Breard v. Greene*, 523 U.S. 371 (1998). To

apply the ICJ's ruling instead of the Supreme Court's decision "would interfere with the nation's foreign affairs and run afoul of the U.S. Constitution." *Valdez v. State of Oklahoma*, 2002 Okla. Crim. App. LEXIS at *23.

Second, the Court considered that "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." *Id.* at *24. Specifically, the Court noted that no physical, mental, or health history was ever introduced at the trial or sentencing stages. The Court indicated that the failure to introduce this evidence was due to the trial counsel's inexperience.

Moreover, the Court found that trial counsel had failed to inform Valdez of his right to consular assistance, thereby denying Valdez of another resource to assist in his defense. The Court also criticized Oklahoma law enforcement officials, who had contact with Valdez, knew he was a Mexican citizen, and yet failed to inform him of his consular assistance rights.

If Mexican consular officials had participated, the Court found that they would likely have discovered and raised Valdez's physical, mental, and health history at trial, just as they had done at the post-conviction stage.

We cannot ignore the significance and importance of the factual evidence discovered with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner's defense, and provided resources to ensure he received a fair trial and sentence hearing. *Id.* at *24-*25.

The Court indicated that Valdez's physical, mental, and health history could have affected the jury's sentencing determination. Thus, "this Court 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." *Id.* at *27. Indeed, "there is a reasonable probability that the sentencer might have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)).

Accordingly, the Court granted the Application for Post-Conviction Relief and remanded the case for resentencing. While the dissent argued there was no basis for resentencing due to waiver and *res judicata*, the majority disagreed. "The concept of the Rule of Law should not bind this Court so tightly as to require us to advocate the execution of one who has been denied a fundamentally fair sentencing proceeding due to trial counsel's ineffectiveness, particularly when that ineffectiveness is at least in part attributable to State action." *Id.* at *28.

III. United States ex rel. Madej v. Schomig

In 1982, Gregory Madej was convicted of murder in Illinois and sentenced to death. Although he was a Polish citizen, Madej was never informed of his right to communicate with Polish consular officials. In addition, the State of Illinois failed to notify Polish consular officials of Madej's detention pursuant to the Consular Convention of 1972 between Poland and the United States.

On April 13, 1998, Madej filed a petition for *habeas corpus* relief with the federal district court for the Northern District of Illinois. The petition set forth 31 claims for relief, including a Vienna Convention claim.

On March 8, 2002, the federal district court issued its ruling on the petition for *habeas corpus* relief. First, the district court considered Madej's Vienna Convention claim. The court acknowledged the existence of a Vienna Convention violation. However, it refused to provide a remedy for the violation. The court noted that the Vienna Convention claim was procedurally defaulted and there was no cause to excuse the default. Moreover, the court found no prejudice. "Thus petitioner's statement to the police would not have been excluded nor would his indictment have been dismissed." *United States ex re. Madej v. Schomig*, 2002 U.S. Dist. LEXIS 380, *32 (N.D. Ill. 2002).

Second, the district court considered Madej's claim of ineffective assistance of counsel. The court found that no evidence about Madej's background or character was presented at the sentencing stage of his trial. This gave rise to an ineffective assistance of counsel claim. "There can be no confidence in the outcome of a capital sentencing hearing where the defendant was represented by an attorney who failed to present any evidence to counsel against imposition of the death penalty." *Id.* at *19. On this basis alone, the petition for *habeas corpus* relief was granted. The district court held that the State was required to resentence Madej within sixty days.

Despite the district court's favorable ruling, Madej filed a motion to alter or amend judgment, seeking a new trial or resentencing. Madej raised several grounds in his motion, including a renewed Vienna Convention claim. Specifically, Madej asked the court to amend its prior ruling on the Vienna Convention claim in light of the ICJ's *LaGrand* decision, which had been issued after the submission of his 1998 petition for *habeas corpus* relief.

On September 24, 2002, the federal district court issued its ruling on the motion to alter or amend judgment. *United States ex rel. Madej v. Schomig*, 223 F. Supp.2d 968 (N.D. Ill. 2002). The court began its analysis of the

Vienna Convention claim by noting that the Seventh Circuit had not resolved whether the Vienna Convention created individually enforceable rights. The court indicated, however, that the ICJ's *LaGrand* decision addressed and resolved this issue. According to the district court, "[t]he ruling of the International Court of Justice in *LaGrand* is certainly among the most important developments defining the treaty obligations of signatories to the Vienna Convention." *Id.* at 978. On the question of individual rights, the ICJ ruled conclusively that the Vienna Convention creates individually enforceable rights, "resolving the question most American courts (including the Seventh Circuit) have left open." *Id.* at 979. The *LaGrand* decision also suggested that "courts cannot rely upon procedural default rules to circumvent a review of Vienna Convention claims on the merits." *Id.*

The district court distinguished the Supreme Court's 1998 decision in *Breard v. Greene* on several grounds. In *Breard*, the Supreme Court held that the procedural default rule applied to any claims arising under the Vienna Convention. The district court noted that the ICJ's ruling in *LaGrand* undermined a major premise of the *Breard* ruling – the notion that procedural default rules do not interfere with Vienna Convention obligations. The district court further noted that the *Breard* ruling was of limited precedential value because it was a *per curiam* decision and was decided on an accelerated timetable without full briefing and consideration.

Despite the limitations of *Breard*, the district court found the Supreme Court's decision instructive in establishing the requirements for making a valid Vienna Convention claim. To gain relief, the petitioner must show: (1) that his Vienna Convention rights were violated; and (2) that the violation had a material effect on the outcome of the trial or sentencing proceeding. "In Madej's case, the

violation of his rights is clear; the effect of the violation, however, is somewhat muddy.” *Id.* at 980. It is doubtful that consular assistance would have affected the outcome of the trial. In contrast, consular assistance could have affected the sentencing hearing. “Particularly in this case, where trial counsel failed completely to undertake any investigation of the client’s life, character, and background in preparation for the sentencing phase, the participation of the Consulate could possibly have made a difference.” *Id.*

While the district court granted the motion to alter or amend judgment on the Vienna Convention claim, it denied relief on this claim. “As this Court has already granted Petitioner relief from his death sentence, this issue becomes moot.”⁷ *Id.*

Subsequently, the State of Illinois filed a motion for reconsideration, arguing that the district court had chosen to follow international law and ignore the decisions of the Supreme Court. Accordingly, the reconsideration motion asked the district court to disregard the *LaGrand* decision and revise its earlier ruling.

On October 22, 2002, the district court denied the reconsideration motion. *United States ex rel. Madej v. Schomig*, 2002 U.S. Dist. LEXIS 20170 (N.D. Ill. 2002). The court noted that the United States had ratified both the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes. Under the Optional Protocol, the United States had agreed to submit disputes arising out of the interpretation or application of the Vienna Convention to the compulsory jurisdiction of the ICJ. Accordingly, the ICJ’s interpretations of the Vienna Convention are binding upon the United States. “To disregard one of the I.C.J.’s most significant decisions interpreting the Vienna Convention would be a decidedly imprudent course.” *Id.* at *2.

The district court went on to reiterate the significance of the *LaGrand* decision. “After *LaGrand*, . . . no court can credibly hold that the Vienna Convention does not create

individually enforceable rights.” *Id.* at *3. In addition, *LaGrand* acknowledged that the Vienna Convention prohibits the use of procedural default rules to prevent judicial review of purported violations. “This interpretation of the Convention is binding upon the United States and this Court as a matter of federal law due to the ratification of the Optional Protocol.” *Id.* at *4.

The district court then considered the role that consular assistance could have played in *Madej*’s case. While consular assistance would not have affected the outcome at the trial stage, it could have played a significant role at the sentencing stage. “What the Consulate almost certainly would have done is provided Petitioner with an attorney who would have assisted in obtaining constitutionally effective assistance at the sentencing hearing.” *Id.* at *6. Such assistance could have resulted in a different outcome at the sentencing hearing.

Despite these findings, the district court reiterated that it had not granted *habeas corpus* relief based on the Vienna Convention violation. Due to restrictions on *habeas corpus* relief, the court noted it was doubtful that a federal court could premise *habeas* relief on a Vienna Convention violation. As a result, the court indicated that it premised its earlier ruling on the ineffective assistance of counsel claim.

IV. Conclusion

Valdez and *Madej* are significant cases. Both cases recognize the binding nature of the Vienna Convention and the Article 36 obligation to inform foreign nationals of their right to seek consular assistance. Both cases recognize the importance of consular assistance at the pre-trial, trial, and sentencing stages. *Madej* also recognizes the binding nature of ICJ rulings and the implications of the *LaGrand* decision on U.S. courts.

These cases are also significant because they reveal the potential influence of

international law in domestic litigation, including capital litigation.⁸ While the Vienna Convention claims were not dispositive, they played a prominent role in each case. Thus, advocates must continue to press for recognition of international law and its status in the United States “as the supreme law of the land.”

Endnotes

¹ Federal Republic of Germany v. United States (June 27, 2001), located at <http://www.icj-cij.org>. See generally William J. Aceves, *International Decision: LaGrand*, 96 AM. J. INT’L L. 210 (2002).

² The procedural default rule precludes a defendant from raising a claim on appeal that was not raised in earlier proceedings.

³ As a result, the Vienna Convention continues to engender significant scholarly interest. See, e.g., Howard S. Schiffman, *The LaGrand Decision: Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099 (2002); Cara Drinan, *Article 36 of the Vienna Convention on Consular Relations: Private Enforcement in American Courts After LaGrand*, 54 STAN. L. REV. 1303 (2002); Jennifer Lynne Weinman, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the LaGrand Case*, 17 AM. U. INT’L L. REV. 857 (2002); Stephanie Baker, *Germany v. United States in the International Court of Justice: An International Battle Over the Interpretation of Article Thirty-six of the Vienna Convention on Consular Relations and Provisional Measures Orders*, 30 GA. J. INT’L & COMP. L. 277 (2002).

⁴ Mexican President Vicente Fox contacted Governor Keating and requested clemency on behalf of Valdez.

⁵ Press Release, Governor Frank Keating, Governor Grants 30-Day Stay of Execution to Valdez, (Aug. 17, 2001).

⁶ John Greiner, *Mexican National Granted Indefinite Stay of Execution*, THE DAILY OKLAHOMAN, Sept. 11, 2001.

⁷ In a footnote, the district court also expressed concern about retroactivity. This footnote appears to refer to the Supreme Court’s earlier ruling in *Teague v. Lane*, which had imposed a retroactivity limitation on federal *habeas corpus* actions. *Teague v. Lane*, 489 U.S. 288 (1989). Despite the district court’s apparent concern with retroactivity, it is unclear that the *Teague* rule would apply to preclude review of a treaty violation.

⁸ See generally Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT’L L. 427 (2002); John Quigley, *LaGrand: A Challenge to the U.S. Judiciary*, 27 YALE J. INT’L L. 435 (2002).