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Note

People v. Madej: Illinois' Violation of the Vienna Convention on Consular Relations

*Brook M. Bailey**

I. INTRODUCTION

> How can we expect protection under [the Vienna Convention] for American citizens abroad if we do not extend equal protection to foreign nationals residing in the United States? The answer is, we cannot. The decision reached in this case thus has implications reaching far beyond the execution of this defendant.[1]

In 1982, Gregory Madej was convicted and sentenced to death for the gruesome murder of Barbara Doyle.[2] Nearly sixteen years later, his native country of Poland—an opponent of the death penalty—learned of Madej's arrest and trial for the first time.[3] On August 10, 2000, a divided Illinois Supreme Court rejected both Madej's and the Polish Government's pleas for relief under the Vienna Convention on Consular Relations.[4] Article 36 of the Vienna Convention provides that an arresting State must notify a foreign national[5] of his right to contact his

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1. People v. Madej, 739 N.E.2d 423, 432 (Ill. 2000) (Heiple, J., dissenting).

2. *See* People v. Madej, 478 N.E.2d 392, 394 (Ill. 1985); *infra* Part III.A (recounting the facts surrounding the murder of Barbara Doyle).

3. *Madej*, 739 N.E.2d at 432 (Heiple, J., dissenting).

4. *Id.* at 429.

5. For the purpose of consular notification, a "'foreign national' is any person who is not a U.S. citizen." U.S. ST. DEP'T, CONSULAR NOTIFICATION AND ACCESS 1 (Jan. 1998), *available at* http://www.state.gov/www/global/legal_affairs/ca_notification/ca_part3.pdf [hereinafter *State Department Manual*].

consul[6] and notify proper foreign authorities that one of their citizens has been detained.[7] Illinois did not deny that it failed to meet its obligation under this international treaty.[8] A remedy, however, for such violations cannot be found in the Vienna Convention, nor are U.S. courts willing to provide any relief.[9]

As of June 2000, eighty-seven foreign nationals from twenty-eight different countries were on death row in the United States.[10] While not all of these foreign nationals allege that they were deprived of their rights under the Vienna Convention, there is overwhelming evidence that the failure on the part of the United States to notify them of their rights is the rule rather than the exception.[11] State violations of the Vienna Convention cause a great outcry of disapproval from foreign countries, human rights organizations, and the general public.[12] Given the increase in litigation on these claims, a claim that meets all of the procedural requirements inevitably will be brought, forcing the courts to conceive a remedy for state violations.[13] Further, the international reaction to United States treaty violations will pressure the United States into taking concrete measures to ensure treaty compliance.[14]

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6. The United States State Department defines a "consul" or "consular officer" as:

> [A] citizen of a foreign country employed by a foreign government and authorized to provide assistance on behalf of that government to that government's citizens in a foreign country. Consular officers are generally assigned to the consular section of a foreign government's embassy in Washington, DC, or to consular offices maintained by the foreign government in locations in the United States outside of Washington, DC.

Id. at 1.

7. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77 [hereinafter Vienna Convention].

8. *See Madej*, 739 N.E.2d at 430 (McMorrow, J., concurring in part, dissenting in part).

9. *Infra* Part II.B.4 (discussing the courts disapproval of remedies for Vienna Convention violations).

10. As of June 2000, Amnesty International had the names of eighty-seven foreign nationals of twenty-eight nationalities who are sentenced to death in the United States. *United States of America: Worlds Apart—Violations of the Rights of Foreign Nationals on Death Row—Cases of Europeans*, at *9, *at* http://amnesty.it/ailib/aipub/2000/AMR/25110100.html (last visited Sept. 9, 2000) [hereinafter *Worlds Apart*].

11. Mark Warren, *Death Penalty Information Center, Foreign Nations and the Death Penalty in the United States, at* http://www.oranous.com/justice/foreignnationals.html (Sept. 26, 1999).

12. *See* Brief Amicus Curiae of the Consulate General of the Federal Republic of Germany in Chicago, *Madej* (Nos. 87574, 87752, 87725, 87726); Brief of Amicus Curiae the Human Rights Committee of the Bar of England and Wales in Support of the Defendant-Appellant, *Madej* (Nos. 87574, 87752, 87725, 87726); Brief Amicus Curiae of the United Mexican States, *Madej* (Nos. 87574, 87752, 87725, 87726).

13. Cara O'Driscoll, Comment, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 339 (2000).

14. *Infra* Part V.B (outlining the international reaction to United States violations of the

This Note begins with a discussion on the background of the Vienna Convention.[15] Next, this Note outlines how the United States Supreme Court avoided interpreting the rights and remedies contained in the Vienna Convention by choosing, instead, to focus on the procedural issues.[16] Additionally, this Note describes three fundamental issues federal and state courts consider when confronted with Vienna Convention violations: whether the Vienna Convention confers a private right of action on an individual;[17] whether a state can be compelled to comply with the treaty;[18] and whether suppression of evidence or dismissal of an indictment are appropriate remedies.[19] This Note then examines the Illinois Supreme Court's ruling on the procedural obstacles in the case of *People v. Madej*.[20] Additionally, this Note critiques the majority's failure to address a remedy for a state violation of the Vienna Convention, which led to the confirmed execution of a foreign national.[21] Finally, this Note assesses the potentially antagonistic reaction the international community will have on state violations of the treaty and outline possible measures states can take to avoid future violations.[22]

II. BACKGROUND

In the mid-1960s, the Vienna Convention on Consular Relations codified consular law.[23] Article 36 of the Vienna Convention is of special importance to foreign nationals because it confers a right to communicate and to meet with their consulate.[24] The extent of the rights and remedies for violations under Article 36, however, are much debated by United States federal and state courts.[25] When the United

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Vienna Convention).

15. *Infra* Part II.A (discussing the advent of the Vienna Convention on Consular Relations and the resulting treaty).

16. *Infra* Part II.B.1 (outlining the United States Supreme Court ruling in Breard v. Greene).

17. *Infra* Part II.B.2 (discussing whether a private right of action can be gleaned from Article 36).

18. *Infra* Part II.B.3 (examining states' compliance with the Vienna Convention).

19. *Infra* Part II.B.4 (discussing remedies that courts have found are inappropriate for state violations of the Vienna Convention).

20. *Infra* Part IV.A (discussing the limitations section 2-1401 of the *Illinois Code of Civil Procedure* place on Vienna Convention claims in Illinois).

21. *Infra* Part IV.B (analyzing the majority's failure to consider the policy arguments for overlooking the procedural obstacles).

22. *Infra* Part V (outlining the impact of the *Madej* rulings and similar rulings on the international community).

23. *Infra* Part II.A (discussing the codification of consular law).

24. *Infra* Part II.A (discussing rights contained in the Vienna Convention).

25. *Infra* Part II.B (examining the interpretation of rights and remedies under Article 36).

States Supreme Court refused to provide concrete guidance on these issues in *Breard v. Green*,[26] courts developed judicially-created tests to avoid any direct interpretation of the Vienna Convention.[27]

A. *The Historical Development of the Vienna Convention on Consular Relations*

Bilateral consular agreements formed between nations as early as the seventeenth century.[28] These agreements established diplomatic relations between two states[29] and primarily functioned to protect nationals in foreign countries.[30] Conflicting treaties, however, caused frustration[31] and rapid developments in international law after the Second World War prompting the need for a uniform system of consular law.[32] Consequently, in 1963, states from diverse political and economic backgrounds came together in Vienna, Austria, to set universal standards for diplomacy and international law.[33]

On March 2, 1963, the Vienna Convention on Consular Relations[34] convened with ninety-two states participating.[35] The purpose of the Vienna Convention was to establish guidelines for a consul's duties, rights, and privileges.[36] While the seventy-nine articles[37] of the Vienna Convention treaty were assembled with general ease, Article 36 became a source of much conflict and debate.[38] Article 36 was eliminated from the original draft[39] and was revived only two days prior to the end of the

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26. Breard v. Greene, 523 U.S. 371 (1998) (per curiam) [hereinafter *Breard III*].

27. *Infra* Part II.B.2 (highlighting the use of the prejudice test in state and federal courts).

28. Constantin Ecomidès, *Consular Treaties, in* 9 ENCYCLOPEDIA OF PUB. INT'L L. 37, 38 (Elsevier Sci. Publishers B.V., 1986).

29. *Id.* at 35.

30. *Id.* at 40.

31. *See* LUKE LEE, CONSULAR LAW AND PRACTICE 18 (2d ed. 1991).

32. *See id.* at 23.

33. *Id.* at 25.

34. Vienna Convention, *supra* note 7.

35. LEE, *supra* note 31, at 25. The Convention built upon its predecessor conference, the United Nations Conference on Diplomatic Relations, which took place two years earlier and set the stage for a productive and agreeable adoption of the Articles. *Id.* at 24.

36. Gregory Dean Gisvold, Note, *Stranger in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 780 (1994).

37. The Vienna Convention contains seventy-nine articles and is divided into five chapters: "consular relations in general; facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post; the régime relating to honorary consular officers and consular posts headed by such officers; general provisions; and final provisions." Ecomidès, *supra* note 28, at 39.

38. LUKE LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 107 (1966).

39. *Id.* Article 36 did not get the necessary two-thirds majority vote and thus was eliminated.

Convention.[40] The dispute over Article 36 centered on whether a duty should be imposed on the arresting State to notify the detainee's State of the detainment and to allow for unimpeded communication and visitation between the detainee and consul.[41] After multiple defeated drafts and much deliberation,[42] Article 36 was finally adopted and incorporated in the Vienna Convention Treaty.[43]

The original draft provided:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) Nationals of the sending State shall be free to communicate with and to have access to the competent consulate, and the consular officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;
>
> (b) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or detained in any other manner. Any communication addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay;
>
> (c) Consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, for the purpose of conversing with him and arranging for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement [sic].
>
> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these rights.

2 United Nations Conference on Consular Relations: Official Records, at 23-24 U.N. Doc. A/Conf.25/6, U.N. Sales. No. 63.X.2 (1963).

40. LEE, *supra* note 38, at 112-13.

41. *Id.* at 107.

42. *Id.* at 112-13.

43. The adopted Article 36 of the Vienna Convention on Consular Relations states in relevant part:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) 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;
>
> (b) if he 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 said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and the arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a

The revised Article 36 enables governments to provide for the safety of their citizens abroad and to avoid international conflicts resulting from the mistreatment of persons detained in foreign countries.[44] Specifically, Article 36 details the procedures an arresting State must follow when a foreign national is detained.[45] The arresting State is required to notify a detained foreign national that he has a right to communicate and meet with his consul.[46] Furthermore, the State must notify the proper authorities of the detainee's State that a foreign national is in custody.[47] The Article gives no specific timelines for these notification requirements; rather, these procedures must be done "without delay."[48]

The United States officially ratified the Vienna Convention in 1969.[49] As a result, the treaty became binding law pursuant to the Supremacy Clause of the United States Constitution.[50] The Vienna Convention itself has been called "the single most important event in the entire

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> judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Vienna Convention, *supra* note 7, art. 36, 21 U.S.T. at 100-01.

44. *See* William J. Aceves, *Treaties–Vienna Convention on Consular Relations–consular access to detained nationals–habeas corpus–Antiterrorism and Effective Death Penalty Act of 1996*, 92 AM. J. INT'L L. 87, 89-90 (1998).

45. Vienna Convention, *supra* note 7, art. 36, 21 U.S.T. at 100-01.

46. *Id.* (stating that "[t]he said authorities *shall* inform the person concerned without delay of his rights under this subparagraph" (emphasis added)).

47. *Id.* (stating that "the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner").

48. *Id.* The Vienna Convention emphasizes the urgency of honoring these rights "without delay" stating that:

> [T]he receiving State shall, *without delay*, inform the consular post of the sending State . . . . Any communication addressed to the consular post by the person arrested . . . shall also be forwarded by said authorities *without delay*. The said authorities shall inform the person concerned *without delay* of his rights under this subparagraph . . . .

Vienna Convention, *supra* note 7, art. 36 (1), 21 U.S.T. at 100-01 (emphasis added).

49. 115 CONG. REC. S30997 (daily ed. Oct. 22, 1969).

50. Article VI, clause two of the United States Constitution reads in full:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

history of the consular institution."[51] Any dispute about the role of consular relations cannot be settled without reference to the Vienna Convention and the resulting treaty.[52] Since its ratification, some United States courts found the treaty's language unequivocal on its face.[53] These same courts, however, struggle with interpretation of this language, attempting to provide individuals with rights and remedies when a state violates the treaty.[54]

B. The Construction and Destruction of the Vienna Convention in United States Federal and State Courts

United States courts first dealt with the Vienna Convention in the context of United States Immigration and Naturalization Service (INS) hearings.[55] These cases considered an INS regulation[56] created to ensure compliance with Article 36 and, thus, did not confront specific provisions in the treaty.[57] More recently, courts have confronted the actual language of Article 36 in both deportation hearings and in criminal cases.[58] Even so, given the paucity of precedent on this treaty,

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51. LEE, *supra* note 31, at 26.

52. *Id.*

53. *See, e.g.*, United States v. Lombera-Camorlinga, 206 F.3d 882, 890 (9th Cir. 2000) (Boochever, J., dissenting) (stating that "the language of the provision is not precatory, but rather mandatory and unequivocal"), *cert. denied*, 2000 WL 798553 (U.S. Nov. 13, 2000); United States v. Li, 206 F.3d 56, 71 (1st Cir. 2000) (stating that "the language of the Vienna Convention . . . is anything but ambiguous"), *cert. denied*, 2000 WL 723038 (U.S. Oct. 30, 2000) (Torruella, J. dissenting); Breard v. Pruett, 134 F.3d. 615, 622 (4th Cir. 1998) (Butzner, J., concurring) [hereinafter *Breard II*] (stating that "[t]he language is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government"), *aff'd per curium sub nom.*, Breard v. Green, 523 U.S. 371 (1998) (per curium); People v. Madej, 739 N.E.2d 423, 430 (Ill. 2000) (McMorrow, J., concurring in part, dissenting in part) (stating that "[t]he language of the treaty 'is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government'") (quoting Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring)).

54. *Infra* Part II.B (discussing various court rulings on Vienna Convention violations in the context of immigration hearings).

55. *See* Tejeda-Mata v. Immigration and Naturalization Serv., 626 F.2d 721 (9th Cir. 1980); United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980); United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Vega-Mejia, 611 F.2d 751 (9th Cir. 1979); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979).

56. *Infra* note 112 and accompanying text (discussing the claims pursuant to 8 C.F.R. § 242.2 in United States v. Calderon-Medina).

57. *Infra* note 112 and accompanying text (discussing the claims pursuant to 8 C.F.R. § 242.2 in United States v. Calderon-Medina).

58. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 276-82 (1998) (comparing cases brought under federal regulations in deportation hearings with cases brought under the Vienna Convention in criminal proceedings).

state and federal courts created tests to address three fundamental questions regarding the implementation of the Vienna Convention. First, courts considered whether the Vienna Convention confers a private right of action on an individual.[59] Second, courts examined whether a state can be compelled to comply with the treaty.[60] Finally, courts examined whether dismissal of indictment or suppression of evidence are appropriate remedies for a state violation of the Vienna Convention.[61] The development of these tests is due, in part, to the United States Supreme Court's failure to provide guidance to state and federal courts about how to deal with state violations of the Vienna Convention.[62]

1. The Procedural Default Doctrine and *Breard III*

In the landmark case of *Breard III*,[63] the United States Supreme Court had its first opportunity to confront the issue of a state's violation of the Vienna Convention.[64] In 1992, Angel Francisco Breard was convicted and sentenced to death by a Virginia trial court for the murder of Ruth Dickie.[65] Upon the affirmation of his conviction and sentence by the Virginia Supreme Court,[66] Breard filed a motion to the federal district court for *habeas* relief, alleging that his rights were violated when the authorities failed to inform him of his rights under the Vienna Convention.[67] The district court rejected his claim because he failed to

59. *Infra* Part II.B.2 (discussing whether a private right of action can be gleaned from the treaty).

60. *Infra* Part II.B.3 (examining whether a state can be compelled to comply with an international treaty).

61. *Infra* Part II.B.4 (discussing options considered by courts to remedy a state violation of the Vienna Convention). Due to this Note's focus on the Illinois case of *People v. Madej*, the background section will primarily concentrate on court decisions that are binding or persuasive precedent to Illinois Supreme Court decisions. Given the scant authority on Vienna Convention violations in Illinois, however, cases from other jurisdictions are incorporated in order to develop a thorough backdrop upon which to view the *Madej* ruling.

62. *Infra* Part II.B.1 (outlining the failure on the part of the United State Supreme Court to provide guidance on state violations of the Vienna Convention).

63. *Breard III*, 523 U.S. 371 (1998) (per curiam).

64. Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 149 (1999).

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

66. *Id.*

67. *Breard III*, 523 U.S. at 373.

raise the issue in state court, thereby procedurally defaulting the claim.[68] The Fourth Circuit affirmed.[69]

In an eleventh-hour plea to the Supreme Court,[70] Breard argued that the Vienna Convention should trump the state procedural default doctrine in federal court because it is an international treaty.[71] In a 6-3 decision to deny certiorari, the Supreme Court commented that Breard's claim was procedurally defaulted because he failed to raise this claim in state court.[72] The Court stated the Vienna Convention intended for state procedural rules to govern the implementation of the treaty.[73] Additionally, the Court speculated that even absent procedural preemption, Breard could not show that the state's failure to inform him of his rights prejudiced[74] the outcome of the trial.[75]

The three justices who argued in favor of granting certiorari argued that the Court's refusal to review the case was made too hastily, especially given the international context.[76] The "entire case was mooted" when Breard was executed that night.[77] The Supreme Court

68. Breard v. Netherland, 949 F. Supp. 1255, 1266 (E.D. Va. 1996) [hereinafter *Breard I*]. The procedural default doctrine is based on the procedural status of a claim. *See Breard III*, 523 U.S. at 375. By definition, procedurally defaulted claims are claims that cannot be decided on the merits because they have been time-barred. *See id.*

69. *Breard II*, 134 F.3d 615, 621 (4th Cir. 1998) (holding that petitioner's claim under the Vienna Convention procedurally defaulted because it was not raised in the state court), *aff'd per curium sub nom.*, Breard v. Greene, 523 U.S. 371 (1998) (per curium).

70. The Paraguayan government did not find out about Breard's detainment until three years after he entered death row. Luna & Sylvester, *supra* note 64, at 148. Even then, the government was notified by Breard's family, not by the United States government. *Id.*

71. *Breard III*, 523 U.S. at 375.

72. *Id.* at 375-76.

73. *Id.* at 375. The Court held, "By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review." *Id.* at 375-76.

74. *Infra* Part II.B.2.c (discussing the prejudice test which is a judicially-created test that petitioners can use to show that a remedy is necessary because the state's violation of the Vienna Convention prejudiced the outcome of their trial).

75. *Breard III*, 523 U.S. at 377. The Court stated, "[N]o such showing could even arguably be made. Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been." *Id.* Responding to Breard's claim that he was prejudiced by not knowing of his right to contact his consul, the Court stated this claim is "far more speculative than the claims of prejudice courts routinely reject in those cases were [sic] an inmate alleges that his plea of guilty was infected by attorney error." *Id.*

76. *Id.* at 380 (Stevens, J., dissenting) (stating that the Court was deprived of the normal time for consideration of this case); *id.* at 380-81 (Breyer, J., dissenting) (noting that the petitioner's arguments are without merit, but the court has not had enough time to consider all the issues); *id.* at 381 (Ginsburg, J., dissenting) (stating that the stay of execution should be granted).

77. Luna & Sylvester, *supra* note 64, at 149.

side-stepped a number of critical questions that had been brewing in many state and federal courts regarding the interpretation of the Vienna Convention, including: whether an individual has a private right of action under the Vienna Convention;[78] whether a state can be compelled to notify foreign nationals of their rights under the treaty;[79] and whether suppression of evidence or dismissal of an indictment are appropriate remedies for violations of this treaty.[80] By failing to provide guidance to state and federal courts, the Supreme Court set the stage for considerable confusion about how to deal with state violations of the Vienna Convention.

2. The Right to Consular Assistance under Article 36

A major source of confusion for United States courts is whether an individual has a private right of action under Article 36 of the Vienna Convention.[81] Typically courts circumvent this determination by first ascertaining whether an individual even has standing to allege a treaty violation.[82] If no determination on standing can be made, then courts look directly at the text of the treaty and official documents to see if any explicit right of action is provided for an individual.[83] Finally, some

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78. *Infra* Part II.B.2 (discussing whether a private right exists for an individual in the Vienna Convention).

79. *Infra* Part II.B.3 (examining a state's duty of compliance with an international treaty).

80. *Infra* Part II.B.4 (discussing possible remedies courts have examined when confronted with a state violation of the Vienna Convention).

81. *See* United States v. Chaparro-Alcantara, Nos. 99-2721, 99-2874, 2000 WL 1182450, at *4 (7th Cir. Aug. 21, 2000) (assuming that a private right is created by the Vienna Convention); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000) (stating that even if a private right is assumed to exist, the remedy sought is not provided for by the treaty), *cert. denied*, 2000 WL 798553 (U.S. Nov. 13, 2000); United States v. Li, 206 F.3d 56, 60 (1st Cir. 2000) (refusing to address directly whether private right is created by holding that remedy sought by defendants is inappropriate), *cert denied*, 2000 WL 723038 (U.S. Oct 30, 2000); Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) (stating that the Vienna Convention cannot be construed to create individual rights); United States v. Rangel-Gonzales, 617 F.2d 529, 530 (9th Cir. 1980) (holding that defendant has a private right under the Vienna Convention); United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979) (refusing to decide whether individual has private right); United States v. Carrillo, 70 F. Supp. 2d 854, 857 (N.D. Ill. 1999) (holding that a private right of action is a threshold issue); United States v. Rodrigues, 68 F. Supp. 2d 178, 182 (E.D.N.Y. 1999); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 989 (S.D. Cal. 1999) (finding that Article 36 creates individual rights), *aff'd*, 2000 WL 1256890 (9th Cir. (Cal.) Sept. 5, 2000); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999) (holding that it is doubtful that a private right exists); People v. Madej, 739 N.E.2d 423, 427 (Ill. 2000) (implying that defendant would have a private right of action if claim not time-barred); People v. Villagomez, 730 N.E.2d 1173, 1182 (Ill. App. Ct. 2000) (holding that the Vienna Convention arguably confers a private right, but Article 36 does not create a fundamental right).

82. *Infra* Part II.B.2.a (discussing whether an individual has standing to allege a treaty violation).

83. *Infra* Part II.B.2.b (examining the text of the Vienna Convention).

courts avoid addressing this issue altogether by using a judicially-created prejudice test to show that regardless of whether a private right is provided for an individual, the foreign national's case was not biased by a state violation of the treaty.[84]

a. Standing to Allege a Treaty Violation

In *Breard III*, the Supreme Court only suggested that the Vienna Convention "arguably" confers an individual the right to contact his consulate upon arrest.[85] Thus, in determining whether the Vienna Convention confers a private right of action on an individual, courts first consider whether an individual has standing to allege a treaty violation.[86] In *United States v. Carrillo*,[87] the U.S. District Court for the Northern District of Illinois held that standing to assert rights under the Vienna Convention was a threshold issue in determining whether there was a right of action under the treaty.[88] While no Seventh Circuit precedent existed on the issue of standing under the Vienna Convention,[89] the court noted the frequency with which this issue has been litigated in other courts.[90] Due to the varied holdings from these

84. *Infra* Part II.B.2.c (demonstrating the use of the prejudice test).

85. *Breard III*, 523 U.S. 371, 376 (1998) (per curiam) (the Court stated that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest").

86. *See, e.g.*, United States v. Carrillo, 70 F. Supp. 2d 854, 857 (N.D. Ill. 1999).

87. *Id.*

88. *Id.* at 857. In the fall of 1998, Anselmo Carrillo and two other men were detained by the Drug Enforcement Agency because of alleged involvement with drug trafficking. *Id.* at 855. Carrillo signed a waiver to have his car searched for narcotics. *Id.* After they were arrested and informed of their *Miranda* rights, Carrillo and the other men were charged with drug possession and intent to distribute. *Id.* at 856. After the court order, the men made a motion to dismiss their convictions and suppress the evidence based on the claim that they were not told of their rights to consular notification under the Vienna Convention. *Id.* The court found no authority for such a claim, and their motion was denied. *Id.* at 862.

89. The court found that under a different treaty, the Seventh Circuit previously stated that "'individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.'" *Id.* at 858 (quoting Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990)). Thus, under that authority, the "[d]efendants appear to lack standing to assert individual rights under Article 36" because the sovereign State failed to assert any rights on behalf of the foreign nationals involved. *Id.* at 858.

90. *Id.* at 858-59. The court cited the following cases and their relative status on standing:

> United States v. Lombera-Camorlinga, 170 F.3d 1241, 1242-43 (9th Cir.1999) (concluding that an individual has standing), *withdrawn*, Oct. 1, 1999 188 F.3d 1177, 1999 WL 787431 at *1; United States v. Rodrigues, 68 F. Supp. 2d 178, 181-83 (E.D.N.Y. 1999) (stating that an individual probably does have standing, but declining to decide the issue conclusively); United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999) (concluding that an individual has standing); United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 77-78 (D. Mass. 1999) (same); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 988-89 (S.D. Cal. 1999) (following Lombera-Camorlinga to conclude that an individual has standing); United States v. Kevin, 97

courts on whether standing to assert a right exists, the court in *Carrillo* did not decide whether standing existed, but rather turned to the language of the treaty to investigate whether a private right is explicitly conferred.[91]

b. The Text of the Treaty is Ambiguous as to Whether a Private Right Exists

The Supreme Court has instructed that, when construing a treaty, courts must first look to the plain words of the treaty.[92] Article 36 states that

> the receiving State *shall, without delay*, inform the consular post of the sending State .... Any communication addressed to the consular post by the person arrested ... *shall* also be forwarded by said authorities *without delay*. The said authorities *shall* inform the person concerned *without delay* of his rights under this subparagraph ....[93]

While this language appears to provide certain benefits to an individual, the question of whether the treaty confers a private right of action is unclear.[94] The first sentence of Article 36 and the preamble to the Vienna Convention suggest that the purpose of the treaty is to standardize consular activities, not to aid a foreign detainee.[95] The focus of this language seems to aid the consul in carrying out his

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> CR 763JK, 1999 WL 194749, at *3 (S.D.N.Y. Apr. 7, 1999) (addressing but declining to decide the issue of standing); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1253 (D. Utah 1999) (stating that it is "doubtful" that an individual has standing, but declining to decide the issue conclusively); United States v. Superville, 40 F. Supp. 2d 672, 678 (D.V.I. 1999) (concluding that an individual has standing); United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1125 (C.D. Ill.1999) (same); United States v. $69,530.00, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998) (same, in a civil forfeiture case); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998) (stating that the issue is "murky" and that several factors indicate individual standing, but declining to decide the issue conclusively); Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (discussing whether the Vienna Convention is "self-executing" and suggesting that an individual does not have standing), *aff'd*, 134 F.3d 622 (4th Cir.), *and cert. denied*, 523 U.S. 371 (1998); Kasi v. Commonwealth, 256 Va. 407, 508 S.E.2d 57, 64 (1998) (stating that Article 36 creates no legally enforceable individual rights).

Id.

91. *Id.* at 859.

92. United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992).

93. Vienna Convention, *supra* note 7, art. 36(1)(b), 21 U.S.T. at 100-01 (emphasis added).

94. United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (stating that "[e]ven where a treaty provides certain benefits for nationals of a particular state ... it is traditionally held that any rights arising from such provisions are, under international law, those of states and ... that individual rights are only derivative through states'" (quoting Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) (alternations in original)).

95. *See* Vienna Convention, *supra* note 7, art. 36(1), pmbl., para. 5, 21 U.S.T. at 100.

responsibilities to nationals in foreign states.[96] Additionally, the preamble states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States."[97] This clause implies the treaty is intended to benefit the consular, not the detained individual.[98]

In *United States v. Li*,[99] the First Circuit interpreted the preamble to the Vienna Convention as "explicitly disclaim[ing] any attempt to create individual rights."[100] Moreover, the court in *Li* found that the Article 36 language was ambiguous as to whether individual rights are created at all.[101] Due to the ambiguity of the treaty, the court turned to non-textual sources to decipher the meaning of Article 36.[102] The *Li* court took special note of the U.S. State Department's opinion on whether treaties create individual rights.[103] After reviewing court documents submitted by the State Department, the court found that the State Department concluded that the Vienna Convention establishes state-to-state rights and obligations, not the rights of individuals.[104] The court explained that any individual rights found in the Vienna Convention were merely derivative of the state's right to extend consular communication and protection.[105]

In holding that individual rights were not provided for in the Vienna Convention, the *Li* court refused to decide the case at bar based on whether the treaty provided a foreign national with a private right of action.[106] Rather, the court focused its holding on the fact that the treaty did not provide for the *remedy* sought by the defendants.[107] Such

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96. *Id.* (focusing on "facilitating the exercise of consular functions relating to nationals of the sending State").

97. *Id.* at pmbl., para. 5.

98. Howard S. Schiffman, Breard *and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 37 (2000).

99. United States v. Li, 206 F.3d 56 (1st Cir. 2000).

100. *Id.* at 62.

101. *Id.*

102. *Id.* at 63 (stating, "To the extent that the treaty's terms are ambiguous . . . rely upon non-textual sources 'such as the treaty's ratification history and its subsequent operation.'" (quoting United States v. Stuart, 489 U.S. 353 (1989))).

103. *Id.* The court referred to the State Department's views that "treaties do not create individual rights at all." *Id.*

104. *Id.*

105. *Id.* (referring to the State Department's conclusion that "[t]he right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned").

106. *Id.*

107. *Id.* at 66. The court concluded that "[t]he remedies sought by appellants are unavailable

avoidance is not uncommon in U.S. courts given the ambiguities and confusion about interpreting an international treaty and the potential impact a lower court decision could have internationally.[108] Rather than analyzing the meaning behind the treaty's text, most courts move directly to a prejudice analysis as a way of avoiding such interpretation.[109]

c. The Prejudice Test

In the late 1970s, courts began to inquire whether the Vienna Convention conferred a private right of action on an individual by considering whether the detainee was prejudiced by the state's violation.[110] In *United States v. Calderon-Medina*,[111] the defendants alleged that in a prior deportation hearing they were not informed of their right to contact their consul,[112] and that their deportation was, therefore, unlawful.[113] The Ninth Circuit decided not to resolve this issue directly and instead created a test to determine if such violations prejudiced the rights of the alien.[114] The court thus established a two-part prejudice test. The first part of the test inquires whether the regulation served to benefit the detainee.[115] The second part of the test

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to them under . . . the Vienna Convention . . . . Therefore, irrespective of whether [the Vienna Convention] . . . create[s] individual rights, the defenses asserted must be denied." *Id.*; *see also supra* Part II.B.4 (discussing the various court holdings based on inappropriate remedies).

108. 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, 602 (1997). Kadish states, "Courts considering the issue of Article 36 violations have generally avoided the issue of whether an individual right exists by moving directly to a prejudice analysis." *Id.*

109. *See, e.g.*, Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997); Waldron v. Immigration and Naturalization Serv., 17 F.3d 511 (2nd Cir. 1996); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996); United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979); Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996).

110. *See, e.g.*, Tejeda-Mata v. Immigration and Naturalization Serv., 626 F.2d 721 (9th Cir. 1980); United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980); United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Vega-Mejia, 611 F.2d 751 (9th Cir. 1979); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979).

111. *Calderon-Medina*, 591 F.2d at 530.

112. The defendants alleged that pursuant to 8 U.S.C. § 1326 the INS violated its own regulation, 8 C.F.R. § 242.2(e)(1978). *Id.* at 530. This regulation states, "Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality." 8 C.F.R. § 242.2 (2000). This statute was created to correspond with and ensure compliance with Article 36 of the Vienna Convention. *Calderon-Medina*, 591 F.2d at 531 n.6.

113. *Calderon-Medina*, 591 F.2d at 530.

114. *Id.* at 531 (stating, "Violation of a regulation renders a deportation unlawful only if the violation prejudiced [the] interests of the alien which were protected by the regulation").

115. *Id.*

asks whether the violation of the regulation prejudiced the detainee.[116] Under this initial test, the foreign national had the burden of proving his defense was prejudiced by demonstrating he was unable to understand the legal proceedings due to his status as a foreigner or language barriers.[117] As long as a court found that no prejudice occurred, the question of whether Article 36 established a private right for individuals could be avoided.[118]

As appeals based on Vienna Convention violations increased, the scope of the prejudice test narrowed.[119] Courts adopted a new test which held that in order to establish prejudice, the foreign national had to provide evidence demonstrating that (1) he did not know of his rights, (2) that he would have pursued his rights under the treaty, and (3) the consul would have assisted him.[120] Under both tests, only one defendant has been able to prove successfully that a state violation of the Vienna Convention prejudiced his defense.[121] This small number is,

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116. *Id.*

117. Gisvold, *supra* note 36, at 801 (finding that the test gives the defendant an opportunity to show "his alienage, language disability, or lack of sufficient understanding of the legal proceedings against him, harmed his defense sufficiently to merit reversal").

118. United States v. Carrillo, 70 F. Supp. 2d 854, 859 (N.D. Ill. 1999) (stating, "While several factors weigh in favor of recognizing a private right of action under Article 36, this court agrees with those courts that have found it unnecessary to decide the issue conclusively").

119. *See, e.g.*, United States v. Salas, No. 98-4374, 1998 WL 911731, at *3 (4th Cir. 1998) (stating that the defendant must show prejudice to suppress evidence under Article 36); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996) (rejecting habeas petitioner's claim under the Convention on the ground that any assistance he might have obtained from his consulate would have had no effect on his defense); United States v. Rodrigues, 68 F. Supp. 2d 178, 182-84 (E.D.N.Y. 1999) (stating that defendant did not provide enough evidence to prove his case was prejudiced); United States v. Miranda, 65 F. Supp. 2d 1002, 1007 (D. Minn. 1999) (holding that prejudice was not demonstrated by the defendant because he never attempted to contact his consular while in prison); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 991 (S.D. Cal. 1999) (holding that defendant could not prove prejudice because she was fully informed of her *Miranda* rights); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1254 (D. Utah 1999) (holding that defendant could not show that failure to contact consular would have made difference in trial); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1096 (S.D. Cal. 1998) (denying motion to suppress evidence under an Article 36 claim because prejudice was not shown). *But see* United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999) (skipping any discussion of prejudice and proceeding to what is the appropriate remedy).

120. United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998) (finding that "[t]o establish prejudice, the defendant must produce evidence that (1) he did not know of his right; (2) he would have availed himself of the right had he known of it; and (3) there was a likelihood that the contact with [the consul] would have resulted in assistance to him"); *accord*, Illinois v. Villagomez, 730 N.E.2d 1173, 1183 (N.D. Ill. 2000) (holding that "[t]o establish prejudice, a defendant must show that (1) he did not know of his right to contact the consulate for assistance; (2) he would have availed himself of the right; and (3) there was a likelihood that the consulate would have assisted defendant").

121. United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980). One source indicates that the deciding factor in the defendant's successful showing of prejudice in *Rangel-Gonzales*

in part, due to the defendant's burden of meeting the high standard of the prejudice test.[122] Unsatisfied with the prejudice test as a dispositive factor in denying a remedy to a foreign national, courts further questioned whether a state can even be compelled to enforce a treaty[123] and then addressed whether the remedy sought is appropriate under the Vienna Convention.[124]

3. State Compliance with the Vienna Convention

A fundamental question of whether a state can be compelled to comply with the Vienna Convention is entangled with the issue of whether an individual has rights under the treaty. A treaty is "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law."[125] Pursuant to the Supremacy Clause, a ratified treaty has the dignity of an act of Congress.[126] In the seminal case of *Missouri v. Holland*,[127] the United States Supreme Court held that the Supremacy Clause[128] permits Congress to impose regulations on states in areas that

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was the superior legal counsel the defendant received. The showing of prejudiced included:

> [T]he defendant's affidavit stating that he did not know that he could contact his consul and that he would have contacted the consul if he had known he could; an affidavit from the consul stating the steps he would have taken when notified of the defendant's detention; and the affidavit of an experienced immigration attorney stating that, if the defendant had obtained consular assistance, he would have obtained a better result in the case.

Linda Jane Springrose, Note, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 192 (1999).

122. One observer noted that "[t]he current state of the law puts too great a burden on defendants to prove that they were prejudiced by not having been advised of their right to contact consul." Springrose, *supra* note 121, at 213; *see also* Luna & Sylvester, *supra* note 64, at 189. Luna and Sylvester state that "a violation of the Vienna Convention should be presumptively prejudicial to the defendant and must be met with affirmative government evidence to the contrary." *Id.* They further argue that upon determining a state violation has occurred, "the burden should be placed on the government to demonstrate that no prejudice has accrued to the defendant's case." *Id.*

123. *Infra* Part II.B.3 (examining state compliance with the Vienna Convention).

124. *Infra* Part II.B.4 (discussing possible remedies for a state violation of the Vienna Convention).

125. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 184-85 & n.36 (2d ed. 1996) (quoting RESTATEMENT OF FOREGN RELATIONS LAW § 301, Preface n.2, adapting Article 1 of the Vienna Convention on the Law of Treaties).

126. Head Money Cases, 112 U.S. 580, 598 (1884) (stating that the "Constitution [of the United States] places [treaties] in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land'").

127. Missouri v. Holland, 252 U.S. 416 (1920).

128. Article VI, clause two of the United States Constitution reads in full:

the federal government would not otherwise have any independent source of authority.[129] Congress' treaty power is plenary, the Court held, and is carried out by the "necessary and proper" clause.[130] Once a treaty is ratified by two-thirds vote in Congress, it becomes binding law and is essentially the equivalent of a federal statute, which is superior to all conflicting state statutes.[131] As a result, a treaty does not violate the Tenth Amendment rights of the states and must, therefore, be complied with.[132]

Recent Supreme Court decisions, however, have drawn on some unresolved ambiguities in *Missouri v. Holland*.[133] These cases indicate that the federal government may be barred from compelling states to implement treaties because commandeering states to enact federal programs violates the Tenth Amendment.[134] In the context of an individual's rights under the Vienna Convention, commentators have noted the ominous refusal at the state level to notify foreign nationals of the right to contact their consul.[135] For example, in the period since the reinstatement of the death penalty in 1976, Arizona has executed three foreign nationals without notifying them of their rights under the Vienna Convention.[136] Therefore, the constitutionality of requiring a state to

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> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

129. *Holland*, 252 U.S. at 434.

130. *Id.* at 432. The "necessary and proper" clause, found in article 1, section 8 of the United States Constitution, provides the federal government with the power to take all measures that are "necessary and proper" in executing their enumerated powers. *Id.* The Constitution reads, "[t]o Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States or in any Department or Officer Thereof." U.S. CONST. art. I, cl. 18.

131. *Holland*, 252 U.S. at 433.

132. *Id.* at 434.

133. Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not compel local governments to perform administrative functions for the federal government because "such commands are fundamentally incompatible with our constitutional system of dual sovereignty"); New York v. United States, 505 U.S. 144 (1992) (finding that Congress may not simply commandeer the legislative process of the states by compelling them to enact and enforce a federal regulatory program).

134. Molora Vadnais, *A Diplomatic Morass: An Argument Against Judicial Involvement in Article 36 of the Vienna Convention on Consular Relations*, 47 UCLA L. REV. 307, 324 (1999).

135. Detlev Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 461 (1998) (noting the "ominous . . . refusal or neglect to notify foreign nationals arrested in the United States of their right to communicate with their consul").

136. O'Driscoll, *supra* note 13, at 323 (stating that "[s]ince the death penalty was reinstated in

comply with a treaty is uncertain and, accordingly, as long as this issue remains unclear, state violations of the Vienna Convention will continue.[137]

4. Suppression of Evidence and the Exclusionary Rule

The Vienna Convention does not provide a remedy for state violations of the treaty. Nonetheless, foreign nationals have sought to have their indictment dismissed or evidence suppressed when it was obtained through a violation of the treaty.[138]

There are, however, several instances where a foreign national has sought suppression of evidence that is obtained in violation of the Vienna Convention.[139] Similar to the rationale behind the application of the exclusionary rule,[140] foreign nationals argue that if evidence can be suppressed when it is obtained in violation of the Vienna Convention, arresting authorities will be deterred from violating the detainee's

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1976, Arizona has executed three foreign nationals . . . after failing to notify their home country of their arrest").

137. Vadnais, *supra* note 134, at 323.

138. *See, e.g.*, United States v. Li, 206 F.3d 56, 60 (1st Cir. 2000), *cert. denied*, 2000 WL 723038 (U.S. Oct. 30, 2000) (noting that appellant argued dismissal of indictment and suppression of confession as a remedy for Vienna Convention violation); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 987 (S.D. Cal. 1999), *aff'd*, No. 99-50597, 2000 WL 1256890 (9th Cir. Sept. 5, 2000) (stating that defendant argued that suppression of evidence and dismissal of indictment were appropriate remedies); United States v. Lombera-Camorlinga, 170 F. Supp. 3d 1241, 1243 (9th Cir. 1999), *cert. denied*, 2000 WL 798553 (U.S. Nov. 13, 2000) (recounting that defendant argued that suppression of evidence was sufficient remedy); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1255 (D. Utah 1999) (noting that defendant sought suppression of confession as a remedy for a Vienna Convention violation); United States v. Rodrigues, 68 F. Supp. 2d 178, 185 (E.D.N.Y. 1999) (stating that appellant argued that suppression of statement is an appropriate remedy); United States v. Carrillo, 70 F. Supp. 2d 854, 856 (N.D. Ill. 1999) (stating that appellants sought dismissal of the charges against them and suppression of certain evidence obtained in violation of the Vienna Convention).

139. *See, e.g.*, *Li*, 206 F.3d at 66 (holding that dismissal of indictment and suppression of confession was not a remedy available under the Vienna Convention); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 993-94 (S.D. Cal. 1999), *aff'd*, No. 99-50597, 2000 WL 1256890 (9th Cir. Sept. 5, 2000) (suppression of evidence and dismissal of indictment were inappropriate remedies); United States v. Lombera-Camorlinga, 170 F. Supp. 3d 1241, 1243 (9th Cir. 1999) (suppression of evidence was insufficient remedy); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1254-55 (D. Utah 1999) (suppression of confession not a remedy for a Vienna Convention violation); United States v. Rodrigues, 68 F. Supp. 2d 178, 185 (E.D.N.Y. 1999) (suppression of statement is an inappropriate remedy); *Carrillo*, 70 F. Supp. 2d at 861 (dismissal of the indictment and suppression of evidence is not a remedy for a Vienna Convention violation).

140. When an individual's constitutional rights are violated, invoking the exclusionary rule allows for evidence to be suppressed because it was obtained in violation of a detainee's rights. *Carrillo*, 70 F. Supp. 2d at 861 (citing Miranda v. Arizona, 384 U.S. 436 (1966) (discussing the Fifth Amendment)).

rights.[141] The Seventh Circuit, in *United States v. Chaparro-Alcantara*,[142] however, held that suppressing evidence is not an appropriate remedy under the Vienna Convention because the treaty does not expressly provide for suppression of evidence.[143] The court held that imposing this judicially-created remedy would be improper because it is only within the power of the legislature to apply the exclusionary rule to a treaty-based right.[144] The court also found that no other countries allowed for suppression of evidence as a remedy to treaty violations because such a ruling would "promote disharmony in the interpretation of an international agreement."[145] Consequently, as the court in *Chaparro-Alcantara* found, most courts maintain that violations of Article 36 do not require that courts dismiss[146] an indictment or suppress evidence.[147]

Courts have consistently considered the above three fundamental issues when confronted with state violations of the Vienna Convention. The Illinois Supreme Court, in August 2000, examined a factually similar case, *People v. Madej*,[148] which addressed whether a foreign national's conviction and death sentence should be voided under international law because of Illinois' violation of the Vienna Convention.[149]

III. DISCUSSION

The Illinois Supreme Court reviewed an Illinois violation of the Vienna Convention in *People v. Madej*.[150] In a 4-3 decision, the court refused to provide a remedy for Madej's claim, holding that the claim

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141. Kelly Trainer, *The Vienna Convention on Consular Relations in the United States Courts*, 13 TRANSNAT'L LAW. 227, 263 (2000); *see also* United States v. Rodrigues, 68 F. Supp. 2d 178, 185 (E.D.N.Y. 1999) (holding that the exclusionary rule cannot be invoked for violation of a treaty because such rights do not rise the level of constitutional rights).

142. United States v. Chaparro-Alcantara, 226 F.3d 616 (7th Cir. 2000).

143. *Id.* at 621.

144. *Id.* at 622 (finding that "[o]nly the legislature can require that the exclusionary rule be applied to protect a statutory or treaty-based right").

145. *Id.* at 622. The court cites the *Restatement of Foreign Relations Law*, stating that "[t]reaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between international legal systems." RESTATEMENT OF FOREIGN RELATIONS LAW § 325 cmt. d (1987).

146. United States v. Carrillo, 70 F. Supp. 2d 854, 859 (N.D. Ill. 1999).

147. *Supra* note 139 and accompanying text (examining the various holdings of courts regarding remedies for state violations of the Vienna Convention).

148. People v. Madej, 739 N.E.2d 423 (Ill. 2000).

149. *Id.*

150. People v. Madej, 739 N.E.2d 423 (Ill. 2000).

was procedurally barred under the *Illinois Code of Civil Procedure*.[151] Three Justices in two powerful dissents, however, illuminated the profound policy arguments favoring a remedy to the state violation.[152]

A. The Facts

On August 23, 1981, at 5:00 a.m. the Chicago police observed an automobile drive through a stop sign.[153] The driver of the car, Gregory Madej, refused to stop and a high-speed chase through the city ensued between the police and Madej.[154] After twenty-year-old Madej drove into an alley and attempted to escape by foot, police apprehended him.[155] The police observed that Madej's arms and face were covered with blood and scratches.[156]

Earlier that morning, Madej had been drinking and smoking marijuana at a bar with a woman named Barbara Doyle.[157] The two left the bar and had sex twice in Doyle's car.[158] Doyle bought some drugs from Madej, but then made the mistake of attempting to steal more drugs from him.[159] Madej saw a baggie under Doyle's leg and pushed her.[160] She pulled out a knife and a struggle ensued.[161] Doyle's naked body was found at 5:30 a.m., and forensic evidence showed that she had been stabbed approximately thirty-four times and run over by her own car.[162]

B. Prior Court Decisions in People v. Madej

Following a bench trial in the Circuit Court of Cook County, Madej was convicted[163] of one count of murder[164] and three counts of felony-

151. *Infra* Part III.C.1 (discussing the majority holding that the Vienna Convention claim was procedurally barred).

152. *Infra* Part III.C.2 (outlining Justice McMorrow and Justice Heiple's dissent).

153. People v. Madej, 478 N.E.2d 392, 394 (Ill. 1985).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 395.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. People v. Madej, 685 N.E.2d 908, 913 (Ill. 1997).

163. *Madej*, 478 N.E.2d at 394.

164. 38 ILL. REV. STAT. 9-1(a)(1) (1979) (current version at 720 ILL. COMP. STAT. 5/9-1 (1998 & Supp. 1999)).

murder,[165] which were predicated on the felonies of armed robbery,[166] rape,[167] and deviate sexual assault.[168] The court sentenced him to death on the three murder counts and to thirty years imprisonment for the predicate felonies.[169] Madej appealed to the Illinois Supreme Court in April 1985,[170] but the Illinois Supreme Court rejected all of his arguments.[171] Then, in October 1985, the United States Supreme Court denied Madej's petition for a writ of certiorari.[172] Two months later, the United States Supreme Court denied Madej's petition for rehearing.[173]

Thereafter, pursuant to the Post-Conviction Hearing Act,[174] Madej filed a *pro se* motion for relief. Several years later his attorney filed an amended petition.[175] The circuit court dismissed the amended petition, and Madej appealed to the Illinois Supreme Court.[176] The court again

165. *Id.* § 9-1(a)(3) (current version at 720 ILL. COMP. STAT. 5/9-1 (1998 & Supp. 1999)).

166. *Id.* § 18-2 (current version at 720 ILL. COMP. STAT. 5/18-2 (1998 & Supp. 1999)).

167. *Id.* § 11-1 (current version at 720 ILL. COMP. STAT. 5/12-13 (1998)).

168. *Id.* § 11-3 (repealed by P.A. 83-1067, § 28, eff. July 1, 1984; P.A. 83-1362, Art. II, § 40, eff. Sept. 11, 1984)

169. People v. Madej, 478 N.E.2d 392, 394 (Ill. 1985). The thirty years imprisonment was to be served concurrently for the counts of armed robbery and rape. *Id.*

170. *Id.* Madej argued that he was wrongly convicted based on the unconstitutionality of the death penalty, ineffective assistance of counsel, a drug and alcohol defense, unproven felonies, improper waiver of jury for sentencing, and the circuit court's abuse of discretion. *Id.*

171. The court found that the death penalty was not unconstitutional pursuant to the court's reasoning in *People v. Owens*. *Id.* at 396 (citing People v. Owens, 464 N.E.2d 261 (Ill. 1984)). The court held that Madej was not denied effective assistance of counsel because the defendant did not show there was a reasonable probability that the proceeding would have been different if not for counsel's unprofessional errors as required by *Strickland v. Washington*. *Id.* at 398 (citing Strickland v. Washington, 466 U.S. 668 (1984)). Madej's drug and alcohol defense was rejected because the court held that it is "no defense to criminal conduct unless the intoxication is so extreme as to make impossible the existence of a mental state which is an element of the crime," and Madej failed to show that "he was not able to act knowingly." *Id.* at 398-99. The claims of unproven felonies were adequately found by the trial court given the surrounding facts. *Id.* at 399. The court further found that the defendant had properly waived his right to a jury for his sentencing hearing because he signed a typewritten waiver form and made an intelligent and voluntary waiver. *Id.* at 399-401. Finally, the court found that the lower court considered all mitigating factors and properly used its discretion in rejecting the defendant's testimony. *Id.* at 401.

172. Madej v. Illinois, 474 U.S. 935 (1985).

173. Madej v. Illinois, 474 U.S. 1038 (1985).

174. 38 ILL. REV. STAT. 122-1 (1985) (current version at 725 ILL. COMP. STAT. 5/122-1(2000)). The Post-Conviction Hearing Act "provides a mechanism by which those under criminal sentence in [Illinois] can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." People v. Coleman, 701 N.E.2d 1063, 1070 (Ill. 1998) (citing 725 ILL. COMP. STAT. ANN. 5/122-1 (West 1994)).

175. People v. Madej, 685 N.E.2d 908, 913 (Ill. 1997).

176. *Id.* The court heard arguments on mitigating evidence, the nonunanimity rule, death penalty eligibility, ineffective assistance of counsel at trial, and ineffective assistance of counsel

affirmed the circuit court's ruling and denied Madej's petition for post-conviction relief.[177] At no time throughout these initial proceedings did Madej raise a claim for relief under the Vienna Convention.

In July 1998, Madej filed a petition in the criminal division under section 2-1401 of the *Illinois Code of Civil Procedure* seeking relief from judgment.[178] Madej also filed a *mandamus* petition in the chancery division because of local court rules.[179] In December 1998, the Polish Consul General was granted leave to intervene in the *mandamus* proceeding, and the entire matter was transferred to Judge Thomas Fitzgerald, who was presiding over the section 2-1401 claim.[180] Subsequently, Judge Fitzgerald denied both petitions and the matter was appealed directly to the Illinois Supreme Court.[181]

C. Illinois Supreme Court's Ruling in People v. Madej

1. Majority Decision

Madej and the Consul General appealed the lower court ruling to the Illinois Supreme Court.[182] In a 4-3 ruling,[183] Justice Rathje confronted the issue of a defendant's rights under the Vienna Convention in Illinois. In an untraditional examination[184] of the Vienna Convention, the court considered whether state law procedurally preempted Madej's claim under the Vienna Convention.[185] The court also examined

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on appeal. *Id.* at 915-30.

177. *Id.* at 932. The court found that Madej's mitigation argument was inadequate because he did not show that more evidence or better counsel would have made a difference at the hearing. *Id.* at 920. The court further rejected Madej's argument on the nonunanimity rule. *Id.* at 921. Furthermore, the court did not find that Madej was ineligible for the death penalty because of ineffective assistance of counsel. *Id.* at 922. The court also found that Madej did not suffer prejudice because of inappropriate attorney conduct such that he had ineffective assistance of counsel at trial. *Id.* at 923.

178. People v. Madej, No. 98-CH-10183 (1999).

179. People v. Madej, 739 N.E.2d 423, 423 (Ill. 2000).

180. *Id.*

181. *Id.*

182. *Id.*

183. Justice Rathje wrote for the majority, *see id.* at 425-29, Justice Bilandic specially concurred, *see id.* at 429, Justice Morrow concurred in part and dissented in part, *see id.* at 429-31, Chief Justice Harrison dissented and joined Justice Heiple's dissent, *see id.* at 431-32, Justice Heiple dissented, *see id.* at 432.

184. The *Madej* court is the first court to apply international law strictly without imposing any judicially-created tests, which distinguishes this ruling from the background cases discussed thus far. *See infra* Part IV.A (analyzing the distinction between the *Madej* ruling and its predecessor cases).

185. *Infra* notes 189-98 and accompanying text (discussing the application of section 2-1401 of the *Illinois Code of Civil Procedure*).

whether the state's failure to conform to the Convention constituted fraudulent concealment such that the statute of limitations should be tolled.[186] Furthermore, the court considered whether Poland could intervene in the action pursuant to section 2-1401 of the *Illinois Code of Civil Procedure*.[187] Finally, the court examined whether Madej's sentence and conviction were void under international law.[188]

The crux of the majority's rationale for denying Madej relief was the petitioner's failure to overcome the state procedural hurdles.[189] The court held that Madej was procedurally preempted from bringing his claim because section 2-1401 of the *Illinois Code of Civil Procedure* served as a bar.[190] According to section 2-1401, a petition to obtain relief from a judgment must be filed within two years after the entry of that judgment.[191] Madej argued, however, that he could not be prevented by a state procedural rule from seeking an international law remedy because he was not notified of his rights under the Vienna Convention.[192] In response, the court cited the analysis in *Breard III*,[193] which stated that a court must look at the text of the treaty and the drafting history in order to determine whether the state's procedural rules govern its implementation.[194] The *Madej* court found that, because the Vienna Convention explicitly stated that the treaty should be "exercised in conformity with the laws and regulations of the receiving state,"[195] Illinois procedural rules govern the defendant's rights under the treaty.[196] Thus, the court held that the defendant had "ample opportunity to raise his claim and have it considered on the

186. *Infra* notes 199-203 and accompanying text (examining the possibility of fraudulent concealment on the part of Illinois).

187. *Infra* notes 204-08 and accompanying text (examining Poland's intervention claim under section 2-1401 of the *Illinois Code of Civil Procedure*).

188. *Infra* notes 209-13 and accompanying text (discussing the application of *restitutio in integrum*).

189. People v. Madej, 739 N.E.2d 423, 426 (Ill. 2000).

190. *Id.*

191. 735 ILL. COMP. STAT. ANN. 5/2-1401(c) (West 1998) (stating that "the petition must be filed not later than 2 years after the entry of the order or judgment").

192. *Madej*, 739 N.E.2d at 428.

193. *Breard III*, 523 U.S. 371, 375 (1998) (per curiam).

194. *Madej*, 739 N.E.2d at 428 (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988)); *see also Breard III*, 523 U.S. at 375; *supra* Part II.B.1 (discussing *Breard III*).

195. Vienna Convention, *supra* note 7, art. 36, 21 U.S.T. at 101.

196. *Madej*, 739 N.E.2d at 429.

merits during trial,"[197] and, therefore, there was no basis to conclude that the state law frustrated the treaty.[198]

Madej further argued that the statue of limitations should be tolled because the state fraudulently concealed his rights under the Vienna Convention.[199] Under Illinois law, a petitioner can seek relief two years after a ruling is handed down provided that the petitioner can show he was "under duress, or a legal disability, or that grounds for relief were fraudulently concealed."[200] The court found that a showing of fraud must be an affirmative act that is aimed at preventing relief.[201] The court found that Madej could not make the requisite showing because the state did not affirmatively act to prevent the petitioner from learning of his rights under the Vienna Convention.[202] Indeed, the court implied that such rights could hardly be fraudulently concealed because the rights could be found in treaties around the world.[203]

The court also considered Poland's petition to intervene in the section 2-1401 motion.[204] The court laid out the same section 2-1401 standard for bringing a claim within the applicable time period.[205] Poland argued that it did not intervene earlier because it only recently discovered that its citizen had been convicted and sentenced to death.[206] Without determining whether Poland had a right to bring a claim under the Vienna Convention, the court held that the claim was time-barred because Poland could not prove that they suffered from duress, fraud, or

197. *Id.*

198. *Id.*

199. *Id.* at 427-28.

200. *Id.* at 426 (citing People v. Caballero, 688 N.E.2d 658 (Ill. 1997) (holding that a petitioner who filed a motion for post-conviction relief and relief from a judgment pursuant to section 2-1401 of the Civil Practice Law was not entitled to relief after two years of the date of judgment absent a showing of legal disability, duress or fraud)).

201. *Id.* at 427-28 (stating that fraud "must consist of 'affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief.'" (quoting Crowell v. Bilandic, 411 N.E.2d 16, 18 (Ill. 1980))).

202. *Id.* at 428.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 427. The Petitioner's Joint Brief states:

> The Republic of Poland also was unaware that Gregory Madej had been arrested and detained in violation of the Vienna Convention pending trial, and was therefore unable to render any timely assistance. As a result, Gregory Madej was forced to rely upon the efforts of his inexperienced trial counsel. . . . [T]he results were disastrous.

Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul General for the Republic of Poland in Chicago at 7, People v. Madej, 739 N.E.2d 423 (Ill. 2000).

a legal disability.[207] Thus, because the statute of limitations had expired, Poland's motion to intervene was denied.[208]

Finally, the majority also rejected the defendant's argument that his conviction and sentence were void under the principle of *restitutio in integrum*.[209] The court held that an order is only void when a court lacks jurisdiction over the subject matter or the parties.[210] In this case, the court had jurisdiction over both the subject matter and the parties.[211] Thus, because the petitioner did not cite any further authorities other than the dictionary on this matter, the majority held that there was no reason to conclude that the defendant's conviction and sentence were void.[212] The court upheld the petitioner's conviction and death sentence concluding that his untimely petition simply could not be heard because the petitioner had already been given ample time and opportunity to litigate the issues.[213]

2. The Dissenting Opinions

a. Justice McMorrow's Dissent

Departing from the majority's affirmation of the death sentence, Justice McMorrow argued that the state's clear violation of the Vienna Convention required a remedy.[214] The dissent reasoned that the state had a duty to inform Madej of his rights under the Vienna Convention given the "mandatory and unequivocal" language in the treaty.[215] Hence, Justice McMorrow concluded that there was no question that the state's failure to inform the defendant of his rights under an international treaty is a serious violation of international law, especially considering that the death penalty was being imposed.[216] Justice

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207. *Madej*, 739 N.E.2d at 427.

208. *Id.*

209. The court accepted the petitioner's definition of *restitutio in integrum*:

> In the civil law, restoration or restitution to the previous condition. This was effected by the prætor on equitable grounds, at the prayer of an injured party, by rescinding or annulling a contract or transaction valid by the strict law, or annulling a change in the legal condition produced by an omission, and restoring the parties to their previous situation or legal relations. The restoration of a cause to its first state, on petition of the party who was cast, in order to have a second hearing.

Id. at 426-27 (quoting BLACK'S LAW DICTIONARY 1313 (6th ed. 1990)).

210. *Id.* at 427.

211. *Id.*

212. *Id.*

213. *Id.* at 429.

214. *Id.* (McMorrow, J., concurring in part, dissenting in part).

215. *Id.* at 430 (McMorrow, J., concurring in part, dissenting in part).

216. *Id.* (McMorrow, J., concurring in part, dissenting in part).

McMorrow referenced a recent ruling from the Inter-American Court of Human Rights, which stated that when a state fails to observe an individual's rights under Article 36, imposition of the death penalty is a violation of international law and is an arbitrary deprivation of life.[217] This holding, the dissent continued, was consistent with that court's previous ruling that death penalty cases must maintain a "high standard of procedural accuracy."[218] Given this international context, as well as Poland's substantial interest in this case,[219] the dissent argued that any procedural obstacles were overshadowed by the "extraordinary" nature of this case.[220]

Justice McMorrow further illuminated the profound impact that the majority's ruling could have on a global scale.[221] According to the Justice, the safety and freedom enjoyed by United States citizens all over the world is seriously endangered when international treaties are not honored.[222] The United States simply cannot expect that Americans abroad will be given their rights under the Vienna Convention if the same rights are not provided for foreign nationals in the United States.[223] Therefore, in considering the nation's own self interest, the Justice found that it was best to acknowledge the violation and provide an appropriate remedy.[224] Justice McMorrow called for the vacation of

217. *Id.* (McMorrow, J., concurring in part, dissenting in part). Justice McMorrow noted that the Inter-American Court of Human Rights has recently held that,

> [F]ailure to observe a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life 'arbitrarily,' as stipulated in the relevant provisions of the human rights treaties.

Id. (McMorrow, J., concurring in part, dissenting in part). For the full opinion of the Inter-American Court, see *The Right to Information about Consular Assistance Within the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights, par. 141.7, October 1, 1999.

218. *Madej*, 739 N.E.2d at 430 (McMorrow, J., concurring in part, dissenting in part) (stating that the Inter-American Court's holding "mirrors this court's own recognition that death penalty cases require a 'high standard of procedural accuracy.'" (quoting People v. Walker, 91 Ill.2d 502, 517 (1982))).

219. *Infra* Part IV.B.2 (discussing Poland interest in intervention).

220. *Madej*, 739 N.E.2d at 431 (McMorrow, J., concurring in part, dissenting in part).

221. *Id.* (McMorrow, J., concurring in part, dissenting in part).

222. *Id.* (McMorrow, J., concurring in part, dissenting in part) (citing Hilton v. Guyot, 159 U.S. 113, 228 (1895)).

223. *Id.* at 431 (McMorrow, J., concurring in part, dissenting in part). Justice McMorrow stated, "[W]e cannot expect that the citizens of this country, while abroad, will be afforded their rights under the Vienna Convention, or indeed, under any treaty, if we do not afford those same international rights to foreign nationals here in the United States." *Id.* (McMorrow, J., concurring in part, dissenting in part).

224. *Id.* (McMorrow, J., concurring in part, dissenting in part) (stating that "[i]t is in our own

Madej's death sentence and for the case to be remanded for further hearings on this violation.[225]

b. Justice Heiple's Dissent

In a separate dissent, Justice Heiple disagreed with the majority's affirmation of Madej's conviction and death sentence.[226] Justice Heiple found that the state violated a clear duty and, thus, relief should be afforded to the petitioner.[227] The Justice stated that if equal protection is not extended to foreign nationals in this country, the United States cannot expect protection under this treaty for Americans abroad.[228] He added that the majority's decision had implications that reached beyond this defendant's execution.[229] Consequently, Justice Heiple's dissent held that the conviction and sentence should be reversed and a new trial should be ordered in compliance with the treaty.[230]

IV. ANALYSIS

The court in *Madej* correctly held that section 2-1401 of the *Illinois Code of Civil Procedure* barred Madej's claim.[231] The majority ruling was procedurally accurate, and the court properly applied both international and state law, thereby not frustrating the purpose of the Vienna Convention.[232] In dealing exclusively with the procedural issue, the court did not preclude a foreign national from bringing a timely Vienna Convention claim in Illinois.[233] The majority, however, failed

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self-interest to uphold the principle of international comity, acknowledge the notification violation that occurred in the case at bar, and provide a remedy").

225. *Id.*

226. *Id.* at 432 (Heiple, J., dissenting). The Justice sarcastically noted that the majority had not specified whether the letter of apology to the Polish government "would be sent before or after defendant's execution." *Id.* (Heiple, J., dissenting).

Chief Justice Harrison joined Justice Heiple's dissent, but also dissented separately and stated that the death penalty violates the Eighth and Fourteenth Amendments of the United States Constitution. *Id.* at 431-32 (Harrison, J., dissenting).

227. *Id.* (Heiple, J., dissenting).

228. *Id.* at 432 (Heiple, J., dissenting). Justice Heiple asked, "[H]ow can we expect protection under this treaty for American citizens abroad if we do not extend equal protection to foreign nationals residing in the United States?" *Id.* (Heiple, J., dissenting). Answering his own question, Justice Heiple stated, "The answer is, we cannot." *Id.* (Heiple, J., dissenting).

229. *Id.* (Heiple, J., dissenting) (stating that "[t]he decision reached in this case thus has implications reaching far beyond the execution of this defendant").

230. *Id.* (Heiple, J., dissenting).

231. *Id.* at 428-30 (Heiple, J., dissenting).

232. *Id.* at 428 (Heiple, J., dissenting).

233. *Infra* Part IV.A (discussing the majority's correct procedural ruling).

to provide a remedy for Illinois' violation of the Vienna Convention, which ultimately allowed for the execution of a foreign national.[234]

A. *The Majority's Proper Application of International and State Law*

The court's analysis in *Madej* is strikingly dissimilar from its predecessors.[235] Not only did the *Madej* court noticeably omit the three fundamental issues addressed by most courts,[236] but it also cited only one factually similar case in which a state violated the Vienna Convention.[237] Many courts spend a great deal of time determining whether an individual has standing, whether the treaty confers a private right of action, whether prejudice exists, and whether the state can be compelled to enforce the notification requirement.[238] These issues, however, have been unnecessarily examined[239] by courts in order to avoid confronting international issues in domestic courts.[240] This provincialism[241] in United States courts skirts the application of international law in exchange for judicially-imposed tests and doctrines

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234. *Infra* Part IV.B (analyzing the court's failure to account for the strong policy arguments).

235. Compare the issues raised in the *Madej* ruling with those raised in United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000) (discussing prejudice and suppression of evidence as a remedy); United States v. Lombera-Camorlinga, 170 F.3d 1241, 1243-44 (9th Cir. 1999) (holding that denial of motion to suppress without making determination of prejudice was reversible error); United States v. Carrillo, 70 F. Supp. 2d 854, 859 (N.D. Ill. 1999) (examining standing, private right of action, language of the treaty, and suppression of evidence as an insufficient remedy); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 989-90 (S.D. Cal. 1999) (requiring showing of prejudice and held that suppression of evidence was inappropriate remedy); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1255 (D. Utah 1999) (holding that suppression of confession was an insufficient remedy for a Vienna Convention violation); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1096-97 (S.D. Cal. 1998) (holding that prejudice must be demonstrated); State of New Jersey v. Cevallos-Bermeo, 754 A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000) (requiring showing of prejudice to bring Vienna Convention claim).

236. *Supra* Part II.B (identifying three fundamental questions that courts address: (1) whether the Vienna Convention confers a private right of action on an individual; (2) whether a state can be compelled to comply with the treaty; and (3) whether suppression of evidence or dismissal of indictment a remedy for violation of the Vienna Convention).

237. The court cited only the United States Supreme Court's denial of certiorari in *Breard III*. *Madej*, 739 N.E.2d at 428.

238. *Supra* Part II.B (discussing court findings on the issues of standing, private right of action, prejudice, and state compliance under the Vienna Convention).

239. One court even admits that it is unnecessary to decide these issues conclusively because the remedy sought by the defendant, typically suppression of evidence or reversal of indictment, is not warranted by Article 36. *Carrillo*, 70 F. Supp. 2d at 859.

240. Patrick McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 7 (1995) (identifying three ways that U.S. courts marginalize international law: jurisdictional provincialism, doctrinal provincialism, and methodological provincialism).

241. *Id.* at 5 (stating that provincialism is "an institutional, almost reflexive, animosity toward the application of international law in U.S. courts").

that result in inconsistent applications of international law.[242] Doctrinal provincialism, specifically, relates to the development of judicially-created rules in situations where international law already provides the necessary guidance.[243] Reflecting upon the case history of state violations of the Vienna Convention, it becomes clear that these courts applied judicially-created tests where international law already provided guidance.[244]

The *Madej* ruling is unique because the Illinois Supreme Court applied pure international law and the requisite state procedures as stipulated by the Vienna Convention.[245] The majority ruling can be distinguished from the line of cases confronting the Vienna Convention because it restrained itself from using judicially-created tests. Specifically, by omitting the use of these tests, the court implicitly assumed that the petitioner had standing, that the treaty supplied a right of action, that no prejudice existed, and that Illinois must comply with the treaty.[246] The only issue the court confronted was whether the

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242. *Id.* McFadden states:

> Over the past 200 years, United States judges have developed a series of rules and practices that minimize the role of international law in domestic litigation. Considered collectively, these rules and practices embody a thoroughgoing, deeply rooted provincialism . . . . As a consequence, international law plays almost no part in the judicial business of the United States. It is rarely discussed in American cases, and almost never provides the rule of decision upon which court judgments turn.

Id. at 5. McFadden goes on to state that "the rules and doctrines of judicial provincialism arise haphazardly—whenever a situation or lawsuit makes them relevant. Random confrontations and compartmentalized treatment hide the larger picture . . . ." *Id.* at 7.

243. *Id.* at 11 (stating that doctrinal provincialism "refers to the judiciary's use of rules that restrict when international law can provide the rule of decision in a court's judgment").

244. *Id.* at 13 (stating that "[t]he end result [of judicial provincialism] is that U.S. courts seldom decide international cases on the basis of international law").

245. People v. Madej, 739 N.E.2d 423, 428 (Ill. 2000).

246. Compare the issues raised in the *Madej* ruling with those raised in United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000) (discussing prejudice and suppression of evidence as a remedy); United States v. Lombera-Camorlinga, 170 F.3d 1241, 1243 (9th Cir. 1999) (holding that denial of motion to suppress without making determination of prejudice was reversible error); United States v. Carrillo, 70 F. Supp. 2d 854, 859 (N.D. Ill. 1999) (examining standing, private right of action, language of the treaty, and suppression of evidence as an insufficient remedy); United States v. Alvarado-Torres, 45 F. Supp. 2d 986, 989-90 (S.D. Cal. 1999) (required showing of prejudice and held that suppression of evidence was inappropriate remedy); United States v. Tapia-Mendoza, 41 F. Supp. 2d 1250, 1255 (D. Utah 1999) (holding that suppression of confession was an insufficient remedy for a Vienna Convention violation); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1096-97 (S.D. Cal. 1998) (holding that prejudice must be demonstrated); State of New Jersey v. Cevallos-Bermeo, 754 A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000) (requiring showing of prejudice to bring Vienna Convention claim). McFadden states that judicially-created rules and doctrines "help to minimize the role of international law in U.S. courts: standing requirements, the political question doctrine, the rule that treaties may not be invoked in U.S. courts unless they are self-executing . . . ." McFadden, *supra* note 240, at 7.

petitioner's claim was procedurally time-barred.[247]

The court correctly held that the Vienna Convention governs the procedures by which the treaty is to be implemented.[248] The court agreed with Madej's assertion that it is necessary to turn directly to the treaty itself to determine the procedure for dealing with a treaty violation.[249] Citing *Breard III*, the majority held that when applying international law, a court must look at the text of the treaty to determine whether the state's procedures should govern.[250] The Vienna Convention states that the rights contained in a treaty "shall be exercised in conformity with the laws and regulations of the receiving State . . . ."[251] The Supreme Court in *Breard III* interpreted this provision to mean that the State's procedural rules should govern the treaty's implementation in that state.[252] The majority in *Madej* adopted this proper reading of the Vienna Convention and held that Illinois' procedural rules direct the implementation of the Vienna Convention.[253]

After determining that the Vienna Convention endorsed the use of state procedural law, the court turned to section 2-1401 of the *Illinois Code of Civil Procedure* to determine the possibility of relief from judgment.[254] The statute clearly indicates that a section 2-1401 petition must be filed "not later than 2 years after the entry of the order or judgment."[255] After the expiration of two years, relief will not be considered unless the petitioner can show that he suffered from duress, a legal disability, or that relief was fraudulently concealed.[256] Because the petitioner made no showing that the state affirmatively acted to

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247. People v. Madej, 739 N.E.2d 423, 428 (Ill. 2000).

248. Vienna Convention, *supra* note 7, art. 36, 21 U.S.T., at 101.

249. *Madej*, 739 N.E.2d at 428. The court noted the "[d]efendant acknowledges that the Supreme Court has held that, to determine whether a state's procedural rules govern, a court must look to the treaty's text and drafting history." *Id.*

250. *Id.* (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) and *Breard III*, 523 U.S. 371, 375 (1998) (per curiam)). In *Volkswagenwerk Aktiengelsellschaft v. Schlunk*, the Court stated that "[w]hen interpreting a treaty, we begin 'with the text of the treaty and the context in which the written words are used.'" *Volkswagenwerk*, 486 U.S. at 700 (quoting Societe Nationale Industrielle Aerospatiale v. U.S. District Ct., 482 U.S. 522, 534 (1987), which quotes Air Franc v. Saks, 470 U.S. 392, 397 (1985))

251. Vienna Convention, *supra* note 7, art. 36, 21 U.S.T., at 101.

252. *Breard III*, 523 U.S. at 375 (stating that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State").

253. *Madej*, 739 N.E.2d at 428.

254. *Id.* at 426.

255. *Id.* (quoting 735 ILL. COMP. STAT. ANN. 5/2-1401(c) (West 1998)).

256. *Id.* (citing People v. Caballero, 688 N.E.2d 658, 660-61 (Ill. 1997)).

conceal the petitioner's rights, the claim of fraud could not be proved.[257] This accurate reading of the Illinois statute of limitations under section 2-1401 reveals that Madej's claim for relief under the Vienna Convention was indeed barred by the state's procedural rules.

The majority's analysis implied that Madej could have sought some measure of relief from the state's violation of the Vienna Convention before the claim was barred.[258] Indeed, at no point did the court deny that the state violated the treaty. Given the majority's interpretation of the Vienna Convention, Madej could have sought relief under this claim at any time before a final judgment, for two years after the entry of judgment, or after two years upon a showing of duress, legal disability, or fraud.[259] Nor did the court deny giving full effect to the treaty by using section 2-1401 because Madej had a substantial opportunity and period of time in which he could have sought relief.[260] Instead, the court pragmatically held that limiting claims to a reasonable amount of time is in the public's interest and complies with international law.[261]

By appropriately addressing whether Madej's claim could be tolled under section 2-1401, the court not only avoided doctrinal provincialism, but it also did not unnecessarily preclude a petitioner in Illinois from bringing a timely Vienna Convention violation claim as many other courts have done.[262] Rather, the Illinois Supreme Court only concluded that the time for bringing such claims under section 2-1401 must be reasonably limited.[263]

B. Policy Arguments for Setting Aside the Procedural Obstacles

While the court correctly applied international law in this ruling, Illinois' failure to comply with an international treaty is a profound issue the court should have addressed. Engrossed in its focus on

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257. *Id.* at 427-28 (citing Crowell v. Bilandic, 411 N.E.2d 16 (1980)). In *Crowell*, the Illinois Supreme Court stated, "It is well established that fraudulent concealment sufficient to toll a statute of limitations requires affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief." *Crowell*, 411 N.E.2d at 18.

258. *See Madej*, 739 N.E.2d at 428.

259. *Id.* at 426.

260. *Id.* at 428. The court stated, "We do not believe that a reasonable limitation period designed to preserve the public's interest in the finality of judgments can be construed as a rule that frustrates the purposes of the Vienna Convention." *Id.*

261. *Id.* The court further explained, "Because 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." *Id.*

262. *Supra* note 235 and accompanying text (discussing various court holdings that preclude the possibility of bringing a timely Vienna Convention claim).

263. *Madej*, 739 N.E.2d at 428.

procedure, the majority did not address the fact that Madej's failure to raise the Vienna Convention claim was, at least in part, due to the fact that Illinois breached its duty by not complying with an international treaty.[264] The majority failed to address the powerful policy arguments that exist for setting aside procedural obstacles such as section 2-1401.[265] Specifically, the court did not address the state's violation of international law, Poland's strong interest in avoiding the execution of one of its citizens, and the ramifications for United States citizens abroad.

1. The State's Violation of International Law

Illinois violated international law when it failed to notify Madej of his rights under the Vienna Convention.[266] The state's omission constituted a failure to meet an affirmative duty to inform the detainee of his right to consular access which is clearly set forth in the treaty.[267] Justice McMorrow's dissent illuminated this point, stating that the treaty's language "is mandatory and unequivocal."[268] The critical role of Article 36 cannot be overstated as evidenced by the debates at the Vienna Convention.[269] During the debate, the United States delegate stated that the notification requirement was useful and could be practically implemented.[270] Other countries also strongly support the rights contained in Article 36.[271] These accounts elucidate the

264. *Id.* at 428-29 (McMorrow, J., concurring in part, dissenting in part). This is especially noteworthy because the Northern District of Illinois addressed these issues in *United States v. Carrillo*. *See supra* Part II.B (discussing how the *Carrillo* court held that standing to assert rights under the Vienna Convention was a threshold issue in determining whether a right of action under the treaty existed, for which the court turned to the language of the treaty itself). The Appellate Court of Illinois for the First District addressed these issues in *Illinois v. Villagomez*, 730 N.E.2d 1173 (Ill. App. Ct. 2000). The Seventh Circuit addressed these issues post-*Madej* in *United States v. Chaparro-Alcantara*, Nos. 99-2721, 99-2874, 2000 WL 1182450 (7th Cir. Aug. 21, 2000).

265. *Id.* at 429 (McMorrow, J., concurring in part, dissenting in part). Justice McMorrow noted, "[T]his is an extraordinary case. More is at stake here than the rights of a single defendant." *Id.* at 431 (McMorrow, J., concurring in part, dissenting in part).

266. *Id.* at 429-30 (McMorrow, J., concurring in part, dissenting in part).

267. *Id.* (McMorrow, J., concurring in part, dissenting in part).

268. *Id.* (McMorrow, J., concurring in part, dissenting in part).

269. Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul General for the Republic of Poland in Chicago at 16, People v. Madej, 739 N.E.2d 423 (Ill. 2000).

270. The United States report stated the notification requirement "ha[d] the virtue of setting out a requirement which [was] not beyond means of practical implementation in the United States, and at the same time, [was] useful to the consular service of the United States in the protection of [its] citizens abroad." *Report of the United States Delegation to the United Nations Conference on Consular Relations*, Vienna, Austria, March 4 to April 22, 1963, Sen. Doc. Exec. E., 91st Cong., 1st Ses. (1969).

271. Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul

importance of consular notification and, accordingly, the seriousness of a violation.[272] Thus, given this powerful policy issue, the majority should have attempted to afford the petitioner a remedy for the state's violation and the potential prejudice it caused the petitioner.[273]

2. Poland's Strong Interest in Avoiding the Execution of Madej

Poland officially banned the death penalty in 1997, after a two-year moratorium.[274] Accordingly, it has a strong interest in avoiding the execution of one of its citizens.[275] Nonetheless, the United States did not notify Poland of Madej's arrest, much less his death sentence, until sixteen years after his conviction and sentence.[276] Poland contended that the Polish Consulate in Chicago would have assisted Madej upon

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General for the Republic of Poland in Chicago at 16-17, People v. Madej, 739 N.E.2d 423 (Ill. 2000). The Petitioner's Brief noted the positions of several countries on the need for Article 36:

> Drafting parties offered the following comments: failure to include Article 36 in the Vienna Convention would constitute "an admission of dismal failure" (India); "it would be a lamentable failure on the part of the Conference" not to adopt Article 36 (France); country "very concerned" at failure to include Article 36 (Yugoslavia); without Article 36, "the convention would be unsatisfactory and incomplete" (Federal Republic of Germany); "it would be inconceivable to draft a convention which did not include a provision of the kind contemplated in article 36" (Brazil); representative "could not conceive of a convention which provided the first international codification of the law concerning consular relations and which did not make provision for free communication between consular officials and nationals of the sending State" (Syria); subject of Article 36 "was too important to be passed over in silence" (Congo, Leopoldville); it was "essential that the convention should contain a provision on so important a matter as communication and contact between the consulate and nationals of the sending State" (Italy); "Article 36 was one of the most important in the convention" (Thailand); "Article 36 was of the greatest importance" (Congo, Brazzaville); "it was essential that the convention should contain an article dealing with one of the principal consular functions" (Mali); "the provisions of Article 36 were an essential part of the convention" (Austria); "attach[ing] the greatest importance to article 36 and to its inclusion in the convention" (Switzerland).

Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul General for the Republic of Poland in Chicago at 17 n.11, People v. Madej, 739 N.E.2d 423 (Ill. 2000) (citing Official Records I, at 81-86, ¶¶ 45, 59, 69, 75, 77, 78, 85, 86, 88, 92, 94, 96, 99).

272. *Breard II*, 134 F.3d. 615, 622 (4th Cir. 1998), *aff'd*, 523 U.S. 371 (1998) (per curium) (Butzner, J., concurring) (stating that "[t]he language is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government").

273. *Madej*, 739 N.E.2d at 431 (McMorrow, J., concurring in part, dissenting in part).

274. Amnesty Int'l, *Death Penalty Worldwide: Developments in 1997, Death Penalty Worldwide, Amnesty International, available at* http://www.amnest.org/ailib/aipub/1998/ACT/A5000498.html.

275. Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul General for the Republic of Poland in Chicago at 51, *Madej* (Nos. 87574, 87752, 87725, 87726).

276. *Madej*, 739 N.E.2d at 432 (Heiple, J., dissenting).

his arrest.[277] Specifically, in uncontradicted affidavits,[278] Poland indicated that it would have arranged for Madej to avoid the death penalty.[279] Additionally, Poland's interest in seeking to intervene was to preserve the Vienna Convention rights of both Madej and the Republic of Poland.[280] Accordingly, the court should have accorded Madej a remedy that would have compensated for the lack of legal representation from and communication with the Polish authorities.

Furthermore, other countries are concerned about the United States violating the right to consular notification.[281] While Madej's appeal to the Illinois Supreme Court was pending, the Consulate General of the Federal Republic of Germany in Chicago, the Human Rights Committee of the Bar of England and Wales, and the United Mexican States filed

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277. Petitioner's Joint Brief at 43, *Madej* (Nos. 87574, 87752, 87725, 87726).

278. *Id.*

279. *Id.* The Petitioner's Joint Brief indicated that the Consul General

> provided a detailed account of the importance of the Vienna Convention and the Consular Convention, and attested that the Polish Consulate could have provided significant assistance to Gregory Madej had he requested it. Indeed, in his uncontradicted affidavit, the Consul General explained that (1) the Polish Consulate could have addressed the Illinois authorities, and thereby persuaded them not to pursue the death penalty; and (2) the Polish Consulate could have arranged for an attorney with experience in death penalty cases to represent Gregory Madej. Furthermore, the Consul General attested that the Polish Consulate or a properly qualified attorney (arranged for by the Polish Consulate) could have (3) advised Gregory Madej to accept the State's plea bargain; (4) advised Gregory Madej of his rights against self-incrimination and his right to decided whether or not to testify; (5) advised Gregory Madej not to waive jury sentencing, or at a minimum, advise him of the one-juror rule; and (6) assisted in obtaining mitigating evidence for presentation during sentencing.

Id. at 43-44 (citations omitted).

280. *Id.* at 51. The Petitioner noted that:

> More individuals of Polish origin live in the Chicago area than in any other city in the world outside of Warsaw. Because thousands of Polish nationals and Polish-Americans currently live in the Chicago area, the interest of the Consul General in this case extends also to his treaty rights to render consular assistance to the large numbers of Polish nationals who reside in or visit Illinois.

Id. (footnote omitted).

281. *Madej*, 739 N.E.2d at 431 (McMorrow, J., concurring in part, dissenting in part).

briefs as *amici curiae*.[282] These, and other countries,[283] are concerned about consular notification violations, especially in the context of death penalty cases.[284] Thus, given this international attention, the court should have addressed a remedy for Illinois' violation of the Vienna Convention, thus easing the international community's concerns about such state violations.

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282. Brief Amicus Curiae of the Consulate General of the Federal Republic of Germany in Chicago, *Madej* (Nos. 87574, 87725, 87726, 87752); Brief of Amicus Curiae The Human Rights Committee of the Bar of England and Wales in Support of the Defendant-Appellant, *Madej* (Nos. 87574, 87725, 87726, 87752); Brief Amicus Curiae of the United Mexican States, *Madej* (Nos. (Nos. 87574, 87725, 87726, 87752). The German Consul in Chicago argued that they were not only protesting Illinois' violation of the Vienna Convention, but they were also opposed to the imposition of the death penalty on foreign nationals. Brief Amicus Curiae of the Consulate General of the Federal Republic of Germany in Chicago at 5, *Madej* (Nos. 87574, 87725, 87726, 87752). The German Consul further maintained that in situations where measures were taken to safeguard the rights of foreign nationals, "'[c]apital punishment may only be carried out pursuant to a final judgement [sic] rendered by a competent court after legal process which gives *all possible safeguards to ensure a fair trial* . . . .'" *Id.* at 4 (citing *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, U.N. Economic and Social Council, E/RES/1984/50, 25 May 1984, *available at* http://www.unhchr.ch/html/menu3/ab/h_comp41.htm). Failure to take cautious measures, Germany further maintained, must result in "restoring the *status quo ante*, meaning that the situation as it existed before the detention, trial, sentencing and conviction of the foreign national must be re-established." *Id.* at 5. This means, at the least, setting aside the death penalty sentence. *Id.* The Brief Submitted by England and Wales similarly argued that a breach of the Vienna Convention should be rectified by returning the petitioner to the position in the lawsuit before the breach occurred. Brief of Amicus Curiae the Human Rights Committee of the Bar of England and Wales in Support of the Defendant-Appellant, at 11-13, *Madej* (Nos. 87574, 87725, 87726, 87752). Additionally, England and Wales argued that a state should not prevent a foreign national from having his rights afforded to him. *Id.* at 19-20. The United Mexican States also argued that *restitutio in integrum* provided the proper relief for a state violation of international law. Brief Amicus Curiae of the United Mexican States at 8, *Madej* (Nos. 87574, 87725, 87726, 87752). Mexico pointed out the United States intervention in the Harry Wu case in China. *Id.* at 5. Mexico also noted that the United States protested China's refusal to allow consular access to Wu, who was imprisoned based on the fact Wu was a U.S. national and allegedly spied on the Chinese government. *Id.* Mexico argued, given the United States recognition of these important rights afforded to foreign nationals, the United States should similarly be prohibited from disallowing consular access to foreign nationals in the United States. *Id.* at 7.

283. Other countries include Mexico, El Salvador, Guatemala, the Dominican Republic, Honduras, Paraguay, and Costa Rica. *Madej*, 739 N.E.2d at 431 (McMorrow, J., concurring in part, dissenting in part).

284. The Amicus Curiae Brief for Germany stated, "While the right to consular notification is guaranteed to all foreign national detainees, it is critical in cases where the foreign national is charged with a crime that may carry a death sentence." Brief Amicus Curiae of the Consulate General of the Federal Republic of Germany in Chicago at 5, *Madej* (Nos. 87574, 87725, 87726, 87752). Currently, "over 80 reported foreign nationals are on death row in the USA. Fourteen non-US citizens have been put to death across the country in the past decade, 11 of whom were executed between 1997 and 1999." *Worlds Apart, supra* note 10, at *2.

3. The International Ramifications for U.S. Citizens Abroad

The majority failed to recognize that by not providing a remedy for the state's notification violation, United States citizens are potentially at risk of having their freedom and safety compromised.[285] Failure to honor such treaties on the part of the United States can seriously jeopardize the safety and freedom of American citizens abroad.[286] The implications of decisions like the one in *Madej* reach far beyond the execution of one defendant.[287] It is in the best interest of the United States to adhere to the notification requirements in the Vienna Convention for the simple reason that it helps to ensure that other nations will do the same with United States citizens abroad.[288] Moreover, as one court has pointed out, the integrity of our judicial system depends on adhering to our international treaty obligations.[289] Clearly, the court in *Madej* failed to provide the defendant with the needed resources and protection, and in doing so, the court potentially jeopardized the safety of United States citizens abroad.

V. IMPACT

The *Madej* ruling does not preclude a foreign national in Illinois from obtaining a timely remedy under the Vienna Convention.[290] Nonetheless, state violations of the Vienna Convention have caused a great outcry of disapproval from foreign countries and human rights organizations.[291] Within the United States judicial system, an increase in litigation on these claims will inevitably produce a claim that is not procedurally preempted and force the courts to conceive a remedy for state violations.[292] Moreover, the international reaction to United States treaty violations will pressure the United States into taking concrete measures to ensure treaty compliance.[293]

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285. *Madej*, 739 N.E.2d at 430 (McMorrow, J., concurring in part, dissenting in part).

286. *Id.* at 431 (McMorrow, J., concurring in part, dissenting in part).

287. *Id.* at 432 (Heiple, J., dissenting).

288. *Id.* at 431 (McMorrow, J., concurring in part, dissenting in part); *id.* at 432 (Heiple, J., dissenting).

289. United States v. Chaparro-Alcantara, 226 F.3d 616, 622 (7th Cir. 2000) (stating that "[f]aithful adherence to our treaty obligations is important not only to the foreign relations of the United States but also to the integrity of our criminal justice system").

290. *Supra* Part III.C.1 (discussing the majority's correct application of Illinois procedural law).

291. *Madej*, 739 N.E.2d at 431 (McMorrow, J., concurring in part, dissenting in part).

292. O'Driscoll, *supra* note 13, at 339.

293. *Infra* Part V.B (discussing the international reaction to the *Madej* holding and similar rulings).

A. Domestic Impact

Although the Vienna Convention treaty was ratified in the United States in 1969, the United States State Department did not come out with a manual on consular notification and access until 1998—seventeen years after Madej's arrest.[294] While the treaty imparts a duty on both the local and federal government and law enforcement, there is a strong duty on the part of the federal government to provide local governments with direction, especially in situations involving international law.[295] Without such direction, courts will develop judicially-imposed tests to avoid directly interpreting the rights and responsibilities of parties under the Vienna Convention.[296] Courts do this, generally, because they do not interact on an international level, and, therefore, it is difficult for them to envision the larger national and international ramifications of their rulings.[297] Hence, only when the high courts impart a mandatory directive on the states will a clear remedy be available.[298] Until then, the over eighty reported foreign nationals on death row[299] will await their execution.

B. International Reaction and Impact Abroad

While top United States officials have expressed little concern about any fallout the United States has with foreign governments,[300] the impact abroad may prove more antagonistic than originally thought.[301]

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294. *State Department Manual*, *supra* note 5.

295. Vadnais, *supra* note 134, at 332-34.

296. *Supra* Part II.B (discussing judicially-imposed tests on Vienna Convention claims).

297. Gisvold, *supra* note 36, at 796 (stating that state courts "cannot adequately judge how their actions may affect the broader federal interests at stake").

298. Trainer, *supra* note 141, at 269.

299. *Worlds Apart*, *supra* note 10, at *2.

300. Associated Press, *Legal Wrangling Keeps German Citizen Inches Away from Death*, (Mar. 3, 1999) (Arizona Governor Jane Hull indicated that "she was not worried about any fallout to Arizona's image overseas" based on Arizona's violation of the Vienna Convention that led to the execution of two German foreign nationals), *at* http://www.cnn.com/US/9903/03/arizona.execution.04/index.html; *see also* Associated Press, *Death Row Debate: Is Treaty Obeyed?* (Dec. 28, 1998) (Former Texas Governor George Bush was "unmoved" by a foreign national's plea for a stay of execution in Texas, stating, "'People can't just come in our state and cold-blood [sic] murder somebody. . . . That's unacceptable behavior, regardless of their nationality.'"), *at* http://www.cnn.com/US/9812/28/death.row.diplomacy/index.html.

301. Gisvold, *supra* note 36, at 792. Gisvold states that "[e]ach State must weigh the risk of noncompliance against the retaliatory effect of noncompliance by other States." *Id.* at 792. Former U.S. State Department spokesman James Rubin said, "'[i]f we don't do all we can to . . . tell foreign nationals here that they can have consular access, then American citizens around the world . . . could be missing out on important opportunities to defend themselves through such notification of our consulates and embassies.'" Associated Press, *Death Row Debate: Is Treaty Obeyed?* (Dec. 28, 1998), *at* http://www.cnn.com/US/9812/28/death.row.diplomacy/index.html.

This notion of international reciprocity is a core issue confronting United States treaty violations.[302] It is possible that it is only a matter of time before a foreign state decides to retaliate against the United States.[303] This scenario is highly probable given the blatant disregard for Vienna Convention violations.[304] If the United States is to insist that other countries meet the standards set by the Vienna Convention, then "compliance must begin at home."[305]

C. Prevention and Remedies

The Illinois Supreme Court had its hands tied in *Madej*. The time for bringing the Vienna Convention claim had expired under section 2-1401.[306] Such dilemmas could be avoided by taking greater measures to prevent state violations of the Vienna Convention. Furthermore, courts must afford some remedy to foreign nationals who were deprived of their right to consular access, especially when the violation possibly contributes to their execution.

There are a number of ways that the United States can prevent state violations of the Vienna Convention. Within the past few years, the United States State Department has made efforts to inform local law enforcement officials about the rights of foreign nationals under the Vienna Convention.[307] The State Department and other federal

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302. People v. Madej, 739 N.E.2d 423, 431 (Ill. 2000) (McMorrow, J., concurring in part, dissenting in part).

303. Gisvold, *supra* note 36, at 794 (stating that, "It is only a matter of time before a nation decides to retaliate for maltreatment of one of its nationals by the United States"). Gisvold goes on to state:

> Currently, the United States is both a leading champion and violator of the right to consular protection. The United States must act to remedy this grave inconsistency. Justice cannot be equal where, simply as a result of a defendant's nationality and lack of familiarity with our legal precepts, the state denies him the occasion to fully participate in the judicial proceedings against him.

Id. at 803.

304. O'Driscoll, *supra* note 13, at 340. *Contra* Charlie Condon & Gerald Le Melle, *At Issue, Capital Controversy: Is it Acceptable to Execute Foreign Nationals?*, A.B.A. J., Jan. 1998, at 36 (stating that "[m]oral bullying based on international law is unlikely to convince many Americans [not to execute foreign nationals when] that runs contrary to their legal tradition").

305. Gisvold, *supra* note 36, at 794; *see also* Christopher E. van der Waerden, *Death and Diplomacy: Paraguay v. United States and the Vienna Convention on Consular Relations*, 45 WAYNE L. REV. 1631, 1663 (1999) (stating that "[w]hile many of these recent cases involve horrific crimes justifying harsh punishment, Article 36 of the Vienna Convention remains a 'diplomatic golden rule,' and the United States must treat foreign nations in our justice system as we expect other nations to treat Americans abroad").

306. *Madej*, 739 N.E.2d at 426.

307. *State Department Manual*, *supra* note 5. The *State Department Manual* describes itself as

agencies can also monitor and facilitate compliance through training programs and regular publications.[308] Notices regarding international obligations should be sent out annually, instead of merely periodically.[309] Furthermore, enacting legislation, while not necessary to implement obligations, may facilitate a stricter implementation.[310] Also, incorporating foreign national's rights into *Miranda* warnings, or other routinely publicized rights, could be feasibly implemented.[311]

A state violation of the Vienna Convention also necessitates a remedy.[312] Courts have held that dismissal of an indictment and suppression of evidence are inappropriate remedies for a treaty violation,[313] but these courts have not made another remedy available.[314] The dissents in *Madej* found that the most practical and equitable remedy would be to vacate the death sentence[315] and remand

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> designed to help ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments. The instructions and guidance herein should be followed by all federal, state, and local government officials, whether law enforcement, judicial, or other, insofar as they pertain to foreign nationals subject to such officials' authority or to matters within such officials' competence.

Id. at i. Additionally, the *State Department Manual* lists the duties of the state when detaining a foreign national as:

> 1. When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified.
>
> 2. In some cases, the nearest consular officials must be notified of the arrest or detention of a foreign national, regardless of the national's wishes.
>
> 3. Consular officials are entitled to have access to their nations in detention, and are entitled to provide consular assistance.
>
> 4. When a government official becomes aware of the death of a foreign national, consular officials must be notified.
>
> 5. When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or incompetent, consular officials must be notified.
>
> 6. When a foreign ship or aircraft wrecks or crashes, consular officials must be notified.

Id. at 13-15.

308. Aceves, *supra* note 58, at 314.

309. *Id.*

310. *Id.*

311. Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 HOUS. J. INT'L L. 375, 423 (1997).

312. People v. Madej, 739 N.E.2d 423, 431 (Ill. 2000) (McMorrow, J., concurring in part, dissenting in part) (stating that "[i]t is in our own self-interest to uphold the principle of international comity, acknowledge the notification violations that occurred in the case at bar, and provide a remedy").

313. *Supra* Part II.B.4 (discussing inappropriate remedies for state violations of the Vienna Convention).

314. Kadish, *supra* note 108, at 609-10.

315. *Madej*, 739 N.E.2d at 431 (McMorrow, J., concurring in part, dissenting in part).

the case for a new trial in compliance with the Vienna Convention.[316] Additionally, the Governor has the ability to pardon or reduce the sentence of a death row inmate when state violations materially alter or prejudice a foreign national's case.[317] Also, there is the option of repatriation to Poland, which was suggested in Justice Bilandic's concurring opinion.[318] Habeas corpus relief may also be sought in capital criminal cases.[319] At a minimum, a remedy is required that allows foreign nationals to have access to the "cultural bridge" envisioned by the Vienna Convention.[320] Unfortunately, only when the United States Supreme Court gives lower courts a mandatory directive will a clear remedy be properly applied.[321]

VI. CONCLUSION

The majority correctly held that the Illinois state procedural rules barred the Vienna Convention violation claim. The language of the Vienna Convention and Illinois' procedural rules require this conclusion. The majority reached its holding by properly avoiding doctrinal provincialism and the application of unnecessary judicially-imposed tests. Strong policy arguments exist, however, for courts to overlook procedural obstacles, such as section 2-1401 in Madej's case, especially in situations where a state violation of the treaty results in the execution of a foreign national. Illinois courts must devise such remedies to afford accused foreign nationals sufficient fairness under the treaty. In turn, the international reaction to U.S. violations of the Vienna Convention will be eased and the freedom and safety of United States citizens abroad will not be jeopardized.

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316. *Id.* at 432 (Heiple, J., dissenting).

317. The Governor of Illinois, George Ryan, declared a moratorium on executions in Illinois, effective as of January 2000, due to the "shameful" record of wrongful convictions. *Worlds Apart, supra* note 10, at *18 n.1.

318. *Madej*, 739 N.E.2d at 429 (Bilandic, J., concurring). Furthermore, at the end of this year two Illinois Supreme Court justices are stepping down and *Madej* is pending re-hearing. The thin majority in *Madej* may turn and provide a remedy for state violations of the Vienna Convention.

319. Kadish, *supra* note 108, at 610.

320. *Id.* at 611 (stating that a remedy "necessarily demands a new trial in which the foreign national has full access to the 'cultural bridge' envisioned by the world delegates of the Vienna Convention").

321. Trainer, *supra* note 141, at 269.