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INTERPRETING U.S. TREATIES IN LIGHT OF HUMAN RIGHTS VALUES

LORI FISLER DAMROSCH*

International treaty law occupies a more secure place in U.S. constitutional text than customary international law. Treaties, we know, are the “supreme law of the land” under Article VI of the Constitution and are routinely applied both in state courts and in federal courts under Article III.¹ So the “awkward relationship” to which I will address myself is how U.S. courts should determine the meaning of an international treaty to which the United States is bound, when the parties involved in court have different views on the substance of the obligation that the United States has undertaken. Thus my general topic is treaty interpretation, and my particular examples will be drawn from treaties relating to the rights of individuals in courts in the United States. Such treaties need not be human rights treaties, and indeed my examples will involve two kinds of treaties that are not usually found in compilations of human rights instruments: extradition treaties and treaties on consular relations.

HUMAN RIGHTS INTERPRETATION OF AN EXTRADITION TREATY

My first real-world exposure to the interface between international and domestic law came during my clerkship on the district court, in a fairly typical case involving an extradition treaty. Perhaps because of

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1. The proposition in the text refers to self-executing treaties. Another aspect of the “awkward relationship” is how to determine whether a given treaty is self-executing or non-self-executing and who should make such a determination. Compare the points of view in John Choon Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); Carlos M. Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); and John Choon Yoo, *Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999). See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 198-204 (2d ed. 1996); Lori Fidler Damrosch, *Symposium on Parliamentary Participation in the Making and Operation of Treaties: The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515 (1991).

my inexperience in these matters as a newly-minted graduate of the Yale Law School, the opinion that I drafted for Judge Newman in the extradition proceeding concerning one John Peter Galanis² did not survive review by the Second Circuit. Galanis was accused of a transnational stock fraud, affecting holders of securities in both the United States and Canada. In the United States, Galanis had cooperated with government investigators and reached a plea bargain with the U.S. Attorney's Office for the Southern District of New York. In Canada, however, he was still wanted for prosecution on charges growing out of the same swindle. The events in question occurred prior to the effective date of an extradition treaty between the United States and Canada which had been signed in 1971 and entered into force in 1976.³ One legal question was whether that treaty had retroactive effect. This technical question of treaty interpretation had human rights implications, because the later treaty had some safeguards that the earlier treaty did not have, especially a double jeopardy provision that was relevant to Galanis's argument that he had already been convicted in the United States for the same crime on which Canada sought his extradition. In brief, Galanis argued that the newer treaty was retroactive to expand the rights available to him in an extradition proceeding beyond what he would have had if the earlier treaty had applied.

A clause in the treaty seemed to dispose of the retroactivity question neatly, and adversely to Galanis's position:

This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; *except that the crimes . . . committed prior to entry into*

2. United States v. Galanis, 429 F. Supp. 1215 (D. Conn. 1977); Galanis v. Palanck, 568 F.2d 234 (2d Cir. 1977) (order denying writ of habeas corpus reversed). Technically, Judge Newman's decision was not reversed, since the court of appeals lacks power to review the certification of a district judge sitting as extradition magistrate. What was reversed was Judge Robert Zampano's subsequent order denying the writ of habeas corpus. The Second Circuit panel wrote in the final sentence of its opinion: "While we have no power on this appeal to direct Judge Newman to alter his certification, we assume that he will promptly advise the Department of State of our decision and that no extradition warrant will be issued." *Galanis*, 568 F.2d at 240. Compare with *Lo Duca v. United States*, 93 F.3d 1100, 1105 (2d Cir. 1996) (Newman, J.) (direct judicial review of extradition order not available).

3. Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, T.I.A.S. No. 8237 (entered into force March 22, 1976).

*force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.*⁴

Moreover, the record reflected two official communications from the U.S. Department of State, one transmitted to the Senate with the request for advice and consent to ratification of the treaty,⁵ and one submitted to the district court in connection with Canada's extradition request.⁶ The import of both of these was that the treaty was not retroactive. Under this interpretation, the only rights available to Galanis would derive from the Webster-Ashburton Treaty of 1842,⁷ which was formulated long before the modern era of human rights awareness and (even as supplemented over the ensuing century) did not contain many protections for the accused.

At the time that I drafted the opinion finding the defendant extraditable under the old treaty and finding the new treaty inapplicable, I did not foresee that I would one day become a professor of international law, and I was not yet sensitive to disputes on treaty interpretation. Rereading Judge Newman's opinion in *Galanis* twenty-five years later, I recognize what every classically trained international lawyer knows as the methodology of Article 31 of the Vienna Convention on the Law of Treaties, that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁸ Under this classic method of treaty interpretation, Judge Newman's conclusion that the treaty was not retroactive is beyond reproach.

4. 1971 Treaty, art. 18(2) (emphasis added).

5. Letter of Submittal of the Treaty from Robert S. Ingersoll, Acting Secretary of State, in Message from the President of the United States Transmitting the Treaty on Extradition Between the United States and Canada, 93d Cong., 2d Sess., at vi (1974) ("The Treaty is not retroactive in effect.").

6. Affidavit of K.E. Malmborg, Assistant Legal Adviser for Management in the Office of the Legal Adviser, U.S. Department of State ("all of the provisions on extradition in other agreements in force prior to the 1971 treaty, and not the provisions of the 1971 treaty, apply to crimes . . . committed prior to March 22, 1976.").

7. Webster-Ashburton Treaty of 1842, 8 Stat. 572, T.S. 119 (last supplemented 1952). On the evolution of the U.S.-Canadian extradition relationship from 1842 onward see *Galanis v. Pallanck*, 568 F.2d 234, 237 n.2 (1997).

8. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 Int'l Legal Materials 679. Although the United States has not ratified the Vienna Convention, the Convention's provisions on treaty interpretation are considered to reflect customary international law. See *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. at & 99 (June 27), http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (last accessed Sept. 20, 2002). The *LaGrand Case* is further discussed infra at text accompanying notes 35-46.

The district court opinion in *Galanis* does give a faithful reading of the ordinary meaning of the terms under the Vienna Convention methodology. Indeed, when the Second Circuit considered the same matter on review of denial of Galanis's petition for habeas corpus, the appellate court acknowledged that the non-retroactivity interpretation "would be permissible and perhaps would adhere more closely to the letter of the 'except' clause than that urged by Galanis".⁹

Also, the district court opinion was consistent with the position of the Executive Branch. Under the doctrine that the views of the Executive on a matter of treaty interpretation are entitled to "great weight,"¹⁰ the district court's conclusion was entirely understandable. When the Second Circuit considered Galanis's habeas corpus petition, the court took note of the doctrine of deference to the Executive on treaty interpretation; but then it went ahead to reject the Executive's position with a gratuitous snub to the lead lawyer from the U.S. Department of State in the negotiations with Canada.¹¹ I was not yet in the employ of the State Department (I would join the Office of the Legal Adviser at the end of my clerkship), so I had not acquired the pro-Executive bias that would afflict me for my first few years as a practicing lawyer, before I acquired the greater wisdom of academia. Discerning the conditions under which a court perhaps *should* reach a different reading of a treaty from that of the Executive is an important project for scholars and courts alike.

The Second Circuit disagreed with the position of the Executive Branch notwithstanding the fact that both the U.S. government and the Canadian government had the same view on non-retroactivity of the later treaty. Generally, when both governments have the same interpretation of a treaty, a court will honor rather than reject their

9. *Galanis*, 568 F.2d at 237.

10. For the proposition that the views of the Executive on matters of treaty interpretation are entitled to great weight *see, e.g.*, *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *compare* *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176 (1982) (following State Department's interpretation of treaty term "company of Japan" to exclude a U.S. subsidiary of a Japanese corporation in an antidiscrimination case; lower courts had differed with the State Department), *with* *Perkins v. Elg*, 307 U.S. 325 (1939) (rejecting executive interpretation of U.S.-Swedish treaty in matter involving determination of citizenship status of a woman born in the United States to Swedish parents).

11. The Second Circuit felt free to differ with the "conclusory" assertion of K.E. Malmberg, Assistant Legal Adviser in the Department of State, that the treaty was not retroactive. In so doing, it cited *Greci v. Birknes*, 527 F.2d 956, 960 (1st Cir. 1976), "in which the court rejected a much more convincing affidavit by Mr. Malmberg." *Galanis*, 568 F.2d at 239. When I joined the Office of the Legal Adviser later in 1977 and got to know Mr. Malmberg in person, he and I had a few chuckles over his treatment by the two courts of appeals.

shared view.¹² Moreover, the U.S. government had maintained a consistent point of view, in contrast to other instances where a later administration has sought to “reinterpret” a treaty entered into by one of its predecessors.¹³

Yet the Second Circuit disagreed with the consistent interpretation of both governments. Why? Apparently because the Second Circuit panel wanted to give the extradition treaty a more progressive human-rights oriented interpretation than the interpretation suggested by “ordinary meaning” of the terms in their context and in light of the object and purpose of the treaty.¹⁴

12. It is accepted in the international law of treaty interpretation that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” is to be taken into account. Vienna Convention on the Law of Treaties, art. 31(3)(a). *See also* Statements by Parties as “Subsequent Agreement” in Treaty Interpretation, in *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT’L L. 887 (Sean D. Murphy ed., 2001).

13. In the 1980s the Executive and Legislative Branches clashed on the constitutional import of statements about the meaning of a treaty that the Executive’s representatives conveyed to the Senate as part of the request for advice and consent. *Cf. United States v. Stuart*, 489 U.S. 353 (1989) (on relevance of Senate’s preratification materials). The issue of whether a substantial change in the U.S. interpretation of treaty obligations would require renewed Senatorial consent was hotly debated in the context of the Reagan Administration’s “reinterpretation” of the 1972 Anti-Ballistic Missile Treaty with the Soviet Union. *See generally* LORI F. DAMROSCH, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 196 (2001) (references on ABM treaty reinterpretation controversy). The issue resurfaced in a slightly different form in 2001, with controversy over whether a hypothetical U.S.-Russian understanding to permit some adjustment of the constraints of the ABM Treaty would require new consent from the Senate. President George W. Bush gave notice of termination of the ABM Treaty in December 2001, and thus the several iterations of the Senate’s potential role in reinterpretation of that treaty are moot.

In contrast to the ABM reinterpretation debate, there would be no reason to involve the Senate a second time to confirm an interpretation that had already been before the Senate when it approved the treaty in the first instance, as was the case with the non-retroactivity interpretation of the 1971 U.S.-Canadian extradition treaty.

14. It is not entirely clear how to ascertain the object(s) and purpose(s) of an extradition treaty under the methodology of Article 31 of the Vienna Convention on the Law of Treaties. Although the Second Circuit engaged in a kind of purposive interpretation in its treatment of “deep considerations of policy” in the treaty, *see infra* text accompanying notes 23-24, it could also be argued that the relevant object and purpose is to facilitate transnational prosecutions. The preamble to the U.S.-Canadian extradition treaty is typical in referring only to the parties’ desire “to make more effective the cooperation of the two countries in the repression of crime by making provision for the reciprocal extradition of offenders.” There is no mention of a rights-protecting purpose, nor has one been added in the subsequent amendments to the treaty up to the present.

I suggest that we can discern in the Second Circuit's *Galanis* opinion a trend that has picked up considerable force in the ensuing twenty-five years: an inclination on the part of some (but far from all) courts to infuse human rights values into the interpretation of non-human rights treaties. Let me pause on the point of whether an extradition treaty is or is not a human rights treaty. Few if any extradition treaties are found in the main compilations of human rights instruments.¹⁵ Thus I do not ask (though one could well ask) whether there is any special interpretive methodology that does or should apply to human rights treaties.¹⁶ Rather, I use the extradition treaty as an example to ask whether we can detect tendencies on the part of some courts to infuse garden-variety (non-human-rights) treaties with human rights values, and if so, whether that trend should be encouraged.

The "old" extradition treaty between the United States and Canada—the Webster-Ashburton Treaty of 1842, as supplemented between 1889 and 1952¹⁷—was not very rights-protective. One innovation of the "new" 1971 treaty was to introduce a double jeopardy clause as follows:

Extradition shall not be granted in any of the following circumstances:

15. A recent collection of some 125 human rights documents includes no extradition treaties. See generally HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT (Henkin, et al. eds., 2001). In 1100 pages of materials therein, only passing references to problems of extradition are found, as in *The Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity* (U.N.G.A. Res. 3074 (1973)), in *ibid.* at 902.

16. For example, where a provision of a human rights treaty is ambiguous, should there be a special method of interpretation so that a tribunal would resolve doubts in the direction of greater protections for the claimant (or conversely, in favor of the state)? On such questions, see, e.g., J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 63-112 (2d ed. 1993) (chs. 4-5 on methods of interpretation and principle of effectiveness); RUDOLF BERNHARDT, THOUGHTS ON THE INTERPRETATION OF HUMAN RIGHTS TREATIES, IN PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION: STUDIES IN HONOR OF GERARD J. WIARDA 65-71 (1988) (human rights treaties are to be interpreted in an objective and dynamic manner, to strike a fair balance between individual and community interests); A.A. Cancado Trindade, *Coexistence and Coordination of Mechanisms of Protection of Human Rights*, 202 Coll. Courses of Hague Acad. of Int'l L. 9, 91-112 (1987) (Part III, The Proper Interpretation of Human Rights Treaties) (observing that international human rights bodies converge in stressing "distinctive character" of human rights treaties, so that their interpretation and coordination of mechanisms for their implementation "cannot operate to the detriment of the individuals (alleged victims) concerned," at 96-98, and that dynamic and evolutionary interpretation should be favored, at 98-100). Thanks to Gerald Neuman for insight into the literature on interpretation of human rights treaties.

17. See *supra* note 7.

(1) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.¹⁸

The Webster-Ashburton Treaty contained no such protection, and the U.S. Constitution of its own force would not have provided it. The Second Circuit had previously applied the “separate sovereigns” doctrine to hold that there was no constitutional right to be free from double jeopardy resulting from extradition;¹⁹ and the judges of this circuit continue to believe themselves bound by the Supreme Court’s attitude toward “separate sovereignties” even though some of them have expressed doubts about the doctrine.²⁰ Thus Galanis’s right (if

18. 27 U.S.T. 983.

19. See *In re Ryan*, 360 F. Supp. 270, 275 (E.D.N.Y. 1973), *aff’d*, 478 F.2d 1397 (2d Cir. 1973); *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925 (2d Cir. 1974), both cited by the district court in *Galanis*, 429 F. Supp. at 1226. In *Galanis*, however, the Second Circuit referred to the policy of the Department of Justice against duplicative federal-state prosecutions, as well as to U.S. judicial opinions expressing accord with the reasons for avoiding dual prosecutions as a general matter. 568 F.2d at 238-39. Cf. *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (different treatment of double jeopardy issue in another extradition case, written by author of *Galanis* opinion, Friendly, J.).

20. In a notorious case involving a racially charged incident in the Crown Heights neighborhood of Brooklyn, defendant Lemrick Nelson had been acquitted of second degree murder charges in a New York State prosecution arising out of the death of Yankel Rosenbaum. When Nelson was subsequently prosecuted under federal law for violating Rosenbaum’s civil rights, he argued that the second prosecution was barred by double jeopardy. The Second Circuit concluded that this claim “fails in light of the doctrine of dual sovereignty, under which a defendant in a criminal case may constitutionally be prosecuted by different sovereigns for the same offense.” *United States v. Nelson*, 277 F.3d 164, 212 (2d Cir. 2002). Judge Calabresi wrote: “Although the author of this opinion has argued, and adheres to the view, that the dual sovereignty doctrine is in need of rethinking, see *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 496-99 (Calabresi, J., concurring), and although he also believes that a reexamination of the doctrine is particularly appropriate in light of distinctions drawn by the Supreme Court in *United States v. Balsys*, 524 U.S. 666, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998), between the relationships among the several sovereigns that constitute the United States, and those among these sovereigns and foreign countries, such a reconsideration of a Supreme Court doctrine is not the province of the Courts of Appeals.” 277 F.3d at 212-13 n.58.

In the *Balsys* case to which Judge Calabresi referred, the Supreme Court held that the Fifth Amendment privilege against self-incrimination does not apply when the fear is of criminal prosecution by a *foreign* government. Judge Newman on the District Court in Connecticut had written one of the first opinions addressing this issue. See *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972), *cited in* *United States v. Balsys*, 119 F.3d 122 (2d Cir. 1997), *rev’d*, 524 U.S. 666 (1998). The Supreme Court did not endorse the rights-protective approach of Judge Newman in *Cardassi* and the Second Circuit in *Balsys*.

any) not to be sent to Canada for prosecution on a charge for which he had been subjected to jeopardy in the United States would have to be a treaty right rather than a constitutional right.²¹

In order to find that the defendant could benefit from the double jeopardy protection of the 1971 treaty, the Second Circuit had to find that the new treaty rather than the old treaty applied to crimes committed prior to its entry into force. The Court of Appeals, *per* Judge Friendly, arrived at this result through a deliberately rights-enhancing methodology. The court was persuaded that one rationale for a non-retroactivity clause in an extradition treaty would be to protect the defendant from greater liability for extradition under a new treaty than under the treaty that was in force at the time of the crimes.²² Moreover, the Court discerned an objective in the new treaty to “modernize” the extradition relationship between the United States and Canada, and it found a rights-protective trend in most “modern” extradition treaties, including the one under consideration. Thus, the Court concluded,

we do not see any reasons, and the Government has pointed out none, why the draftsmen should have wished to deprive a person whose extradition was sought after the treaty's effective date of the double jeopardy defense here asserted, or of [other defenses under the same treaty].²³

* * *

In view of the deep considerations of policy that must have moved the draftsmen to include the double jeopardy provision in this treaty, it would seem reasonable to con-

21. The interjurisdictional double jeopardy problem has drawn renewed attention in debates over the relationship between national and international criminal jurisdiction. The Rome Statute of the International Criminal Court (adapting the formulations used for the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda) accords some protection for the accused under the principle of *ne bis in idem* (not twice for the same), unless the proceedings in another court were for the purpose of shielding the person from criminal responsibility or were inconsistent with an intent to bring the person concerned to justice. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), 39 Int'l Legal Materials 999, art. 20 (1998). Critics of the Rome Statute have questioned whether the treaty provision would give sufficient protection against duplicative prosecutions of individuals who might already have been acquitted in the United States. Of course, since the U.S. Constitution would not protect such defendants from non-U.S. prosecutions in any event, the Rome Statute might actually give potential defendants a treaty defense that would otherwise be unavailable.

22. 568 F.2d at 237-38.

23. *Id.* at 238.

clude that they did not wish to defer the obligation of this country to respect it, but rather wished this and other improvements implemented by the 1971 treaty to become operative as soon as the treaty became effective.²⁴

The court accordingly advanced these considerations of human rights policy to a place even higher than the terms of the treaty or the government's explanations of its meaning.²⁵

HUMAN RIGHTS INTERPRETATION OF A CONSULAR TREATY

I now turn to another treaty that likewise raises issues of whether it should be interpreted in a rights-protective manner. This treaty, the Vienna Convention on Consular Relations (VCCR),²⁶ was little-known in the United States until a few years ago but has recently generated a wave of litigation, especially in death penalty cases.²⁷ It is also of very considerable interest to the 1000 or so aliens detained in the United States for immigration violations and other reasons in the round-up following the September 11, 2001 attacks on the World Trade Center and the Pentagon.²⁸

24. *Id.* at 239.

25. "The Department of State urged the Solicitor General to seek certiorari, on the grounds that the Second Circuit's ruling on double jeopardy was 'clearly erroneous in law' and would have serious adverse effect on . . . United States foreign relations." MARIAN LLOYD NASH, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 402-03 (1978). On the subsequent fate of John Peter Galanis within the U.S. criminal justice system, see *Galanis v. United States*, 513 U.S. 1154 (1995) (denying certiorari); for summary of petition for certiorari, see 63 U.S.L.W. 3602 (1995) (denial of post-conviction relief seeking reduction of sentence).

26. Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

27. See, e.g., *Breard v. Greene*, 523 U.S. 371 (1998); *Germany v. United States*, 526 U.S. 111 (1999); *LaGrand v. Arizona*, 526 U.S. 1001 (1999).

28. Barbara Crossette, *Diplomats Protest Lack of Information*, N.Y. TIMES, Dec. 20, 2001, at B5; William Glaberson, *A Frustrated A.C.L.U. Tries to Guide Consulates Through a Thicket*, N.Y. TIMES, Jan. 2, 2002, at A11. See also *Pakistani Man Dies in I.N.S. Custody*, N.Y. TIMES, Oct. 25, 2001, at B10 (I.N.S. spokesman said detainee had "waived his right to have the Pakistani Consulate informed of his detention"). Compare with *United States v. Bin Laden*, 126 F. Supp. 2d 290, 295-96 (S.D.N.Y. 2001); *United States v. Bin Laden*, 132 F. Supp. 2d 168, 194-97 (S.D.N.Y. 2001) (VCCR issues raised by foreign defendants in custody on charges of embassy bombings in Kenya and Tanzania).

As with extradition treaties, the VCCR is not usually considered as a human rights treaty;²⁹ but it does indeed have clauses protective of individual rights, and those clauses call for interpretation as they are not entirely clear in their import. They can be given a more or less rights-enhancing construction, depending on the interpretive methodology to be applied and the predilections of the interpreter. In the recent and pending cases in U.S. domestic and international courts, the clause needing interpretation is Article 36, which is sometimes known as the “consular notification” or “consular access” clause. In brief, Article 36 provides for free communication between a foreign individual who is detained and his consular post, and it gives the foreign national the right to be informed of that right. In its literal formulation, it does not necessarily require the receiving state to notify the consular post that its national has been detained; but it does require that the detained national be informed of *his* right to request notification of the consulate. The provision reads 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. . . . The said authorities shall inform the person concerned without delay of his rights under this subparagraph. . . .

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.

29. Consular treaties, like extradition treaties, are not included in standard collections of human rights documents, such as the supplement by Henkin and colleagues cited in *supra* note 15.

In the *Breard* and *LaGrand* cases that reached the U.S. Supreme Court on petition for writ of habeas corpus, the United States government conceded that there had been a breach of the treaty, in that the relevant state authorities had not informed the foreign nationals arrested on capital charges of their rights to communicate with the consular posts of their countries (Paraguay and Germany, respectively). But beyond acknowledgment of the underlying treaty violation, there was disagreement about whether the treaty itself requires a mechanism for post-conviction relief to remedy any effects of the breach. The U.S. government consistently maintained in all domestic and international tribunals that the Vienna Convention imposed no such requirement, and that there would be no authority within the U.S. constitutional system for federal courts to grant such relief from a state death sentence, unless the affected foreign national had complied with all applicable procedural requirements for federal habeas relief.³⁰

The Supreme Court dealt with the VCCR summarily in the *Breard* case, by denying the petition for the writ of certiorari and motion for stay just a few hours before petitioner's scheduled execution. The Supreme Court accepted the Solicitor General's position on several disputed issues,³¹ including on how to construe the treaty and how to reconcile a potential conflict between substantive treaty obligations and domestic procedural law:

. . . while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. . . . This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must en-

30. See, e.g., Lori F. Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, in *Agora: Breard*, 92 AM. J. INT'L L. 666, 697-704 (1998) and the U.S. amicus briefs cited therein.

31. The Solicitor General had also taken a position on the then-unresolved question of whether provisional measures orders of the International Court of Justice are binding under the treaty establishing that Court, by asserting that they were not binding. The Supreme Court effectively followed the Solicitor General's lead by treating the ICJ order as having no legal force within the federal system. See *Breard*, 523 U.S. at 376. Later on, the ICJ ruled in *LaGrand* that provisional measures orders are indeed binding. See *infra* note 38 and accompanying text.

able full effect to be given to the purposes for which the rights accorded under this Article are intended.”³²

Note that the Supreme Court here reached its own conclusion that U.S. procedural rules do enable giving full effect to the purposes of the rights under Article 36, within the meaning of Article 36 itself. Thus, the Supreme Court engaged in a substantive act of treaty interpretation, uninformed by the views of the international tribunal that had authority to decide this question on the international plane (and that later resolved it adversely to the United States in another case), and uninformed by the kinds of materials that international lawyers would usually cite in their briefs on the merits in a treaty interpretation case.³³ Having first fixed on a rather ungenerous interpretation of the treaty’s requirements, the Court also subordinated any substantive treaty obligations to U.S. rules of procedural default, without attempting to resolve a potential conflict between international and domestic law in order to enable the United States to comply with the relevant international obligations.³⁴

The paragraph from the Supreme Court’s per curiam denial of certiorari quoted above begins with the noteworthy phrase “*while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such . . .*”. At the time the Supreme Court declined to interfere with the scheduled state execution in *Breard*, it did not have the benefit of the relevant international court’s interpretation of the treaty in question. A few years later, in a case raising similar issues brought by Germany against the United States at the international level, the International Court of Justice did give its authoritative interpretation of the Vienna Convention under binding provisions for dispute settlement to which the United States had consented in advance; and the International

32. 523 U.S. at 375 (citing VCCR, art. 36(2)).

33. There is no sign that the Supreme Court was aware of, for example, the *travaux préparatoires* of the VCCR.

34. Usually, courts presume that Congress did not intend to require the United States to violate its treaty obligations. See generally *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

Court reached the opposite conclusion from the Supreme Court.³⁵ In the dispositive part of its judgment,³⁶ the International Court:

(4) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations [of the VCCR] had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 2, of the Convention; . . .

(7) By fourteen votes to one,

Finds that, should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (*b*) of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

The judge of U.S. nationality formed part of the fourteen-vote majority on these paragraphs.³⁷

The U.S. Supreme Court had deferred to the position of the Executive Branch in the *Breard* and *LaGrand* matters, both on disputed points of treaty interpretation and on the interface between international and domestic law. But it turned out that the Executive Branch was wrong in its apprehension of the applicable requirements of international law, though the error did not become known until the International Court gave its ruling on the merits in the *LaGrand* case. The Executive Branch committed a separate error in advising the Supreme

35. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. at & 91, http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm (last accessed Sept. 20, 2002). The basis for ICJ jurisdiction was the Vienna Convention's Optional Protocol on Compulsory Settlement of Disputes, Dec. 24, 1969, 21 U.S.T. 325, T.I.A.S. No. 6820, 596 U.N.T.S. 487. The Senate had approved this dispute settlement protocol as a treaty under Article II of the U.S. Constitution, and it entered into force for the United States on December 24, 1969.

36. *LaGrand*, 2001 I.C.J. at para. 128.

37. Judge Thomas Buergenthal of the United States dissented on only one aspect, having to do with the admissibility of one of Germany's submissions in light of the last-minute nature of Germany's filing of the request for provisional measures. The dissenting judge on the paragraphs quoted in the text was Judge Oda of Japan.

Court that there was probably no international obligation to carry out the ICJ's provisional measures orders: though the legal quality of such orders was in dispute prior to the ICJ's judgment on the merits in *LaGrand*, the latter ruling has now clarified that such orders are indeed binding on parties to the Court's Statute.³⁸ Furthermore, the Solicitor General had informed the Supreme Court that the Vienna Convention does not require post-conviction review as a remedy for breach of the Convention; but the International Court of Justice has now established that the treaty *does* require review and reconsideration of conviction and sentence, at least where "severe penalties" such as the death penalty have been imposed after the breach.³⁹ The U.S. government had further insisted that the treaty does not confer rights on individuals, but only on states; the International Court, however, has determined that both individuals and states can claim rights under this treaty.⁴⁰ The Solicitor General had argued to the Supreme Court that federal courts lack power to redress this treaty violation under the circumstances presented, at least under existing statutory law; but the ICJ has now held that in a case involving severe penalties the United States "by means of its own choosing" must find a way to give review and reconsideration of serious sentences imposed before the treaty breach had been cured.⁴¹

The U.S. Supreme Court reached its own conclusion, uninformed by the International Court, that the Vienna Convention's requirements could be reconciled with the "procedural default" rule applied by U.S. federal courts to foreclose consideration in habeas corpus proceedings of treaty claims that had not first been raised in the state courts. In so doing, the Supreme Court gave Article 36(2) of the Convention a restrictive interpretation which effectively subordinated treaty rights to the "laws and regulations of the receiving State." But, when the International Court addressed the same problem of the interface between the international and domestic systems, it concluded that in the circumstances of the case before it, the application of the procedural default rule impaired the exercise of treaty rights, and thus was inconsistent with the proviso of Article 36(2) that the receiving state's laws and regulations "must enable full effect to be given to the

38. *LaGrand*, 2001 I.C.J. at paras. 92-116.

39. *Id.* at para. 128.

40. *Id.* at para. 77 ("the Court concludes that Article 36, paragraph 1, creates individual rights These rights were violated in the present case."). The Court did not find it necessary to consider Germany's further contention that the right in question was not only an individual right but also has assumed the character of a human right. *Ibid.*, para. 78.

41. *LaGrand*, 2001 I.C.J. at para. 128, dispositive provision (7), quoted *supra* in text accompanying note 37.

purposes for which the rights accorded under this Article are intended.”⁴² The International Court ruled that although the procedural default rule itself would not necessarily violate the Vienna Convention, its specific application in the *LaGrand* case did do so.⁴³

Some aspects of the ICJ’s *LaGrand* ruling may have come as a surprise to the U.S. government and to other observers. For example, it is arguable that the ICJ went farther than would have been expected of a state-centered international court in upholding rights *for individuals* rather than interests of states. Also, the ICJ penetrated rather more deeply into the black box of “the state” (the United States as a state in international law, but also the state of Arizona that had convicted and sentenced the *LaGrand* brothers) in requiring review and reconsideration of determinations reached in a domestic criminal justice system. In so doing, it seems to have applied a rights-protective approach to interpretation of the VCCR, using the traditional interpretive methodology of the Vienna Convention on the Law of Treaties as a starting point but perhaps giving greater weight to considerations of individual rights than might have been expected for a consular treaty that generally facilitates interstate relations.

This ICJ judgment was handed down June 27, 2001. Meanwhile, the U.S. government has been trying to figure out what to do with it in the dozens of pending death penalty cases in similar posture to *LaGrand*. The typical case comes up in a habeas corpus proceeding, in which the petitioner claims that he was not advised of his treaty rights upon arrest and before trial, and therefore, was prejudiced in the ensuing conviction and sentence. According to one scholar’s account,

. . . [I]n the 6 months since the [*LaGrand*] ruling, 17 of 20 reported U.S. court decisions on consular rights do not even mention the World Court judgment. None rely on it.

Worse, several contradict it, with no indication that they are aware of doing so. For example, without mentioning the World Court, the New Mexico Supreme Court

42. See *supra* notes 36-37 and accompanying text. The ICJ discussed the U.S. procedural default rule at paras. 79-91 of the judgment.

43. *LaGrand*, 2001 I.C.J. at para. 90; see also *id.* at para. 91 (under the circumstances in which Germany was prevented from retaining private counsel for the *LaGrands* and assisting them in preparing their defense, “the procedural default rule had the effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended,’ and thus violated paragraph 2 of Article 36”); *id.* at para. 125 (“In the present case, the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such”).

ruled in September that individuals have no legally enforceable rights under the treaty, while the Delaware Supreme Court ruled in November that a foreigner's consular claim was raised too late.⁴⁴

Apart from the claims for post-conviction relief, there is also a line of cases beginning before the ICJ's *LaGrand* decision, under which pre-trial motions to enforce treaty rights have been denied on the basis of the Department of State's cramped interpretation of treaty requirements.⁴⁵ In the aftermath of *LaGrand*, it is incumbent on the Executive and the courts to adhere to the more rights-enhancing approach of the authoritative international organ of interpretation.⁴⁶

CONCLUSION

The issue identified in this comment—judicial interpretation of a treaty that has human rights considerations as one of its aspects—has arisen frequently in the Second Circuit and the district courts within the Second Circuit, as well as in the opinions of Judge Newman himself. From Judge Newman's own opinions, we could mention (in addition to the cases already noted):

- cases involving the rights of children whose parents disagree on their custody, as affected by the Convention on the International Aspects of Child Abduction;⁴⁷

44. Douglass W. Cassel, Jr., *Ignoring the World Court*, CHICAGO DAILY LAW BULL., Jan. 10, 2002, at 6.

45. See, e.g., *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000). In this case, the Ninth Circuit affirmed the district court's denial of a motion to suppress the defendant's statements given before he had been informed of his consular rights. *Id.* at 888. The en banc court accepted the State Department view that an exclusionary rule is not applicable under the treaty. *Id.*

46. The Ninth Circuit en banc in *Lombera-Camorlinga* was too quick to follow the Department of State, which informed the court that several other parties to the Vienna Convention had rejected a suppression rule for evidence obtained without compliance with the treaty requirements. 206 F.3d at 887. The court said, "By refusing to adopt an exclusionary rule, we thus promote harmony in the interpretation of an international agreement." *Id.* at 888 (citing Restatement (Third) of the Foreign Relations Law of the United States, § 325 cmt. d). After the ICJ's *LaGrand* ruling, the best way to promote "harmony in the interpretation of an international agreement" is to consider pre-trial motions complaining of treaty violations under *LaGrand*'s standards.

47. *Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001); *U.S. v. Amer*, 110 F.3d 873 (2d Cir. 1997). These cases involved the Convention on the Civil Aspects of International Child Abduction, done at The Hague, Oct. 25, 1980, T.I.A.S. No. 11670 (entered into force for the United States July 1, 1988).

- cases involving the rights of individuals injured or killed in aircraft disasters, as affected by the Warsaw Convention;⁴⁸
- cases involving the rights of individuals killed in acts of state-sponsored terrorism, such as the explosion of Pan Am Flight 103 over Lockerbie, in relation to the Montreal Convention on Safety of Civilian Aircraft⁴⁹ and actions of the Security Council under Chapter VII of the Charter of the United Nations;⁵⁰
- cases involving the rights of refugees and asylum-seekers, in relation to the Protocol on the Status of Refugees and other aspects of international human rights law;⁵¹
- cases involving the laws of war and international humanitarian law in armed conflict, involving such treaties as the Genocide Conven-

48. *Petriere v. Spantax, S.A.*, 756 F.2d 263 (2d Cir. 1985); *Stratis v. Eastern Air Lines*, 682 F.2d 406 (2d Cir. 1982) (Newman, J., dissenting). These cases involved the Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C.A. 1502 (1976) (entered into force for the United States Oct. 29, 1934).

49. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 (entered into force Jan. 26, 1973).

50. *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1996), cert. denied, 520 U.S. 1204 (1997). The *Smith* plaintiffs argued, *inter alia*, that sovereign immunity should be denied to foreign states who were in violation of binding Security Council resolutions, as Libya was for failing to surrender two suspects in the Lockerbie explosion. *Smith*, 101 F.3d at 241. Judge Newman wrote that the Foreign Sovereign Immunity Act:

does not contemplate a dynamic expansion whereby FSIA immunity can be removed by action of the UN taken after the FSIA was enacted. Such a contention would encounter a substantial constitutional issue as to whether Congress could delegate to an international organization the authority to regulate the jurisdiction of United States courts. It would take an explicit indication of Congressional intent before we would construe an act of Congress to have such an effect.

Id. at 246-47; Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605(a)(1).

The *Smith* case was decided before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 221 (Apr. 24, 1996) (codified at 28 U.S.C. § 1605(a)(7)) ("AEDPA"), which revoked the foreign sovereign immunity of certain states designated as sponsors of terrorism. Whether the AEDPA could constitutionally be made retroactive to expand the liability of state defendants in relation to events occurring before its enactment came before the Second Circuit in another installment of the *Lockerbie* cases. See *Rein v. Socialist Libyan People's Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).

51. *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992); *Dong v. Slattery*, 84 F.3d 82 (2d Cir. 1996), both involving the Protocol Relating to the Status of Refugees, done at New York, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for the United States Nov. 1, 1968).

tion of 1948,⁵² the Geneva Conventions of 1949,⁵³ and the 1984 Convention Against Torture.⁵⁴

Clearly, issues of individual rights under treaties are coming up more and more frequently in the courts of this Circuit. It would be interesting to inquire into the extent that they do or do not apply the kinds of rights-enhancing methodologies addressed in this comment.

I close with a paragraph from Judge Newman's extrajudicial writings on international law, cited in Judge Weinstein's ruling of January 9, 2002, in a case involving the intersection of U.S. treaty obligations with the issue of whether an alien could be made retroactively deportable because of a change in U.S. statutory law after his crime was committed. In deciding to interpret and apply U.S. statutes to enable the United States to give effect to its treaty commitments, Judge Weinstein quoted Judge Newman's statement to the Second Circuit of 1996 as follows:⁵⁵

There are international supremacy clauses which have civil consequences and criminal consequences that we today are currently not comfortable with. . . . Once this country says there is a U.N. Charter, there are U.N. covenants, there are treaties, and we subscribe to them, in effect, having something of an international supremacy clause, then there are going to be civil and perhaps criminal consequences that we might not all think are so wonderful. But you can't simply say that we're going to have

52. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force for the United States Feb. 23, 1989).

53. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, done at Geneva, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, done at Geneva Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

54. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (addressing the treaties cited in the previous two notes as well as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), done at New York Dec. 10, 1984, 1465 U.N.T.S. 85, entered into force for the United States Nov. 20, 1994.

55. Statement of Jon O. Newman, 170 F.R.D. 201, 317-18 (1996) (2d. Cir. Jud. Conf.), *cited in* *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. Jan. 22, 2002).

treaties for the rest of them but, of course, they won't apply to us.

It is impossible for me to disagree with (or even quibble with) that statement. Let me just add two points:

- Some of the treaty obligations of the United States entail commitments to honor the authoritative interpretation given by the appropriate international institution, such as an international court or treaty monitoring body.

- Some of those institutions, in a manner similar to that of the International Court in *LaGrand*, using methods comparable to that of the Second Circuit in *Galanis*, are expanding the frame of treaty interpretation discourse beyond the traditional materials of text, context, object-and-purpose, and preparatory work to include human rights considerations, perhaps pushing the envelope slightly beyond what the drafters or ratifiers of a particular instrument might have had in mind. If so, then in the spirit of full compliance with all our legal obligations, the rights-enhancing interpretation of an authoritative international institution should be followed.

