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Chapter I

General International and U.S. Foreign Relations Law

Overview

As demonstrated throughout this volume, during 2002–2004 the United States continued in its role as a critical player with respect to international legal initiatives and as a major supporter of a variety of international organizations, including dispute resolution fora. At the same time, the United States resisted having various initiatives under international law apply to the United States, notably the International Criminal Court, the Kyoto Protocol on climate change, and the UN Convention on the Law of the Sea. Further, while the United States marshaled considerable global support for the "war on terrorism" through UN Security Council sanctions and other measures, the United States resisted the application of the 1949 Third Geneva Convention and human rights instruments to persons detained in Afghanistan and elsewhere in the course of waging that war. Such resistance led many states and observers to criticize the United States as embarking on a unilateralist or "exceptionalist" course. Despite this, the United States viewed international law and its institutions as an important component of U.S. foreign policy, and international law and foreign law continued to influence the development of U.S. law, as may be seen in various cases of the U.S. Supreme Court.

U.S. Influence on International Law

President Bush 2004 Speech to UN General Assembly

In September 2004, U.S. President George W. Bush spoke to the UN General Assembly regarding the desire of the United States to join with other nations in initiatives that promote security, prosperity, human rights, and the rule of law in international affairs:

> The United Nations and my country share the deepest commitments. Both the American Declaration of Independence and the Universal Declaration of Human Rights proclaim the equal value and dignity of every human life. That dignity is honored by the rule of law, limits on the power of the state, respect for women, protection of private property, free speech, equal justice, and religious tolerance. That dignity is dishonored by oppression, corruption, tyranny, bigotry, terrorism, and all violence against the innocent. And both of our founding documents affirm that this bright line between justice and injustice – between right and wrong – is the same in every age and every culture and every nation.
>
> Wise governments also stand for these principles for very practical and realistic reasons. We know that dictators are quick to choose aggression, while free nations strive to resolve differences in peace. We know that oppressive governments support terror, while free governments fight the terrorists in their midst. We know that free peoples embrace progress and life, instead of becoming the recruits for murderous ideologies.
>
> Every nation that wants peace will share the benefits of a freer world, and every nation that seeks peace has an obligation to help build that world. Eventually, there is no safe isolation from terror networks or failed states that shelter them or outlaw regimes or weapons of mass destruction. Eventually, there is no safety in looking away, seeking the quiet life by ignoring the struggles and oppression of others.

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In this young century, our world needs a new definition of security. Our security is not merely found in spheres of influence or some balance of power. The security of our world is found in the advancing rights of mankind.

These rights are advancing across the world, and across the world, the enemies of human rights are responding with violence. Terrorists and their allies believe the Universal Declaration of Human Rights and the American Bill of Rights and every charter of liberty ever written are lies to be burned and destroyed and forgotten. They believe that dictators should control every mind and tongue in the Middle East and beyond. They believe that suicide and torture and murder are fully justified to serve any goal they declare, and they act on their beliefs.

. . . .

We're determined to destroy terror networks wherever they operate, and the United States is grateful to every nation that is helping to seize terrorist assets, track down their operatives, and disrupt their plans. We're determined to end the state sponsorship of terror, and my Nation is grateful to all that participated in the liberation of Afghanistan. We're determined to prevent proliferation and to enforce the demands of the world, and my Nation is grateful to the soldiers of many nations who have helped to deliver the Iraqi people from an outlaw dictator.

. . . .

Defending our ideals is vital, but it is not enough. Our broader mission as U.N. members is to apply these ideals to the great issues of our time. Our wider goal is to promote hope and progress as the alternatives to hatred and violence. Our great purpose is to build a better world beyond the war on terror.

Because we believe in human dignity, America and many nations have established a Global Fund to Fight AIDS, Tuberculosis, and Malaria. In 3 years, the contributing countries have funded projects in more than 90 countries and pledged a total of $5.6 billion to these efforts. America has undertaken a $15 billion effort to provide prevention and treatment and humane care in nations afflicted by AIDS, placing a special focus on 15 countries where the need is most urgent. AIDS is the greatest health crisis of our time, and our unprecedented commitment will bring new hope to those who have walked too long in the shadow of death.

Because we believe in human dignity, America and many nations have joined together to confront the evil of trafficking in human beings. We're supporting organizations that rescue the victims, passing stronger antitrafficking laws, and warning travelers that they will be held to account for supporting this modern form of slavery. Women and children should never be exploited for pleasure or greed anywhere on Earth.

Because we believe in human dignity, we should take seriously the protection of life from exploitation under any pretext. In this session, the U.N. will consider a resolution sponsored by Costa Rica calling for a comprehensive ban on human cloning. I support that resolution and urge all governments to affirm a basic ethical principle: No human life should ever be produced or destroyed for the benefit of another.

Because we believe in human dignity, America and many nations have changed the way we fight poverty, curb corruption, and provide aid. In 2002, we created the Monterrey Consensus, a bold approach that links new aid from developed nations to real reform in developing ones. And through the Millennium Challenge Account, my Nation is increasing our aid to developing nations that expand economic freedom and invest in the education and health of their own people.

Because we believe in human dignity, America and many nations have acted to lift the crushing burden of debt that limits the growth of developing economies and holds millions of people in poverty. Since these efforts began in 1996, poor countries with the heaviest debt burdens have

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received more than $30 billion of relief. And to prevent the buildup of future debt, my country and other nations have agreed that international financial institutions should increasingly provide new aid in the forms of grants rather than loans.

Because we believe in human dignity, the world must have more effective means to stabilize regions in turmoil and to halt religious violence and ethnic cleansing. We must create permanent capabilities to respond to future crises. The United States and Italy have proposed a Global Peace Operations Initiative. G-8 countries will train 75,000 peacekeepers, initially from Africa, so they can conduct operations on that continent and elsewhere. The countries of the G-8 will help this peacekeeping force with deployment and logistical needs.

. . . .

Because we believe in human dignity, peaceful nations must stand for the advance of democracy. No other system of government has done more to protect minorities, to secure the rights of labor, to raise the status of women, or to channel human energy to the pursuits of peace. We've witnessed the rise of democratic governments in predominantly Hindu and Muslim, Buddhist, Jewish, and Christian cultures. Democratic institutions have taken root in modern societies and in traditional societies. When it comes to the desire for liberty and justice, there is no clash of civilizations. People everywhere are capable of freedom and worthy of freedom.

Finding the full promise of representative government takes time, as America has found in two centuries of debate and struggle. Nor is there . . . only one form of representative government because democracies, by definition, take on the unique character of the peoples that create them. Yet this much we know with certainty: The desire for freedom resides in every human heart. And that desire cannot be contained forever by prison walls or martial laws or secret police. Over time and across the Earth, freedom will find a way.

. . . .

Today I've outlined a broad agenda to advance human dignity and enhance the security of all of us. The defeat of terror, the protection of human rights, the spread of prosperity, the advance of democracy, these causes, these ideals, call us to great work in the world. Each of us alone can only do so much. Together, we can accomplish so much more.

History will honor the high ideals of this organization. The charter states them with clarity: "to save succeeding generations from the scourge of war," "to reaffirm faith in fundamental human rights," "to promote social progress and better standards of life in larger freedom."

Let history also record that our generation of leaders followed through on these ideals, even in adversity. Let history show that in a decisive decade, members of the United Nations did not grow weary in our duties or waver in meeting them. I'm confident that this young century will be liberty's century. I believe we will rise to this moment, because I know the character of so many nations and leaders represented here today, and I have faith in the transforming power of freedom.[1]

International and Foreign Relations Law Influences on the United States

Interpretation of Constitution in Light of Foreign and International Law

In several cases decided in 2002–2004, the U.S. Supreme Court in majority and separate opinions referred to foreign and international law when interpreting the U.S. Constitution. In some instances,

[1] Remarks to the U.N. General Assembly in New York City, 40 Weekly Comp. Pres. Doc. 2075, 2076–79 (Sept. 21, 2004).

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reference was made to the law of the United Kingdom at the time of the founding of the United States, as a means of illuminating the original intention of the drafters of the Constitution, who had been trained in and in many respects were reacting to such foreign law.[1] Yet foreign and international law of more recent vintage also featured in Supreme Court opinions during 2002–2004. While a majority of the justices appeared comfortable in modestly relying upon such law for the purpose of constitutional interpretation, a minority of justices believed such reliance to be misplaced, and so stated in dissenting opinions.[2]

In *Lawrence v. Texas*,[3] the Supreme Court considered the constitutionality of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. The case involved two adult males (the petitioners) who had engaged in a consensual act of sodomy in the privacy of their home. The Court found (by a six-to-three majority) that the statute was unconstitutional because it impinged on the petitioners' right to exercise liberty interests protected by the Due Process Clause of the Fourteenth Amendment.[4] In finding that such conduct fell within protected liberty interests, the Court overruled its 1986 decision in *Bowers v. Hardwick*, written by Chief Justice Warren Burger, which had found that proscriptions against sodomy had "ancient roots" in Western moral and ethical traditions.[5] In the course of explaining why the foundations of *Bowers* could no longer be sustained, Justice Anthony Kennedy, writing for the Court, referred to foreign and international law:

> The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1.
>
> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) ¶52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.
>
> . . . .
>
> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P.G.* & *J.H. v. United Kingdom*, App. No. 00044787/98, & ¶56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to

[1] *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 42–47 (2004) (construing the Confrontation Clause of the Sixth Amendment to the U.S. Constitution).

[2] For an exchange among academics regarding the propriety of such use of international and foreign law, see *Agora: The United States Constitution and International Law*, 98 AJIL 42 (2004).

[3] 539 U.S. 558 (2003).

[4] *See* U.S. Const. amend. XIV, §1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

[5] Bowers v. Hardwick, 478 U.S. 186 (1986). Justice Sandra Day O'Connor, while voting with the majority in *Lawrence*, stated that she did so without overruling *Bowers*.

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> engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11–12.[6] The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[7]

In his dissent to the majority's opinion, Justice Antonin Scalia stated:

> Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," . . . but rather rejected the claimed right to sodomy on the ground that such a right was not "'deeply rooted in *this Nation's* history and tradition,'" 478 U.S., at 193–194 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," see *id.*, at 196. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida*, 537 U.S. 990, n. (2002) (THOMAS, J., concurring in denial of certiorari).[8]

In *Grutter v. Bollinger*,[9] the Supreme Court (by a five-to-four majority) considered whether the Equal Protection Clause of the Fourteenth Amendment[10] was violated by a University of Michigan law school admissions policy designed to promote the racial diversity of the student body. Writing for the Court, Justice Sandra Day O'Connor found that the law school had a compelling interest in attaining a diverse student body and that, since the school's admissions program was narrowly tailored to serve that compelling interest, the program did not violate the Equal Protection Clause. Noting, however, that race-conscious admissions policies must have a "logical end point," the Court expressed its expectation that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[11] In her concurring opinion, Justice Ruth Bader Ginsburg (joined by Justice Stephen Breyer) noted:

> The Court's observation that race-conscious programs "must have a logical end point," . . . accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422–423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G.A. Res. 2106, 20 U.N. GAOR Res. Supp. (No. 14) 47, U.N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in

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[6] [Author's Note: *See* Brief Amici Curiae of Mary Robinson, Amnesty International U.S.A., Human Rights Watch, Interights, the Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights in Support of Petitioners, 11–12 (Jan. 16, 2003), *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).]

[7] 539 U.S. at 572–73, 577.

[8] *Id.* at 598. In *Foster*, a death penalty case, Justice Breyer dissented from the denial of a writ of certiorari noting, among other things, that:

> The Supreme Court of Canada recently held that the potential for lengthy incarceration before execution is "a relevant consideration" when determining whether extradition to the United States violates principles of "fundamental justice." *United States v. Burns*, [2001] 1 S.C.R. 283, 353, ¶123. Just as "attention to the judgment of other nations" can help Congress determine "the justice and propriety of [America's] measures," The Federalist No. 63, P. 382 (C. Rossiter ed. 1961) (J. Madison), so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.

Foster v. Florida, 537 U.S. 990, 992 (2002) (citation omitted) (Justice Breyer dissenting from denial of certioriari).

[9] 539 U.S. 306 (2003).

[10] *See* U.S. CONST. amend. XIV, §1 ("nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws").

[11] 539 U.S. at 343.

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> no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Ibid*; see also Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G.A. Res. 34/180, 34 U.N. GAOR Res. Supp. (No. 46) 194, U.N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating *de facto* equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved").[12]

In *Eldred v. Ashcroft*,[13] the Supreme Court considered whether the expansion by federal statute of the copyright term by 20 years violated the Copyright Clause of the U.S. Constitution, which requires that copyright terms be for "limited" periods of time.[14] Specifically, the Copyright Term Extension Act (CTEA)[15] was challenged because it extended the copyright term for *existing* copyrighted works by the same 20-year period being granted to future works. Justice Ginsburg, writing for a seven-to-two majority of the Court, found that the CTEA complied with the Copyright Clause, based on that clause's text, history, and precedent.[16] The Court then turned to whether such an extension was a rational exercise of the legislative authority conferred by the Copyright Clause.

> The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain. As respondent describes . . . , a key factor in the CTEA's passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years. EU Council Directive 93/98, Art. 1(1), p. 11; see 144 Cong. Rec. S12377-S12378 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch). Consistent with the Berne Convention, the EU directed its members to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term. See Berne Conv. Art. 7(8); P. Goldstein, International Copyright §5.3, p. 239 (2001). By extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts. The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States.[17]

In *Atkins v. Virginia*,[18] the Supreme Court determined (by a six-to-three majority) that the Cruel and Unusual Punishment Clause of the Eighth Amendment[19] was violated by a Virginia statute that allowed the execution of the mentally impaired. Justice John Paul Stevens, writing for the Court, stated:

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100–101.[20]

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[12] *Id.* at 344.
[13] 537 U.S. 186 (2003).
[14] The Copyright and Patent Clause, U.S. Const., art. I, §8, cl. 8, provides: "Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings."
[15] Pub. L. No. 105-298, §§102(b) & (d), 112 Stat. 2827–2828 (1998) (amending 17 U.S.C. §§302, 304). Under the 1976 Copyright Act, copyright protection generally lasted from the work's creation until 50 years after the author's death. Under the CTEA, most copyrights run from creation until 70 years after the author's death.
[16] 537 U.S. at 199–204.
[17] 537 U.S. at 205–06 (footnotes omitted).
[18] 536 U.S. 304 (2002).
[19] *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").
[20] 536 U.S. at 311–12.

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In determining contemporary standards of decency on this issue, the Court surveyed numerous statutes of several states of the United States so as to identify a trend toward precluding execution of the mentally impaired.[21] In footnote 21 of the opinion, the Court stated:

> Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. . . . In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." . . . Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. . . . Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.[22]

In his dissent to the majority's opinion, Chief Justice Rehnquist (joined by Justices Scalia and Clarence Thomas) stated:

> I write separately . . . to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion. . . . The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved." *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion).
>
> . . . .
>
> In my view, . . . two sources – the work product of legislatures and sentencing jury determinations – ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.
>
> In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his *amici* have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner. Instead, it adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders. . . . I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. While it is true that some of our prior opinions have looked to "the climate of international opinion," [*Coker v. Georgia*, 433 U.S. 584, 596 n. 10 (1977)] to reinforce a conclusion regarding evolving standards of decency, see *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion); [*Enmund v. Florida*, 458 U.S. 782, 796–797, n. 22 (1982)]; *Trop v. Dulles*, 356 U.S. 86, 102–103 (1958) (plurality opinion); we have

[21] *Id.* at 313–16.
[22] *Id.* at 316 n.21.

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since explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people." *Stanford*, 492 U.S., at 369, n.1 (emphasizing that "*American* conceptions of decency . . . are dispositive" (emphasis in original)).

Stanford's reasoning makes perfectly good sense, and the Court offers no basis to question it. For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant. And nothing in *Thompson, Enmund, Coker*, or *Trop* suggests otherwise. *Thompson, Enmund*, and *Coker* rely only on the bare citation of international laws by the *Trop* plurality as authority to deem other countries' sentencing choices germane. But the *Trop* plurality – representing the view of only a minority of the Court – offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in *Stanford*.[23]

In his dissent, Justice Scalia (joined by Justices Rehnquist and Thomas) stated:

[T]he Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. . . . I agree with [Chief Justice Rehnquist] that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Thompson*, 487 U.S., at 868–869, n. 4 (SCALIA, J., dissenting).[24]

Interpretation of Treaty in Light of Foreign Court Decisions

In addition to the use of foreign and international law for the purpose of interpreting the U.S. Constitution, the U.S. Supreme Court during 2002–2004 interpreted U.S. treaty obligations by reference to court decisions of U.S. treaty partners.

For example, in *Olympic Airways v. Husain*, Dr. Abid Hanson and his wife, Rubina Husain, traveled on Olympic Airways in December 1997 from San Francisco to Athens and Cairo for a vacation. During the return flight, Dr. Hanson and his wife discovered that their seats were located very near the smoking section of the economy class, even though they had informed Olympic that Dr. Hanson suffered from asthma and was sensitive to secondhand smoke. The Olympic flight attendant refused to change their seats and during the flight Dr. Hanson died from an allergic reaction to secondhand smoke.[1]

Rubina Husain then sued Olympic Airways for the wrongful death of her husband, citing Article 17 of the Warsaw Convention,[2] which creates a presumption of air carrier liability so long as the plaintiff

[23] *Id.* at 322, 324–26 (footnote omitted).
[24] *Id.* at 347–48 (footnote omitted).
[1] Olympic Airways v. Husain, 540 U.S. 644, 646–49 (2004).
[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, Art. 17, 49 Stat. 3000, 3018, 137 LNTS 11, 23 [hereinafter Warsaw Convention]. The Warsaw Convention entered into force for the United States on October 29, 1934. Article 17 of the convention provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

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shows that the injury was caused by an "accident."[3] Olympic Airways responded, however, that the refusal to reseat Dr. Hanson did not constitute an "accident" within the meaning of Article 17. Having lost before both the federal district[4] and circuit courts,[5] Olympic Airways then appealed to the U.S. Supreme Court.

In considering whether the flight attendant's refusal to reseat Dr. Hanson qualified as an "accident" under Article 17, the Court's majority opinion (written by Justice Thomas) noted that, while the word "accident" is not clearly defined in the Warsaw Convention, the Court had previously discerned its meaning from the Convention's "text, structure, and history as well as from the subsequent conduct of the parties."[6] In *Air France v. Saks*,[7] the Court had undertaken a textual analysis of Article 17, and of Article 17 in relation to Article 18,[8] finding that a passenger's loss of hearing caused by the normal operation of an aircraft's pressurization system was not an "accident." In that case, the Court found that an "accident" under Article 17 is "an unexpected or unusual event or happening that is external to the passenger," and not "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."[9] By contrast, in *Olympic Airways v. Husain*, the Court found that the refusal to move Dr. Hanson was a "factual event" external to him, that the event was a link in the chain of events that had caused his death, and that Olympic Airways had not challenged the contention that the flight attendant's conduct was unusual or unexpected in light of both industry standards and Olympic's own company policy.[10]

Justice Scalia, joined by Justice O'Connor, dissented from the majority decision for its failure to consider how the courts of U.S. treaty partners have addressed the issue.

> When we interpret a treaty, we accord the judgments of our sister signatories "'considerable weight.'" *Air France v. Saks*, 470 U.S. 392, 404 . . . (1985). True to that canon, our previous Warsaw Convention opinions have carefully considered foreign case law. See, e.g., *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 173–174 . . . (1999); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 550–551 . . . (1991); *Saks*, supra, at 404. . . . Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us.
>
> This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least, Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations' courts have no role in enforcing. See *Atkins v. Virginia*, 536 U.S. 304, 316–317, n.21 . . . (2002) (whether the Eighth Amendment prohibits execution of the mentally retarded); *Lawrence v. Texas*, 539 U.S. 558 . . . (2003) (whether the Fourteenth Amendment prohibits the criminalization of homosexual conduct). One would have thought that foreign courts' interpretations of a treaty that their governments adopted jointly with ours, and that they have an actual role in applying, would be (to put it mildly) all the more relevant. The Court's new abstemiousness with regard to foreign fare is not without consequence: Within the past year, appellate courts in both England and Australia have rendered decisions squarely at odds with today's holding. . . .
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[3] Once the plaintiff makes a prima facie showing, the defendant carrier may rebut the presumption under Article 20 by showing that it took "all necessary measures to avoid the damage or that it was impossible for [the airline] to take such measures." 49 Stat. at 3019, 137 LNTS at 25; *see* Andreas Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 521 (1967).

[4] Husain v. Olympic Airways, 116 F.Supp.2d 1121 (N.D. Cal. 2000).

[5] Husain v. Olympic Airways, 316 F.3d 829 (9th Cir. 2002).

[6] 540 U.S. at 649–52 (citing Air France v. Saks, 470 U.S. 392, 399 (1985)).

[7] 470 U.S. 392 (1985).

[8] Article 18 addresses liability for destruction or loss of baggage caused by an "occurrence." 49 Stat. at 3019, 137 LNTS at 23.

[9] 470 U.S. at 405.

[10] 540 U.S. at 651–57.

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Cambridge University Press
0521750717 - United States Practice in International Law, 2002-2004 - Volume 2
Sean D. Murphy
Excerpt
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. . . In *Deep Vein Thrombosis and Air Travel Group Litigation*, [2003] EWCA Civ. 1005, 2003 WL 21353471 (July 3, 2003), England's Court of Appeal, in an opinion by the Master of the Rolls that relied heavily on *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (C.A. 3 1984), and analyzed more than a half-dozen other non-English decisions, held as follows:

> "A critical issue in this appeal is whether a failure to act, or an omission, can constitute an accident for the purposes of Article 17. Often a failure to act results in an accident, or forms part of a series of acts and omissions which together constitute an accident. In such circumstances it may not be easy to distinguish between acts and omissions. I cannot see, however, how inaction itself can ever properly be described as an accident. It is not an event; it is a non-event. Inaction is the antithesis of an accident." [2003] EWCA Civ. 1005, ¶25, 2003 WL 21353471 (Lord Phillips, M. R.).

Six months later, the appellate division of the Supreme Court of Victoria, Australia, in an opinion that likewise gave extensive consideration to American and other foreign decisions, agreed:

> "The allegations in substance do no more than state a failure to do something, and this cannot be characterised as an event or happening, whatever be the concomitant background to that failure to warn or advise . . ." *Qantas Ltd. v. Povey*, [2003] VSCA 227, ¶17, 2003 WL 23000692 (Dec. 23, 2003) (Ormiston, J. A.).

We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently. (The Warsaw Convention's preamble specifically acknowledges "the advantage of regulating in a uniform manner the conditions of . . . the liability of the carrier." 49 Stat. 3014 (emphasis added).) Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration.[11]

In light of the decisions reached by foreign courts, Justice Scalia disagreed with the majority opinion's willingness to qualify the flight attendant's lack of help as inaction and still conclude that it was an "accident."[12]

In a footnote, the majority opinion responded to Justice Scalia's dissent. The majority first asserted that its conclusion was not inconsistent with the *Deep Vein Thrombosis* and *Qantas Ltd. v. Povey* decisions. Moreover, even if it were inconsistent, the majority stated that it would hesitate to follow the opinions of intermediate appellate courts of foreign treaty partners where the highest courts had not yet spoken, especially when there are substantial factual distinctions between the cases.[13]

Interpretation of Foreign Law When Applying U.S. Statutes

In several cases during 2002–2004, U.S. courts were called upon to use and interpret foreign law as a means of interpreting or applying U.S. statutes. For example, in *J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*,[1] the Supreme Court was confronted with whether a corporation organized in the British Virgin Islands (BVI) was a "citize[n] or subjec[t] of a foreign state" for purposes of "diversity jurisdiction" in federal court. Uncertainty about the application of the diversity jurisdiction statute (28 U.S.C. §1332) arose because the BVI is an overseas territory of the

[11] *Id.* at 1230–32.
[12] *Id.* at 1233–34.
[13] *Id.* at 1229 n.9.
[1] 536 U.S. 88 (2002).

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