

TREATY DIALOGUE IN *SANCHEZ-LLAMAS*: IS CHIEF JUSTICE  
ROBERTS A TRANSNATIONALIST, AFTER ALL?

by

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*Chief Justice John Roberts is generally considered to be a “nationalist” with respect to transnational judicial dialogue: for example, he has expressed skepticism as to the value of foreign authority in constitutional interpretation. In his majority opinion in Sanchez-Llamas v. Oregon, however, Roberts eagerly engages in treaty dialogue, by considering foreign and international sources in interpreting U.S. treaty obligations. This Essay examines Roberts’ use of both “direct” and “indirect” treaty dialogue in interpreting the Vienna Convention on Consular Relations. By engaging in dialogue with both treaty partners and the International Court of Justice, Roberts allows foreign precedent and practice to influence the Court’s interpretation of the treaty provisions while at the same time using dialogue to “educate” the ICJ on the American adversarial system.*

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I. INTRODUCTION

In perhaps no other legal debate of recent years have the battle lines been drawn more starkly than in the controversy over U.S. courts’ engagement in transnational judicial dialogue with foreign courts. Thus far, that debate has focused almost exclusively on the most controversial kind of dialogue: the role of foreign and international law in interpreting the U.S. Constitution. Advocates of such dialogue—the self-described “transnationalists”—argue that U.S. courts have much to learn from the constitutional jurisprudence of their

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foreign counterparts. Their opponents—labeled “nationalists” by detractors—dismiss the entire enterprise as fundamentally illegitimate.<sup>1</sup>

The *Crossfire*-esque controversy over constitutional dialogue has quickly entered the political mainstream: proposed congressional resolutions roundly condemn the transnationalist position,<sup>2</sup> and the issue has become yet another litmus test for judicial appointments to the federal bench.<sup>3</sup> Indeed, emotions run so high in some quarters that Justices have received death threats for advocating even a relatively modest role for foreign authority in constitutional interpretation.<sup>4</sup> In this politically charged atmosphere, it is perhaps no surprise that in the 2005–2006 Term, Justices on the Court fell virtually silent on the issue of constitutional dialogue.

But dialogue among the world’s courts takes place in a much broader context, and on a much broader range of issues, than the current narrowly conceived controversy between transnationalists and nationalists would suggest.<sup>5</sup> A rich, multifaceted judicial dialogue is occurring on a wide range of

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<sup>1</sup> Harold Hongju Koh was the first to adopt the “transnationalist/nationalist” nomenclature. See Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT’L L. 1 (2004).

<sup>2</sup> See, e.g., H.R. Res. 97, 109<sup>th</sup> Congr. (2005) (“Resolved, That it is the sense of the House of Representatives that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”).

<sup>3</sup> During their confirmation hearings, both Chief Justice Roberts and Justice Alito were asked to offer up their views on the role of foreign authority in interpreting the U.S. Constitution. In response to a series of questions posed by Senator John Kyl, Republican of Arizona, both Justices argued that foreign authority should play little to no role in constitutional interpretation. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/050913/se.04.html> [hereinafter *Roberts Confirmation Hearing*]; *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States*, 109th Cong. (2005), available at <http://www.washingtonpost.com/wp-yn/content/article/2006/01/10/AR2006011000781.html>.

<sup>4</sup> See Bill Mears, *Justice Ginsburg Details Death Threat*, CNN.COM, Mar. 15, 2006, <http://www.cnn.com/2006/LAW/03/15/scotus.threat/>. An anonymous Internet poster made the threat against Justice Ginsburg and former Justice O’Connor, stating that the Justices’ reliance on foreign and international law “is a huge threat to our Republic and Constitutional freedom. . . . If you are what you say you are, and NOT armchair patriots, then those two justices will not live another week.” *Id.* Justice Ginsburg blamed some lawmakers’ vociferous criticism of the Justices’ use of foreign authority for fueling “the irrational fringe.” *Id.*

<sup>5</sup> See Susan L. Karamanian, *Briefly Resuscitating the Great Writ: The International Court of Justice and the U.S. Death Penalty*, 69 ALB. L. REV. 745 (2006) (in debate over constitutional dialogue, “[a] well demarcated line has been drawn . . . [with] the line drawn, the sides seem to be talking past each other. . . . [A]mid the big fuss, and perhaps lost in the sea of over-reaction and hype, is that foreign law and international law are finding their way into U.S. jurisprudence in a meaningful manner because they are central to resolution of specific disputes before U.S. courts.”).

issues outside the constitutional context.<sup>6</sup> Indeed, one of the most salient arguments of the transnationalists is that in an era of globalization, U.S. courts will inevitably be drawn into participation in this broader transnational judicial dialogue. An important question, then, is whether the Supreme Court will sanction U.S. court participation in other kinds of dialogue that fall outside the constitutional rubric—and if so, what approaches the Justices might take to these non-constitutional forms of dialogue.

Chief Justice Roberts' majority opinion in *Sanchez-Llamas*<sup>7</sup> may provide a partial answer to this question. On constitutional dialogue, of course, Roberts is squarely in the nationalist camp: at his confirmation hearing, he passed the conservative litmus test with flying colors.<sup>8</sup> But *Sanchez-Llamas* complicates the picture. In it, Roberts proved to be perfectly willing, and even eager, to engage in dialogue with foreign judges regarding treaty interpretation—specifically, the interpretation of Article 36 of the Vienna Convention on Consular Relations, which requires police authorities to notify detained foreign nationals of their right to contact their country's consulate.<sup>9</sup> Roberts engaged in two important kinds of dialogue in interpreting this provision of the Vienna Convention. First, he took part in a very "direct" kind of dialogue with the International Court of Justice (ICJ) itself, considering and responding to a prior ICJ ruling on the issue of procedural default.<sup>10</sup> Second, and less obviously, Roberts engaged in a kind of "indirect" dialogue with foreign courts and legal systems around the world in considering whether suppression of evidence was a required remedy for Vienna Convention violations.<sup>11</sup>

Is Roberts' enthusiasm for treaty dialogue in *Sanchez-Llamas* consistent with his nationalist views condemning constitutional dialogue? Jurisprudential conservatives would certainly argue that it is. In fact, Roberts' approach in *Sanchez-Llamas* hews to what I have elsewhere described as an emerging

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<sup>6</sup> See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000). See also Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 493 (noting growing role of dialogue in antitrust, securities regulation, and intellectual property contexts); *id.* at 529–54 (discussing role of dialogue in regulating transnational speech).

<sup>7</sup> *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006).

<sup>8</sup> See *Roberts Confirmation Hearing*, *supra* note 3, at 201 ("a couple of things that cause concern on my part about the use of foreign law as precedent . . . . The first has to do with democratic theory. . . . If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping the law that binds the people in this country. I think that's a concern that has to be addressed. The other part of it that would concern me is that, relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want . . . [a]nd that actually expands the discretion of the judge.").

<sup>9</sup> Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

<sup>10</sup> See *Sanchez-Llamas*, 126 S.Ct. at 2682–86.

<sup>11</sup> See *id.* at 2678–82.

conservative alternative approach to transnational judicial dialogue.<sup>12</sup> First articulated by Justice Scalia in his opinions and public comments two years ago,<sup>13</sup> the conservative alternative approach rejects all forms of constitutional dialogue, taking the position that foreign legal materials “can *never* be relevant to an interpretation of—to the *meaning* of—the U.S. Constitution.”<sup>14</sup> At the same time, however, the approach envisions a very active role for U.S. courts in transnational judicial dialogue regarding treaty interpretation. Indeed, Justice Scalia has suggested that interpretations from the courts of other treaty parties deserve a strong presumption of validity.<sup>15</sup> In this view, U.S. courts should not only respect, but even defer to, foreign judicial interpretations of treaties, so long as those interpretations are reasonable.<sup>16</sup>

The rationale behind the conservative alternative approach to treaty dialogue is straightforward: Dialogue promotes uniformity in treaty interpretation. As Justice Scalia has commented, “We can, and should, look to decisions of other signatories when we interpret treaty provisions. . . . [I]t is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently. . . . [E]ven if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration.”<sup>17</sup> In the conservative alternative view, then, uniformity in treaty interpretation is an important goal. Thus, judicial dialogue with our treaty partners is not only permissible, but actually encouraged, precisely because it promotes uniformity in treaty interpretation (and indeed, is essential to achieving this important goal).

In the remainder of this Essay, I consider Chief Justice Roberts’ dialogic approach to treaty interpretation in *Sanchez-Llamas* as a possible example of an emerging conservative alternative approach to transnational judicial dialogue. Moreover, given that uniformity appears to be one of the touchstones of the conservative approach to treaty dialogue, it seems appropriate to ask whether Roberts’ use of foreign authority in *Sanchez-Llamas* promotes a uniform interpretation of the Vienna Convention among parties to the treaty. As we shall see, in this regard Roberts’ record is decidedly mixed. He interpreted the Convention consistently with treaty partners’ views as to the appropriate remedy for Vienna Convention violations (holding that the Convention does not require imposition of the American exclusionary rule). But on the issue of procedural default, he declined to interpret the treaty language consistently with the prior interpretation of the International Court of Justice—despite the fact

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<sup>12</sup> See Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue?*, 12 TULSA J. COMP. & INT’L L. 149 (2004).

<sup>13</sup> See *id.* (discussing Scalia’s development of conservative alternative approach, and its characteristics).

<sup>14</sup> Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC’Y INT’L L. PROC. 305, 309 (2004) (emphasis in original).

<sup>15</sup> See Waters, *supra* note 12, at 153–57 (discussing Justice Scalia’s dissenting opinion in *Olympic Airways v. Husain*, 540 U.S. 644, 659 (2004) (Scalia, J., dissenting)).

<sup>16</sup> See *id.*

<sup>17</sup> *Husain*, 540 U.S. at 660 (Scalia, J., dissenting).

that the United States and other parties to the Convention specifically conferred upon the ICJ the authority to resolve disputes regarding interpretation of the treaty. I will consider both of these instances of treaty dialogue in turn.

## II. DIALOGUE WITH TREATY PARTNERS

Chief Justice Roberts' first foray into transnational judicial dialogue came in his discussion of the application of the exclusionary rule to Article 36 of the Vienna Convention. Sanchez-Llamas argued that incriminating statements that he had made to the police should have been suppressed because authorities never told him of his consular notification rights. He conceded, however, that the text of Article 36 itself did not mandate suppression.<sup>18</sup> Chief Justice Roberts commented,

We think this a wise concession. The Convention . . . expressly leaves the implementation of Article 36 to domestic law: Rights under Article 36 are to "be exercised in conformity with the laws and regulations of the receiving State." As far as the text of the Convention is concerned, the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.<sup>19</sup>

Having thus made it clear that that the text of the Convention itself does not mandate suppression (and given that Sanchez-Llamas had already conceded this point), Chief Justice Roberts could simply have proceeded to consider the arguments that Sanchez-Llamas *did* make—namely, that the Supreme Court should require suppression for Convention violations as a matter of U.S. law.<sup>20</sup> But Roberts continued to drive home his point; and in so doing, he looked abroad, relying heavily on the views and practices of other states party to the treaty. He observed that "[i]t would be startling if the Convention were read to require suppression," given that "[t]he exclusionary rule as we know it is an entirely American legal creation" and is "universally rejected" by other countries.<sup>21</sup> Thus, he argued, "[i]t is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law."<sup>22</sup> In short, "[t]here is no reason to suppose that Sanchez-Llamas would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention."<sup>23</sup> And if other countries do not require suppression of evidence as the remedy for an Article 36 violation, the Convention surely could not be interpreted as imposing such a requirement on police in the United States.

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<sup>18</sup> Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2678–79 (2006).

<sup>19</sup> *Id.* at 2678 (internal citations omitted).

<sup>20</sup> *See id.* at 2678–79. Sanchez-Llamas argued that the Court should require suppression "as a matter of [its] 'authority to develop remedies for the enforcement of federal law in state-court criminal proceedings.'" *Id.* at 2679.

<sup>21</sup> *Id.* at 2678.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

By relying heavily on foreign views in interpreting the Vienna Convention, Chief Justice Roberts managed to hoist the Court's transnationalists on their own petard. Justice Breyer, writing for the dissent, likely would have been all too happy to ignore foreign authority rejecting the American exclusionary rule, despite his previous enthusiasm for citing foreign authority rejecting American death penalty practices.<sup>24</sup> In order to develop a credible response to the majority, however, Justice Breyer was forced to grapple with the overwhelming weight of foreign precedent and practice rejecting the American exclusionary rule. In short, Roberts turned the tables on the transnationalists: he proved that nationalists, too, can play the game of "looking over the heads of the crowd and picking out their friends."<sup>25</sup>

Justice Breyer responded to the Chief Justice's challenge by essentially arguing that Roberts was misusing the foreign authority. In Breyer's view, Roberts' mistake was that he viewed the issue through a narrow lens: by asking whether other countries required this *particular* remedial device for violations of the Convention, Chief Justice Roberts was asking the wrong question.<sup>26</sup> The proper analysis, according to Breyer, was to view the foreign authority through a broad lens: The Vienna Convention does not require a particular remedy, but instead uses general language that requires member nations to give "full effect" within their legal systems to the consular notification requirement. The right question, then, is whether other countries offer *some* remedy that gives "full effect" to the purposes of the treaty.<sup>27</sup> Thus, the drafters of the Convention assumed that civil law systems, for example, would have a completely different approach to remedies for Article 36 violations. The fact that foreign judges do not require suppression of incriminating statements tells us only that they do not believe that that particular remedy is appropriate in the broader context of their very different legal systems. It tells us nothing whatsoever about whether suppression might sometimes be the appropriate remedy for Convention violations in the *American* legal system.<sup>28</sup>

The broad lens/narrow lens debate over the exclusionary rule in *Sanchez-Llamas* thus confirms what comparativists have been emphasizing for decades: a rigorous approach to the use of foreign authority is notoriously tricky, and it is exceedingly difficult even for the experts to "get it right." Both conservatives and liberals on the Court agree on principle that U.S. courts should consider the views of treaty partners in interpreting the language of a treaty. But the devil is in the details, and even that uncontroversial premise may simply open more

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<sup>24</sup> Indeed, Breyer had an opportunity to consider foreign authority rejecting the American exclusionary rule in his dissenting opinion in another case last Term, *Hudson v. Michigan*, 126 S.Ct. 2159, 2171 (2006) (Breyer, J. dissenting). Neither he nor Justice Scalia, writing for the majority, mentioned the foreign authority. *See id.*

<sup>25</sup> *Cf. Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting) (responding to majority's use of foreign authority in interpreting the Eighth Amendment, complaining, "all the Court has done today . . . is to look over the heads of the crowd and pick out its friends.").

<sup>26</sup> *See Sanchez-Llamas*, 126 S.Ct. at 2707–09 (Breyer, J., dissenting).

<sup>27</sup> *See id.* at 2708.

<sup>28</sup> *See id.* at 2709.

fierce debate on exactly how to *read* the foreign authority. Which treaty partners? How do we determine their “views” on a given issue? Can such analysis be done in an objective manner? In light of these problems, will consideration of foreign authority really contribute much added value in the average case, even in the limited context of treaty dialogue? In my view, the jury is still out on this fundamental question.

### III. TREATY DIALOGUE WITH THE INTERNATIONAL COURT OF JUSTICE

In addition to indirect dialogue with treaty partners, Chief Justice Roberts engaged in a more direct form of dialogue with the International Court of Justice itself.<sup>29</sup> At issue in this second dialogue was the application of the procedural default rule to Article 36 claims brought in U.S. courts. In *Case Concerning Avena and other Mexican Nationals*, the ICJ had ruled that application of the procedural default rule violated the Convention, because it failed to give “full effect” to the purposes of Article 36.<sup>30</sup> Chief Justice Roberts seemed quite willing to engage in transnational judicial dialogue with the ICJ. His opinion focused on two issues: first, the appropriate weight to accord to an ICJ judgment generally; and second, the specific application of the ICJ ruling on procedural default to this particular case.

Chief Justice Roberts began by setting out the parameters of the dialogue. He emphasized that this was not a dialogue based on a vertical relationship between a superior international court and its national subordinate. The ICJ’s interpretation of the Vienna Convention, he explained, was not binding on courts in the United States. After all, “[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”<sup>31</sup> Instead, dialogue with the ICJ must be based on a kind of horizontal relationship between co-equals: The ICJ’s rulings were “entitled only to the ‘respectful consideration’ due an interpretation of an international agreement by an international court.”<sup>32</sup>

Having declared that dialogue with the ICJ should be based on “respectful consideration” rather than automatic deference, Chief Justice Roberts proceeded to engage the substance of the ICJ’s ruling on procedural default. The ICJ had concluded that the procedural default rule failed to give “full effect” to Article 36 because it prevented U.S. courts from attaching “legal significance” to Article 36 violations. Chief Justice Roberts rejected this view,

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<sup>29</sup> *See id.* at 2682–86.

<sup>30</sup> *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31), at 46 (citing *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27)).

<sup>31</sup> *Sanchez-Llamas*, 126 S.Ct. at 2684.

<sup>32</sup> *Id.* at 2685.

asserting that it was “inconsistent with the basic framework of an adversary system.”<sup>33</sup> He explained:

[The ICJ’s] reasoning overlooks the importance of procedural default rules in an adversary system . . . . Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate “the law’s important interest in the finality of judgments.” The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that claim. As a result, rules such as procedural default routinely deny “legal significance”—in the *Avena* . . . sense—to otherwise viable legal claims.<sup>34</sup>

Indeed, Roberts’ opinion suggested that the ICJ’s interpretation of the Convention may have stemmed from a bias in favor of the inquisitorial systems with which the ICJ was no doubt more familiar. He observed:

Procedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention. . . . In an inquisitorial system, the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.<sup>35</sup>

Roberts’ opinion in *Sanchez-Llamas* can thus be read as an attempt to use dialogue with the ICJ as a means to educate the international court. By explaining the significance of the procedural default rule as part of the “basic framework” of the adversarial system, Roberts’ opinion called upon the ICJ to take into account the special requirements of adversarial systems in interpreting the Vienna Convention.

To be sure, this was not exactly the kind of dialogue with the ICJ that most transnationalists were hoping for. It is nevertheless, in my view, an important kind of dialogue. As I have argued elsewhere, dialogue with foreign and international courts need not entail automatic deference to those courts’ views.<sup>36</sup> To be sure, transnational judicial dialogue can play an important educative role for U.S. judges: in some contexts, U.S. courts may find foreign judicial decisions to be particularly instructive. But judicial education is a two-way street, and in other contexts it is entirely appropriate for U.S. courts to use transnational judicial dialogue as a way to educate foreign or international courts on important aspects of the American legal system. Such an approach ensures that communication between U.S. and foreign courts is not merely a unidirectional monologue in which U.S. judges are merely passive recipients of foreign legal norms, but rather a true dialogue in which U.S. judges can contribute to the co-constitutive process of international norm development.<sup>37</sup>

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<sup>33</sup> *Id.* at 2673.

<sup>34</sup> *Id.* at 2685–86 (internal citations omitted).

<sup>35</sup> *Id.* at 2686.

<sup>36</sup> See Waters, *supra* note 6, at 556–57.

<sup>37</sup> See *id.* at 557.

## IV. THE FUTURE OF TREATY DIALOGUE

What does *Sanchez-Llamas* tell us about the future of transnational judicial dialogue in U.S. courts? First, it tells us that the standard characterization of the debate over dialogue, as a sort of *Crossfire*-style controversy between “nationalist” and “transnationalist” Justices, has been both overblown and oversimplified. By focusing narrowly on the controversy over constitutional dialogue, the current debate has ignored other forms of judicial dialogue in which U.S. courts are participating with little controversy. In *Sanchez-Llamas*, Chief Justice Roberts embraced dialogue with foreign and international courts regarding interpretation of the Vienna Convention, despite his rejection of dialogue in interpreting the U.S. Constitution. His approach thus defies easy characterization as a simplistic “nationalist” rejection of foreign authority; rather, it is in keeping with a more complex conservative alternative approach to dialogue that is at least partially “transnationalist” in orientation.

Second, *Sanchez-Llamas* reminds us that U.S. court participation in transnational judicial dialogue can take a variety of forms, and need not entail automatic deference to foreign authority. Roberts engaged in an indirect kind of dialogue with treaty partners in which he allowed the practices of foreign legal systems to instruct, or influence, the Court’s interpretation of the Convention’s procedural requirements. But he also engaged in a more direct dialogue with the ICJ. He did not merely reject the ICJ’s ruling in *Avena*; instead, he used his discussion of the ICJ’s ruling to educate the international court on the requirements of the American adversarial system.

But *Sanchez-Llamas* also reveals the limitations of Roberts’ conservative approach to treaty dialogue. In particular, if uniformity in treaty interpretation is an important goal of treaty dialogue, Roberts’ approach yields a mixed record on this score. On the exclusionary rule issue, for example, his approach did promote a certain kind of narrowly defined uniformity in treaty interpretation. In the vast majority of the other 169 countries party to the Vienna Convention, neither courts nor legislatures had specifically addressed the question whether suppression was a required remedy for Convention violations. But given their universal rejection of mandatory suppression in the ordinary criminal context, Roberts reasonably assumed that these countries would reject such an interpretation of the Convention, as well. Thus Roberts’ decision to interpret the treaty as not requiring suppression as a remedy promoted uniformity with our treaty partners’ (assumed) views.

Uniformity in treaty interpretation, however, may well be in the eye of the beholder. Roberts’ version of “uniformity” was achieved by focusing narrowly on a specific remedial device—the mandatory exclusionary rule—and on the non-existence of that particular device outside the United States. Had Roberts instead adopted the dissent’s broad lens approach to the foreign authority—had he focused on the existence in foreign legal systems of *other* remedies giving “full effect” to the treaty’s requirements—“uniformity in treaty interpretation” would have taken on a far different meaning, and achieving uniformity with treaty partners would have led the Court in an altogether different direction.

In his dialogue with the ICJ, Roberts showed little concern for the goal of uniformity in treaty interpretation. Here, in order to achieve uniformity there was little need to “predict” how other parties to the treaty might view the procedural default issue. Instead, here was an international tribunal, specifically charged by states party to the treaty (including the United States) to resolve disputes over treaty interpretation. It had clear jurisdiction over the matter, it had in fact ruled on the very issue of interpretation facing the Court, and it had squarely held that the Convention precluded at least certain applications of the procedural default rule. Moreover, as the dissent pointed out, “the ICJ’s position as an international court specifically charged with the duty to interpret numerous international treaties (including the Convention) provides a natural point of reference for national courts seeking . . . uniformity.”<sup>38</sup> Indeed, like their counterparts around the world, U.S. courts have traditionally looked to the ICJ for guidance on matters of treaty interpretation and international law.<sup>39</sup>

In the interest of uniformity, then, one might have expected Chief Justice Roberts to defer to the ICJ’s interpretation of the treaty’s requirements with respect to procedural default, so long as that interpretation was reasonable. Justice Breyer, in his dissent, labored mightily (and, in my view, convincingly) to prove the reasonableness of the ICJ’s ruling,<sup>40</sup> but Roberts remained unconvinced. Thus Roberts’ interest in uniformity of treaty interpretation gave way to his firm belief that the ICJ had simply gotten it wrong.

The debate in *Sanchez-Llamas* provides interesting clues into the difficulties that the Court will face in developing sound jurisprudential approaches to various non-constitutional forms of transnational judicial dialogue. Dialogue over treaty interpretation is surely one of the least controversial forms that the Court will encounter. Both liberals and conservatives on the Court generally agree that the views of treaty partners and the International Court of Justice should receive “respectful consideration”—and perhaps even some measure of deference—in interpreting treaty language. But the debate in *Sanchez-Llamas* also reveals that consideration of foreign authority in such circumstances is not as straightforward as it might first appear. Should foreign precedent and practice be viewed through a broad lens or a narrow lens? Are the views of an international court entitled to *more* deference, because it has been tasked by policymakers to interpret the treaty—or entitled to *less* deference, precisely because it is a politically-oriented arbitral body, and not a “real” court? Even in the relatively uncontroversial context of treaty dialogue, there are no easy answers to these questions. Above all, then, *Sanchez-Llamas* reveals the rocky road ahead for *all* of the Court’s “transnationalists,” as they proceed with the absolutely essential task of shaping the Court’s participation in the myriad forms of transnational judicial dialogue that will likely emerge in the years ahead.

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<sup>38</sup> *Id.* at 2700 (Breyer, J., dissenting).

<sup>39</sup> *See id.* at 2700–01.

<sup>40</sup> *See id.* at 2700.