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Structural Conflicts in Judicial Interpretations of Customary International Law

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STRUCTURAL CONFLICTS IN THE INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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I. INTRODUCTION

The use of customary international law[1] ("CIL") by courts in the United States, long the subject of debate among scholars,[2] has finally come to the attention of the Supreme Court. In the last few years, the Court has interpreted and applied CIL in at least three different ways.

First, the Court has recently cited a number of international precedents to interpret provisions of the U.S. Constitution. For instance, the Court recently cited the CIL of human rights to find that the imposition of the death penalty for crimes committed before the age of eighteen is unconstitutional.[3] Second, the Court has used the CIL to interpret stat-

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1. There are two main types of international law, treaties, and customary law. Unlike treaties, which are agreements between nation-states, customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT].

2. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). *See also* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

3. Roper v. Simmons, 125 S. Ct. 1183 (2005). The Court also cited CIL in its decision to find Texas's laws prohibiting sodomy unconstitutional. *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003) (citing P. G. & J. H. v. United Kingdom, App. No. 00044787/98, P 56 Eur. Ct. H.R., Sept. 25, 2001; Modinos v. Cy-

utes and treaties. For example, the Court cited CIL of war to interpret the September 11th Resolution[4] as authorizing the detention of enemy combatants in *Hamdi v. Rumsfeld*.[5] Finally, the Court has used CIL as a substantive rule of decision. This has occurred most recently in *Sosa v. Alvarez-Machain*[6] where the Court interpreted CIL as part of the common law cognizable in federal courts pursuant to the Alien Tort Statute[7] to reject a plaintiff's claim for damages due to his detention by a Mexican citizen and U.S. drug enforcement agents.[8]

For many commentators, it is entirely appropriate for the Court to independently interpret and apply CIL in all of these contexts. Indeed, a number of scholars have actively encouraged the Court, and federal courts in general, to do so.[9] These scholars have identified a number of reasons why such use of CIL in these different contexts is historically grounded, formally authorized, and in some cases, functionally useful as a mechanism for supporting the overall development of CIL.[10]

While garnering many accolades, the use of CIL by the Court has drawn criticism as well.[11] With respect to the use of CIL for constitutional interpretation, members of the House of Representatives have proposed a resolution decrying such usage.[12] Additionally, scholars have criticized the

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prus, 259 Eur. Ct. H.R., Apr. 22, 1993; Norris v. Ireland, 142 Eur. Ct. H.R., Oct. 26, 1988).

4. Authorization for the Use of Military Force, Pub. L. No. 107-40 (2001).

5. 124 S. Ct. 2633, 2641 (2004) (citing Geneva Conventions and documents describing customary law of war).

6. 124 S. Ct. 2739 (2004).

7. 28 U.S.C. § 1350 (2000).

8. *Sosa*, 124 S. Ct. at 2764.

9. *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L. L. 461 (1989); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991). *See also* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

10. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 509 n.17 (2d ed. 1996) (citing CIL as common law); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 5-6, 95, 338-45 (1996) (arguing that some customary international law rules supersede even later federal legislation); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984) (arguing that CIL should have status as federal law).

11. *See, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004).

12. Tom Curry, *A Flap over Foreign Matter at the Supreme Court, House*

Court's endorsement of CIL as a substantive rule of decision in lawsuits brought under the Alien Tort Statute.[13]

The purpose in this essay is not to recapitulate these disagreements, but instead, to identify a different problem with the interpretive and substantive use of CIL by federal and state courts. Whether a court uses CIL as a tool for statutory or constitutional interpretation or as a substantive rule of decision, the court's usage creates potentially serious structural conflicts in the U.S. constitutional system.

Part I begins with an explanation of this structural conflict by briefly reviewing the debates over the constitutional allocation of control over customary international law in the U.S. domestic system. Analysis of the text of the U.S. Constitution, past practice, and existing doctrine does not definitively resolve the status of whether federal courts have the final authority to interpret and whether those interpretations also bind the executive branch. Indeed, there are strong arguments suggesting that as a matter of the original understanding of the Constitution and as historical practice, the executive branch holds the dominant role in the interpretation, application, and execution of CIL obligations on behalf of the United States.

Part II explores some of the consequences of federal courts' usage of CIL. If the Executive does hold a central, if not dominant, role in the interpretation and application of CIL, then any judicial use of CIL may create structural conflict with the executive branch's use of CIL as part of its conduct of foreign policy. Part III concludes that courts can avoid structural conflicts by adopting rules limiting their usage of CIL. The proposed rules, similar in form but stricter in effect than the limitations imposed by the Supreme Court in *Sosa*,[14] should, in most cases, result in the avoidance of this structural conflict.

To be sure, the examples of structural conflict that I identify are not always severe and some are unlikely to lead to any serious structural crisis. Even if such structural conflicts are rare, they still may occur, and, at the very least, courts

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Members Protest Use of Non-U.S. Rulings in Big Cases, MSNBC, *at* http://www.msnbc.msn.com/id/4506232 (Mar. 11, 2004).

13. Julian G. Ku & John C. Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004).

14. *Sosa*, 124 S. Ct. at 2739.

and commentators must recognize and address the likelihood of such conflicts in order to credibly defend the continued usage of CIL by federal and state courts.

II. CONSTITUTIONAL ALLOCATION OVER INTERPRETATION OF CIL

Although the Supreme Court has recently indicated that CIL should be considered a type of federal law,[15] it is still unclear which branch of the federal government holds the authority to issue binding interpretations of CIL. For a variety of reasons, the president has emerged as the branch of government most responsible for the interpretation and application of CIL on behalf of the United States.

A. CIL and the Constitution

The only mention of CIL in the text of the Constitution occurs in Art. I, section eight, where Congress is assigned the power to "define and punish . . . Offences against the Laws of Nations."[16] This under-used and understudied provision might give Congress the exclusive power to interpret or recognize CIL.[17] But, neither historical materials nor judicial interpretation of this provision has supported this reading.

Rather, the majority view of courts and commentators is that even if Congress has not codified CIL as federal statutory law, CIL is still cognizable by federal courts as part of the common law. This view, best reflected in the *Restatement (Third) of Foreign Relations Law,*[18] holds that CIL should be understood as incorporated into the phrase "Laws of the United States" in Articles III and VI of the Constitution. As such, claims of violations of CIL would properly fall within the federal courts' subject matter jurisdiction under Article III[19] and would also preempt inconsistent state law under Article VI.[20]

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15. *See, e.g., id.*

16. U.S. CONST. art. I, § 8, cl. 10.

17. The lone recent study of the clause can be found in Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000).

18. RESTATEMENT, *supra* note 1, § 111. The Restatement is published by the American Law Institute and is generally accepted to reflect the views of leading scholars and practitioners on important areas of law.

19. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

20. Although no court has preempted state law using CIL, there is some

But while there is scholarship supporting this view,[21] it is far from conclusive, certainly as a matter of historical evidence and judicial precedent. As noted in a series of articles, the incorporation of CIL as federal law is unsupported by any judicial precedent, nor is it required by any convincing evidence of the original intent of the drafters of the Constitution.[22] Indeed, early historical documents and subsequent judicial precedent actually support the view that CIL forms part of the general common law that was not exclusive to either federal or state courts.[23]

Thus, as a historical matter, whether or not Congress chose to codify CIL as federal statutory law, federal and state courts have applied CIL as part of their interpretation of the general common law. This body of law was applicable in both federal and state courts, but it constituted neither federal nor state law. The "CIL as common law" understanding is further strengthened by judicial precedent. In particular, a number of Supreme Court decisions held that the Court's appellate jurisdiction limiting appeals to questions of federal law did not extend to appeals based on CIL because CIL did not constitute federal law.[24] The Supreme Court's decision in *Sosa* to uphold lawsuits claiming violations of CIL under the Alien Tort Statute partially settled this debate over the status of CIL.[25] Although the Court did not explicitly address the status of CIL, it appeared to assume that CIL could be, in limited circumstances, cognizable in federal courts, even in

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academic support for this view. RESTATEMENT, *supra* note 1, § 111, reporters' note 3.

21. *See, e.g.*, sources cited *supra* note 10.

22. *See, e.g.*, Bradley & Goldsmith, *supra* note 2; Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 38-44 (1995).

23. I have discussed the "CIL as general common law" view extensively in Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 271-91 (2002). This question has been the subject of substantial commentary elsewhere as well, and despite some aggressive claims by scholars such as Professor Paust, as in Jordan J. Paust, *Customary International Law and Human Rights Treaties Are the Law of the United States*, 20 MICH. J. INT'L L. 301, 301 n.4 (1999), most other scholars have conceded that that CIL was understood as a form of general common law. *See, e.g.*, RESTATEMENT, *supra* note 1; Neuman, *supra* note 2, at 373; Stephens, *supra* note 2, at 400-01 & n.34.

24. *See, e.g.*, Wulfsohn v. Russian Socialist Federated Soviet Republic, 266 U.S. 580 (1924); Ker v. Illinois, 119 U.S. 436, 444 (1886); New York Life Ins. Co. v. Hendren, 92 U.S. 286 (1876).

25. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2764 (2004).

cases where diversity of citizenship did not exist.[26] While thus endorsing CIL as a form of federal law, the Court did not elaborate on either the textual or precedential basis for this holding. It also refused to extend its holding to allow plaintiffs to invoke CIL as the basis for federal question jurisdiction, thus appearing to keep CIL as a unique form of federal law that can only be invoked pursuant to the Alien Tort Statute and in no other context.[27]

B. CIL and the Executive Branch

Despite the attention paid to judicial determinations of the status of CIL, culminating in the Supreme Court's apparent endorsement of CIL as federal law last Term,[28] neither federal nor state courts have been the primary expositors of CIL in the U.S. system.

Rather, for a variety of reasons, the executive branch has emerged as the institution most responsible for administering, interpreting, and applying CIL. This power may flow from the Constitution's vesting of the "executive power" in the President in Article II of the Constitution or it may flow from the president's general responsibility to conduct foreign affairs.[29] Because CIL is traditionally determined by state practice and administering foreign policy entails the president's administration of state practice, the president is usually responsible for the interpretation, application, and recognition of CIL on behalf of the United States.

For example, in 1948, President Harry Truman unilaterally declared, by executive order, that the United States claimed rights to the undersea continental shelf pursuant to the customary law of the sea.[30] This order extended U.S.

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26. *Id.* at 2765 n.19.

27. *Id.* ("[W]e know of no reason to think that federal-question jurisdiction was extended [to other CIL] subject to any comparable congressional assumption.").

28. *See id.*

29. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001), for the most powerful statement of the view that the president controls all foreign affairs matters not specifically allocated to Congress due to the Constitution's allocation of "executive power" to the president in Article II. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004), for a critique of the historical foundations of this view.

30. *See* Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Presidential Proclamation No.

claims over thousands of square miles of undersea territory and arguably modified the existing CIL of the sea.[31] Yet, the president's power to issue such a declaration accepting CIL rules on behalf of the United States has never been seriously questioned by any court. President Ronald Reagan made a similar declaration in 1983 when he accepted, on behalf of the United States, most (but not all) of the 1982 Law of the Sea Treaty rules as CIL binding on the United States.[32]

In some cases, domestic courts have treated the president's views as binding. For instance, great weight, if not absolute deference, has been given by both federal and state courts with regard to the executive's views of the proper application of the law of foreign sovereign immunity.[33] This was especially the case prior to Congress's codification (pursuant in part to its "Define and Punish" powers) of the law of foreign sovereign immunity in 1975,[34] and it continues to be the case in those areas that Congress failed to codify.[35]

The domestic effect of the president's views of CIL is also buttressed by the Supreme Court's recent decision in *American Insurance Ass'n v. Garamendi*[36] to allow statements of national executive policy to preempt inconsistent state laws.[37] While that decision did not involve a question of CIL, its broad recognition of the president's power to preempt state law by setting a national policy could easily be understood to include the power to declare adherence to international law. Indeed, the executive branch is currently attempting to use this foreign policy power to preempt state law inconsistent with a recent judgment of the International Court of Justice.[38]

2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

31. *See id.*

32. *See* Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

33. *See, e.g.*, Mexico v. Hoffman, 324 U.S. 30 (1945); F.W. Stone Eng'g Co. v. Petroleous Mexicanos, 42 A.2d 57, 59-60 (Pa. 1945).

34. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (2000).

35. *See, e.g.*, United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (rejecting sovereign immunity for Panamanian leader on grounds that Executive Branch "has manifested its clear sentiment that Noriega should be denied head-of-state immunity").

36. 539 U.S. 396 (2003).

37. *Id.* at 425 (finding California law preempted by "express federal policy.").

38. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 52, Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004) (No. 03-20687), http://www.scotusblog.com/movabletype/archives/medellin.sg.brief.pdf.

If this exercise of the foreign policy preemption power is upheld, the president could similarly claim a power to preempt state law inconsistent with a rule of CIL that the president has adhered to on behalf of the United States.

The executive's central role in the administration of CIL has led scholars to speculate and debate whether the Executive is "bound" by CIL under his duties to "take care" that the laws be faithfully executed.[39] The leading case on the subject, *The Paquete Habana*,[40] appears to contemplate a power by the executive to issue "controlling executive acts" that would override a court's application of CIL.[41] This opinion has been read to suggest that although the executive might be bound as a matter of international law, no domestic court has the authority to require the executive to comply with a CIL rule. Although recent scholarship has contested this reading of the case,[42] the executive branch seems to have adopted this view.[43] Moreover, no court since *The Paquete Habana* has addressed this issue.

In sum, historical practice and judicial doctrine strongly suggest that regardless of the status of CIL as domestic law, the president is the chief administrator of CIL on behalf of the United States. Absent congressional intervention, the president holds the power to accept or reject CIL rules on behalf of the United States and to make his interpretations binding on federal and state courts.

III. REVEALING THE STRUCTURAL CONFLICT

A closer look at the timely but highly controversial U.S. interpretations of the CIL of war in the context of its ongoing war on terrorism reveals the ways that the judicial use of CIL can create structural conflicts between the judicial and executive branches.

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39. *See* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1239-40 (1988).

40. 175 U.S. 677 (1900).

41. *Id.* at 700.

42. Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985).

43. *See, e.g.*, Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163, 170-71 (1989) (discussing whether Congress and the executive can override CIL).

A. CIL as Common Law

Since the terrorist attacks of September 11, 2001, the U.S. executive branch has made a number of determinations about the applicability of CIL. For example, President George W. Bush concluded that the customary international law of war does not require the United States to treat captured fighters, whom it accuses of being terrorists, with the same protections that it would give so-called "lawful combatants."[44] Additionally, the military is now charging various detainees with committing violations of the CIL of war, including the crime of conspiracy to commit terrorist acts that violate the CIL of war.[45] The executive branch has further concluded that the CIL of human rights law does not prevent it from removing foreign citizens from Iraq as part of the controversial practice of renditions.[46] In all cases, the U.S. government claims to be interpreting what CIL requires (e.g. that combatants avoid targeting civilians and engaging in terrorist acts) and what CIL does not require (e.g. treating such "terrorist" combatants as prisoners of war).

These determinations about the applicability of CIL are highly controversial. Although most of the criticism focuses on the administration's interpretations of its treaty obligations,[47] lawsuits challenging the Administration's policies under the Alien Tort Statute have alleged that the U.S. govern-

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44. *See* President's Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html [hereinafter Military Order]. For a discussion of the international law determinations in this order, see James C. Ho & John C. Yoo, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003).

45. The propriety of such charges is being challenged in a current appeal in the D.C. Circuit. *See* Brief of Amici Curiae Professors Allison Danner & Jenny S. Martinez, Hamdan v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 04-5393), *available at* http://www.law.georgetown.edu/faculty/nkk/documents/dannermartinezamicus.pdf (last visited July 30, 2005) (arguing that law of conspiracy does not apply to law of war).

46. *See* Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A01, http://www.washingtonpost.com/ac2/wp-dyn/A57363-2004Oct23?language=printer (last visited Apr. 17, 2005).

47. *See, e.g.*, Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) (arguing that the president is bound by treaties codifying the law of war).

ment itself has been violating the CIL of war.[48] Because the U.S. government claims that it is not violating CIL, these lawsuits are based on the theory that the U.S. government's interpretation of CIL was mistaken or incorrect.[49]

For instance, numerous lawsuits filed under the Alien Tort Statute allege that the United States has violated CIL in detaining suspected or alleged collaborators of Al Qaeda in Guantanamo Bay. In *Rasul v. Rumsfeld*, the plaintiffs, former detainees at Guantanamo Bay, allege that they were subjected to prolonged arbitrary detentions in violation of the law of nations.[50]

The executive branch disagrees that these detentions constitute a violation of the CIL prohibition on arbitrary detention. Indeed, as the administration argued in its briefing in *Sosa*,[51] there is no such CIL prohibition on arbitrary detention where federal law authorizes such detentions.[52]

Thus, a trial court attempting to discern the proper interpretation of CIL must choose between the plaintiffs' and the executive branch's view of CIL. Although there may be strong arguments that, as a matter of international law, the plaintiffs' view is the correct one, this does not change the fact that such a determination would create a structural conflict between the executive branch and the judicial branch.

B. CIL as Statutory and Treaty Interpretation

Courts not only consider CIL in the context of alien tort lawsuits, but they also use it as a tool of statutory and treaty interpretation. In the statutory context, courts in the United States adhere to *The Charming Betsy* doctrine, which instructs them to avoid interpreting acts of Congress when it will violate CIL.[53] In the treaty context, courts use CIL either

48. *See, e.g.*, Rasul v. Rumsfeld (complaint *available at* http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1VSkOOGX7D&Content=455) (last visited Aug. 22, 2005).

49. *Ex-Guantanamo Inmates File Suit*, N.Y. TIMES, Oct. 28, 2004, at A10, 2004 WLNR 5398491. *See* Terri Somers, *Lawsuit Ties Titan to Abuse at Iraq Prison*, SAN DIEGO UNION-TRIBUNE, July 2, 2004, at C1.

50. Complaint, Rasul v. Rumsfeld, http://www.ccr-ny.org/v2/legal/september_11th/docs/Rasul_v._RumsfeldComplaint_October_26octfinal.pdf (last visited July 30, 2005).

51. Brief of the United States in Support of Petition, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339), 2003 U.S. Briefs 485.

52. *See id.*

53. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

to fill gaps in treaty language or to adopt rules of treaty construction.

For instance, in *Sosa*, the Court was asked to interpret whether a federal statute[54] authorized the arrest of the plaintiff in Mexico. The plaintiff urged the Court to construe the statute to avoid violating CIL prohibiting extraterritorial arrests under *The Charming Betsy* doctrine. The government urged that the statute be read to authorize such an arrest, especially where any norm of customary international law that existed was "ill defined."[55] The *Sosa* Court did not address this issue because it disposed of the suit on other grounds.[56] But the issue highlights the structural conflict between the Court's interpretation and the executive's interpretation of whether a rule of CIL exists. The *Sosa* Court wisely avoided this issue.

Courts have also used CIL as an aid in the interpretation of treaties in the context of suits challenging treatment of prisoners at Guantanamo Bay.[57] Courts have interpreted the Geneva Conventions such that they either avoid conflict with or incorporate emerging principles of CIL. Courts have held that Common Article 3 of the 1949 Geneva Conventions embodies "international humanitarian norms"[58] and sets forth the "most fundamental requirements of the law of war."[59] Such requirements under CIL include "not only acts such as torture and intentionally causing great suffering or inflicting serious injury to body, mind or health but also extends to other acts contravening the fundamental principle of humane treatment, in particular those which constitute an attack on

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For a general discussion of the doctrine, see Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretative Role of International Law*, 86 GEO. L.J. 479 (1998).

54. 21 U.S.C. § 878 (2000).

55. Brief of the United States in Support of Petition, *supra* note 50.

56. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2768 n.26 ("We have no occasion to decide whether Alvarez is right that 21 U.S.C. § 878 did not authorize the arrest.").

57. A number of such suits have been filed. The two most prominent cases have been filed in the U.S. District Court for the District of Columbia. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 480-82 (D.D.C. 2005) (ruling that detainees had rights under constitution and treaty but not customary international law); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (holding detainees have neither constitutional, nor treaty, nor CIL rights cognizable in federal court).

58. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002).

59. Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995).

human dignity."[60] The court further held that this includes injury to "mental health" and "includes those acts which do not fulfill the conditions set for the characterization of torture . . . ."[61] Thus, by interpreting CIL as part of a treaty obligation, the court's interpretation of CIL (as opposed to the provisions of the treaty itself) may conflict with the executive's view of what CIL requires.

Even if the executive is not "bound" as a matter of domestic law, it is still limited in its ability to set U.S. policy toward a particular rule of CIL by the court's citation of CIL in the same area. For example, a U.S. soldier or a U.S. government official appearing in a foreign or international court might not be able to argue that the United States does not accept a rule of CIL if judicial decisions from the United States have recognized and cited that rule of CIL. In this way, the president's traditional and constitutionally allocated power to control CIL is challenged by judicial interpretations.

C. CIL and Constitutional Interpretation

The area where a structural conflict seems least serious is, paradoxically, where it might occur most frequently. In the past three years the Supreme Court has begun to regularly cite foreign and customary international law in order to interpret provisions of the U.S. Constitution. This practice has been controversial among some of the Court's own members as well as in Congress. The actual significance of this practice, however, remains uncertain.

In *Roper v. Simmons*,[62] the Supreme Court held that the Eighth Amendment prohibits the execution of individuals for crimes committed before the age of eighteen. To buttress its holding that such executions would violate evolving standards of decency incorporated by the Eighth Amendment, the Court cited several international law sources as evidence that world opinion found such executions unacceptable.[63] The Court

60. *Mehinovic*, 198 F. Supp. 2d at 1352 (quoting Prosecutor v. Blaskic, Case No. IT-95-14, Judgment (Trial Chamber I, Mar. 3, 2000) ¶155, 2004 WL 34467832).

61. *Id.* ¶ 156.

62. 125 S. Ct. 1183 (2005). *See also* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment proscribes execution of individuals who are mentally retarded).

63. *Roper*, 125 S. Ct. at 1198-99.

cited a number of treaties that the United States had either failed to ratify or ratified subject to reservations with respect to the death penalty,[64] judicial opinions of international and foreign tribunals rejecting such executions, and treaties that the United States was not even asked to sign. Because none of the international legal sources cited by the Court formally binds the U.S. government as a treaty obligation, the Court was implicitly recognizing a norm of CIL proscribing such executions.

The Court has also used CIL prohibitions against arbitrary detention to interpret whether individuals detained by the U.S. military as "enemy combatants" in its war on terrorism have due process protection.[65] In response to the U.S. government's claim that due process protections do not apply to unlawful enemy combatants, human rights advocates argued that CIL prohibitions on arbitrary detention require the U.S. government to provide due process protections under the Fifth Amendment.[66] The Court in *Hamdi* did not endorse this analysis. Indeed, the plurality opinion appeared to suggest that due process protections could be more narrowly interpreted to conform to the right of nations to detain enemy combatants as reflected in the CIL of war.[67] As Justice O'Connor explained, "the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities."[68]

Though the Court avoided the conflict here, the invocation of CIL of human rights and war in the context of the interpretation of the Fifth Amendment demonstrates how CIL

64. *See id.* (citing Convention on the Rights of the Child, Nov. 20, 1989, art. 37, 1577 U.N.T.S. 3 (United Nations); American Convention on Human Rights "Pact of San José, Costa Rica," Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 146 (Organizacion de los Estados Americanos); African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, art. 5(3), http://www.logos-net.net/ilo/150_base/en/instr/afri_3.htm (last visited Apr. 17, 2005) (Organization of African Unity)).

65. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004).

66. *See* Brief of Amicus Curiae Global Rights in Support of Petitioners at 10-11, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004) (No. 03-6696) ("Neither the ICCPR nor customary international law creates an exception from this prohibition on arbitrary detention for the Executive's invented 'enemy combatant' classification. . . .").

67. *Hamdi*, 124 S.Ct. at 2647.

68. *Id.*

can become intertwined with the process of constitutional interpretation. Rather than decry this somewhat controversial practice or opine on the merits of the Court's decision, the focus should be on a different consequence of the Court's invocation of CIL.

Any recognition of a CIL principle, whether to limit or increase constitutional protections, also constitutes judicial recognition of that principle as an accepted rule of CIL. In turn, this comprises evidence that the United States has accepted, through state practice, the proposed CIL rule. While such rules may be salutary, the court's citation of such rules limits the executive branch's ability to contest the rule either in domestic litigation or in the implementation of its foreign policy.

It is arguable that CIL would have any significance as an interpretive tool if the Supreme Court establishes essentially the same requirements as a matter of constitutional law. However, under existing doctrine, not all constitutional protections restrain U.S. government actions overseas, especially against aliens.[69] For this reason, a citation by a court that something constitutes a rule of CIL might affect U.S. government officials or agents abroad in a way that a constitutional rule does not.

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It may be that courts, especially when interpreting the Geneva Conventions, adopted a better accepted rule of CIL or one that reflects better moral or policy considerations. Even so, such interpretations run into longstanding judicial and executive practice authorizing the executive branch to control the interpretation of CIL. Thus, even if the courts would be better at interpreting CIL, a proposition John Yoo and I dispute elsewhere,[70] their intervention here creates, at the very least, the possibility of conflict with the executive branch's interpretation of CIL as part of its constitutionally allocated powers to conduct foreign policy. Judicial interpretation of CIL does not always create this conflict, but it *could* create a conflict and such a conflict could be serious.

69. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Fourth Amendment restrictions do not limit action of government agents acting against aliens outside U.S. territory).

70. *See generally* Ku & Yoo, *supra* note 13.

IV. RULES FOR AVOIDING STRUCTURAL CONFLICTS

The existence of a structural conflict here remains mostly speculative due to the Court's self-restraint. Notably, the Court in *Sosa* and in *Hamdi* purposefully limited the use of CIL by either restricting the ability of courts to recognize CIL or by refusing invitations to use CIL to interpret statutes and constitutional provisions. This restrained practice suggests techniques that courts can use to minimize or limit the conflicts identified in Part II.

A. Absolute Deference to Executive Branch Interpretations of CIL

One way courts could avoid most structural conflicts would be to give the executive branch absolute deference in its interpretations of CIL. Thus, to the extent courts do interpret CIL, any such interpretation could not depart from stated policies of the executive branch. Such absolute deference may seem unusual, but such absolute deference also characterizes judicial application of the CIL of foreign sovereign immunity.[71]

To avoid strategic executive branch manipulation of CIL, courts might require a formal declaration or "controlling executive act"[72] before acquiescing to an executive branch determination. The Court has debated what constitutes such a controlling act in the context of executive acts that would preempt state law,[73] although members of the current Court appear to agree that the executive can make such controlling executive acts.[74] Such "controlling executive acts" might take the form of an executive order issued by the president himself or a controlling legal opinion from a subordinate to which he delegates this authority.[75] If such a controlling act is issued,

71. *See* discussion *supra* text accompanying notes 33-35.

72. *See* The Paquete Habana, 189 U.S. 453 (1903) (following international law in absence of a "controlling executive act").

73. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 423 n.13 and 441 n.5 (2003).

74. *Compare id.* at 423 n.13 (explaining that executive policy statements should be given effect where there is no evidence of conflict within executive branch), *with id.* at 441-42 (Ginsburg, J. dissenting) (explaining that more formal executive statement is needed to preempt state law).

75. The "Tate Letter" is perhaps the most famous example of the type of delegated legal opinion which courts have traditionally given absolute deference. Letter from Jack B. Tate, Acting Legal Adviser, U.S. State Department, 26

the Court should defer to this view. Thus, if the president determines that CIL does not require giving Prisoner-Of-War status to non-uniformed combatants,[76] the court should give absolute deference to this determination.[77]

This proposed rule for executive deference is different from that suggested by the Supreme Court in *Sosa*. While the Court in *Sosa* suggested that executive branch views on the effect of a particular lawsuit on foreign relations should be given "serious weight,"[78] this rule goes farther and would require absolute deference to controlling executive branch determinations on the substantive content of CIL.[79] Moreover, unlike in *Sosa*, this rule would apply to judicial citations to CIL even when CIL is merely used as a rule of statutory or constitutional interpretation.

B. Avoid CIL Where Doubts Exist as to the Views of the Executive Branch

As a prudential matter, courts should also avoid citing to a rule of CIL if there is any doubt as to that rule's acceptance by the executive branch. As explained above,[80] if a court recognizes a rule of CIL, either in an alien tort claim suit or as a matter of interpretation, it may interfere with the executive branch's ability to conduct foreign policy in some future instance. For this reason, courts should limit their recognition of CIL to rules endorsed not just as a matter of state practice, but by practice of the United States, in the form of the executive branch. To the extent there is any doubt as to the executive branch's view, the court should err on the side of avoiding even a citation to CIL.

DEP'T. ST. BULL. 984 (1952). Issued by the State Department's Acting Legal Adviser, it set U.S. policy toward the CIL of foreign sovereign immunity and was generally given effect by courts. *Id. See, e.g.*, Isbrandtsen Tankers v. President of India, 446 F.2d 1198 (2d Cir. 1971) (following Tate Letter).

76. *See* Military Order, *supra* note 44.

77. This does not mean, however, that a court might not reject the president's position on the grounds that his view violates a statutory requirement, a treaty obligation, or a constitutional right. *See, e.g., In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) (avoiding plaintiffs CIL claims but ruling against government on treaty claims).

78. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 (2004).

79. Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (holding that once the state department has ruled on a matter of customary international law, the judiciary should not interfere).

80. *See* discussion *supra* Part II.

This may seem draconian, but if one takes seriously the notion that the executive branch has control over the interpretation, application, and development of CIL, then judicial determinations will undercut this control. While the Executive Branch might have the ability to override such a judicial determination as a matter of domestic law, the real issue is the international consequence of the judicial determination. The executive branch's attempt to accept or reject a rule of CIL in an international forum or court could be undercut by inconsistent domestic judicial determinations. Again, while this is not always a serious problem, it is a non-trivial conflict that can be avoided by judicial prudence at home.

C. *Cite Foreign Law instead of CIL*

Courts utilizing CIL as a method of constitutional interpretation could also limit their interpretations to foreign law rather than customary international law. Foreign law, or the domestic law of foreign countries, does not create the same kind of structural conflict because the court's citation of foreign law does not recognize or otherwise buttress a rule of CIL.

Under this view, for instance, a court could cite a rule of English common law,[81] or a decision of the Zimbabwe Supreme Court,[82] without creating the potential structural conflict. In fact, the practice of citing foreign law in a variety of circumstances is long standing and relatively uncontroversial. While one might challenge its relevance or legitimacy as a tool for constitutional interpretation, citing foreign law at least avoids the structural difficulty identified above.

D. *A Continuing Role for International Law*

The main objection to this rather restrictive view of the role of CIL in domestic courts is that it would essentially remove international law from the purview of domestic courts.

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81. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger J., concurring) (citing Roman and English common law to justify view that Constitution did not protect homosexual sodomy), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

82. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 995 (Breyer, J., dissenting from the denial of petition for certiorari) (citing decisions from foreign courts to support view that long wait on death row might constitute violation of constitutional rights).

This is not necessarily true for at least two reasons. First, none of the structural conflicts identified necessarily applies to that other main form of international law: treaties. Treaties, with the imprimatur of the Senate and textual recognition in the Supremacy Clause and Article III, have a much greater claim to the status of federal law binding the executive branch.[83] Moreover, treaties probably have the same status in domestic law as federal statutory law.[84] While some deference to the executive branch in the interpretation of treaties is probably necessary, unlike CIL, courts are not required to give the executive branch absolute deference in the interpretation or application of treaties.[85] Indeed, it is not surprising that courts have relied on treaties like the Geneva Convention rather than CIL in cases where they have ruled against executive policies in the conduct of the war on terrorism.[86]

The second reason is that even if CIL falls into disuse by the courts, this does not mean that CIL no longer exists as a part of domestic U.S. law. Congress still retains the power to codify CIL under the "Define and Punish" Clause of the Constitution.[87] When Congress acts through this clause, as it has most prominently done in the context of foreign sovereign immunity,[88] courts have the authority to interpret and develop CIL within the statutory guidelines established by Congress. Any complaints of structural conflict by the executive have far less, and perhaps, no weight in this context.

V. CONCLUSION

It is increasingly commonplace for federal courts to consider questions of CIL, either as a substantive rule for resolving a particular case, or as a tool for statutory or constitu-

83. *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties."); U.S. CONST. art. III, § 2, cl. 1 (listing treaties as one basis for federal court jurisdiction); U.S. CONST. art. VI, cl. 2 (listing treaties as part of "the supreme Law of the Land").

84. *See, e.g.*, Julian G. Ku, *Treaties as Laws: A Defense of the Last in Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. (forthcoming 2005).

85. *But see* John C. Yoo, *Politics As Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 868-70 (2001) (book review).

86. *See, e.g.*, *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 443.

87. U.S. CONST. art. I, § 8, cl. 10.

88. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (2000).

tional interpretation. The goal in this essay is not to attack this trend, but simply to point out that this approach to CIL, even merely as a tool of interpretation, poses potentially serious structural conflicts for our constitutional system. Scholars who support the increased use of CIL in all these contexts cannot simply ignore these conflicts, and they should turn their attention toward developing rules or guidelines to avoid such structural conflicts.

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