## Notes

### *Erie* and incorporation of customary international law

#### Why did Scalia say the court should rule against the plaintiff in Sosa?

#### Would Scalia accept jus cogens even for torture as providing substance law for the ATS?

#### What is Scalia’s *Erie* problem?

#### Can the federal courts accept jus cogens under an absolute view of *Erie*

#### What do some scholars argue as a workaround?

#### What law wins if customary international law conflicts with US statutes?

#### Can a subsequent statute overrule customary international law that has been incorporated by the court?

#### Is this court likely to accept the primacy of customary international law?

#### Since we have statutes that ban torture, will the problem come up?

#### What is the scholarly view on the president’s power to overrule customary international by executive order?

#### Can you think of examples where this has happened?

#### Is there any avenue for judicial consequences for such actions?

#### What could be diplomatic consequences?

### Thinking about Customary International Law (CIL)

#### How does CIL develop?

#### Why does this argue against CIL being binding on the executive?

#### Are there are areas where the United States is trying to change CIL?

#### How do we give and get on CIL?

#### How does jus cogens differ from CIL?

#### Are you bound by CIL if you refuse to be?

#### What about CIL?

#### How does Koh, currently chief legal advisor to the State Department, argue that the courts are using less discretion when adopting CIL than when recognizing state common law?

#### Can you think of areas where CIL evolve to conflict with basic US constitutional law?

#### Al-Bihani v. Obama, 619 F.3d 1 (DCC 2010)

##### Judge Kavanaugh

###### Judge Kavanaugh makes a long argument for why the US courts do not need to incorporate CIL, which is a different argument than Scalia’s claims that it would be wrong to do it whether we need it or not. What is Kavanaugh’s argument for the larger context of the AUMF that makes it unnecessary to incorporate CIL?

###### What is the hard view of *Erie* that he expounds as applied to CIL?

###### In a broader sense, how does Judge Kavanaugh’s position act as a counterpoint to the scholar’s push for the incorporation of CIL?

##### Judge Williams

###### What is Judge Williams’s weaker use for CIL?

###### What is his example of why need to CIL to define military force in the AUMF?

###### What is Judge Williams view of the impact of *Erie?*

##### Notes

###### What are Ramsey’s four critieria for using CIL?

###### When might CIL constrict rights?

### How do we fit these ideas together as a picture of the role of CIL and jus cogens in US law?

### How has the role of CIL changed over the years?

### Is CIL always a broader set of rights than US law?