International Law before the Supreme Court: A Mixed Record of Recognition

Jordan J. Paust
This short article will address the use of international law and its relevance in six cases decided by the United States Supreme Court in 2004. For those familiar with its core and contours, international law resonates through several issues addressed by the Court. Nonetheless, members of the Court have sometimes viewed international law only obliquely, despite its obvious applicability and its great utility for more than 200 years as a basis for judicial decision making and as an interpretive aid. Sometimes there was an evident unfamiliarity with that history, and sometimes there was just plain error—each conditioned partly, I assume, by less than historically accurate briefing by lawyers that provided argument and advice to the Court. Several of the cases addressing international law arose out of the George W. Bush administration’s detention of persons without trial, and it is likely that, in the future, issues concerning criminal ill-treatment of detainees at Guantanamo and illegalities surrounding the military commissions will reach the Court.

For the first time in its history, the Court addressed the nature and scope of the Alien Tort Claims Act (“ATCA”), but its sense of history and awareness of the content of international law and rich patterns of incorporation over the last two centuries leave much to be desired. Indeed, the history of judicial incorporation and views of the Founders and Framers should be revisited in any future ATCA cases as well as in

---

* Mike and Teresa Baker Law Center Professor, University of Houston. B.A., J.D., UCLA; LL.M., University of Virginia; J.S.D. Cand., Yale University. © 2005. All Rights Reserved.

1. 28 U.S.C. § 1350 (2000). This statute, also called the Alien Tort Statute (“ATS”), states: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.*
cases implicating war crime responsibility (civil or criminal) of present and former members of the executive branch who eagerly planned, encouraged, and otherwise aided and abetted the denial of protections and rights of other human beings under human rights law and the laws of war.²

I. Rasul's Relevant Recognitions

Although the majority opinion of Justice Stevens in Rasul v. Bush³ was based on the proper reach of the U.S. habeas statute⁴ and federal court jurisdiction and was not predicated on international law, two important issues involving international law were raised (1) concerning the meaning of certain terms contained in the habeas statute, such as the word "jurisdiction," and phrases that cover relevant violations of customary international law and treaties, such as "laws ... of the United States" and "treaties of the United States," and (2) concerning the reach of the habeas statute to all persons. With respect to the first issue, Justice Stevens rightly recognized that a 1903 international agreement with Cuba affirmed the existence of the "ultimate sovereignty of the Republic of Cuba," but also provided the United States "complete jurisdiction and control over and within" the Guantanamo area;⁵ that Guantanamo is thus "a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty,'"⁶ and that persons detained at Guantanamo are therefore "detained within 'the territorial jurisdiction' of the United States,"⁷ although they

---

⁶ Rasul, 124 S. Ct. at 2693 (internal quotations and citation omitted).
⁷ Id. at 2696. See also id. at 2700 (Kennedy, J., concurring) (stating that "Guantanamo Bay is in every practical respect a United States territory"); Gherebi v. Bush, 352 F.3d 1278, 1286 n.9, 1289-30 nn. 13-14 (9th Cir. 2003); Paust, supra note 5, at 692.
are "outside the United States." These are not remarkable recognitions concerning treaty interpretation, sovereignty, and territorial jurisdiction, but they were correct and properly arrayed as background for purposes of statutory interpretation and supporting the democratically required reach of judicial power. These recognitions also implicate international law, and, with respect to statutory interpretation, it is important to note that the Supreme Court has often used treaty-based and customary international law as necessary background for proper interpretation of federal statutes. With respect to the habeas statute, which sets forth words and phrases such as "jurisdiction" and violations of "laws . . . of the United States" and "treaties," it would be all the more appropriate to address the meaning of jurisdiction under international law and relevant violations of customary international law (which are laws of the United States) and treaties.

For example, what Justice Stevens recognized as U.S. "territorial jurisdiction" at Guantanamo has similar meaning under customary international law, since territorial jurisdictional competencies and responsibilities can reach beyond U.S. territory to include U.S. flag vessels, aircraft of U.S.

8. Rasul, 124 S. Ct. at 2698.
11. Rasul, 124 S. Ct. at 2693.
12. See, e.g., Lauritzen v. Larsen, 345 U.S. 571, 584-86 (1953); Flores, 289 U.S. at 155-59; United States v. Rodgers, 150 U.S. 249, 264-65 (1893); United States v. Davis, 25 F. Cas. 786, 787 (C.C.D. Mass. 1837) (No. 14,932) (noting that "the offence . . . was committed . . . on board of a foreign schooner" and was therefore "committed within . . . [a foreign state's] territorial jurisdiction"); United States v. Cooper, 25 F. Cas. 631, 641 (C.C.D. Pa. 1800) (No. 14,865) (stating that "[a]ll vessels, whether public or private, are part of the territory and within the jurisdiction of the nation to which they belong"); Paust, supra note 9, at 417, 427 n.17; Jordan J. Paust, Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions, 79 Notre Dame L. Rev. 1335, 1347-48 & n.46 (2004); Jordan J. Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Mich. J. Int'l L. 1, 24, 24-25 n.68
registry, space stations of U.S. registry, war-related occupied territory in Afghanistan and Iraq, and territory at Guantanamo. Moreover, the focus of the habeas statute is on jurisdiction, despite selectively activist judges who prefer to legislate by adding limiting words such as "sovereign borders," "sovereign territory," or "sovereignty" that Congress has not chosen and international law would not tolerate. Among them are judges who in other contexts prefer to apply the well-known rule of construction that federal statutes are to be interpreted with reference to international law.

International law is also relevant to an adequate interpretation of other words that appear in the habeas statute. For example, the word "treaties" that is found in the habeas statute obviously implicates international law. Moreover, various Founders, Supreme Court Justices, and other federal


13. See, e.g., Chumney v. Nixon, 615 F.2d 389, 391 (6th Cir. 1980) (construing "special maritime and territorial jurisdiction of the United States" as applying to aircraft in 18 U.S.C. § 7 (1976)); United States v. Cordova, 89 F. Supp. 298, 302-03 (E.D.N.Y. 1950) (not extending a domestic statute "to a plane in flight over the high seas under a statute which speaks of crimes committed upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States") (emphasis added); PAUST, supra note 9, at 417, 427 n.17; Paust, Antiterrorism Military Commissions, supra note 12, at 24-25, 25 n.69.

14. See, e.g., PAUST, supra note 9, at 317.


16. See, e.g., Paust, supra note 5, at 692; Paust, Antiterrorism Military Commission, supra note 12, at 25 n.70.

17. See Rasul v. Bush, 124 S. Ct. at 2701 (Scalia, J., dissenting) (feigning a desire to "leave it to Congress to change § 2241"). It is important to recognize that habeas corpus has historically been available for U.S. and foreign persons detained in foreign territory and on foreign vessels. See, e.g., Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004); Paust, supra note 5, at 692, 692 n.69, and the many cases cited. But see Rasul, 124 S. Ct. at 2706 (Scalia, J., dissenting) ("[T]oday's opinion . . . extends the habeas statute, for the first time, to aliens beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts.").


19. Id. at 1048-50. But see Gherebi, 352 F.3d at 1286-90 & nn.9, 12 & 14 (9th Cir. 2003).

20. See infra text accompanying note 27.


judges have long recognized more generally that another phrase that appears in the habeas statute, the phrase "laws of the United States," encompasses the law of nations or what we term "customary international law." Under treaty-based and customary international law that is directly incorporable and is also executed by and incorporated by reference through the habeas statute, the United States has an obligation to assure meaningful and effective judicial review of executive decisions to detain persons without trial wherever it exercises control over a detained person. Rasul allows the United States to comply with international duties and fundamental rights of persons detained at Guantanamo under a statute that permits habeas review with respect to persons who claim to be detained in violation of the Constitution, laws, or treaties of the United States. Considering

23. See, e.g., Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985); Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980); District of Columbia v. Int'l Distributing Corp., 331 F.2d 817, 820 n.4 (D.C. Cir. 1964); United States v. Ravara, 2 U.S. (2 Dall.) 297, 299 n.* (C.C.D. Pa. 1793); United States v. The Ariadne, 24 F. Cas. 851, 856 (D.C.D. Pa. 1812) (No. 14,465); Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J., on circuit); PAUST, supra note 9, at 7-11, 38 n.36, 44 n.54, 50 n.60 passim.

24. See, e.g., PAUST, supra note 9, at 7-12 (concerning direct incorporation of customary international law), 67-71 (concerning direct incorporation of treaties) passim.


26. The habeas statute incorporates by reference international law for habeas purposes in two ways: (1) expressly with respect to treaties of the United States and (2) impliedly with respect to customary international law through the phrase "laws . . . of the United States." See 28 U.S.C. § 2241(a), (c)(3). Concerning incorporation by reference, see for example Ex parte Quirin, 317 U.S. 1, 27-30 (1942); United States v. Smith, 18 U.S. (5 Wheat.) 153, 158-62 (1820); PAUST, supra note 9, at 9, 12-14, 95-97 n.125, 373, 447-48; PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S., supra note 25, at 143-49.

27. See, e.g., Paust, Judicial Power, supra note 25, at 507-10, 514.

28. Whether protections under the Fifth and Sixth Amendments to the U.S. Constitution reach aliens abroad and whether the president has any authority to act inconsistently with the Constitution, here or abroad (that they do and the president does not, see, e.g., Paust, Antiterrorism Military Commissions, supra note 12, at 18-20), the president has an unavoidable constitutional duty to faithfully execute international law. See, e.g., U.S. CONST. art. II, § 3; PAUST, supra note 9, at 7-9, 169-73, and the unanimous views of the Founders and Framers and the many cases cited.

29. See, e.g., Paust, supra note 5, at 691 n.65 (concerning cases addressing habeas claims based on violations of customary international legal principles
such duties and rights under international law as background for interpretive purposes, the interpretation of the habeas statute in *Rasul* was most appropriate. As noted in a prior writing, Supreme Court decisions assure that:

federal statutes must be interpreted consistently with international law and, in case of an unavoidable clash between a federal statute and international law, international law will prevail unless there is a clear and unequivocal intent of Congress to override international law. In this case, international law requires the availability of habeas corpus and there is no clear and unequivocal intent of Congress to override international law. Even if there had been such an intent, international law concerning the right to habeas corpus would prevail under either the "rights under treaties" exception (guaranteeing the primacy of "rights under" a treaty) or the "war powers" exception (guaranteeing the primacy of international law in the context of war) to the "last in time" rule.\(^3\)

Moreover, Justice Stevens was clearly correct in noting that the detainees’ allegations that their detention was in violation of the law of nations and treaties of the United States, and even actionable under the Alien Tort Claims Act, "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"\(^3\)

The second issue in *Rasul* implicating international law involves fundamental treaty-based and customary rights of equal access to courts. Despite the Bush administration’s eager trampling of customary and treaty-based international law that precludes the "denial of justice" to aliens and provides freedom from discrimination on the basis of national or

---

30. See, e.g., id. (concerning cases addressing habeas claims based on violations of treaties).

31. Id. at 693. As writings cited therein demonstrate, each step in this interpretive process and each exception to the "last in time" rule is based in Supreme Court decisions. See, e.g., PAUST, supra note 9, at 99, 101-02, 104-07, 120, 124-25 nn.2-3. That Congress is also bound by the laws of war, see, for example, id. at 48-49 n.57, 106-09.


33. PAUST, supra note 9, at 225, 286-89 n.479, 481. See generally RESTATEMENT OF THE FOREIGN RELATION LAW OF THE UNITED STATES § 711, cmts. a, c & reporters’ note 2 (3d ed. 1987) (concerning the customary international legal prohibition of “denial of justice” to aliens); Paust, Antiterrorism Military Commission, supra note 12, at 12 n.26, 13, n.27 (concerning the “denial of justice” to aliens at Guantanamo).
social origin, equal protection, and equal access to courts, Justice Stevens recognized that “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under the habeas statute that clearly provides relief for “any person.” He noted that “courts of the United States have traditionally been open to nonresident aliens,” recognized that the ATCA “explicitly confers the privilege of suing for an actionable ‘tort . . . in violation of the law of nations or a treaty of the United States on aliens,” and ruled that whether the detainees “are being held in military custody is immaterial.” In this regard, Rasul allows the United States to comply with fundamental treaty-based and customary international law. More generally, Rasul seemed to send a message that executive actions are not above the law and are not unreviewable by the judiciary—a message that is also apparent in opinions addressed in the next two sections.

II. PADILLA’S PRESIDENT PROTESTATION

In Rumsfeld v. Padilla, by ruling that Padilla’s habeas petition was filed in the wrong federal district court, the Court ducked significant issues concerning lawfulness of detention without trial and judicial power and responsibility to review executive decisions to detain persons in order to obtain information from them. Nonetheless, Justice Stevens reaffirmed the overriding importance in our free and democratic society of “the constraints imposed on the Executive by the rule of law.” While addressing the use of “[i]ncommunicado

34. See, e.g., Paust, supra note 5, at 678; Paust, Antiterrorism Military Commission, supra note 12, at 12-13, 17 n.37.
35. See, e.g., Paust, supra note 5, at 678; Paust, Antiterrorism Military Commission, supra note 12, at 12-13, 17 n.38, 18.
37. Rasul, 124 S. Ct. at 2696.
39. Rasul, 124 S. Ct. at 2698.
40. Id. at 2699.
41. Id.
42. 124 S. Ct. 2711 (2004).
43. See id. at 2711, 2715, 2727. The issues and relevant cases are addressed in Paust, Judicial Power, supra note 25, at 503-29.
44. Padilla, 124 S. Ct. at 2735 (Stevens, J., dissenting). For similar recognitions, see, for example, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,
detention for months on end” as an executive-approved tactic to obtain information from a detained person, Justice Stevens also offered a prescient warning of relevance to supporters of executive miscreants who attempt to justify or otherwise aid in denials of legal protections to persons detained at Guantanamo and elsewhere:

Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.45

III. HAMDI’S HELPING HAND

Although addressing an implied congressional authorization for detention during an armed conflict in Afghanistan, Justice O’Connor’s majority opinion in Hamdi v. Rumsfeld46 echoed part of Justice Stevens’s warning in Padilla: “we agree that indefinite detention for the purpose of interrogation is not authorized.”47 Justice O’Connor also recognized that the law of war authorizes certain forms of detention of certain persons and that such law is impliedly within the scope of the congressional authorization, but “that detention may last no longer than active hostilities”48 and that the war in Afghani-

646, 649-50, 655 (1952) (Jackson, J., concurring); United States v. Lee, 106 U.S. 196, 219-21 (1882); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 119-21 (1866); United States v. Worrall, 2 U.S. (2 Dall.) 384, 393-94 (Chase, J.); Paust, Judicial Power, supra note 25, at 520-26; infra notes 53, 128.
45. Padilla, 124 S. Ct. at 2735.
47. Id. at 2641.
stan had still involved "[a]ctive combat operations against Taliban fighters."\textsuperscript{49}

Justice Souter, with whom Justice Ginsburg joined, disagreed with the conclusion that law of war powers to detain were implicitly infused within the congressional authorization or were within the president's power as Commander in Chief in the face of a federal statute prohibiting detention of any citizen "except pursuant to an Act of Congress,"\textsuperscript{50} at least where "the Government has not made out a case on any [such] theory."\textsuperscript{51} Moreover, Justice Souter made the valid

\textsuperscript{49} Hamdi, 124 S. Ct. at 2642.

\textsuperscript{50} The Non-Detention Act, 18 U.S.C. § 4001(a) (2000). Concerning congressional power to set limits on presidential war powers, see for example Herrera v. United States, 222 U.S. 558, 572 (1912) ("It was there decided that the military commander at New Orleans had power to do all that the laws of war permitted, except so far as he was restrained by . . . the effect of congressional action.") (quoting Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 483, 495 (1873)); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 330-38 (1818); Brown v. United States, 12 U.S. (3 Cranch) 110, 125-29 (1814); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 177-78 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28, 41 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40-42 (1800); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 157-66 (D.D.C. 2004); 9 Op. Att'y Gen. 516, 518-19 (1860); PAUST, supra note 9, at 9, 16, 44-47, 79, 82, 88, 160, 185, 457, 468-69, 480-81. Yet, as a matter of domestic primacy, both congressional and international legal authorizations or competencies are subservient to the requirements of the Constitution. See, e.g., Reid v. Covert, 354 U.S. 1, 16-17 (1957); PAUST, supra note 9, at 99, 101, 116-18, 120-21, 123-24 n.1, and the many cases cited.

\textsuperscript{51} Hamdi, 124 S. Ct. at 2653 (Souter, J., dissenting in part and concurring in the judgment). Justice Scalia agreed that the statute does not authorize "detention of a citizen with the clarity necessary." See id. at 2671 (Scalia, J., dissenting). See also Ingrid Brunk Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 NW. U. L. REV. 1567, 1568, 1580, 1585-86, 1589, 1593 (2004).

The Executive had alleged that Hamdi "took up arms with the Taliban during" the war in Afghanistan. 124 S. Ct. at 2635; see also id. at 2642 n.1 ("Hamdi was carrying a weapon against American troops on a foreign battlefield"). Justice O'Connor also argued that those "associated with the September
point that an implied congressional authorization to detain in accordance with the laws of war would bring with it other limitations under the laws of war, such as the obligation to treat Hamdi and members of the Taliban as prisoners of war until a competent tribunal determines their status.\textsuperscript{52} That the president and every member of the executive branch are bound by the law of war has been well understood since the

11, 2001 terrorist attacks" included those "who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks." 124 S. Ct. at 2640; see also id. at 2642 (stating that "individuals legitimately determined to be Taliban combatants who 'engaged in armed conflict against the United States' are also covered). However, the congressional authorization in the Authorization for Use of Military Force, 115 Stat. 224, § 2(a) (Sept. 18, 2001), appears to be far more restrictive. With respect to persons, Congress merely authorized "necessary and appropriate force" against those "nations, organizations, or persons" that "planned, authorized, committed, or aided" the 9/11 terrorist attacks as such or that "harbored such...persons." Id. It does not authorize "force" against persons who were merely "associated" with the 9/11 attacks, much less those persons who were merely fighting with a de facto government that had "supported" al Qaeda more generally. In particular, there was no clear proof that Mr. Hamdi had "aided" the 9/11 attacks or "harbored" those who planned, authorized, committed, or aided the 9/11 attacks as such. If the Taliban "organization" had "harbored" al Qaeda, it is not clear that an authorization to use force against the Taliban "organization" as such extends to persons who are merely members of the Taliban, and it would not extend to a person who merely "took up arms with the Taliban." These points are relevant to inquiry whether others detained at Guantanamo actually fit within the language of the congressional authorization. It can be noted, for example, that the statement in \textit{Khalid v. Bush}, 355 F. Supp. 2d 311 (D.D.C. 2005), that the authorization reaches anyone who "posed a threat of future terrorist attacks" (355 F. Supp. 2d at 315) is clearly incorrect. Moreover, Justice O'Connor stated that the majority's interpretation of the congressional grant of authority to detain was "based on longstanding law-of-war principles." 124 S. Ct. at 2641. Thus, when persons have been captured and detained outside the theater of war or a war-related occupation in Afghanistan or Iraq in circumstances where the laws of war do not apply, the expanded interpretation of the congressional authorization might be doubly doubtful. Additionally, the laws of war necessarily would not provide executive authority to detain a person to whom the laws of war do not apply. Importantly, the U.S. cannot be at "war" with al Qaeda as such because it is not an insurgent, belligerent, nation, or state. See, e.g., Paust, \textit{Judicial Power}, supra note 25, at 513 n.30. Similarly, the laws of war do not protect them or authorize their detention outside an actual theater of war or war-related occupied territory, unless a particular person is engaged in belligerent acts in direct support of a party to an armed conflict in, for example, Afghanistan or Iraq. The ICCPR prohibits "arbitrary" detention (International Covenant on Civil and Political Rights, art. 9(1), 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR]), but it does not grant a power to detain persons when such detention is not "arbitrary." Moreover, the ICCPR requires that detention be "on...grounds and in accordance with procedures...established by law." Id.

52. \textit{Hamdi}, 124 S. Ct. at 2657-58.
Without ruling on whether the Executive "is in

53. See, e.g., U.S. Const., art. II, § 3 (assuring in the text and structure of the Constitution that the president is constitutionally bound to faithfully execute the "Laws"); Dooley v. United States, 182 U.S. 222, 231 (1901); The Paquete Habana, 189 U.S. 453, 464 (1903); The Paquete Habana, 175 U.S. 677, 698 ("law of war"); 700, 708, 711, 714 (1900); Herrera, 222 U.S. at 572-73 (quoting Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) at 495, but adding: "if it was done in violation of the laws of war ... it was done in wrong"); New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 394 (1874) (limits "in the laws and usages of war"); Miller v. United States, 78 U.S. (11 Wall.) 268, 314-16 (1870) (Field, J., dissenting); The Prize Cases, 67 U.S. (2 Black) 635, 667-68, 671 (1863) (finding that the president is "bound to take care that the laws be faithfully executed," including in context the "laws of war," "jure belli"); Brown v. United States, 12 U.S. (8 Cranch) 110, 149, 153 (1814) (Story, J., dissenting); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.); 11 Op. Att'y Gen. 297, 299-300 (1865); Paust, supra note 9, at 7-9, 67-70, 169-73, 175, 488-89, 493-94, (describing support from numerous cases, attorney general opinions, and unanimous views of the Founders and the Framers); Paust, Judicial Power, supra note 25, at 514, 517-22; Jordan J. Paust, Paquete and the President: Rediscovering the Brief for the United States, 34 VA. J. INT'L L. 981 (1994) (demonstrating why The Paquete Habana allows no exception and recognizes the venerable power of the judiciary to control the interpretation of customary international law and rule that Executive military conduct abroad during war against enemy aliens and their vessels is illegal in violation of the laws of war); see also United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318 (1936) ("[O]perations of the nation in ["foreign"] territory must be governed by treaties ... [as well as] the principles of international law."); United States v. Adams, 74 U.S. 463 (1869) (argument of counsel: "The war powers of Congress and of the President, as Commander-in-Chief ... and (as a necessary consequence) of his subordinate commanding generals ... are unlimited in time of war, except by the law of war."); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-35, 137 (1852) (holding that illegal orders provide no defense); Ex parte Duncan, 153 F.2d 943, 956 (9th Cir. 1946) (Stephens, J., dissenting) ("[The commander's] will is law subject only to the application of the laws of war."); United States v. Am. Gold Coin, 24 F. Cas. 780, 782 (C.C.D. Mo. 1868) (No. 14,439) (showing it became necessary for the national government to take every possible measure against an enemy "and at the same time [to do so] consistent with the laws of war"); Elgee's Adm'r v. Lovell, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (concerning the "law of nations, ... no proclamation of the president can change or modify this law"); United States ex rel. Henderson v. Wright, 28 F. Cas. 796, 798 (C.C.W.D. Pa. 1863) (No. 16,777) (explaining that a war cartel is like a treaty and "[u]nder the law of nations the president could not [engage in particular conduct], and what the president of the United States cannot do, will not be assumed by the judiciary"); Johnson v. Twenty-One Bales, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417) (holding courts cannot construe Executive orders so as to abrogate a right under the law of war); Dias v. The Revenge, 7 F. Cas. 637, 639 (C.C.D. Pa. 1814) (No. 3,877) (Washington, J., on circuit) (concerning improper conduct under the laws of war, the owner of a privateer cannot "shield himself, by saying that the privateer ... acts under the president's instructions"); Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Co. (In re Agent Orange Prod. Liab. Litig.), 2005 WL 729177, at *85 (E.D.N.Y. 2005); 8 Op. Att'y Gen. 365, 369 (1857) (re: jus belli, "[t]he commander of the..."
fact violating the Geneva Convention [Relative to the Treatment of Prisoners of War] and is thus acting outside the customary usages of war, Justice Souter declared the government's conduct to be "apparently at odds with its claim... to be acting in accordance with customary law of war and hence to be within" the congressional use of force authorization.

invading, occupying, or conquering army, rules... with supreme power, limited only by international law, and the orders of the sovereign or government"; State ex rel. Tod v. Court of Common Pleas, 15 Ohio St. 377, 389-91 (1864)

There is no limitation placed upon this grant of the power to carry on war, except those contained in the laws of war. If a party brings a suit against the president, or any one of his subordinates, do not questions at once arise, of the extent and lawfulness of the power exercised, and of the right to shield the subaltern acting under orders, and hold his superior alone responsible? And are not these constitutional questions? If so, then, the case is one 'arising under the constitution' [appropriate for federal courts]... The controversy is merely as to the occasions and manner of its exercise, and as to the parties who should be held responsible for its abuse. In time of war, he possesses and exercises such powers, not in spite of the constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto... And in time of war, without any special legislation, not the commander-in-chief only, but every commander... is lawfully empowered by the constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war... The president is responsible for the abuse of this power. He is responsible civilly and criminally...

Id. In re Kemp, 16 Wis. 359, 392 (1863) ("His duty is still only to execute the laws, by the modes which the laws themselves prescribe; to wage the war by employing the military power according to the laws of war."); id. at 395 ("Within those limits let the war power rage, controlled by nothing but the laws of war."); Ward v. Broadwell, 1 N.M. 75, 79 (1854) (quoting President Polk: "The power to declare war against a foreign country, and to prosecute it according to the laws of war... exists under our constitution. When congress has declared that war exists with a foreign nation, the laws of war apply... and it becomes the duty of the president... to prosecute it;" (citing the Message of the President of July 24, 1848, Exec. Doc. No. 70)); see, e.g., infra note 128 (finding that the president is also bound by other forms of international law). Moreover, judicial power clearly exists to review the legality of executive decisions and actions in time of war in the face of executive views to the contrary, and the laws of war are clearly judicially enforceable. See, e.g., cases cited in this footnote; PAUST, supra note 9, at 170-73, 175, 488-90, 493-94; Paust, Judicial Power, supra note 25, at 514, 518-24; see cases cited supra note 25. See also Hamdi, 124 S. Ct. at 2650 ("In times of conflict,... [the Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

56. Id. at 2657. See also id. at 2660 (recognizing that there was an "absence of... a showing that the detention conforms to the laws of war").
This roundabout use of the laws of war may seem appropriate in terms of normal judicial caution, but when a judge realizes that every violation of the laws of war is a war crime and war crime activity by the Executive against a habeas petitioner who is before the Court is apparent, such caution in the face of international crime is less than satisfying. The Court should have mandated that the Executive comply with particular laws of war when it was apparent that they were being violated.

The holding in *Hamdi* rested primarily on Hamdi's due process rights under the U.S. Constitution, and Justice O'Connor rightly concluded that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker." Fundamental human rights law and the laws of war also require judicial review of the propriety of the detention of any human being. Justice O'Connor's opinion, which was based on constitutional due process, did not reach the point that treaty law guarantees "similar access to a tribunal for a determination of his status," but, as noted, human rights and law of war treaties do require such access.

IV. ALTMANN'S AVOIDANCE

Ruling on the narrow ground that the Foreign Sovereign


58. *Hamdi*, 124 S. Ct. at 2635; see also id. at 2648-49 (The detainee "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker," "a neutral and detached judge in the first instance," (quoting Ward v. Monroeville, 409 U.S. 57, 61-62 (1972)) "must be granted at a meaningful time and in a meaningful manner," (quoting Fuentes v. Shevin, 470 U.S. 67, 80 (1972)), and "[t]hese essential constitutional promises may not be eroded.").

59. See, e.g., Paust, Judicial Power, supra note 25, at 507-10, 514.

60. *Hamdi*, 124 S. Ct. at 2649 n.2. In other contexts, international law has been used to inform the meaning of various constitutional amendments. See, e.g., PAUST, supra note 9, at 9, 12, 43-44 n.53, 200-01, 205, 212, 218-21, 248 n.92, 275-76 n.392, 324-26.
Immunities Act ("FSIA") applies retroactively to provide jurisdiction with respect to claims brought to recover artwork allegedly confiscated by the Nazi regime in violation of international law, the majority opinion of Justice Stevens in Republic of Austria v. Altmann understandably neglected certain historic judicial recognitions and left aside two important issues. The first was whether confiscation of property or theft during war are violations of international law covered by an express exception to immunity in section 1605(a)(3) of the FSIA. The second was whether the act of state doctrine should apply to confiscation or war-time thievery in violation of international law. In this respect, the Court missed an opportunity to reaffirm important international legal precepts, although it might revisit this or similar cases in the future.

First, confiscation of property is a violation of international law unless it is necessary during war and consistent with the laws of war. Pillage or war-time thievery is also proscribed. Second, in 1822, the Supreme Court provided an

---

63. See id. at 2254.
64. See id. at 2254-55.
66. See, e.g., Hague Convention No. IV Respecting the Law and Customs of War on Land, Oct. 18, 1907, Annex, arts. 28 ("pillage"), 46 ("[P]rivate property ... must be respected. Private property cannot be confiscated.")", 47 ("Pillage is formally forbidden.")", 56 ("All seizure of, destruction or willful damage to ... works of art ... is forbidden, and should be made the subject of legal proceedings.")", 36 Stat. 2277, T.S. No. 539; FM 27-10, supra note 57, at 21, ¶ 47, 24, ¶ 59; 1919 List of War Crimes adopted by the Responsibilities Commission of the Paris Peace Conference, Nos. 13 (pillage), 14 (confiscation of property), reprinted in PAUST, ET AL., INTERNATIONAL CRIMINAL LAW, supra note 57, at 32, 33; Altmann v. Republic of Austria, 317 F.3d 954, 958, 965-69, 974 (9th Cir. 2002); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 325 (S.D.N.Y. 2003); Menzel v. List, 49 Misc. 2d 300; 267 N.Y.S.2d 804 (N.Y. 1966); Branner v. Felkner, 48 Tenn. (1 Heisk) 228, 231-35 (1870); Terrill v. Rankin, 65 Ky. 453, 456, 460 (1867). Germany had refused to ratify the Hague Convention by the time of World War II, but the International Military Tribu-
important recognition that if a foreign sovereign violates international law and "comes personally within our limits, although he generally enjoys a personal immunity, he may become liable to judicial process, in the same way, and under the same circumstances, as the public ships of the nation," which then only enjoyed immunity as a matter of "public comity and convenience, and . . . [a] presumed consent . . . [that] may be withdrawn, upon notice, at any time," and that "involves no pledge, that if illegally captured [in violation of the law of nations] they shall be exempted." In a 1917 case presenting nearly the same issues, the Supreme Court reaffirmed its earlier decision and recognized that "an illegal capture [of property] would be invested with the character of a tort" and that alien plaintiffs were allowed to sue for restitution "conformably to the laws of nations and the treaties and laws of the United States" for the German government's violation of customary international law and treaty law. In that case, the Court recognized jurisdiction and the right to a remedy despite the intervention of the German ambassador and other foreign affairs concerns, the claim that the U.S. court lacked jurisdiction, and the claim that since other proceedings had been instituted in Germany, the U.S. court should decline jurisdiction. With respect to the act of state doctrine more generally, it should only be considered with re-

67. See The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822) (Marshall, C.J.). The presumed or implied consent was also recognizably withdrawn when the ship engaged in commercial activities. See 1 Op. Att'y Gen. 337-38 (1820); see also United States v. Wilder, 28 F. Cas. 601, 604 (C.C.D. Mass. 1838) (No. 16,694) (quoting EMERICH DE VATTEL, THE LAW OF NATIONS II, § 213 (1758) ("All the private contracts of the sovereign, are naturally subject to the same rules as those of private persons."); Nathan v. Virginia, 1 U.S. (1 Dall.) 77, 78 (Common Pleas, Phila. 1781) (argument of counsel).
69. Id. at 154. See also id. at 153-56. See also PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S., supra note 25, at 575.
70. See The Steamship Appam, 243 U.S. at 147, 152, 156. See also The Peterhoff, 72 U.S. 28, 57 (1866) ("[W]e administer the public law of nations, and are not at liberty to inquire what is for the particular . . . disadvantage of our own or another country").

spect to lawful "public" acts of a foreign state and must not provide a mantel of protection for violations of international law, since such acts are ultra vires and are not lawfully protectable under international law.\textsuperscript{71}

V. \textsc{Hoffman-La Roche's Hallucinations}

The sane and sacrosanct rule of construction recognized by Chief Justice Marshall is found in \textit{F. Hoffman-La Roche v. Empagran},\textsuperscript{72} federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains."\textsuperscript{73} Marshall added an important supplement to the rule that assures the primacy of rights under customary international law when he affirmed that federal statutes "can never be construed to violate ... rights ... further than is warranted by the law of nations."\textsuperscript{74} Additionally, it is well-known that international law limits the reach of U.S. jurisdictional competencies and, as law of the United States, such limits can bind the judiciary.\textsuperscript{75} Surprisingly however, in com-

\begin{flushleft}
\textsuperscript{71} See, e.g., \textsc{Paust, et al., International Law and Litigation in the U.S., supra} note 25, at 573-76, 628, 686, 706-11; \textit{Opinion and Judgment, supra} note 66 (Regarding an "act of state," such a principle "cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position," and one "cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."); \textit{reprinted in 41 Am. J. Int'l L. 172, 221 (1947); Altman, 317 F.3d at 968; West v. Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987) ("violations of international law are not 'sovereign' acts"); Paul v. Avril, 812 F. Supp. 207, 211 (S.D. Fla. 1993); 2 Op. Att'y Gen. 725, 726 (1835) (noting that Vattel had recognized that a foreign consul has no immunity if "he violate[s] the law of nations"); Jordan J. \textsc{Paust, Tolerance in the Age of Increased Interdependence, 56 Fla. L. Rev. 987, 998-1000 (2004); Jordan J. \textsc{Paust, Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine, 23 Va. J. Int'l L. 191, 242-47 (1983). The material cited above demonstrates that the ultra vires principle also allows recognition that acts of government actors in violation of international law are not acts taken within the scope of lawful "public" or "official" authority.}
\textsuperscript{72} F. Hoffman-La Roche v. Empagran, 124 S. Ct. 2359 (2004).
\textsuperscript{73} \textit{Id. at 2366} (quoting Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)). See also \textit{Rasul v. Bush, 124 S. Ct. 2686, 2698 n.15 (2004).}
\textsuperscript{74} Murray, 6 U.S. (2 Cranch) at 118 (emphasis added). See, e.g., \textsc{Paust, supra} note 9, at 144 (concerning this important recognition).
\textsuperscript{75} See, e.g., Cook v. United States, 288 U.S. 102, 118-22 (1933); Ford v. United States, 273 U.S. 593, 606 (1927); United States v. Darnaud, 25 F. Cas. 754, 759-60 (C.C.E.D. Pa. 1855) (No. 14,918); United States v. Yunis, 681 F.
\end{flushleft}
bination with these venerable rules the opinion in *F. Hoff-
man-La Roche* contains an erroneous notion that a principle
of "reasonableness" concerning the reach of U.S. extraterrito-
rial jurisdiction that is proclaimed in section 403 of the Re-
statement 76 has anything to do with customary international
law based in real-world patterns of generally shared expecta-
tion and practice.

Justice Breyer's majority opinion stated that the Court
"ordinarily construes ambiguous statutes to avoid unreason-
able interference with the sovereign authority of other na-
tions," but cited only three cases in support of this broad as-
sertion, and they involved the unique circumstance of
activities on foreign flag vessels.77 Thereafter, Justice Breyer
accepted a false notion that Justice Scalia previously could
only set forth in dissent, that section 403 of the Restatement
"reflects principles of customary international law."78 How-
ever, as noted elsewhere:

The Restatement's alleged rule of "reasonableness," pre-
ferring an ad hoc "balancing" of factors or contacts ap-
proach that might function to limit federal jurisdiction,
has not generally been followed by U.S. courts, especially
if jurisdiction is possible under the protective or national-
ity principles. In fact, the alleged "rule" is not a require-
ment of international law, nor is it a reflection of general
practice in the U.S. or abroad. It is a controversial assertion
based on "comity" or "choice of law" theory (which is not customary international law or treaty law)79 and would
operate as a self-denying limit on jurisdictional competen-
cies that pertain under international law . . . . The U.S.
Supreme Court offered criticism of such an approach in
McCulloch v. Sociedad Nacional de Marineros de Hondu-

---

76. RESTATEMENT, supra note 33, § 403.
de Marineros de Honduras, 372 U.S. 10, 20-22 (1963); Romero v. Int'l Terminal
Operating Co., 358 U.S. 354, 382-83 (1959); Lauritzen v. Larsen, 345 U.S. 571,
578 (1953)). But see Doe v. United States, 487 U.S. 201 (1988); Societe Nation-
ale Industrielle Aerospatiale v. Dist. Court, 482 U.S. 522 (1987); supra text ac-
companying note 70.
78. *F. Hoffman*, 124 S. Ct. at 2366 (citing Hartford Fire Ins. Co. v. Cal., 509
79. See also Hartford Fire Ins. Co., 509 U.S. at 814-19 (Scalia, J., dissenting)
(recognizing that the theory is one of mere "comity" or "choice-of-law theory,"
but thereafter improperly confusing such theories with "international law").
ras, 372 U.S. 10, 19 (1963) ("Application of the sanctions of the Act . . . on a purely ad hoc weighing of contacts basis . . . would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice") . . . . If used, what weight should be given to what factors? What if there are combinations of prescriptive jurisdictional competence for the forum state? Wouldn't such an approach be haphazard, inflexible and "unreasonable" concerning policies at stake, and unpredictable, leaving others without adequate guidance or notice whether jurisdiction might be exercised?80

Additionally, the so-called "reasonableness" principle has no application when U.S. jurisdiction rests on universal jurisdiction,81 a point that Justice Breyer recognized obliquely in another case when stating that "universal jurisdiction . . . is consistent with . . . comity."82 Moreover, "Congress has also generally ignored a comity-factors approach to jurisdiction,"83

80. PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S., supra note 25, at 441-42. In fact, I know of no federal case obviating jurisdiction under such a comity-factors theory when U.S. jurisdiction rests on either the protective or nationality principle. It would not apply when universal jurisdiction pertains and, in view of the importance of providing criminal and civil sanctions for violations of customary international law that implicate universal jurisdiction, clearly it should not. See also United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) (explaining piracy "is against all, and punished by all . . . within this universal jurisdiction"); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159-61 (1795) ("[A]ll . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it . . . . [Such] is not merely an offence against the nation of the individual committing the injury, but also against the law of nations, and, of course, cognizable in other countries . . ."); Dole v. New England Mut. Marine Ins. Co., 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966) (holding piracy "may be tried and punished in the courts of justice of any nation by whomsoever and wheresoever committed"); PAUST, supra note 9, at 420-23, 440-41 n.76, 443-48.

81. PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S., supra note 25, at 445; RESTATEMENT, supra note 33, § 404 & cmt. a ("[I]nternational law permits any state to apply its law to punish certain offenses although the state has no links of territory with the offense . . ."); supra note 80.

82. See Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2783 (2004) (Breyer, J., concurring in part). However, Justice Breyer seemed to miss the point that ATCA suits involve universal jurisdiction because they necessarily rest on violations of international law. Compare id. at 2782 ("comity concerns . . . do arise" regarding "a claim that a certain kind of foreign conduct violates an international norm") with PAUST, supra note 9, at 421-23; see also cases cited supra notes 67-71, 80.

and the Supreme Court has ignored it in the past.\textsuperscript{84} Also, foreign court practice is generally to retain jurisdiction permitted by international law,\textsuperscript{85} and the political branches should decide whether to give or trade away jurisdictional competencies that exist under international law.\textsuperscript{86} Further, it is peculiar to pretend that Congress had such a comity theory in mind when enacting legislation and then to deny the very reach of legislation that it chose.\textsuperscript{87}

Even stranger, Justice Scalia's concurrence offered a newly created, but allegedly "customary," "principle" that is clear anathema to international law and seemingly would have provided comfort to the Nazi regime in Germany.\textsuperscript{88} As Justice Scalia prefers, "statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories."\textsuperscript{89} With respect to violations of international law, Justice Scalia's view might not be so bad, however, since there is no customary deference to foreign state laws that are violative of international law and, with respect to international crime in particular, domestic law clearly is no excuse.\textsuperscript{90} Additionally, there is no customary deference when jurisdiction is based on the nationality or protective principles.\textsuperscript{91}

\textsuperscript{84} See id. at 444.
\textsuperscript{85} See id. at 442.
\textsuperscript{86} Id. at 442-45.
\textsuperscript{87} See F. Hoffman, 124 S. Ct. at 2366 (stating that the comity theory "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws").
\textsuperscript{88} See, e.g., Opinion and Judgment, supra notes 66, 71; infra note 90 (domestic law is no excuse).
\textsuperscript{89} See F. Hoffman, 124 S. Ct. at 2373 (Scalia; J., concurring) (offering no citations). And why should activist judges in our democracy "read" out of a statute the reach that Congress chose with nothing more than a slot-machine ad hoc "comity" balancing approach to a decision that Congress has not sanctified, is not generally required by treaty, and is not actually based in customary international law?
\textsuperscript{91} The nationality principle permits jurisdiction to prescribe extraterritorial laws reaching the prescribing state's nationals anywhere in the universe. The protective principle allows prescriptive competence with respect to extraterritorial conduct that poses significant national security threats and if it is not otherwise impermissible under international law to exercise jurisdiction. See, e.g., PAUST, supra note 9, at 416, 419-20.
VI. Sosa's Serious Shortcomings

*Sosa v. Alvarez-Machain*\(^92\) is among the more disappointing decisions of the Court. Perhaps partly because of the focus of and limited space allowed for some of the amici briefs in the case, the majority opinion of Justice Souter missed a far richer legal history relevant to: (1) whether the ATCA creates a cause of action\(^93\) (since other than a highly criticized concurrence by former Judge Bork,\(^94\) the *Sosa* opinion was the first in over 200 years of judicial history to rule that it does not),\(^95\) and (2) the types of infractions of both treaties and the customary law of nations by public and private actors that were known to the Founders, Framers, and early judiciary.\(^96\)

A 1781 Resolution of the Continental Congress\(^97\) was mentioned, but its actual reach was not fully appreciated. Justice Souter recognized that it addressed breaches of neutrality (therein termed "acts of hostility") and all "infractions of treaties,"\(^98\) but he overlooked the point expressed in the 1781 Resolution that some of the listed infractions of the customary laws of nations were only those "offences against [the] law [of nations]"\(^99\) which are most obvious and, therefore, that the list was inclusive and not exclusive. By focusing elsewhere in his opinion merely on Blackstone's list, which did not expressly include breaches of neutrality and all infractions of treaties, Justice Souter seemed to forget the types of infractions recognized by the Continental Congress and, in any event, missed other types of international law known to the

\(^92\) 124 S. Ct. 2739 (2004).


\(^94\) *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring). History and the weight of judicial opinion were completely to the contrary, and there were several other errors in Judge Bork's opinion. *See*, e.g., Paust, *supra* note 93. Indeed, if the ATCA had been merely jurisdictional, what would have been its purpose given the precursor to 28 U.S.C. § 1331?

\(^95\) *See* Sosa, 124 S. Ct. at 2754.

\(^96\) *See*, e.g., Paust, *supra* note 9, at 11-12, 59-61 nn.76-104, 195-203, 208-09 (including human rights, denials of justice, laws of war or war crimes, breaches of neutrality, and various other international crimes and infractions); Paust, *supra* note 93, at 250-52 n.3, 255-56 & n.13.


\(^98\) *See* Sosa, 124 S. Ct. at 2756-57, 2759 (quoting the 1781 Resolution, *supra* note 97).

\(^99\) *Id.* at 2759.
early judiciary. More specifically, the Supreme Court recognized early in our history, among other pertinent points, that "all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation;" that our judicial tribunals "are established . . . to decide on human rights;" that confiscation of property is a violation of the law of nations; and that our tribunals must address the laws of war. Other early federal cases and opinions of the attorneys general addressed these and other subjects. Clearly, with respect to ATCA litigation after Sosa, that history should be revisited. Today, the types of violations implicating responsibility have expanded.

100. Compare Sosa, 124 S. Ct. at 2756, 2759 (assuming in error that the "law appears to have understood only those three," even though the 1781 Resolution obviously listed two more: (1) breaches of neutrality, and (2) all infractions of treaties). Moreover, Blackstone had expressly referred to the "rights of man" and "rights of mankind," phrases covering what were also termed human rights. See, e.g., Paust, supra note 9, at 196, 242 n.19.

101. Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J.). The Court thereby also recognized universal jurisdiction for all such trespasses. See, e.g., Paust, supra note 9, at 421-22.

102. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.); see also The Julia, 12 U.S. (8 Cranch) 181, 193 (1814) (Story, J., dissenting) ("rights of humanity" in time of war); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 421 (counsel referring to "human rights"), 478 ("rights of men") (1793) (Jay, C.J.); Vanhorn's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795) (Paterson, J.) ("rights of man"); Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6,360) (Wilson, J., with Iredell, J., on circuit, and Judge Peters) ("rights of man"); supra note 96 (concerning views of the Founders and the Framers). See, e.g., Paust, supra note 9, at 210-23 (concerning later attention to human rights precepts in thousands of federal and state cases).

103. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227, 229 (1796) (Chase, J.).

104. See, e.g., Brown v. United States, 12 U.S. (8 Cranch) 110, 149, 153 (1814) (Story, J., dissenting); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28, 39 (1801) (Marshall, C.J.); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.); Ware v. Hylton, 3 U.S. (3 Dall.) at 279 (Iredell, J.); see also Ex parte Quirin, 317 U.S. 1, 27-28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals."); Paust, supra note 9, at 227; Paust, Basisiouni, et al., supra note 57, at 278-80 (early attention to the law of war); Paust, Judicial Power, supra note 25, at 516 n.45; see supra notes 53, 66 and accompanying text.

105. See supra note 96 and accompanying text.

Justice Breyer recognized in *Sosa*, in addition to war crimes, violations implicating responsibility now include “torture, genocide, [and] crimes against humanity.”

Further, in view of misstatements about the relevance of the “law merchant” and “admiralty” law, which had long been separated from customary international law as such, it is a mystery what the Court had in mind when considering an early Opinion of the Attorney General addressing crimes and civilly sanctionable breaches of neutrality on land on the west coast of Africa. The early opinion expressly recognized that the conduct of private U.S. actors, “being in violation of a treaty” and against the customary law of nations, triggered civil liability under the ATCA and that “the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States,” or what we might term today, a cause of action. The international crime of breaches of neutrality was also addressed two years earlier in the famous *Henfield’s Case* by Chief Justice Jay, Justice Wilson, Justice Iredell, and Judge Peters, who

---

use of modern international law is preferable and required. See, e.g., Ware, 3 U.S. (3 Dall.) at 281 (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”); Paust, *supra* note 93, at 259-60 & n.26.

107. See *Sosa*, 124 S. Ct. at 2783 (Breyer, J., concurring in part and concurring in the judgment).

108. See id. at 2756. Justice Souter did not realize that *The Paquete Habana* involved a violation of the law of war. Compare *supra* note 53; *The Paquete Habana*, 175 U.S. at 698 (“law of war”). See also *supra* note 104. Further, there is a difference between admiralty jurisdiction and admiralty law. See W.B. v. Latimer, 4 U.S. 1, 21-22 (Ct. of Errors and Apps., Del. 1788) (“[P]rizes are acquisitions *jure belli*, and *jus belli* is to be determined by the law of nations, and not by the particular municipal laws of any country.”).


110. 1 Op. Att’y Gen. 57, 58 (1795). The Attorney General’s opinion is addressed only in part in *Sosa*, 124 S. Ct. at 2759. The relevant jurisdiction was not admiralty jurisdiction and the relevant law was clearly not admiralty or maritime law, but treaty law and the customary law of nations. See, e.g., Paust, *supra* note 93, at 250-51 n.3, 254-55 n.11 (concerning other early cases and a 1907 Opinion of the Attorney General relevant to whether the ATCA created a cause of action); Paust, *Private Corporations, supra* note 106, at 823-24 n.111 (regarding the treaties addressed in the 1795 and 1907 opinions of the attorneys general, which did not expressly create a cause of action).

had also been concerned about the need for criminal and civil sanctions and who did not address the directly incorporeal violation of the law of nations as a violation of "common law," but as an offense against the "laws of the United States." Indeed, customary international law was not mere "common law" or limited to or by "common law," and cases like *Erie v. Tompkins* did not address, and had nothing to do with, international law. It is strange, therefore, why Justice Souter assumed in error and without evident need that customary international law is some sort of common law. It is likely that he had been misled.

112. See, e.g., *Henfield's Case*, 11 F. Cas. at 1108 (Wilson, J.); Paust, supra note 94, at 255 n.13.

113. *Henfield's Case*, 11 F. Cas. at 1101, 1103-04, 1112, 1115. The "laws of the United States" directly include customary international law. See, e.g., id. at 1101; PAUST, supra note 9, at 7-8, 10, 38 n.36, 44 n.54, 50 n.60; RESTATEMENT, supra note 33, § 111 & cmt. e, reporters' note 4.

114. See, e.g., PAUST, supra note 9, at 9, 39-43 n.50 (and the many cases cited therein); Paust, supra note 109, at 301-05, 308-10; Paust, note 93, at 265 n.35. Moreover, unlike mere federal common law, international law is not made by U.S. courts, but is created by an international legal process in which numerous actors participate.


118. The mere "common law" error had been part of a shockingly ahistorical trap created as part of an effort by a small, radically right-winged flock to ignore directly relevant views of the Founders and Framers and overwhelming trends in judicial opinions (especially concerning human rights) and to rewrite 200 years of judicial history. But the history they do not wish to conserve cannot be swept away by a few (or many) professorial cantations and highly selective briefings by parroting activists that provide the sometime historic accuracy of a check-out counter rag. Justice Scalia swallowed the trappings of the mere "common law" error with ahistorical statements about the relevance of mere "law merchant," unashamed misreadings of cases like *Erie v. Tompkins*, 304 U.S. 64 (1938), and *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286 (1876), and astonishing misstatements about their supposed effect on the continued use of customary international law in U.S. courts with no attention to numerous directly relevant federal and state cases decided after 1876. *See Sosa*, 124 S. Ct. at 2770-74 (Scalia, J., concurring in part). *But see id.* at 2764-65; Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984) (O'Connor, J., opinion) (relevant congressional-executive "arrangement" must not be "exercised in a manner inconsistent with... international law"); United States v. Maine, 475 U.S. 89, 93 (1986); First Nat'l City Bank v. Banco para el Commercio Exterior de Cuba, 462 U.S. 611, 623, 628-29 n.20 (1983); Banco Nacional de Cuba v. Sabatino, 376 U.S. 398, 427-37 (1964); *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); United States v. Bowman, 260 U.S. 94, 97-98 (1922); United States v. Flores, 289 U.S. 137, 156-59 (1933); Municipality of Ponce v. Roman Catholic Church, 210 U.S. 296, 318 (1908); Dooley v. United States, 182 U.S. 222, 231 (1901); The
Finally, the Court was not briefed on the fact that the International Covenant on Civil and Political Rights ("ICCPR") is at the very least partly self-executing. The U.S. declaration of partial non-self-execution is expressly inapplicable to Article 50 of the ICCPR, which mandates in clear, unavoidable, and self-executing terms that all of "[t]he provisions of the ... Covenant shall extend to all parts of federal States without any limitations or exceptions" whatever. Further, the U.S. Understanding upon ratification

Paquete Habana, 175 U.S. 677, 700, 708, 711, 714 (1903); Hilton v. Guyot, 159 U.S. 113, 163 (1895); Amy v. Watertown, 130 U.S. 320, 326 (1889); Coffee v. Groover, 123 U.S. 1, 9-10 (1887); United States v. Pacific R.R., 120 U.S. 227, 233 (1887); Ker v. Illinois, 119 U.S. 436, 444 (1886); Coleman v. Tenn., 97 U.S. 509, 517 (1878); Shapiro v. Ferrandina, 475 F.2d 894, 906 n.10 (2d Cir. 1973); United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927); The Newfoundland, 89 F. 510, 512 (D.S.C. 1898); In re Ezeta, 62 F. 964, 968 (N.D. Cal. 1894); United States v. The Ambrose Light, 25 F. 408, 443 (S.D.N.Y. 1885); United States v. Yunis, 681 F. Supp. 896, 906 (D.D.C. 1988); PAUST, supra note 9, at 10-11, 56-59 nn.68-73, 116, 165-67 nn.134-135; Paust, supra note 109, at 301-15; see also supra note 114. He fell off his perch and wallowed in the worst of it when parroting: "the law of nations ... was not supreme federal law that could displace state law." Sosa, 124 S. Ct. at 2773 n.* (emphasis deleted) (citing no relevant federal or state cases). Consistent with the views of the Founders and Framers, an overwhelming number of federal and state court opinions have recognized that states are bound by customary international law or the "law of nations." See, e.g., Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941); Manchester v. Massachusetts, 139 U.S. 240, 264 (1891); Ker v. Illinois, 119 U.S. at 444; Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227-29 (Chase, J.); id. at 281 (Wilson, J., dissenting) (universally obligatory customary law of nations); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.); United States v. Ravara, 2 U.S. (2 Dall.) 297, 298 (Wilson, J.), 299 n.* (C.C.D. Pa. 1793); Cheriot v. Foussat, 3 Binn. 220, 257 (Pa. 1810) ("The United States have always considered themselves bound by the law of nations .... The nation which makes a penal municipal law, has a right to direct the proceedings under it, in what manner it pleases, provided it does not violate the law of nations."); PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S., supra note 25, at 388-90, and federal and numerous state cases cited; Paust, supra note 109, at 301-04, 306, 310 n.49, 311-15. These cases alone play havoc with the radical ahistorical theory. See, e.g., id. at 309-13.


120. See, e.g., PAUST, supra note 9, at 78-79, 97 n.126, 361-62, 373; PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S., supra note 25, at 75-76, 193-94; Paust, supra note 93, at 264 & n.33.

121. See ICCPR, supra note 119.

122. Id. at art. 50.

123. See CLAIBORNE DEBORDA PELL, COMMITTEE ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. REP. NO. 102-23, at 18-22 (1992) reprinted in 31 I.L.M. 645, 657-59 (1992); see also sources cited supra note 120.
and the Executive Explanation\textsuperscript{124} concerning Article 50 demonstrate the intent that the United States executive and judiciary, among others, will comply with Article 50's mandate;\textsuperscript{125} and the Executive Explanation also demonstrates that the declaration has a special meaning that the treaty will not itself create a cause of action, but it does not preclude use of the treaty defensively or as incorporated by reference through statutes like the habeas statute and the ATCA.\textsuperscript{126} Unfortunately, and perhaps due to imperfect, limited briefing, Justice Souter missed these critical points when stating in error that the declaration of partial non-self-execution means that the ICCPR does "not itself create obligations enforceable in the federal courts."\textsuperscript{127} Because the Constitution also mandates that the executive branch comply with and faithfully execute treaty law of the United States\textsuperscript{128} and expressly and unavoidably requires that "all" treaties of the United States are supreme law of the land for supremacy purposes,\textsuperscript{129} such a

\textsuperscript{124} S. REP. NO. 102-23, \textit{supra} note 123, at 18; \textit{see also} sources cited \textit{supra} note 120.

\textsuperscript{125} \textit{See also} S. REP. NO. 102-23, \textit{supra} note 123, at 19; \textit{see also} sources cited \textit{supra} note 120.

\textsuperscript{126} \textit{See supra} notes 27, 120.

\textsuperscript{127} \textit{See Sosa}, 124 S. Ct. at 2767. Considering the Executive Explanation noted above, he might have said "not itself create a cause of action."


\textsuperscript{129} \textit{See, e.g.}, U.S. CONST. art. VI, cl. 2 (stating that "all" treaties of the United States are supreme law); PAUST, \textit{supra} note 9, at 67-69, 79-80, 115-16, 361-62, 380-81 nn.3-8. Additionally, the Tenth Amendment is no barrier and assures supremacy of all treaties because the treaty power is expressly "delegated to the United States and" prohibited . . . to the States." See U.S. CONST. amend. X; \textit{see also id.} arts. I, § 10, II, § 2, VI, cl. 2 (promulgating presidential authority to make treaties and prohibiting States from entering into such agreements); Reid v. Covert, 354 U.S. 1, 18 (1957) ("[T]he people and the States have delegated their [treaty] power to the National Government and the Tenth Amendment is no barrier."); Missouri v. Holland, 252 U.S. 416, 432 (1920) ("[B]y Article II, § 2, . . . [the treaty power] is delegated expressly, and by Article VI treaties . . . are declared the supreme law of the land."); United States v. Lue,
statement should be revised. Moreover, the Constitution creates a judicial competence and responsibility to apply treaty law. In this symposium, some of my colleagues have addressed the Court's approach to whether arbitrary detention is a violation of customary human rights law. I will simply add two points. First, as Supreme Court and other cases have demonstrated since the Founding, proof of the content of customary international law rests on general (not universal) patterns of legal expectation and behavior, and need not be restrictive. Second, whether the capture of persons in particular circumstances is "arbitrary" can depend upon context and other legal policies at stake.

134 F.3d 79, 84-85 (2d Cir. 1998) ("Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material") (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 191 (2d ed. 1996)); Commonwealth v. Blodgett, 53 Mass. 56, 81 (1846) ("[T]he States are expressly prohibited from entering into any treaty . . . [T]he power of making . . . treaties . . . is vested absolutely and exclusively in the general government, with their incidents."). Moreover, since the treaty power is expressly among federal prerogatives and an exclusive federal power a so-called "federalism" inquiry would be misplaced.

130. See, e.g., U.S. CONST. art. III, § 2 ("The judicial Power shall extend to Cases, in Law and Equity, arising under . . . Treaties made . . . ."); id. art. VI, cl. 2 (stating that "all" treaties of the United States shall be the supreme law of the land); see also PAUST, supra note 9, at 68-75, 78-79, 105, 129-32 nn.14-15, 189, 295, 361-62, 368-71 passim.

131. See, e.g., The Paquete Habana, 175 U.S. 677, 694 (1900) (noting a rule of international law arising out of "general assent"); id. at 700-01, 708, 711 (observing the "general consent" test); The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871) ("the law of the sea . . . is of universal obligation . . . . Like all the laws of nations, it rests upon the common consent . . . because it has been generally accepted" and has the force of law through the "common consent of mankind"); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) ("The law of nations . . . is founded on the common consent as well as the common sense of the world."); Fleming v. Page, 50 U.S. (9 How.) 603 (1850) (noting counsel's argument that such principles are established by the "common consent"); The Antelope, 23 U.S. (10 Wheat.) 66, 119 (1825) (stating that the Court must look to "general, . . . and admitted practice"); id. at 121 (using a test of "general consent" and "general assent" of the world); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796) ("general consent of mankind"); PAUST, supra note 9, at 3-6, 21-36 nn. 2-4, 11, 14, 17-25, 28 (demonstrating also that customary international law is universal law but does not require universal patterns of expectation or behavior); Paust, supra note 93, at 257-62, 265.

This article has addressed the use and relevance of international law in six cases decided by the Supreme Court in 2004. It is evident that international law did not often form the primary or an alternative basis for decisions. Sometimes international law was viewed obliquely and sometimes its relevance was supplemental to inquiry concerning the meaning of constitutional or statutory provisions.

It is also evident that the rich history of judicial use of customary and treaty-based international law for more than 200 years deserves far greater attention. Ahistorical errors in briefs and oral arguments can mislead the Court. Sometimes, it seems, lawyers intentionally mislead. Greater attention to actual trends in judicial decisions and a full range of relevant cases on particular issues should help. These may be lacking in short briefs or intentionally hidden, but they are readily discoverable by computer-assisted research and more thorough attention to scholarly materials. For example, attention to the rich history of proof of the content of customary international law allows avoidance of fundamentally false claims that nonbinding instruments are irrelevant or that customary international law must rest on universal consent. Another point that is obvious when relevant cases are consulted is that the president is not above the law and that during war the president is bound by the laws of war.

whether domestic law as such provided authorization for arrest. See Sosa, 124 S. Ct. at 2767-69 & n.24. Thus, other issues remain, such as those concerning cross-border abductions and more lengthy detentions.
133. See Paust, supra note 93, at 259 n.25.
134. See id. at 259-61 & n.27.
135. See, e.g., supra notes 44-45, 53.