WHO'S AFRAID OF THE GENEVA CONVENTIONS? TREATY INTERPRETATION IN THE WAKE OF *HAMDAN V. RUMSFELD*

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In its landmark decision in *Hamdan v. Rumsfeld*,[1] the United States Supreme Court rejected the Bush Administration's interpretation of Common Article 3 of the 1949 Geneva Conventions.[2] Common Article 3—so called because it is common to

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1. 126 S. Ct. 2749, 2764 (2006).

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3116–18, 75 U.N.T.S. 31, 32–34 [hereinafter Geneva I]; Geneva Convention for the

all four Geneva Conventions—establishes certain minimum standards of treatment for detainees and others in "case[s] of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[3] Since the events of September

Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3320–22, 75 U.N.T.S. 85, 86–88 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3318–20, 75 U.N.T.S. 135, 136–38 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3518–20, 75 U.N.T.S. 287, 288–90 [hereinafter Geneva IV].

3. Common Article 3 provides in full:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> *(a)* violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> *(b)* taking of hostages;
>
> *(c)* outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> *(d)* the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva I, *supra* note 2, art. 3, 6 U.S.T. at 3116–18, 75 U.N.T.S. at 32–34; Geneva II, *supra* note 2, art. 3, 6 U.S.T. at 320–22, 75 U.N.T.S. at 86–88; Geneva III, *supra* note 2, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38; Geneva IV, *supra* note 2, art. 3, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90.

11, 2001 and the beginning of the so-called Global War on Terror, the Bush Administration had argued that this provision of the Conventions did not apply to the war with al Qaeda because that war was "of an international character."[4] In *Hamdan*, however, the Court explicitly rejected this interpretation and concluded that the requirements of Common Article 3 did, in fact, apply to al Qaeda.[5] In essence, the Court rejected the notion that the President's interpretation of a treaty was dispositive.

The Administration, however, did not take the Supreme Court's decision as the final word on the interpretation of the Geneva Conventions. Following heated debates about the proper legislative response to the *Hamdan* decision, Congress adopted the Military Commissions Act of 2006.[6] While one of the main purposes of this Act was to establish a statutory basis for creating military commissions to try detainees,[7] the Act also addressed questions relating to the interpretation of the Geneva Conventions. First, the Act claims to provide a statutory definition of what would constitute a "grave breach" of Common Article 3.[8] Second, the Act claims that "[n]o foreign or international source of law shall supply a basis for a

4. *See infra* note 15 and accompanying text.

5. *Hamdan*, 126 S. Ct. at 2795.

6. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C.).

7. *See id.* § 3(a)(1) (specifically the subsection which will be codified at 10 U.S.C. § 948(b)) (authorizing the President to establish military commissions to "try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses").

8. *Compare id.* § 6(d)(1) (explaining that acts that constitute a "grave breach" of Common Article 3 are acts of torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages) *with* Geneva III, *supra* note 2, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238. Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War defines a "grave breach" as follows:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Id.

rule of decision in the courts of the United States in interpreting the prohibitions enumerated in" the section of the U.S. Code amended by the Act that seeks to define 'grave breaches.'[9] Third, the Act asserts that beyond the question of what constitutes "grave breaches," the President "has the authority for the United States to interpret the meaning and application of the Geneva Conventions"[10] and establishes a procedure for the President to issue such interpretations by Executive Order, claiming that "[a]ny Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations."[11]

Needless to say, the many issues raised by the *Hamdan* decision and the Military Commissions Act will be studied by legal scholars and practitioners for years to come. In the course of this examination, one issue that requires elaboration is the Court's willingness to reject the President's authority to provide the legally controlling interpretation of a treaty and make itself the final arbiter of interpretation. This aspect of the Court's ruling presents a number of crucial questions about the relationship between the President, the courts, and the Congress with respect to the interpretation of international agreements.

The purpose of this article is to explore the implications of the *Hamdan* decision for treaty interpretation and to make recommendations for policy makers. Part I will explore the Common Article 3 controversy presented in the *Hamdan* case and the method of treaty interpretation employed by the Court. Part II will analyze the Court's traditional jurisprudence on treaty interpretation in light of accepted international law dealing with treaty interpretation. Part III will discuss the implications of the Court's approach for the separation of powers. Finally, Part IV will make several recommendations for policy makers regarding the interpretation of past and future treaties.

9. Military Commissions Act § 6(a)(2).
10. *Id.* § 6(a)(3)(A).
11. *Id.* § 6(a)(3)(C).

I. THE COMMON ARTICLE 3 CONTROVERSY AND *HAMDAN*

A. THE POSITION OF THE ADMINISTRATION

Shortly after September 11, 2001, lawyers in the Bush Administration began struggling with the proper legal characterization of the new Global War on Terror. As the United States began military operations in Afghanistan and elsewhere and persons participating in the armed conflict were detained, the American military required guidance as to how to classify these detainees. If the detainees were determined to be prisoners of war, they would enjoy the full range of rights under the Geneva Convention on Prisoners of War.[12] If not, they would be entitled to a much more limited set of rights.[13]

12. Geneva III, *supra* note 2, arts. 12–16, 6 U.S.T. at 3328–30, 75 U.N.T.S. at 146–48 (providing protections exclusive to prisoners of war ("POWs") beyond the minimum protections afforded by Common Article 3).

13. The Geneva Convention on Prisoners truly offers a privileged status to POWs. *Id.* Following from the basic legal principle that there is nothing *per se* illegal about being a combatant, POWs are to be treated with great respect. For example, Article 13 provides that "[p]risoners of war must at all times be humanely treated" and "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." *Id.* art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146. Article 14 provides that "[p]risoners of war are entitled in all circumstances to respect for their persons and their honour." *Id.* art. 14, 6 U.S.T. at 3330, 75 U.N.T.S. at 148. And Article 17 makes it clear that any questioning of a POW must proceed with great deference:

> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

Id. art. 17, 6 U.S.T. at 3332, 75 U.N.T.S. at 150. If a detainee does not qualify for POW status, he or she does not enjoy the full guarantees provided in the Convention. Such person would, nonetheless, be entitled to the general human rights protections established in the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16 1966, S. Treaty Doc. No. 95-20 (1992), 999 U.N.T.S. 172, the Convention Against Torture, International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No 100-20 (1990), 1465 U.N.T.S. 85 [hereinafter CAT], and other customary international legal requirements.

In one of the first major legal opinions on the issue, Deputy Assistant Attorney General John Yoo argued that because al Qaeda is a non-state actor, it can not be deemed to be a party to the Geneva Conventions and thus its members would not enjoy the rights given to prisoners of war. But, as noted earlier, all four Geneva Conventions contain Common Article 3, which provides, in part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[14]

14. Geneva I, *supra* note 2, art. 3, 6 U.S.T. at 3116–18, 75 U.N.T.S. at 32–34;

Thus, even if the detainees were not entitled to the full range of protections as prisoners of war, Article 3 might seem to provide some minimal rights to all persons detained. In the January 9, 2002 memo, Yoo argued that members of al Qaeda were not entitled to protection under Common Article 3 because this Article was intended to apply to *internal wars*, and the war with al Qaeda was, in fact, a conflict "of international character." [15] This view was echoed, sometimes nearly verbatim, in one of the so-called Bybee Memoranda, authored by Assistant Attorney General for the Office of Legal Counsel Jay Bybee on January 22, 2002.[16] In light of these memoranda, on February 7, 2002, President Bush issued a memorandum on "Humane Treatment of al Qaeda and Taliban Detainees."[17] In this memorandum, the President concluded:

> I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."[18]

Geneva II, *supra* note 2, art. 3, 6 U.S.T. at 320–22, 75 U.N.T.S. at 86–88; Geneva III, *supra* note 2, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38; Geneva IV, *supra* note 2, art. 3, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90.

15. John Yoo, Draft Memorandum for William J. Haynes II, General Counsel Department of Defense, re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38, 43–49 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). Woo argued that Common Article 3, when read together with Article 2 of the Conventions, covers only wars between Nation States or noninternational civil wars. *Id.* at 49.

16. Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 15, at 81, 85–90.

17. George Bush, Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 15, at 134.

18. *Id.* at 134–35.

In its brief submitted to the Supreme Court in *Hamdan*, the Government reiterated the President's interpretation of Common Article 3 and also told the Court that "the President's determination is dispositive or, at a minimum, entitled to great weight."[19] But, as will be seen below, the Court disagreed with both the President's interpretation of Common Article 3 and the notion that his interpretation would be dispositive.

B. THE SUPREME COURT'S RESPONSE IN *HAMDAN*

When the D.C. Circuit Court of Appeals decided *Hamdan*,[20] it ruled that the Geneva Conventions were not enforceable in U.S. courts and even if they were, Hamdan would not be entitled to the rights under the Convention on Prisoners of War.[21] This, the D.C. Circuit ruled, was true for two main reasons. First, Hamdan did not fulfill the requirements under Article 4 of the Geneva Convention that would qualify him as a prisoner of war. As the court explained:

> One problem for Hamdan is that he does not fit the Article 4 definition of a "prisoner of war" entitled to the protection of the Convention. He does not purport to be a member of a group who displayed "a fixed distinctive sign recognizable at a distance" and who conducted "their operations in accordance with the laws and customs of war."[22]

Second, even if Hamdan were not entitled to the full rights guaranteed to prisoners of war, he would also not be entitled to claim rights under Common Article 3. The court rested this conclusion first and foremost on the fact that the President had determined that Common Article 3 did not apply to the conflict with al Qaeda. The court noted:

> Afghanistan is a "High Contracting Party." Hamdan was captured during hostilities there. But is the war against terrorism in general and the war against al Qaeda in particular, an "armed conflict not of an international

19. Brief for Respondents at 48, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184).

20. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), rev'd, 126 S. Ct. 2749 (2006).

21. *Hamdan*, 415 F.3d at 40–41.

22. *Id.* at 40 (citations omitted).

> character"? President Bush determined, in a memorandum to the Vice President and others on February 7, 2002, that it did not fit that description because the conflict was "international in scope." The district court disagreed with the President's view of Common Article 3, apparently because the court thought we were not engaged in a separate conflict with al Qaeda, distinct from the conflict with the Taliban. We have difficulty understanding the court's rationale. Hamdan was captured in Afghanistan in November 2001, but the conflict with al Qaeda arose before then, in other regions, including this country on September 11, 2001. Under the Constitution, the President "has a degree of independent authority to act" in foreign affairs, . . . and, for this reason and others, his construction and application of treaty provisions is entitled to "great weight." While the district court determined that the actions in Afghanistan constituted a single conflict, the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him.[23]

And, the court continued, even if Common Article 3 were to apply to Hamdan, his challenge should be brought *after* the military commission had ruled on his case.[24]

The Supreme Court rejected this approach taken by the D.C. Circuit. First, the Court concluded that it was not necessary to rule on whether the Geneva Conventions were judicially enforceable in and of themselves because Article 21 of the Uniform Code of Military Justice ("UCMJ") empowered military commissions to try individuals for violations of the "laws of war."[25] And, the Court makes clear, the Geneva Conventions are, "as the Government does

23. *Id.* at 41–42 (citations omitted).

24. *Id.* at 42.

25. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 (2006). Uniform Code of Military Justice Article 21, entitled "Jurisdiction of Courts-Martial not Exclusive," provides:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

Uniform Code of Military Justice art. 21, 10 U.S.C. § 821 (2000).

not dispute, part of the law of war."[26] Thus, the UCMJ—a federal statute—had effectively incorporated the laws of war and thus, the Geneva Conventions, into domestic law with respect to the functioning of military commissions.

Second, the Court ruled that irrespective of whether the full protections of the Geneva Conventions applied to Hamdan, it was clear that the protections under Common Article 3 did. And the relevant protection was that "'[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"[27] The military commissions established by the President's order did not, the Court ruled, constitute a "regularly constituted court" under Common Article 3.

In reaching the conclusion that Common Article 3 applied, the Court explicitly rejected the President's interpretation. The Court noted that the reference in Common Article 3 to "conflict not of an international character occurring in the territory of one of the High Contracting parties," does not refer only to civil war—as the Government had argued—but rather to any conflict that is not between states. The Court explained:

> The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." [*Hamdan v. Rumsfeld,* 415 F.3d] at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a

26. *Hamdan*, 126 S. Ct. at 2794.
27. *Id.* at 2795 (citation omitted).

> signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning.[28]

As can be seen from that last sentence, to render this interpretation the Court first looked to a literal reading of the words of the Conventions. But it also relied heavily upon several other sources. The first, and seemingly most important of these, were the Commentaries on the Geneva Conventions prepared by the International Committee on the Red Cross. With one commentary written to correspond to each Geneva Convention, the Court only cited the Commentaries to the Third (GCIII)[29] and Fourth (GCIV)[30] Conventions. When the Court introduced the Commentary to Third Convention in a footnote, it noted "[t]hough not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions."[31] The Court used these Commentaries through out the decision to interpret the meaning of the Geneva Conventions. On the nature of Common Article 3, the Court quoted the Commentary's definition of "conflict not of an international character": "'[a] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities

28. *Hamdan*, 126 S. Ct. at 2795–96 (some internal citations omitted). It is interesting to note that following this statement, the Court goes on to cite Jeremy Bentham, famously held to be the originator of the term *international law*: "See, e.g., J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J. Burns & H. Hart eds. 1970) (using the term 'international law' as a 'new though not inexpressive appellation' meaning 'betwixt nation and nation'; defining 'international' to include 'mutual transactions between sovereigns as such')." *Id.* at 2796. *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2608 (1997) (noting that Bentham coined the term "inter-national law" in 1789 amidst widespread international discourse on sovereignty).

29. 3 JEAN DE PREUX ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., A. P. de Heney trans. 1960).

30. 4 OSCAR M. UHLER ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., Ronald Griffin & C. W. Dumbleton trans. 1958).

31. *Hamdan*, 126 S. Ct. at 2790 n.48.

opposing each other.'"[32] The Court then proceeded to draw upon the Commentary to elaborate upon the meaning of non-international conflict:

> Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i.e.*, a civil war, see GCIII Commentary 36–37, the commentaries also make clear "that the scope of the Article must be as wide as possible," *id.*, at 36. In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. See GCIII Commentary 42–43.[33]

On this last point, the Court is using the Commentary because it discusses the "legislative history" of the Geneva Conventions.

In addition to the Commentary, the Court also cited several other sources to aid it in interpreting Common Article 3. These sources appeared in footnote 63 of the decision.[34] This note is a "*see also*" cite that begins with the Court citing the GCIII for the proposition that "Common Article 3 'has the merit of being simple and clear. . . . Its observance does not depend upon preliminary discussions on the nature of the conflict'" and then the GCIV for the assertion that

32. *Id.* at 2796 (citation omitted).
33. *Id* (alteration in original and footnote omitted).
34. The full text of footnote 63 reads:

> See also GCIII Commentary 35 (Common Article 3 "has the merit of being simple and clear . . . . Its observance does not depend upon preliminary discussions on the nature of the conflict"); GCIV Commentary 51 ("[N]obody in enemy hands can be outside the law"); U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 "serves as a 'minimum yardstick of protection in all conflicts, not just internal armed conflicts'" (quoting *Nicaragua v. United States*, 1986 I.C.J. 14, ¶ 218, 25 I.L.M. 1023)); *Prosecutor v. Tadi[c]*, Case No. IT–94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (ICTY App. Chamber, Oct. 2, 1995) (stating that "the character of the conflict is irrelevant" in deciding whether Common Article 3 applies).

Id. at 2796 n.63.

"'nobody in enemy hands can be outside the law.'"[35] The Court then cited the Department of the Army Law of War Handbook[36], which quoted the International Court of Justice's ("ICJ") decision in *Nicaragua v. United States*,[37] and the decision of the International Criminal Tribunal for Yugoslavia's decision in *Prosecutor v. Tadić*.[38] The Law of War Handbook was cited for the proposition that "Common Article 3 'serves as a "minimum yardstick of protection in all conflicts, not just internal armed conflicts"'"[39] The Court then cited *Prosecutor v. Tadić*, for the conclusion that "'the character of the conflict is irrelevant' in deciding whether Common Article 3 applies."[40]

C. THE IMPLICATIONS OF THE COURT'S DECISION FOR TREATY INTERPRETATION

In examining the Court's method of interpreting Common Article 3, two important conclusions can be reached. First, it is clear that the Court was not deferring to the President's interpretation. Despite the fact that the issue in question related to the President's interpretation of a treaty dealing with the laws of war—an area which could be considered to be within the core Article II powers of the President as commander-in-chief[41]—the Court did not allow the President to have final interpretive authority. Second, the Court was not particularly clear with respect to the method it used to interpret the Geneva Conventions. Unlike some previous cases, the Court did not provide a clear statement of the process it employs to interpret treaties. And it seemed to rely quite heavily upon the Commentary to the Geneva Conventions and fairly little on actual state practice. Given these two facts, it is clear why the *Hamdan* Court's interpretation of Common Article 3 could be troubling. If it rejects the President's interpretation and fails to clarify its own method, observers might be led to believe

35. *Id.* (omission and alteration in original).

36. DEREK GRIMES ET AL., U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., LAW OF WAR HANDBOOK (Keith E. Puls ed., 2004).

37. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

38. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

39. *Hamdan*, 126 S. Ct. at 2796 n.63 (citations omitted).

40. *Id.* (citations omitted).

41. *See* U.S. CONST. art II, § 2, cl. 1.

the Court will interpret treaties on an *ad hoc* basis with no clear guidelines serving as a compass. But, as will be discussed in the next section, the *Hamdan* decision actually falls with in a well-established approach to treaty interpretation.

II. SUPREME COURT PRACTICE ON TREATY INTERPRETATION

Despite the fact that the Supreme Court in *Hamdan* did not provide an explicit articulation of its method for treaty interpretation, an examination of the jurisprudence of the Court in previous cases, reveals a relatively clear and consistent approach to treaty interpretation. What is particularly significant about this approach is that it very closely follows the accepted international approach to treaty interpretation reflected in the Vienna Convention on the Law of Treaties.[42]

A. THE VIENNA CONVENTION ON THE LAW OF TREATIES

The generally accepted approach to treaty interpretation under international law can be found in the Vienna Convention on the Law of Treaties.[43] This "treaty on treaties" has been widely ratified and while the United States is not a party to the treaty, it has indicated that it regards the treaty to be reflective of customary international law.[44] Two principal articles lay out the Convention's approach to treaty interpretation—Articles 31 and 32. Article 31, entitled "General Rule of Interpretation," provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

42. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

43. *Id.* arts. 31-32, 1155 U.N.T.S. at 340.

44. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL AGREEMENTS pt. III, introductory note (1987). Moreover, as Professor John Norton Moore noted in 1980, "[a]lthough the United States has not yet ratified the Vienna Convention, it is generally accepted as reflective of the customary international law of treaty interpretation." John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 88 n.17 (1980) (citation omitted).

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> *(a)* Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> *(b)* Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> *(a)* Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> *(b)* Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> *(c)* Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[45]

As can be seen, Article 31 begins with a strong emphasis on a textual approach to treaty interpretation. First, paragraph 1 tells the interpreter to give words their "ordinary meaning" in light of the treaty's object and purpose, and its context.[46] This is quite similar to the basic rule of statutory interpretation: words are to be given their

45. VCLT, *supra* note 42, art. 31, 1155 U.N.T.S. at 340.
46. *Id.*

plain and simple meaning.[47] Second, paragraph 2 defines context for purposes of interpretation. Context is to mean the whole of the treaty—preamble, annexes, etc.—and any other written agreements or instruments that are agreed to by all the parties. Third, paragraph 3 provides that the interpreter should also take into account, subsequent agreements made by the parties regarding the interpretation of the treaty, subsequent practice by the parties "which establishes agreement of the parties regarding its interpretation."[48] Fourth, paragraph 4 provides that words should be given special meanings "if it is established that the parties so intended."[49]

What is clear from Article 31 is that the basic approach to treaty interpretation is heavily textual. To the extent it relies upon sources other than the text of the treaty, it emphasizes that those other sources are to be used only if it is established that they reflect agreement among the parties that the source is to be seen as providing authoritative interpretive information.

In the Vienna Convention, Article 32 provides further guidance relating to treaty interpretation. Entitled, "Supplementary Means of Interpretation," it provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> *(a)* Leaves the meaning ambiguous or obscure; or
>
> *(b)* Leads to a result which is manifestly absurd or unreasonable.[50]

47. *See* 73 AM. JUR. 2D *Statutes* § 69 (stating that the rule for purposes of statutory interpretation is that "in the absence of a statutory definition, the reviewing court construes all words according to their common and approved usage, which may be established by dictionary definitions").

48. VCLT, *supra* note 42, art. 31, 1155 U.N.T.S. at 340.

49. *Id.*

50. *Id.* art. 32, 1155 U.N.T.S. at 340.

Article 32, in essence, tells the interpreter when to take recourse to the negotiating history of a treaty provision. While it always allows the interpreter to use this negotiating history—to confirm the analysis under Article 31—it seems to give a secondary place to the exploration of the preparatory work.

B. SUPREME COURT JURISPRUDENCE ON TREATY INTERPRETATION

The Supreme Court has mentioned the Vienna Convention in only three cases, and only once in a majority opinion—*Weinberger v. Rossi*.[51] In that 1982 case, the Court cited the Convention for purposes of gleaning the international legal definition of the word "treaty." In the other two cases, the citation to the Vienna Convention can be found in the dissents. In his dissent in *Sanchez-Llamas v. Oregon* in 2006, Justice Breyer cited the provision of the Convention relating to the relationship between domestic law and treaty obligations.[52] Only in Justice Blackmun's dissent in *Sale v. Haitian Centers Council* from 1993, was there a reference to the Vienna Convention's approach to treaty interpretation.[53] In that case, Blackmun was attempting to find the meaning of several terms found in the United Nations Convention Relating to the Status of Refugees and noted that "[i]t is well settled that a treaty must first be construed according to its 'ordinary meaning,'"[54] with the citation following this sentence to Article 31(1) of the Vienna Convention.

But despite the lack of specific references to the Vienna Convention, there does seem to be a reasonably well-established approach to treaty interpretation that is remarkably consistent with

51. 456 U.S. 25, 30 n.5 (1982). Specifically, the Court refers to Article 2 of the Vienna Convention for the definition of "treaty." *Id.* at 29.

52. 126 S. Ct. 2669, 2691–92 (2006) (Breyer, J., dissenting) (citing Article 36 of the Vienna Convention which affords nationals the right to communicate with their state's consular officers when they are arrested in a foreign country). Justice Breyer discusses section 2 of Article 36, which states that the right of consular communication "shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Id.* at 2692 (citation omitted).

53. 509 U.S. 155, 191, 195 (1993) (Blackmun, J., dissenting) (citing United Nations Protocol Relating to the Status of Refugees, Jan 31, 1967, 19 U.S.T. 6223, 660 U.N.T.S. 267).

54. *Id.* at 191 (citation omitted).

the method set forth in Articles 31 and 32 of the Convention. Indeed, over the course of the years, the Court has developed a methodology for interpreting international agreements that consists of several steps.

First, the Court looks to the text of the treaty, giving words their "ordinary meaning." In the 1985 case of *Air France v. Saks*, for example, the Court noted that "[t]he analysis must begin, however, with the text of the treaty and the context in which the written words are used."[55] In *Maximov v. United States*, the Court looked at "normal word use," and "plain language" in interpreting the text.[56] *United States v. Stuart* notes a presumption in favor of the clear language of the text: "'The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."'"[57] As a guide to determining the meaning of the words, the Court has also made clear that recourse should be had to relevant standards of international law. In 1890, in *De Geofroy v. Riggs*, the Court noted:

> It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction, words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.[58]

55. 470 U.S. 392, 397–98 (1985) (citation omitted). The approach to beginning with the text was reaffirmed in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991):

> "When interpreting a treaty, we 'begin "with the text of the treaty and the context in which the written words are used."'" *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988), quoting *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 534 (1987), quoting *Air France v. Saks*, 470 U.S. at 397.

56. 373 U.S. 49, 52–54 (1963).

57. 489 U.S. 353, 365–66 (1989) (citation omitted).

58. 133 U.S. 258, 271 (1890).

In 1931, in *Santovincenzo v. Egan*, the Court reaffirmed this approach, noting that "[a]s treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'"[59]

Second, the Court then takes recourse to the *travaux préparatoires* and the circumstances surrounding the treaty's conclusion. In 1943, the Supreme Court explained in *Choctaw Nation of Indians v. United States* that: "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[60] More recently, in *Zicherman v. Korean Air Lines* in 1996, Justice Scalia, writing for the Court, noted:

> Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties.[61]

In *Rocca v. Thompson*, the Court explained that treaties "are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the states thereby contracting."[62]

Third, the Court looks to the "post-ratification" practice of states. As noted above, *Choctow Nation, Zicherman,* and *Air France* specifically refer to the practice of the parties.[63] In *United States v.*

59. 284 U.S. 30, 40 (1931) (quoting *De Geofroy*, 133 U.S. at 271).

60. 318 U.S. 423, 431–32 (1943) (citing Factor v. Laubenheimer, 290 U.S. 276, 294–95 (1933); Cook v. United States, 288 U.S. 102, 112 (1933)).

61. 516 U.S. 217, 226 (1996).

62. 223 U.S. 317, 331–32 (1912) (citation omitted). At issue in *Rocca* was a 1878 treaty between Italy and the United States that granted consular officers the authority to intervene in the administration of a citizen's estate when the individual died intestate in a foreign country. *Id.* at 325–26. In interpreting the treaty provision at issue, the Court looked beyond the treaty's language and considered an 1894 correspondence between then Italian Ambassador and U.S. Acting Secretary of State and an 1865 "statement of the law" by the Argentine Confederation. *Id.* at 333.

63. *See Zicherman*, 516 U.S. at 225–26; Air France v. Saks, 470 U.S. 392, 403 (1985); *Choctaw Nation*, 318 U.S. at 431–32.

Stuart the Court explained "[t]he practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed."[64] To determine "post-ratification practice," the Court looks to actual practice of the political arms of states parties. For example, in *United States v. Alvarez-Machain*,[65] the Court discussed the way in which the Mexican Government responded to questions about the Extradition Treaty[66] between the United States and Mexico.

The Court has also looked to decisions of domestic courts of parties to the international agreement to determine post-ratification practice. In *Air France*, the Court sought to interpret the word "accident" used in the Warsaw Convention, noting that "[r]eference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories helps clarify the meaning of the term."[67] After looking at political acts by the signatories, the Court noted that "[i]n determining precisely what causes can be considered accidents, we 'find the opinions of our sister signatories to be entitled to considerable weight.'"[68] The Court then looked to the decision of a French court to assist in its interpretation. Even Justice Scalia, who has rejected the notion that decisions of non-American courts should be used to interpret the U.S. Constitution, noted in his dissent in *Olympic Airways v. Husain*, that is it quite proper to use foreign court opinions in interpreting international agreements:

> We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently. . . . Finally, even if we disagree, we surely owe the conclusions reached by appellate

64. United States v. Stuart, 489 U.S. 353, 369 (1989) (citations omitted).

65. *See* 504 U.S. 655, 665–66 (1992) (discussing the Mexican Government's failure to request the inclusion of a clause in the United States-Mexico Extradition Treaty that would have precluded each state from abducting the other's citizens for criminal prosecution, where the Mexican Government knew before and after it ratified the Treaty, that the U.S. government permitted such abductions).

66. Extradition Treaty, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059.

67. *Air France*, 470 U.S. at 403.

68. *Id.* at 404 (quoting Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979)).

> courts of other signatories the courtesy of respectful consideration.[69]

Interestingly enough, the Court has also been willing to examine decisions by the international courts in assisting it in seeking the meaning of treaties. As far back as 1957, Justice Frankfurter cited the ICJ to interpret a treaty provision in *Reid v. Covert.*[70] More recently, the Court has noted in *Sanchez-Llamas* that a decision of the ICJ would be entitled "to the 'respectful consideration' due an interpretation of an international agreement by an international court."[71] The Court, however, emphasized in this case that the ICJ decision would seem to have no binding effect on the courts of the United States.[72]

69. Olympic Airways v. Husain, 540 U.S. 644, 660–61 (2004) (Scalia, J., dissenting) (citation omitted).

70. 354 U.S. 1, 61 (1957) (Frankfurter, J., concurring) ("The word 'disputes' has been interpreted by the International Court of Justice to comprehend criminal as well as civil disputes.") (citation omitted).

71. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2685 (2006). However, the Court also stated that a treaty's plain import overcomes the "respectful consideration" accorded to the ICJ's interpretation. *Id.*

72. The Court explained:

> Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ's decisions have "*no binding force* except between the parties and in respect of that particular case," Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945) (emphasis added). Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. *Id.*, at 1055 (ICJ is "the principal judicial organ of the United Nations"); see also Art. 34, *id.*, at 1059 ("Only states [*i.e.*, countries] may be parties in cases before the Court"). While each member of the United Nations has agreed to comply with decisions of the ICJ "in any case to which it is a party," United Nations Charter, Art. 94(1), 59 Stat. 1051, T.S. No. 933 (1945), the Charter's procedure for noncompliance-referral to the Security Council by the aggrieved state-contemplates quintessentially *international* remedies, Art. 94(2), *ibid.*

Id. at 2684–85 (footnote omitted).

III. THE IMPLICATIONS FOR THE SEPARATION OF POWERS

The decision by the Supreme Court in *Hamdan*—especially when coupled with the Court's historic approach to treaty interpretation—has significant implications for the roles of the President and Congress in the interpretation process.

To begin with, *Hamdan* makes it extraordinarily clear that the final word on treaty interpretation comes from the Judiciary. As noted earlier, despite the fact that the case dealt with the interpretation of a treaty that discussed issues relating to the conduct of war—presumably an area that is core to the President's authority as commander-in-chief—the Supreme Court did not simply defer to the President's interpretation of Common Article 3. And, as Professor Carlos Vazquez has noted, the implications of *Hamdan* for treaty interpretation are even more significant in light of the decision issued by the Court the day before *Hamdan.*[73] In *Sanchez-Llamas v. Oregon*, the Supreme Court was required to interpret the Vienna Convention on Consular Relations.[74] Faced with a decision of the International Court of Justice purporting to provide one interpretation of the Convention, the Court made a very clear statement about the role of the Judiciary in interpreting international agreements. Writing for the Court, Chief Justice Roberts explained:

> Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. That "judicial Power . . . extend[s] to . . . Treaties." *Id.*, § 2. And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." *Marbury v. Madison*. If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established

73. *See* Carlos Vázquez, Hamdan and the Geneva Conventions, (June 30, 2006), http://gulcfac.typepad.com/georgetown_university_law/2006/06/hamdan_and_the_.html (emphasis added); *see also infra* text accompanying note 90.

74. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

> by the Constitution. Ibid.; see also *Williams v. Taylor*, 529 U.S. 362, 378-379, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (opinion of Stevens, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law"). It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.[75]

The Court could not be clearer in indicating that it has the Constitutional duty to interpret all federal law—including treaties. Moreover, the last sentence in the passage above is especially important. Here the Court seems to indicate that when the United States ratifies a treaty and the Senate gives advice and consent, this takes place with the understanding that the courts have a role in the treaty's interpretation. In other words, the Court seems to be suggesting that by making a treaty the "law of the land," the political branches of government are thereby deferring to the Judiciary the right of interpretation.

From this conclusion, one can draw several even more specific inferences for the separation of powers. First, the so-called "common understanding" of a treaty's interpretation that was shared by the President and the Senate at the time of ratification is not binding upon the courts.

During the early 1980's a significant controversy about treaty interpretation emerged in the wake of President Ronald Reagan's efforts to "re-interpret" [76] the Antiballistic Missile ("ABM") Treaty of 1972.[77] At issue was whether the ABM Treaty permitted the

75. *Sanchez-Llamas*, 126 S. Ct. at 2684 (some internal citations omitted).

76. For an overview of the ABM Treaty reinterpretation controversy, see Abram Chayes & Antonia Handler Chayes, *Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986); Kevin C. Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L L 854 (1986); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986); Symposium, *Arms Control Treaty Reinterpretation*, 137 U. PA. L. REV. 1351 (1989).

77. Limitation of Anti-Ballistic Missile Systems Treaty, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435.

development of space-based ABM systems if they were based on "other physical principles."[78] While the negotiation record of the Treaty seemed to be unclear on this question, many argued that when the Senate was considering the Treaty, Administration officials made representations to the Senate that indicated that such systems could not be developed.[79] As a consequence, it seemed to some that there was a "common understanding" that both the Senate and the Executive Branch held. When the Reagan Administration came into office, however, a variety of officials began to "re-interpret" the Treaty. These persons went back to the negotiating record and reached the conclusion that even if the Senate and President Nixon had indeed accepted the interpretation that such systems were not permitted, the Soviet Union never did.[80] Thus, because there had never been a meeting of the minds of the two treaty partners as to this restriction, the parties were free to develop space-based systems based on "other physical principles."

This "re-interpretation" by the Administration so perturbed many members of Congress that when the Senate was giving advice and consent to the Intermediate Range Nuclear Missile Treaty ("INF Treaty"),[81] the Senate imposed a condition requiring the Executive

78. *See* Kennedy, *supra* note 76, at 861 (stating that "other physical principles" is the term of art used in the ABM Treaty to describe systems "such as lasers and particle beams").

79. *See id.* at 864 (quoting Senator James Buckley, who testified against adopting the ABM Treaty at the Senate hearing and stated that the ABM Treaty has the "effect . . . of prohibiting the development and testing of a laser-type system based in space"). The Senate hearings reached two conclusions, "first, that when Article III, paragraph 1 of Article V and Agreed Statement D are read together, their import is that the development and testing of 'Star Wars' technology in any basing mode other than a fixed, land-based mode is prohibited; and second, that the deployment of such technology in even the fixed, land-based mode is prohibited under the Treaty." *Id.* at 862–66.

80. *See*, *e.g.*, Charlotte Saikowski, *U.S. Grapples with ABM Definitions*, CHRISTIAN SCIENCE MONITOR, Oct. 17, 1985, at 1 (providing that Assistant Secretary of Defense Richard N. Perle revisited the ABM Treaty's negotiating records to conclude that "[a]fter one wades through all the ambiguities and reads carefully the text of the treaty itself and the negotiating record . . . with respect to systems based on 'other physical principles'—such as lasers and directed-energy weapons—we have the legal right under the treaty to conduct research and development and testing unlimited by the terms of the treaty").

81. Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., arts. 1–17, Dec. 8, 1987, S. Treaty Doc. No. 100-11 (1988).

Branch to interpret the Treaty in accordance with the "common understanding." The condition—sometimes called the Biden Condition[82]—states:

> (1) Provided, that the Senate's advice and consent to ratification of the INF Treaty is subject to the condition, based on the Treaty Clauses of the Constitution, that—
>
> (A) the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification;
>
> (B) such common understanding is based on:
>
> (i) first, the text of the Treaty and the provisions of this resolution of ratification; and
>
> (ii) second, the authoritative representations which were provided by the President and his representatives to the Senate and its Committees, in seeking Senate consent to ratification, insofar as such representations were directed to the meaning and legal effect of the text of the Treaty; and
>
> (C) the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and

82. *See* Gary M. Buechler, *Constitutional Limits on the President's Power to Interpret Treaties: The Sofaer Doctrine, the Biden Condition, and the Doctrine of Binding Authoritative Representations*, 78 GEO. L.J. 1983, 1990–97 (1990) (discussing the Biden Condition and its three criteria for binding the Executive branch to its former representations about a treaty's meaning made during the Senate advice and consent process). The three criteria are: (1) the statements must have been by persons "authorized to speak for the Executive on that particular [treaty] subject"; (2) only statements "'directed to the meaning and legal effect of the text of the Treaty'" are binding on the Executive; and (3) the Executive must have represented "only one meaning" for the treaty or treaty provision at issue. *Id.* at 1990–95 (footnotes omitted).

> consent to a subsequent treaty or protocol, or the enactment of a statute; and
>
> (D) if, subsequent to ratification of the Treaty, a question arises as to the interpretation of a provision of the Treaty on which no common understanding was reached in accordance with paragraph (2), that provision shall be interpreted in accordance with applicable United States law.[83]

In the wake of the ABM Treaty controversy this reservation certainly seemed to make sense. The Senate did not want a treaty to be presented to it with a particular meaning only to have that Administration or a subsequent one come back and "discover" a true meaning of the treaty that was at variance with what was generally understood when the Senate voted on the treaty. But *Hamdan*, *Sanchez-Llamas*, and indeed the general practice of the courts would seem to indicate rather clearly that while such common understanding would presumably be given "respectful consideration," it would not be binding on the courts.

Interestingly enough President Reagan seemed to acknowledge the role of the Judiciary as the final arbiter of interpretation. Following the Senate's vote on the INF Treaty, Reagan issued a statement expressing his concern with the Senate's reservation. He argued that "[t]he Senate condition relating to the Treaty Clauses of the Constitution apparently seeks to alter the law of treaty interpretation."[84] Explaining that, "[t]reaties are agreements between sovereign states and must be interpreted in accordance with accepted principles of international law and United States Supreme Court jurisprudence,"[85] the President noted:

> This Administration does not take the position that the Executive branch can disregard authoritative Executive statements to the Senate, and we have no intention of

83. 134 CONG. REC. S6876, S6937 (daily ed. May 27, 1988) (Executive session on the INF Treaty).

84. President's Message to the Senate on the Soviet-United States Intermediate-Range Nuclear Force Treaty, 24 WEEKLY COMP. PRES. DOC. 779 (June 10, 1988).

85. *Id.*

> changing the interpretation of the INF Treaty which was presented to the Senate. On the contrary, this Administration has made it clear that it will consider all such authoritative statements as having been made in good health. Nonetheless the principles of treaty interpretation recognized and repeatedly invoked by the courts may not be limited or changed by the Senate alone, and those principles will govern any future disputes over interpretation of this Treaty. As Senator [Richard G.] Lugar pointed out during the debate, *the Supreme Court may well have the final judgment, which would be binding on the President and Senate alike.*[86]

A second implication that can be drawn from the *Hamdan* decision is that it seems unlikely that Congress can impose by statute a particular interpretation on a treaty. The case of *Haver v. Yaker* suggests that the Senate could, through adopting a reservation, impose a specific interpretation on a treaty *as a part of the ratification process*. [87] But Congressional efforts to impose direct interpretations by statute outside of the advice-and-consent process would not seem to be dispositive on the courts. If, as the Supreme Court has consistently ruled, a treaty is an agreement among sovereign states and those states' understandings of the treaty are critical for interpretation, the unilateral effort by U.S. Congress would not in and of itself be authoritative. This would mean the Military Commissions Act, insofar as it purports to impose an interpretation, would not be binding on the courts.

Clearly this view has been debated in the wake of the Military Commissions Act. Professor Julian Ku, for example, noted the following in connection with an earlier legislative proposal:

> I am not aware of other examples where Congress has reversed a Court's interpretation of a treaty, but there is zero doubt in my mind that this move is constitutional. Congress has the authority to nullify the domestic effect of treaties via

86. *Id.* (emphasis added).

87. Haver v. Yaker, 76 U.S. 32, 35 (1869) (affirming that the Senate can impose a reservation upon a treaty, which upon the treaty's ratification becomes binding as U.S. law). "In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it . . . ." *Id.*

> the "last in time rule" and this authority almost certainly includes the power to adopt a binding interpretation of a treaty for domestic purposes as well. In other words, Congress might be adopting an incorrect interpretation of Common Article 3, but its "incorrect" interpretation is still binding as a matter of domestic U.S. law.[88]

Hamdan, *Sanchez-Llamas*, and the record of Supreme Court jurisprudence seem to suggest that Ku is wrong. It is true that under the Supreme Court's decision in *Whitney v. Robertson*—which has been reaffirmed in many other cases—when there is a conflict between a treaty and a federal statute, the court will try to interpret them in such a way as to give effect to both, but if that is not possible, the one enacted later in time will prevail.[89] But that seems to require that the treaty say "X" and the statute say "Not X." For example, if a treaty said "the death penalty is hereby prohibited in cases of persons under eighteen years of age," and the statute said "the death penalty is not prohibited in cases of persons under eighteen years of age," the latter in time—whether the statute or the treaty—would prevail. But if Congress by statute says a treaty to which the United States is a party *must be interpreted* in a particular way, it seems unlikely the courts will accept that interpretation. As Carlos Vázquez has pointed out:

> It is true that, under the last-in-time rule, Congress and the President can legislate in contravention of a treaty obligation. But it is significant that, in a decision on Wednesday [June 28, 2006], *Sanchez-Llamas v.Oregon, the Court relied on Article III of the Constitution and quoted Marbury v. Madison in holding that it is the province and duty of the Supreme Court to interpret treaties.* The Court gave that as a reason why the interpretation of another treaty by the International Court of Justice could not be considered binding, but presumably this analysis also makes the Supreme Court the authoritative interpreter of treaties vis-à-vis the President and even Congress. If so, then the Court's analysis in Sanchez-Llamas rules out a statute that purports to reject the Supreme Court's interpretation of the Geneva

88. Julian Ku, Why Congress Can Override the Supreme Court's Interpretation of International Law, Opinio Juris, (Sept. 7, 2006), http://www.opiniojuris.org/posts/1157605434.shtml.

89. *See* Whitney v. Robertson, 124 U.S. 190, 195 (1888).

> Convention and "restore" the President's interpretation, as Professor John Yoo has urged Congress to do. The law-makers could, of course, repeal the Geneva Convention's domestic effect, but, in light of Sanchez-Llamas, they would have to do so by openly rejecting the Geneva Convention. Openly rejecting the Geneva Conventions would of course be a terrible idea, given the protections they provide to our troops. I assume (and hope) that such repudiation is not within the range of plausible options. If Congress is powerless to reject the Supreme Court's interpretation of the treaty, and repudiation of the treaty is not conceivable, then any legislative solution would have *to comply with the Supreme Court's interpretation of Common Article 3.*[90]

A third implication of the Supreme Court's approach to treaty interpretation is that Congress could not tell the Court to exclude certain sources from its efforts to interpret a treaty. As noted earlier, the Military Commissions Act sought to impose a certain statutory interpretation on the Geneva Conventions, but it also sought to instruct the courts not to consider certain sources in the process of treaty interpretation—domestic courts in other countries and international courts.

Needless to say, there has been a great debate about the use of so-called "foreign court" decisions in U.S. courts.[91] And while the use of non-American courts ruling in efforts to interpret the U.S. Constitution has met with strong criticism from some members of the bench—especially Justice Scalia,[92] the use of non-American court decisions to interpret treaties has not. As noted above, Justice Scalia has applied such court rulings to interpret treaties.[93] Recently, in an address at the American Enterprise Institute, Scalia noted:

90. Vázquez, *supra* note 73 (emphasis added).

91. *See, e.g.*, Mark Tushnet, *When is Knowing Less Better Than Knowing More?: Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1278–1302 (2006) (discussing theory-based, irrelevance, expressivist, and quality-control criticism when dealing with non-U.S. law in constitutional interpretation).

92. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (criticizing the Court's use of foreign case law and noting that "[t]he Court's discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans'") (citation omitted).

93. *See* Zicherman v. Korean Air Lines, 516 U.S. 217, 226 (1996) (providing

> So, moreover, I do not take the position that foreign law is never, ever relevant to American judicial opinions. It sometimes is. For example, in the interpretation of treaties, the object of a treaty is to have nations agree on a particular course of action. If I'm interpreting a provision of a treaty that has already been interpreted by several other signatories, I am inclined to follow the interpretation taken by those other signatories so long as it's within the realm of reasonableness. I mean, if they've taken an absolutely unreasonable interpretation, of course I wouldn't follow it. But where it's within the bounds of the ambiguity contained in the text, I think it's a good practice to look to what other signatories to the treaty have said. Otherwise you're going to have a treaty that's interpreted different ways by different countries and that's certainly not the object of the exercise.[94]

Scalia even indicated that it would be proper to use foreign decisions to interpret a federal statute that related to the treaty. He explained:

> I also think that foreign law is sometimes relevant to the meaning of an American Statute. For example, if the Statute is designed to implement a treaty provision, the interpretation of that treaty provision by foreign courts is relevant to what the treaty means, and hence, relevant to what the provision of the American Statute implementing the treaty means.[95]

Given the comments by Scalia and the Court's jurisprudence on this question, it would seem clear that efforts, like the Military Commission Act, to tell courts that they cannot use a "foreign or international source of law" as "a basis for a rule of decision in the courts of the United States"[96] in interpreting the Military Commission Act's interpretation of the Geneva Conventions would likely be rejected by the Supreme Court.

Justice Scalia's opinion for a unanimous Court and stating that since a ratified treaty is U.S. law as well as an agreement among nation states, the Court has "traditionally considered as aids to its interpretation the negotiating and drafting history *(travaux preparatoires)* and the postratification understanding of the contracting parties.").

94. Justice Antonin Scalia, Keynote Address at the Conference on Outsourcing of American Law, American Enterprise Institute (Feb. 21, 2006), *available at* http://www.aei.org/events/filter.,eventID.1256/transcript.asp.

95. *Id.*

96. Military Commissions Act § 6(a)(2).

IV. CONCLUSIONS AND RECOMMENDATIONS

In light of the preceding analysis, several points seem to be quite clear. First, when it comes to interpreting treaties, the courts—not the President, not the Congress—have the final word—at least when cases are presented for judicial resolution.[97] Second, even though the *Hamdan* decision did not lay out a detailed method for interpreting treaties, prior case law makes it clear that the Supreme Court will follow a procedure remarkably similar to that provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Based on these conclusions, the Executive and Legislative branches should take notice: once a treaty has been made and ratified, they no longer have control over its interpretation. This means that as the President negotiates treaties and as the Senate gives advice and consent, political decision-makers should be aware of steps that they can take to insure that treaties will be given the interpretation that they intend. Here are some recommendations:

- For future treaty negotiations:
  - First, the political branches should make every effort to define terms in the treaty text itself. It is not unusual for treaties to contain explicit provisions that provide definitions of terms or other concepts.[98] If this is done, it will be less likely that a

97. Needless to say, there may have been many treaty interpretation controversies where the matter never reaches the courts. The interpretation questions relating to the ABM Treaty, for example, never got to the judiciary.

98. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1949, S. Treaty Doc. No. 81-15 (1986), 78 U.N.T.S. 277, 280 (defining "genocide" as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group"); CAT, *supra* note 13, art. 1, 1465 U.N.T.S. at 113–14 (defining "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); VCLT, *supra* note 42, art. 2, 1155

court will misinterpret provisions of the treaty. Needless to say, there are times when the negotiators may wish to have ambiguities in the treaty for a variety of political reasons.[99] There should certainly be no hard and fast rule against such ambiguities, but the negotiators should always bear in mind that in the future a court may not rule the same way on those provisions as the drafters might have originally desired.

- Second, the negotiators should make on-record comments about the meaning of the agreement. These statements should be made during the negotiating process and during the ratification process. The more information that has been placed in the *travaux*, the more data the court will have to rely upon when it provides its interpretation.
- Third, if after the treaty negotiations have concluded and the political branches are still concerned about the interpretation of certain provisions of the agreement, the Senate could through a so-called "RUD" (reservation, understanding, or declaration) stipulate a particular interpretation. As noted earlier, under *Haver v. Yaker*, such an interpretation imposed by the Senate as part of the advice and consent process would presumably be binding on the courts.[100] This approach, however, would have numerous disadvantages, not the least of which is that the other treaty parties could conclude that the United States was seeking effectively to change the text after the negotiations had ended. As a consequence, I would recommend that RUDs imposing interpretations be used with great caution.
- Fourth, another option for the political branches during the advice and consent process would be for the Senate to

U.N.T.S. at 333 (creating a list of definitions as one of the first provisions in the Treaty and providing definitions for terms like "treaty," "ratification," "full powers," and "international organization").

99. *See* Christine Bell & Kathleen Cavanaugh, *"Constructive Ambiguity" Or Internal Self-Determination? Self-Determination, Group Accommodation and the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1345, 1356 (1999) ("Constructive ambiguity is a classic maneuver when agreeing on a hotly-disputed text."). "Actors deliberately adopt language that is vague and can, simultaneously, mean different things to different people." *Id.*

100 *See supra* note 87 and accompanying text.

stipulate through an RUD that the agreement as a whole or certain provisions of the agreement were non-self-executing.[101] Although there is some debate on this issue, such an RUD would seem to prevent courts from reaching interpretation questions about the agreement or those specific provisions.[102] But even more so than with RUDs that impose specific interpretations on an agreement, RUDs that make a treaty, or portions thereof, non-self-executing have significant disadvantages. It might appear to our treaty partners that the United States was not fully committed to its international obligations under the agreement and that we were, in essence, acting in bad faith. Accordingly, I believe that such RUDs should be used only in extraordinary cases, if at all.[103]

- Fifth, because postratification practice can also be a guide for court decisions, the Executive Branch should very carefully monitor the way in which other states act—both in court decisions and in the behavior of their executive branches. If a state seems to be behaving in a manner that is contrary to the interpretation of the agreement that the American negotiators

[101] A "self-executing" treaty is one that is immediately effective in the U.S. domestic legal system without the need for statutory implementation. *See* Carlos Manuel Vazquez**,** *The Four Doctrines of Self-Executing Treaties,* 89 AM. J. INT'L L. 695, 695 (1995) (footnote omitted) ("At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative "implementation.")

[102] In *Sosa v. Alvarez-Machain*, the Supreme Court seemed to acknowledge the ability of an RUD to establish that treaty provisions are non-self-executing and thus prevent courts from interpreting those provisions. 542 U.S. 692, 728 (2004) ("Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.") For a more extensive discussion of the arguments surrounding this use of RUDs, see Carlos Manuel Vázquez, *Military Commissions Act of 2006: The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide,* 101 AM. J. INT'L L. 73, 90-91 (2007) which discusses the scholarly debate about the effect of RUDs that seek to make treaties or portions thereof non-self-executing.

[103] I want to thank Professor Carlos Vázquez for bringing this potential use of RUDs to my attention. Neither Professor Vázquez nor I are advocates of this use of RUDs.

intended, then U.S. officials should go on record to indicate that disagreement.

- For prior treaties:

If there are provisions in treaties that have been previously negotiated and ratified, the Executive branch cannot go back in time and construct a negotiation history. But it can take other measures:

- First, the Executive branch could seek to negotiate formal amendments or additional protocols to existing agreements that would establish the definition of certain terms. Take but one example: as noted earlier, much of the current controversy relates to the applicability of the Geneva Conventions to armed conflicts involving non-state actors such as al Qaeda.[104] Instead of trying to determine what the drafters of those Conventions would have done had they have been able to envision the world of Twenty-First Century conflict, it would make more sense to draft new Conventions that could more clearly address the nature of contemporary international conflict.

104. Of course groups like al Qaeda are only one of the many non-state actors that are playing roles in international conflict. Private contractors and security firms have been proliferating and are now intimately involved in many aspects of armed combat. And a multiplicity of non-governmental organizations are also engaged in dealing various aspects of armed conflict. *See generally* Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367, 367–69, 413–14 (noting the expanding participation of civilian contractors in U.S. military operations and arguing that military courts-martial is the preferred jurisdiction for such contractors who commit war crimes); Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29 (discussing the roles of various private security companies in Iraq, such as protecting government buildings, guarding corporate contractors working on Iraq's reconstruction, and defending people likely to be targeted by insurgents); Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, WASH. POST, Sep. 10, 2005, at A1 (observing that foreign security contractors working in Iraq may be undermining relations between foreign military forces and Iraqi civilians); Nathan Hodge, *Army Chief Notes 'Problematic' Potential of Armed Contractors on the Battlefield*, DEF. DAILY, Sept. 9, 2005 (stating that Army Chief of Staff Gen. Peter Schoomaker suggested that the use of private contractors raises important "issues of command and control"); David Washburn & Bruce V. Bigelow, *In Harm's Way: Titan in Iraq; Workers say 'Wild West' Conditions Put Lives in Danger*, SAN DIEGO UNION TRIB., July 24, 2005, at A1 (stating that Operation Iraqi Freedom has experimented with outsourcing "many of the behind-the-lines support functions," but due to the increasing insurgency, "the lines between warriors and civilians" have blurred).

- Second—and this is the more extreme step—Congress could enact legislation that is clearly contrary to the agreement. Under the principle of *Whitney v. Robertson*, when there is a conflict between a treaty and a federal statute, if the two cannot be reconciled, the latter in time will prevail.[105] Note: I am not suggesting that Congress attempt to impose a statutory *interpretation* of terms of a treaty—which is what the Military Commission Act seeks to do. As noted earlier, given the case law, the courts are likely to say that no *interpretation* that Congress seeks to impose on the Courts would be binding on the courts. Rather, I am suggesting that if Congress is truly concerned about the way a certain treaty provision will be interpreted, Congress needs to adopt legislation *clearly contradicting* that provision.

  As noted above, this is truly an extreme step and, in my view, should be undertaken only in exceptional circumstances. Even though as a matter of domestic law, the subsequent statute would prevail, the United States would be in violation of its international obligation under the treaty and would suffer potentially adverse consequences on the international plane.

In sum, treaties in the United States enjoy a dual role. They create both international law *and* U.S. domestic law. Insofar as cases present themselves in U.S. courts, the Supreme Court has made it clear that the courts will be the final authority on treaty interpretation. Rather than attempting to fight against the courts, policy makers should accept this reality of the judicial role and work in the future to craft treaties in such a way that the true intent of the parties will be given effect by American courts.

105. *See* Whitney v. Robertson, 124 U.S. 190, 195 (1888).