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Article

**The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law**

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I.	Early Years of the Court and the “Law of War” .....	1344
A.	Situating Humanitarian Law in the Law of War .....	1345
B.	The Court’s Early References .....	1350
C.	Conclusion .....	1356
II.	Hague Law .....	1357
A.	Seeking Definition: Setting the Parameters of Reliance on Humanitarian Law .....	1358
B.	Hague Law in the Context of Naval War .....	1364
C.	Assessing Alleged Violations of Hague Law: Institutional Reluctance .....	1366
D.	Hague Law Outside of Armed Conflict: Isolated and Brief .....	1370
E.	Conclusions .....	1372
III.	Geneva Law .....	1372
A.	Early Treatment: <i>Yamashita</i> and <i>Eisentrager</i> .....	1373
1.	Petitioners’ Geneva Claims .....	1373
2.	Probing Humanitarian Law to Define War Crimes .....	1378
a.	<i>Yamashita</i> .....	1379
b.	<i>Eisentrager</i> .....	1381
3.	Understanding the Court’s Early Reliance on Geneva Law .....	1383
B.	Geneva Law Outside of Armed Conflict .....	1386
C.	Geneva Law in the “War on Terror” .....	1389
1.	<i>Hamdi v. Rumsfeld</i> .....	1390
a.	<i>Hamdi</i> ’s Use of Humanitarian Law .....	1392

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b.	The Court's Reluctance to Engage Holistically the Corpus of IHL .....	1394
2.	<i>Hamdan v. Rumsfeld</i> .....	1401
a.	Probing Humanitarian Law to Define "Conspiracy" .....	1403
b.	Finding a Violation of Common Article 3 .....	1404
c.	The Wrong Course to the Right Conclusion? .....	1411
3.	<i>Boumediene</i> and <i>Munaf</i> .....	1416
4.	An Emerging Change of Heart on Geneva Issues? .....	1418
	Conclusion .....	1421

The general paucity of authoritative mechanisms to interpret the four Geneva Conventions and the two Additional Protocols presents an obstacle to the development of international humanitarian law (IHL), the body of law designed to regulate the conduct of belligerents and to protect certain categories of persons during warfare.<sup>1</sup> This Article assesses the U.S. Supreme Court's historical, current, and potential role in filling this gap. How willing is the Court to engage humanitarian law issues and how thorough is its treatment of them? What has the Court contributed to the development of humanitarian law? These questions demand primarily descriptive answers. As courts and tribunals around the world grapple with thorny questions of humanitarian law, the experience of the U.S. Supreme Court may be, at turns, instructive and cautionary. But underneath these descriptive questions lies a partially normative one: what role *should* the Supreme Court play among other law-declaring fora in interpreting and developing humanitarian law?

The Supreme Court appears reluctant to invoke the Geneva Conventions. In fact, it has referenced Geneva law in only ten cases: seven cases reference the Geneva Conventions of 1949 and the remaining three reference the Conventions of 1929 and 1864.<sup>2</sup> In four of these ten cases, however, the con-

1. For a brief discussion of the sources of humanitarian law and relevant interpretive bodies, see DOCUMENTS ON THE LAWS OF WAR 4–17 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

2. *Boumediene v. Bush*, 553 U.S. 723, 817, 825 (2008) (Roberts, C.J., dissenting); *Munaf v. Geren*, 553 U.S. 674, 681 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 571–72, 589, 604, 612, 619–20, 625–33, 637, 642, 654, 694, 706, 715–20, 724–25, 728–29 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *Hamdi v. Rumsfeld*, 542 U.S.

ventions receive only fleeting mention in contexts unrelated to armed conflict.<sup>3</sup> In another case, Geneva law surfaces only in dissent.<sup>4</sup> Throughout its history, therefore, the Court has made explicit, substantive reference to Geneva law in only five cases.

The Geneva Conventions, of course, are not the end of the story. Treaties stemming from the Hague Conferences of 1899 and 1907 as well as some customary rules also combine to form the corpus of humanitarian law.<sup>5</sup> The Court has referenced Hague law in a total of sixteen cases, including three already mentioned,<sup>6</sup> placing the number of cases in which at least one

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507, 515, 520–21, 538, 549–51, 587, 597 (2004) (plurality opinion); *Stanford v. Kentucky*, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988); *Dep't of Emp't v. United States*, 385 U.S. 355, 359 & n.8 (1966); *Johnson v. Eisentrager*, 339 U.S. 763, 767, 785, 789 (1950); *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 196 n.1, 199, 200 n.5, 203 & n.10 (1946); *In re Yamashita*, 327 U.S. 1, 6, 15–16, 20, 21 & n.8, 22–23, 24 & n.10 (1946); *id.* at 36–37 (Murphy, J., dissenting); *id.* at 57–58, 72 n.36, 73, 74 & n.38, 77–78, 81 (Rutledge, J., dissenting). This list does not include Justice Thomas's recent dissent from the Court's denial of certiorari in *Noriega v. Pastrana*, 130 S. Ct. 1002 *passim* (2010), discussed in Part II.C.4, nor does it include Justice Breyer's passing reference to Geneva law in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2739 (2010) (Breyer, J., dissenting). "Geneva law" is herein used to refer to the four Geneva Conventions of 1949 and the Convention of 1929 relating to armed conflict.

3. See *Stanford*, 492 U.S. at 389, 390 n.10 (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, as one of "three leading human rights treaties ratified or signed by the United States [to] explicitly prohibit juvenile death penalties"); *Thompson*, 487 U.S. at 831 n.34 (same); *Dep't of Emp't*, 385 U.S. at 359 & n.8 (recognizing that the American Red Cross was devised, in part, "to meet this Nation's commitments under various Geneva Conventions" and citing Geneva Conventions of 1864, 1929, and 1949); *A.P.W. Paper Co.*, 328 U.S. at 199, 200 & n.5 (describing the origins of the Red Cross organization and quoting the 1929 Geneva Convention's provision for the exclusive use of the name and emblem of the Red Cross).

4. *Boumediene*, 553 U.S. at 817, 825 (Roberts, C.J., dissenting).

5. See generally DOCUMENTS ON THE LAWS OF WAR, *supra* note 1, at 47–730 (compiling nearly 700 pages of treaties and other documents that comprise the law of war).

6. *Republic of Austria v. Altmann*, 541 U.S. 677, 707 (2004) (Breyer, J., concurring); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 442 n.2 (1964); *United States v. Merz*, 376 U.S. 192, 199 n.4 (1964); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 297 n.72 (1963) (Brennan, J., concurring); *Dalehite v. United States*, 346 U.S. 15, 19 n.2 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 n.7 (1952); *Madsen v. Kinsella*, 343 U.S. 341, 348 n.13 (1952); *Ex parte Kawato*, 317 U.S. 69, 72 n.1 (1942); *Ex parte Quirin*, 317 U.S. 1, 30 n.7, 34, 38 (1942); *Littlejohn & Co. v. United States*, 270 U.S. 215, 226 & n.\* (1926); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 299, 301 (1918); *Berg v. British & African Steam Navigation Co. v. United States*, 243 U.S. 124, 150–51 (1917); *MacLeod v. United States*, 229 U.S. 416, 425–26

member of the Court explicitly has considered the principal humanitarian law treaties at only twenty-three. The Court's references to the customary laws of war, however, are more numerous. Still, while it has referenced the "law of war" in over one hundred cases, most such references are not to law of a distinctly "humanitarian" character.<sup>7</sup> The Court's long history of reliance on the "law of war" thus reveals a similar paucity of references to what can be more narrowly defined as the "humanitarian" law of war.

Yet this relatively small body of humanitarian law jurisprudence is wide-ranging. It encompasses a broad number of substantive provisions of humanitarian law and arises in a variety of doctrinal contexts: the Court has invoked Hague and Geneva law in interpreting the Eighth Amendment bar on "cruel and unusual" punishment,<sup>8</sup> as guidelines in fashioning process requirements for military tribunals,<sup>9</sup> and in adjudicating petitions for writs of habeas corpus.<sup>10</sup>

The jurisprudence reveals several distinct patterns in the Court's approach to humanitarian law issues. First, the Court is loath to rest its decisions on humanitarian law treaties.<sup>11</sup> The Court generally invokes humanitarian law as second-level authority, which it scrupulously observes as being incorporated into domestic law by statute or executive pronouncement.<sup>12</sup> Second, even where the Court does not rest its decision on hu-

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(1913). The foregoing does not duplicate cases that cite both Geneva and Hague law, of which there are but three: *Hamdan*, 548 U.S. at 603, 604 & n.36 (plurality opinion); *Hamdi*, 542 U.S. at 520; and *Yamashita*, 327 U.S. at 8, 14, 15-16; *id.* at 36-37 (Murphy, J., dissenting).

7. *E.g.*, *Boumediene*, 553 U.S. at 762 ("[T]he Court addressed whether habeas corpus jurisdiction extended to enemy aliens who . . . violat[ed] the laws of war.").

8. *See Thompson*, 487 U.S. at 831 n.34 (considering the implications of the juvenile death penalty); *see also Stanford*, 492 U.S. at 390 n.10.

9. *See Hamdan*, 548 U.S. at 631-33.

10. *E.g.*, *Munaf v. Geren*, 553 U.S. 674, 705 (2008).

11. Humanitarian law treaties are not unique in this respect—at least for certain portions of the Court's history. *See* Paul B. Stephan, *Treaties in the Supreme Court: 1946-2000* (forthcoming 2011) (manuscript at 20), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1559151](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559151) ("What [the Court] did not do [during this period] is allow treaties unaccompanied by statutory implementation to serve as a basis for constraining the treaty-maker, namely the federal government.").

12. *E.g.*, *Hamdan* 548 U.S. at 633 ("[I]t appears the Government 'regard[s] the provisions of [Protocol I of the Geneva Convention of 1949] as an articulation of safeguards to which all persons . . . are entitled.'" (quoting William H. Taft IV, *Current Pressures on International Humanitarian Law: The Law of Armed Conflict After 9/11*, 28 YALE J. INT'L L. 319, 322 (2003))).

manitarian law, it generally offers some degree of analysis, as opposed to rejecting humanitarian law claims out of hand. This analysis, however, suffers from a reticence explicitly to engage the entire corpus of humanitarian law and a tendency to reference discrete principles without providing the necessary context. Third, the Court has historically referred to humanitarian law for purposes of definition, either of particular concepts, or to assess the charges levied against an individual challenging his trial by military tribunal.<sup>13</sup>

This Article offers a comprehensive assessment of the Supreme Court's approach to humanitarian law as embodied in the Hague and Geneva Conventions.<sup>14</sup> But first a cautionary note is in order. This review is necessarily underinclusive in that it does not consider cases in which humanitarian law issues were briefed but not addressed in the Court's opinions. To this extent, this Article does not offer a full picture of the Court's reluctance to engage humanitarian law arguments. Still, focusing on what the Court has actually said about IHL is a necessary step in understanding the Court's place among other law-declaring fora—national and international courts, treaty bodies, etc.—in interpreting this crucial body of law. And while the Court's global influence may be waning, the United States continues to play a major role in the development of customary international law.<sup>15</sup> A close look at the Supreme Court's treatment of humanitarian law thus provides a useful window onto its potential customary development.

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13. *E.g.*, *In re Yamashita*, 327 U.S. 1 *passim* (1946) (analyzing how and why the Geneva Convention did not apply).

14. For a broader discussion about the role of U.S. courts in interpreting IHL, see Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911*, 36 GEO. WASH. INT'L L. REV. 1 (2004). This Article does not wade into the heated debate about the merits of U.S. courts' use of international and foreign law. For background, see Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010), available at [http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?filename=sp\\_07\\_30\\_10.html](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?filename=sp_07_30_10.html).

15. See Achilles Skordas, *Hegemonic Custom?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 317, 319 (Michael Byers & Georg Nolte eds., 2003) (noting the United States' role in shaping customary international law); Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1, available at 2008 WLNR 17704106 ("[A] diminishing number of foreign courts seem to pay attention to the writings of American justices.").

Part I of this Article assesses the Court's historical recourse to the customary "laws of war," situating the Court's first engagement with "humanitarian" law in the context of its lengthy evolution. Part II assesses the Court's treatment of law arising from the Hague Conferences of 1899 and 1907. Part III turns to the Court's reliance on the Geneva Conventions of 1864, 1929, and 1949 and the Additional Protocols of 1977. The Conclusion offers a macroscopic analysis of the Court's approach and conclusions as to the Court's role in developing humanitarian law. In short, the Court appears institutionally ill-suited to the task of interpreting and developing IHL. Its analysis is sometimes haphazard, and never comprehensive. Yet the Court has invoked this body of law from its earliest days, and humanitarian law questions are sure to arise more frequently as U.S. courts continue to grapple with legal issues stemming from international terrorism. The Supreme Court's preeminence in a state critical to shaping the international legal order will ensure that it remains an important voice.

#### I. EARLY YEARS OF THE COURT AND THE "LAW OF WAR"

The Supreme Court has invoked the law of war since shortly after its inception.<sup>16</sup> Yet the term "law of war" is not a precise analog for the body of law studied in this Article. As a massive corpus of customary rules, treaties, and other documents, the law of war has been evolving with civilization since its earliest days,<sup>17</sup> and has come to include more than what might be strictly termed "humanitarian" law.<sup>18</sup> While this body of law is no monolith, the Supreme Court tends to refer generally to the "laws of war." Moreover, commentators often use the terms "law of war" and "humanitarian law" interchangeably.<sup>19</sup> Therefore, several terminological distinctions will be useful before evaluating the Court's approach.

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16. See *infra* note 23.

17. See, e.g., L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 15-53 (2000).

18. DOCUMENTS ON THE LAWS OF WAR, *supra* note 1, at 2 ("A possible disadvantage of the term [humanitarian law] is that it could be thought to exclude some parts of the laws of war (such as the law on neutrality) whose primary purpose is not humanitarian.").

19. E.g., Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55, 70 n.1 (2003) ("The terms 'international humanitarian law,' 'humanitarian law,' 'law of armed conflict,' 'jus in bello,' and 'law of war' are all interchangeable.").

## A. SITUATING HUMANITARIAN LAW IN THE LAW OF WAR

The law of war is comprised of two distinct spheres of law: that governing resort to the use of force (*jus ad bellum*) and that governing conduct in war (*jus in bello*).<sup>20</sup> Commentators often use the term “humanitarian law” to refer to the *jus in bello*. The humanitarian *jus in bello* is designed to ameliorate the human suffering intrinsic to war, and has its principal modern expression in the bodies of law developed in the Hague and Geneva.<sup>21</sup> While these two bodies of law focus on distinct aspects of humanitarian protections, the separate treatment of them in this Article is a function of organizational utility, not substantive precision: commentators have long noted the artificiality of drawing a sharp distinction between the two given their large substantive overlap.<sup>22</sup>

The Court first referenced the “laws of war” in 1795<sup>23</sup> and has continued to do so throughout its history in more than one hundred cases, most recently in 2008.<sup>24</sup> Only a small number of these references, however, relate to what might be strictly termed “humanitarian law.”

The Supreme Court’s first references to the “law of war” adequately demonstrate the flexibility of the term. Of the capture by colonists of a British ship pursuant to an act of Congress,<sup>25</sup> the Court stated “whether prize or no prize, is a part of the power and law of war . . . and must be governed by the law of nations.”<sup>26</sup> The “law of war” here refers to the elaborate set of customary rules governing the capture of property on the high seas during warfare, or the law of maritime prize, that had

20. *E.g.*, HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 1 (2d ed. 1998).

21. *See, e.g., id.* at 1–2.

22. *Id.* at 2.

23. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 148 (1795); *see also Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 74 (1795) (referencing “law of war”).

24. *Boumediene v. Bush*, 553 U.S. 723, 762 (2008) (referring to an earlier decision). Justice Thomas, in a dissent from the Court’s denial of certiorari in *Noriega v. Pastrana*, referenced the executive’s stated policy to treat detainees in accordance with “standards that draw on the ‘laws of war’ as those laws have developed over time and have periodically been codified in treaties such as the Geneva Conventions.” 130 S. Ct. 1002, 1008 (2010) (citation and quotation marks omitted).

25. Congress passed the act in retaliation for similar measures implemented by the British Parliament. *Penhallow*, 3 U.S. (3 Dall.) at 53–57.

26. *Id.* at 74 (citation omitted).

been developing since the early Middle Ages.<sup>27</sup> Though the law of maritime prize is a component of public international law relating to conduct in war,<sup>28</sup> and hence conceptually part of the *jus in bello*, as described below it cannot usefully be classified as a component of humanitarian law. Indeed, the Court itself has characterized the law of nations as being comprised of two principal components in the early years of the Republic: that governing behavior between states and another, “more pedestrian,” component concerned with regulating individuals outside domestic boundaries in matters touching mercantile relationships, shipwrecks, and commerce.<sup>29</sup> This “pedestrian” component must be disentangled from its humanitarian counterpart.

The “humanitarian” component of the *jus in bello* seeks explicitly to balance military necessity against human suffering.<sup>30</sup> The Court has long recognized this fundamental tradeoff. Speaking of the Revolutionary War, Justice Iredell remarked in 1796 that a

means of defence which, when inferior objects were in view, might not be strictly justifiable, might, in such an extremity, become so, on the great principle on which the laws of war are founded, self-preservation; an object that may be attained by any means, not inconsistent with the eternal and immutable rules of moral obligation.<sup>31</sup>

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27. See generally J.H.W. VERZIJL ET AL., 11 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: THE LAW OF MARITIME PRIZE (1992) (providing an extensive history of the law of prize). Maritime prize law has been characterized as “the most obscure and extraneous doctrinal realm in public international law today.” David J. Bederman, *The Feigned Demise of Prize Law*, 9 EMORY INT’L L. REV. 31, 31 (1995) (book review). The Court’s early references to the law of war in this connection, however, demonstrate the expansiveness of the phrase, and the terminological complexities inherent in a historical analysis of the Court’s approach to humanitarian law.

28. Bederman, *supra* note 27, at 33.

29. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

30. J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Services*, 57 A.F. L. REV. 155, 182 (2005) (“The laws of war have long acknowledged that injury to civilian objectives incidental to attack on lawful military objectives may be legitimate if not excessive[,] . . . [which] calls for a balancing test to weigh military advantage against civilian harm.”).

31. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 263–64 (1796). This reference appears in a discussion of whether customary law authorized the United States to confiscate British debts during the Revolutionary War. While the statement is plainly distinct from the Hague and Geneva branches of the *jus in bello* that would crystallize over one hundred years later, it nonetheless demonstrates the fundamental tradeoff inherent in humanitarian law: on the one hand, necessity or expediency during war, and on the other hand, the dictates of humanity or “morality.”

The emergence of positive humanitarian law reflects an effort to codify these tradeoffs. If the “great principle . . . [of] self-preservation” is reflected in the sanction of lawful killing embedded in the very fabric of the law of war,<sup>32</sup> the “immutable rules of moral obligation” are epitomized by the Martens clause of the 1899 and 1907 Hague Conventions, which invokes the “usages established among civilized peoples,” the “laws of humanity,” and the “dictates of the public conscience.”<sup>33</sup>

The term “humanitarian law” is a relatively recent, and somewhat controversial, development.<sup>34</sup> It encompasses the rules of international law designed to regulate both the means and methods of warfare, and the treatment of particular classes of individuals during war.<sup>35</sup> On the one hand, many commentators use the terms “humanitarian law,” “law of war,” and “law of armed conflict” interchangeably.<sup>36</sup> On the other hand, some commentators and international actors, including the U.S. Department of State, reject the use of the term “humanitarian law” in favor of the terms “law of war” or “law and customs of

32. See, e.g., Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1755–57 (2009) (discussing provisions implicitly recognizing that warfare involves killing the enemy).

33. E.g., Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Fourth Hague Convention] (“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”). See generally Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78 (2000) (discussing the history and evolution of the Martens clause).

34. The term was coined by Jean Pictet. See JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 1 (1985). It appears in several international agreements, including the 1977 Final Act of the diplomatic conference that concluded the 1977 Geneva Protocols I and II, and the 1993 ICTY and 1994 ICTR statutes. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 1, at 2 n.3.

35. See THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 8–9 (Dieter Fleck ed., 1995).

36. E.g., Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 761 (2004) (noting the debate on the issue and using the terms interchangeably); Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT’L L. 683, 685 n.4 (2009) (“Although I prefer the terms ‘law of war’ and ‘law of armed conflict,’ I use them interchangeably with the more fashionable expression—‘international humanitarian law.’”).

war.”<sup>37</sup> In this view, the term “humanitarian law” is simply a more fashionable stand-in for the classic “law of war” formulation,<sup>38</sup> whose substitution runs the risk of idealizing what must remain a self-consciously practical body of international law.<sup>39</sup> The term “law of war,” in other words, better conveys that the law’s application is generally in the rational self-interest of those applying it,<sup>40</sup> and that diaphanous appeals to morality risk diluting this logic. The very language with which commentators and courts approach this body of law, therefore, is itself controversial.<sup>41</sup>

The Court has never used the term “humanitarian” to describe this body of law; rather, it either refers specifically to the constitutive treaties of humanitarian law or, more generally, to the “laws of war.” That said, this Article uses the term because it is particularly helpful in evaluating the Court’s jurisprudence. As described above, the term “humanitarian” is analytically useful to distinguish between different components of the *jus in bello* as it existed in the early years of the Republic. Hence, whatever the merits of the argument—that the use of the term “humanitarian” threatens the law’s efficacy—a monolithic conception of the “law of war” is not useful in evaluating

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37. See Letter from John B. Bellinger, Legal Advisor, U.S. Dep’t of State, and William J. Haynes, Gen. Counsel, U.S. Dep’t of Defense, to Jakob Kellenberger, President, ICRC (Nov. 3, 2006), available at [http://www.defenselink.mil/home/pdf/Customary\\_International\\_Humanitarian\\_Law.pdf](http://www.defenselink.mil/home/pdf/Customary_International_Humanitarian_Law.pdf) (“Although [the ICRC study of Customary International Law] uses the term ‘international humanitarian law,’ we prefer the ‘law of war’ or the ‘laws and customs of war.’”); see also David E. Graham, *The Law of Armed Conflict and the War on Terrorism*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 331, 331 (Richard B. Jaques ed., 2006) (arguing that no one has advanced a definitive explanation for the use of the term “international humanitarian law”); Adam Roberts, *Implementation of the Laws of War in Late-Twentieth-Century Conflicts*, in THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 359, 381 (Michael N. Schmitt & Leslie C. Green eds., 1998).

38. Rosen, *supra* note 36, at 685 n.4.

39. Roberts, *supra* note 37, at 381.

40. For the classic formulation of the argument casting the law of war as utilitarian calculus, see R.B. Brandt, *Utilitarianism and the Rules of War*, 1 PHIL. & PUB. AFF. 145, 145–65 (1972).

41. For his part, Pictet explains the utility of the term as follows:

When [I] first proposed the term ‘humanitarian law’ [I] was told that it combined two ideas of different natures, one legal and the other moral. Well, the provisions constituting this discipline are in fact a transposition into international law of moral, and more specifically, of humanitarian concerns. Accordingly, the name seems satisfactory.

PICTET, *supra* note 34, at 1.

the Supreme Court's approach to this body of law.<sup>42</sup> The matter is further complicated because the Court uses the term to refer not just to international humanitarian law, including rules codified in the Hague and Geneva Conventions, but also to this body of law as interpreted and developed by U.S. military courts and tribunals.<sup>43</sup> Therefore, in assessing the Supreme Court's treatment of the "law of war," there exists a preliminary task of understanding to which body of law the Court is referring. This Article uses the term "humanitarian law" to aid that process.

In the wake of the U.S. Civil War, counsel for the United States described the law of war for the Court as "the laws which govern the conduct of belligerents towards each other and other nations, *flagranti bello*."<sup>44</sup> Helpful as far as it goes, this definition offers a useful starting point. The Court purports to recognize and apply this body of law from its earliest days.<sup>45</sup>

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42. As will become evident in Part I.B, *infra*, these terminological distinctions are of particular relevance in assessing the Court's historical treatment of the law of war.

43. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 689 (2006) (Thomas, J., dissenting) (defining the "common law of war as it pertains to offenses triable by military commission" as "derived from the experience of our wars and our wartime tribunals and the laws and usages of war as understood and practiced by the civilized nations of the world" (internal quotation marks and citations omitted)), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; see also John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISRAEL L. REV. 396, 410 n.39 (2007) (noting ambiguity as to the meaning of the term in the U.S. legal system). The blurring of the distinction between the law of nations, of which the law of war forms a part, and its interpretation and elaboration by domestic courts has long been a feature of the Court's treatment of the law of war. See, e.g., *The Sally*, 12 U.S. (8 Cranch) 382, 384 (1814) ("The municipal forfeiture under the non-intercourse act, was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of mere municipal regulations; but is confiscable under the *jus gentium*."); *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 256 n.\* (1808) ("[France], as Britain did in our revolutionary war, clothes her prohibitions in the shape of municipal regulations, thereby pretending to assert her claim of jurisdiction over her revolted subjects . . . but we . . . recognize her rights only so far as they are sanctioned by the laws of a war of the nature of that in which she is engaged, and no further; and they do not bind us further than the laws of war . . ."), *overruled in part by* *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

44. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 14 (1866) (quoting the argument of the United States).

45. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) ("[F]rom 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 of enemy individuals.").

It is to the content of this recognition and application that this Article now turns.

#### B. THE COURT'S EARLY REFERENCES

It is helpful to view the Court's early references to the law of war against the background of the development of modern humanitarian law. In contrast to the well-developed customary law of naval captures, there was little effort to codify the rules of war on land until the 1863 Code of Francis Lieber.<sup>46</sup> The Lieber Code helped to spur the eventual development of the first treaty for the law of war on land at Brussels in 1874 and, later, the first Hague Conference in 1899.<sup>47</sup> The Lieber Code thus provides a useful milestone in evaluating the Court's jurisprudence. These developments contributed to a shift in the normative foundations of the law of war during this time, as humanitarian concerns gradually assumed greater importance.<sup>48</sup> The Supreme Court's jurisprudence reflects this development. As described below, before the Lieber Code most of the Court's references to the "laws of war" refer to aspects that cannot properly be understood as "humanitarian." Rather, the focus in these cases is mercantile commerce.

The early Court identified numerous such propositions. The most common context in which the Court appealed to the law of war is the seizure of property, particularly the capture of vessels or cargo under the law of prize, which is the elaborate set of customary rules governing the seizure of property on the high seas.<sup>49</sup> The Court recognized, for example, that the law of

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46. GENERAL ORDER NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Apr. 24, 1863) [hereinafter Lieber Code], reprinted in 2 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 245-74 (1881); see also GREEN, *supra* note 17, at 29 n.63 (identifying the Lieber Code as the "first modern codification of the law of armed conflict").

47. For a concise history of the laws of war, see DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 237-44 (2006). For a more thorough treatment, see GREEN, *supra* note 17, at 20-53.

48. See THEODOR MERON, WAR CRIMES LAW COMES OF AGE 139-40 (1998); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 244-45 (2000).

49. *E.g.*, *United States v. Reading*, 59 U.S. (18 How.) 1, 10 (1855) ("[B]y the law of war either party to it may receive and list among his troops such as quit the other, unless there has been a previous stipulation that they shall not be received."); *De Valengin's Adm'rs v. Duffy*, 39 U.S. (14 Pet.) 282, 289-90 (1840) ("It has been frequently held, that the device . . . of covering the property as neutral when in truth it was belligerent, is not contrary to the laws of war, or the laws of nations."); *The Caledonian*, 17 U.S. (4 Wheat.) 100, 102 (1819) ("By the general law of war, every American ship, sailing under the

war permitted the seizure and destruction of enemy property.<sup>50</sup> Outside the prize context, the Court invoked the law of war with respect to commerce and trade relations,<sup>51</sup> the validity of contracts,<sup>52</sup> and title or right to land.<sup>53</sup> Indeed, the Court seem-

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pass, or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize."); *The St. Lawrence*, 13 U.S. (9 Cranch) 120, 122 (1815) (referring to traffic in goods as being "not only prohibited by the law of war, but [also] by the municipal regulations of his adopted country," thus condemning it to forfeiture); *The Frances*, 12 U.S. (8 Cranch) 335, 342 (1814) (referring to instructions by the President to privateers of the United States giving them authority "to capture all property liable to capture by the laws of war"); *The Venus*, 12 U.S. (8 Cranch) 253, 260 (1814) ("If Jones had a right to stop these goods *in transitu*, so had the United States, who, by the laws of war, succeeded to his rights."); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 488 (1806) ("It is well known, that a vessel libelled as enemy's property, is condemned as prize . . . . If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy's property . . . ."); *Hannay v. Eve*, 7 U.S. (3 Cranch) 242, 247 (1806) (holding the contract invalid as fraud even though "[t]he agreement to save the ship and cargo, under the semblance of a condemnation, was not, in itself, an immoral act; it was, as has been truly said, a stratagem which the laws of war would authorize"); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 17 (1801) (recounting that the capture of a neutral vessel was to be judged "according to the laws of war, that is, according to the law of nations as applicable to a state of war"); *The Amelia*, 4 U.S. (4 Dall.) 34, 35 (1800); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 148 (1795); *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 74 (1795).

50. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122–23 (1814) ("That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself."). As *Brown* illustrates, in the early nineteenth century there were no law-of-war limits on the power to seize and destroy enemy property. Not until the advent of the Lieber Code was this principle subject to formal limits. See Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 217 (1998).

51. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 77 (1804) ("By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy."); see also *United States v. Guillem*, 52 U.S. (11 How.) 47, 59 (1850) ("Whether or not gold and silver are to be considered as merchandise in regard to the laws of war, will depend on the purposes for which they are shipped."). States seized enemy property to weaken the adversary's military strength. Hence, the law of war relating to commerce cannot be disconnected from its content as to seizures. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 671–72 (1862) (noting that the law of war recognizes the right of a belligerent to capture the property of an enemy on the high seas as a means to "cut these sinews of power" rooted in wealth, the products of agriculture, and commerce).

52. *White v. Burnley*, 61 U.S. (20 How.) 235, 249 (1857) ("When one nation is at war with another nation, all the subjects or citizens of the one are

ingly framed its analysis of conduct during armed conflict as involving a distinct, parallel system of laws, rights, and obligations.<sup>54</sup>

In addition to the law of war's content as to property, commerce, and contracts, the early Court made several references to the rights and duties of belligerents. In *United States v. Reading*, for example, the Court noted that by the law of war "either party to [the conflict] may receive and list among his troops such as quit the other, unless there has been a previous stipulation that they shall not be received."<sup>55</sup> The Court has also affirmed the basic principle that the law of war exempts belligerents for certain acts done during war.<sup>56</sup>

As to domestic applicability, the Court's early interpretation seems to be that the law of war was binding only to the extent that Congress had declared war.<sup>57</sup> Similarly, the Court

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deemed in hostility to the subjects or citizens of the other; they are personally at war with each other, and have no capacity to contract."); *Scholefield v. Eichelberger*, 32 U.S. (7 Pet.) 586, 593 (1833) (declining to adopt an exception to the doctrine that "during a state of hostility, the citizens of the hostile states are incapable of contracting with each other . . . . [S]uch a relaxation of the laws of war is not to be inferred from ordinary circumstances . . . ."); *Patton v. Nicholson*, 16 U.S. (3 Wheat.) 204, 207 n.9 (1818) (stating that an act of Congress prohibiting the use of certain licenses issued by belligerent governments were "merely cumulative upon the pre-existing law of war" and that "as a [corollary] from this principle . . . a contract for the purchase or sale of such a license is void as being founded on an illegal consideration"). The notion that the law of war provides that all citizens of belligerent states are presumed to be personally at war with one another exposes a fundamental difference between this usage of the term and the Court's later usage, consistent with the evolution of a distinctly *humanitarian* law of war: IHL emphatically distinguishes between combatants and noncombatants. Only belligerents are deemed to be at war with one another.

53. See *United States v. Castillero*, 67 U.S. (2 Black) 17, 359 (1862) (consulting writers on the laws of war to determine the rights acquired by the United States by its conquest of Mexican territory); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 427 (1842) (discussing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)); *McIntosh*, 21 U.S. (8 Wheat.) at 581 ("[T]itle was respected until the revolution, when it was forfeited by the laws of war.").

54. Cf. *United States v. Reading*, 59 U.S. (18 How.) 1, 10 (1855) ("War has its incidents and rights for persons and for nations, unlike any that can occur in a time of peace . . . .").

55. *Id.*

56. See *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 225 (1871) ("[L]aws of war . . . exempt[] one engaged in war for certain acts done in the prosecution thereof [because] international law is a law of the United States, of the *nation*, and not of the several States.").

57. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 77 (1804) ("So far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply."); *Talbot v. Seeman*, 5 U.S. (1

made clear that the law of war was not judicially enforceable, i.e., that redress for a violation could be sought only in a belligerent's political capacity and not by an individual through the courts.<sup>58</sup> It is worth highlighting that this question of judicial enforceability remains unanswered as to the 1949 Geneva Conventions.<sup>59</sup> The Court has yet to decide whether the conventions are self-executing.<sup>60</sup>

What, then, of "humanitarian" law? As noted above, the Court has implicitly referred to humanitarian law principles long before the Lieber Code. In the familiar context of customary rules pertaining to the use of force at sea, Justice Johnson alluded to the early development of humanitarian law: "The good sense of mankind has lessened [the] horrors [of war] on land, and it is scarcely possible to find any sufficient reason why an analogous reformation should not take place upon the ocean."<sup>61</sup> Fifteen years later, in contemplating an exception to the doctrine that citizens of hostile states cannot enter into

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Cranch) 1, 28 (1801) ("It is not denied . . . that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."). Indeed, prior to the 1949 Conventions, the law of war became applicable as a function of the existence of a "state of war." See Convention with Respect to the Laws and Customs of War on Land art. 2, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter Second Hague Convention] (noting that regulations were applicable "in case of war"); see also INT'L COMM. OF THE RED CROSS, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 19–21 (Jean S. Pictet ed., 1960) [hereinafter Pictet, POW COMMENTARY] (noting states' manipulation of whether a state of war exists and suggesting that the 1949 conventions attempted to "find a remedy to this state of affairs").

58. See *Young v. United States*, 97 U.S. 39, 60 (1877) (noting that if a belligerent "offends against the accepted laws of nations, he must answer in his political capacity to other nations[,] . . . [o]ther nations may join his enemy, and enter the conflict against him . . . [, and] an aggrieved enemy must look alone for his indemnity to the terms upon which he agrees to close the conflict"); see also *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572 (1874) (likening the effect of maritime law to "international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such").

59. See *Noriega v. Pastrana*, 130 S. Ct. 1002, 1002 (2010) (Thomas, J., dissenting). In *FTC v. A.P.W. Paper*, the Court elided a full airing of whether the 1929 Convention was self-executing, 328 U.S. 193, 203 (1946), but soon thereafter stated that the obvious scheme of the Convention was to entrust the political branches with enforcement responsibility. *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (holding that the "obvious scheme of the agreement" is for enforcement to be on "political and military authorities").

60. See *Noriega*, 130 S. Ct. at 1002 (showing that the question of whether the "Geneva Conventions are self-executing" is still outstanding).

61. *The Atlanta*, 16 U.S. (3 Wheat.) 409, 429 (1818) (Johnson, J., concurring).

binding contracts, Justice Johnson remarked that the “general rule in international law, that the severities of war are to be diminished by all safe and practical means” may in fact militate in favor of such an exception.<sup>62</sup> Similarly vague, yet unmistakable references to humanitarian principles as embodied in the law of war, while not commonplace, dot the landscape of the Court’s references to the law of war.<sup>63</sup>

In *Luther v. Borden*, predating the Lieber Code by fourteen years, the Court first alluded more explicitly to the substance of humanitarian law.<sup>64</sup> Enrolled in the state infantry during the Dorr Rebellion, a citizens’ insurrection mounted to overthrow the New Hampshire state government, Borden broke into Luther’s house to search the premises and arrest Luther, who was suspected of aiding and abetting the insurrection.<sup>65</sup> Upon Luther’s action for trespass, the Court opined, “[w]hen belligerent measures do become authorized by extreme resistance, and a legitimate state of war exists, and civil authority is prostrate, and violence and bloodshed seem the last desperate resort, yet war measures must be kept within certain restraints in all civil contests in all civilized communities.”<sup>66</sup>

The Court quoted Swiss philosopher Emerich de Vattel for the proposition that “[t]he common laws of war, those maxims of humanity, moderation, and honor, which should characterize other wars . . . ought to be observed by both parties in every civil war.”<sup>67</sup> Pointing out that martial force can only be exer-

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62. *Scholefield v. Eichelberger*, 32 U.S. (7 Pet.) 586, 593 (1833). The Court, however, ultimately declined to recognize such an exception on the facts before it. *See id.* (“[I]t may be safely affirmed that there is no such recognized exception.”).

63. *See, e.g., United States v. Castillero*, 67 U.S. (2 Black) 17, 367 (1862) (“The doctrine here maintained, that in war, poison and every species of fraud may rightfully be used, has received the general condemnati[o]n of mankind.”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125, 128 (1814) (discussing confiscation of property during war and making several references to humanity).

64. *Luther v. Borden*, 48 U.S. (7 How.) 1, 85 (1849) (referring to humanity as a common law of war). *Luther* is best known for its pronouncements about the legality of martial law and the nonjusticiability of the Guarantee Clause. *See* Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 424–30 (2007).

65. *Luther*, 48 U.S. (7 How.) at 2. For a historical account of the rebellion, see generally GEORGE M. DENNISON, *THE DORR WAR: REPUBLICANISM ON TRIAL, 1831–1861* (1976).

66. *Luther*, 48 U.S. (7 How.) at 85.

67. *Id.* (citation omitted). This language from Vattel is also cited in *Williams v. Bruffy*, 96 U.S. 176, 191 (1877), and *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1862). For a discussion of Vattel’s influence on the Court’s early juris-

cised to the extent strictly necessary under the circumstances,<sup>68</sup> the Court took care to distinguish between combatants and noncombatants, stating that the punishment of noncombatants belongs to the “municipal tribunals, and not to the sword and bayonet of the military.”<sup>69</sup>

While the Court ultimately recognized New Hampshire’s right to put down the rebellion by force and affirmed the judgment in favor of respondent Borden, it dismissed and remanded as to Luther’s mother, also a plaintiff.<sup>70</sup> Pointing to Mrs. Luther’s status as a noncombatant, the Court noted that the lower courts had not tried “whether any of the rights of war, or rights of a citizen in civil strife . . . have here . . . been violated.”<sup>71</sup> As such, Borden should have been afforded the opportunity to, “as by the general rights of war,” justify his conduct.<sup>72</sup> In light of Mrs. Luther’s status as “a female . . . not at all subject to military duty and laws, and . . . not in arms as an opponent,” however, Borden’s prospects on remand were “very doubtful.”<sup>73</sup>

In several cases during the Civil War and Reconstruction era, the Court further drew on the customary humanitarian law of war. The Court both offered general observations about the nature of the law and elucidated specific propositions.<sup>74</sup> Its observations during this period offer a rough outline of several provisions that later would be codified at the Hague and in Geneva. Nearly three decades after *Luther*, for example, the Court again relied on Vattel for the proposition that the “common laws of war” are equally applicable to civil war.<sup>75</sup> A variation of

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prudence, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 9, 192 n.20 (1996).

68. *Luther*, 48 U.S. (7 How.) at 86 (“[R]ule of force and violence operate only to a due extent and for a due time, within its appropriate sphere . . .”).

69. *Id.*

70. *Id.* at 88.

71. *Id.*

72. *Id.*

73. *Id.* at 87–88.

74. See *Ford v. Surget*, 97 U.S. 594, 613 (1878) (“[L]aws of war as established among nations have their foundation in reason, and tend to mitigate the cruelties and miseries which such conflicts produce.” (citing *The Prize Cases*, 67 U.S. (2 Black) 635, 669 (1862))).

75. See *Williams v. Bruffy*, 96 U.S. 176, 191 (1877) (“[I]n a civil war the contending parties have a right to claim the enforcement of the same rules which govern the conduct of armies in wars between independent nations—rules intended to mitigate the cruelties which would attend mutual reprisals and retaliations.”). The Court made this point even more explicitly a year later. See *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878) (“Though the [Civil War] was not between independent nations, but between different portions of

this proposition was codified in Common Article 3 of the 1949 Geneva Conventions, which provides baseline protections applicable to conflicts “not of an international character.”<sup>76</sup> This language has traditionally been understood to refer to civil wars, though as described below the Supreme Court has since flexed its interpretive muscle to move beyond that view.

Similarly, in the context of territorial conquest, the Court observed that “the rights of war . . . are mitigated by the laws of war . . . with respect to the effects of conquest, as well as to the mode of warfare.”<sup>77</sup> This observation can be viewed as foreshadowing the development of the two distinct branches of humanitarian law: Geneva law and Hague law. The former is concerned with the treatment of persons following conquest, during or after war; the latter is concerned with controlling the means and methods of warfare.<sup>78</sup>

### C. CONCLUSION

The Court’s early treatment of the “laws of war” suggests several observations. As a preliminary matter, the term “humanitarian law” is useful from the viewpoints of taxonomy and analysis. Because the Court’s early references to the “humanitarian” law of war are intertwined with law of war references to distinct, but related, concepts in international law, the use of the term “humanitarian” is warranted as a practical matter.

While the Court frequently refers to the law of war, moreover, it uses the term in a humanitarian sense in only a fraction of these instances. Most such references refer to the customary laws governing the conduct of war on the high seas or relating to the effect of war on commercial relations.<sup>79</sup> Nonetheless, along with several vague references, the Court made at least one explicit reference to humanitarian law principles even before Francis Lieber’s first modern codification of the humani-

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the same nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply.”).

76. *E.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention].

77. *United States v. Castillero*, 67 U.S. (2 Black) 17, 368 (1862). *But see* *Young v. United States*, 97 U.S. 39, 60 (1877) (“As a rule, whatever is necessary to [lessen the strength of an adversary] is law-ful [sic]; and, as between the belligerents, each determines for himself what is necessary.”).

78. *See infra* notes 89, 182–83 and accompanying text.

79. *See supra* note 51 and accompanying text.

tarian *jus in bello*. In *Luther v. Borden*, the Court hinted at the principle of distinction between combatants and noncombatants.<sup>80</sup> That this reference appears in the context of a domestic uprising reinforces what the Court twice affirmed during the Civil War and Reconstruction period: certain humanitarian law principles apply equally during civil wars.<sup>81</sup> Still, it is critical to distinguish these appeals to the “common law of war” from later references to positive humanitarian law. Before the 1949 Geneva Conventions, internal armed conflicts were governed exclusively by domestic law.<sup>82</sup>

Furthermore, as the above discussion of *Luther* suggests, the Court offers some pronouncements on the substantive provisions of customary humanitarian law, or the “common law of war.”<sup>83</sup> And finally, the Court’s early references to the law of war foreshadow a theme that runs throughout its humanitarian law jurisprudence: the Court’s willingness to invoke the law of war is circumscribed by its deference to the political branches during wartime.

## II. HAGUE LAW

The 1899 meeting of twenty-six states in the Hague gave birth to Conventions and Declarations that remain part of the law of war known generally as Hague law.<sup>84</sup> A 1907 Conference adopted ten other Conventions relating to warfare;<sup>85</sup> most significant for this analysis are the Convention Relative to the

80. See *supra* notes 68–69 and accompanying text. See generally 1 JEAN-MARIE HENCKAERTS & LOUIS DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–8 (2005) [hereinafter ICRC, CIHL] (describing the principle of distinction).

81. See *supra* note 75 and accompanying text.

82. See LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 18–20 (2002) (discussing the various stages of armed conflict and stating that “[t]he laws of war were not automatically applicable to internal armed conflicts in the nineteenth and early twentieth centuries”); Pictet, POW COMMENTARY, *supra* note 57, at 28 (“Up to 1949, the Geneva Conventions were designed to assist only the victims of wars between States.”).

83. See *supra* notes 64–73.

84. The Declarations banned the launching of projectiles and explosives from balloons. They did not garner universal support, but are now generally accepted as expressing customary law, which the U.S. Army Field Manual on the Law of Land Warfare recognizes as “binding on all nations.” GREEN, *supra* note 17, at 31 (quoting DEP’T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 7(c) (1956)). Notably, the 1899 conference also produced the Convention with Respect to the Laws and Customs of War on Land. See Second Hague Convention, *supra* note 57.

85. GREEN, *supra* note 17, at 32.

Laws and Customs of War on Land,<sup>86</sup> the Convention Relative to the Opening of Hostilities,<sup>87</sup> and the Convention Relative to the Rights and Duties of Neutral Powers and Persons in War on Land.<sup>88</sup> In general terms, the Hague Conventions and Declarations contain rules relating to the means and methods of warfare, i.e., to tactical conduct and weapons of war.<sup>89</sup> The Supreme Court has cited Hague law in sixteen cases:<sup>90</sup> invoking the Conventions for reasons of definition, as indicia of U.S. government policy, as aids in interpreting statutes, and as a means to consider directly alleged breaches of the Conventions. The first such reference appears in 1913,<sup>91</sup> just one year before a scheduled third Hague conference that never took place in the wake of World War I's outbreak.<sup>92</sup>

A. SEEKING DEFINITION: SETTING THE PARAMETERS OF RELIANCE ON HUMANITARIAN LAW

The Court's early reliance on Hague law can be seen as framing its approach to humanitarian law treaties in general. Broadly speaking, the Court has relied on Hague law for reasons of definition or to seek interpretive guidance. In four cases, the Court invoked Hague law to define particular concepts.<sup>93</sup> The most straightforward use of Hague law for definitional purposes occurs in *MacLeod v. United States*. In *MacLeod*, the Court invoked the Regulations annexed to the 1899 Hague Convention on the Laws and Customs of War on

86. Fourth Hague Convention, *supra* note 33.

87. Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 1 Bevans 619 [hereinafter Third Hague Convention].

88. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654.

89. See, e.g., MCCOUBREY, *supra* note 20, at 28.

90. See *supra* note 6 for a listing of cases. The three cases that cite both Geneva and Hague law—*Hamdan*, *Hamdi*, and *Yamashita*—are discussed in *infra* Part III.

91. See *MacLeod v. United States*, 229 U.S. 416, 425–26 (1913).

92. David Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 22 (2000).

93. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–612 (2006) (discussing whether conspiracy is defined in the Conventions), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *In re Yamashita*, 327 U.S. 1, 14–17 (1946) (discussing whether the convention imposes a duty on commanders to control their troops); *Ex parte Quirin*, 317 U.S. 1, 29–31 & n.7 (1942) (referencing the Hague Convention in the context of defining “persons to whom belligerent rights and duties attach”); *MacLeod*, 229 U.S. at 425–26 (invoking the Convention to define occupation which “give[s] the right to exercise governmental authority”).

Land to define occupation giving rise to governmental rights.<sup>94</sup> But the Court's reliance on Hague law for reasons of definition does not end there. In *Ex parte Quirin*, *In re Yamashita*, and *Hamdan v. Rumsfeld*, the Court turned to Hague law to "define" the charges levied against petitioners, that is, to graft substance onto the bones of the charges in determining that they allege (or do not allege) a violation of the law of war.<sup>95</sup> Compelled by the law's incorporation into domestic statute, this use of Hague law is the most common procedural avenue through which the Court provides thoughtful analysis of humanitarian law. This section assesses the Court's "definitional" approach in *MacLeod* and *Quirin*.

*MacLeod* demonstrates the Court's reliance on Hague law for definition and its reluctance to do so without the sanction of the political branches.<sup>96</sup> In *MacLeod*, the petitioner asked the Court to reverse a court of claims decision dismissing his petition seeking reimbursement from the United States for certain duties paid under protest upon a cargo of rice imported into the Philippine Islands three months before the 1898 outbreak of war with Spain.<sup>97</sup> In determining the propriety of exercising the levy, the Court considered what constituted an "occupation," which would then give rise to the legitimate exercise of governmental authority.<sup>98</sup> To answer this question, it consulted the Second Hague Convention. The Court cited two articles defining occupation and the duties of the occupant,<sup>99</sup> and then

94. *MacLeod*, 229 U.S. at 425–26. Notably, the Court emphasized an executive order approving the Convention notwithstanding that the United States had signed and ratified the Convention. *Id.* at 427.

95. *See supra* note 93.

96. For example, while the Convention defined occupation, the Court still looked to presidential "[m]essages and [p]apers" and "executive orders" for support. *MacLeod*, 229 U.S. at 425–28.

97. *Id.* at 417–20.

98. *Id.* at 425.

99. *Id.* at 426 ("Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself. . . . The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." (quoting Second Hague Convention, *supra* note 57, arts. 42, 43)). In the more recent case of *Madsen v. Kinsella*, the Court quoted a parallel provision of the Annex to the Fourth Hague Convention in elaborating on the President's "urgent and infinite responsibility" of governing territory occupied by U.S. forces. 343 U.S. 341, 348 & n.13 (1952) (citing Fourth Hague Convention, *supra* note 33, Annex art. 43).

noted that President McKinley was “sensible of and disposed to conform the activities of our Government to the principles of international law and practice.”<sup>100</sup> With Hague-based definition and executive approval in hand, the Court reversed, holding the payment made to the United States in the Philippines unlawful.<sup>101</sup>

In the well-known case of *Ex parte Quirin*, the Court approved the use of military commissions to try eight German saboteurs.<sup>102</sup> In so holding, it engaged in an extensive analysis of the law of war and appealed to the Fourth Hague Convention of 1907 to define petitioners’ conduct as unlawful belligerency.<sup>103</sup> *Quirin* offers the paradigmatic example of the most frequent procedural avenue through which the Court approaches humanitarian law and which tends to yield its most extensive analysis. Specifically, the Court analyzed humanitarian law to determine if the charged offense constituted a violation of the law of war so as to be triable by military commission.<sup>104</sup>

After receiving training at a sabotage school near Berlin, the eight *Quirin* petitioners crossed the Atlantic in two German submarines and entered the United States under cover of darkness at beaches in New York and Florida.<sup>105</sup> The petitioners were under instructions from the German High Command to destroy war facilities in the United States in exchange for salary payments from the German government, but were shortly captured by the FBI in New York and Chicago.<sup>106</sup> By order of the President, petitioners were denied access to civilian courts and tried by military commission.<sup>107</sup>

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100. *Macleod*, 229 U.S. at 426. The Court quoted an executive order stating that taxes and duties levied upon conquered populations “are to be used for the purpose of paying the expenses of government under the military occupation,” and that such taxation “is to be exercised within such limitations that it may not savor of confiscation.” *Id.* (quoting Exec. Order, in 10 MESSAGES AND PAPERS OF THE PRESIDENTS 208, 210 (May 19, 1898)).

101. *Id.* at 435 (holding that the payment was “covered by neither the orders of the President nor the ratifying acts of Congress”).

102. *Ex parte Quirin*, 317 U.S. 1, 48 (1942). See generally LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 91–129 (2005) (describing in depth the background of the case).

103. *Quirin*, 317 U.S. at 29–31 & n.7.

104. See *id.* at 34–38.

105. *Id.* at 20–21.

106. *Id.* at 21–22.

107. *Id.* at 22–23.

The petitioners were charged, *inter alia*, with “violation of the law of war.”<sup>108</sup> Because the Court determined that Article 15 of the Articles of War constituted congressional authorization for trial of offenses against the law of war, it faced the question of “whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged.”<sup>109</sup> Answering this question compelled the Court to consider “whether any of the acts charged is an offense against the law of war cognizable before a military tribunal.”<sup>110</sup> Not all law-of-war violations are triable by military commission—either because U.S. courts do not recognize them as violations or because the Constitution mandates trial by jury. The Court thus framed the inquiry as follows: (1) Is the charged offense a violation of the law of war, and if so, (2) does the Constitution prohibit trial by military commission? This Article, of course, is concerned with the former question.<sup>111</sup>

Accordingly, the *Quirin* Court surveyed the law of war to determine if the charge indeed constituted a violation so as to be cognizable by military commission.<sup>112</sup> In performing this analysis, the Court elucidated several core humanitarian law principles. First, the Court recognized two foundational distinctions: between (1) “the armed forces and the peaceful populations of belligerent nations,” and (2) “those who are lawful and unlawful combatants.”<sup>113</sup>

For the former, the Court cited Article I of the Annex to the Fourth Hague Convention, which “defines the persons to whom belligerent rights and duties attach,” as well as a manual of military law from the British War Office, the official law of war

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108. *Id.* at 23. Specification one of the first charge stated:

[Petitioners] being enemies of the United States and acting for the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States and went behind such lines, contrary to the law of war, in civilian dress for the purpose of committing hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States.

*Id.* at 36.

109. *Id.* at 29.

110. *Id.*

111. *Id.* This inquiry into the charged offenses was necessary because Congress incorporated by reference all offenses against the law of war recognized as such by that body of law. *Id.* at 30.

112. *See id.* at 29–36.

113. *Id.* at 30–31.

volume of the German General Staff, and a number of other international law treatises.<sup>114</sup> That petitioners removed their army uniforms in an effort to disguise their military identities, thus violating this principle, was crucial to the Court's holding that they were subject to trial by military tribunal.<sup>115</sup>

As to the second distinction—between lawful and unlawful combatants—the Court observed that while each category of persons is subject to capture and detention, unlawful combatants are also subject “to trial and punishment by military tribunals for acts which render their belligerency unlawful.”<sup>116</sup> The term “unlawful combatants” is variously defined as “[s]couts or single soldiers, if disguised,” “[a] messenger or agent who attempts to steal through the territory occupied by the enemy,” and “[a]rmed prowlers, by whatever names they may be called.”<sup>117</sup> For this proposition the Court again cited the British War Manual as well as several treatises.<sup>118</sup> It also pointed to U.S. practice and quoted at length various provisions of the Lieber Code and the War Department's Rules of Land Warfare in concluding that unlawful combatants are “not entitled” to the privileges of a prisoner of war.<sup>119</sup>

Hague law played a critical role in the Court's analysis. The Court reasoned that because the government saw fit to define lawful combatants,<sup>120</sup> it therefore impliedly recognized the existence of the corollary category—unlawful combatants. In other words, the Court's reliance on and adoption of the Hague Convention's definition of lawful belligerent—armies, militia, and volunteer forces under the command of a “person responsible for his subordinates,” bearing a “fixed distinctive emblem recognizable at a distance,” carrying arms openly, and acting in accordance with the law of war<sup>121</sup>—served as the launching

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114. *Id.* at 30 n.7.

115. *See id.* at 31 (holding that “sp[ies] who secretly and without uniform pass the military lines” are “offenders against the law of war subject to trial . . . by military tribunals”); William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 128 (2003).

116. *Quirin*, 317 U.S. at 31.

117. *Id.* at 32–33, 33 n.11 (internal quotation marks and citations omitted).

118. *Id.* at 31 n.8.

119. *Id.* at 34–36.

120. The definition of lawful belligerent adopted by the War Department's Manual was taken from Article 1 of the Annex to the Fourth Hague Convention. *Id.* at 34.

121. Fourth Hague Convention, *supra* note 33, Annex, art. 1; *see also Quirin*, 317 U.S. at 37–38 (“Citizens who associate themselves with the military

point for its explicit inference of the corollary category: unlawful belligerents. The Court found the principle that unlawful combatants exist as a separate category both not entitled to prisoner of war privileges and triable by military tribunal to be so universally recognized and accepted that “we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.”<sup>122</sup> The Court thus held that the charge against petitioners “plainly alleges [a] violation of the law of war,” for which Congress had authorized trial by military commission.<sup>123</sup>

*Quirin*’s treatment of humanitarian law is critical for at least two reasons. First, the Bush Administration relied heavily on *Quirin* to justify its detention of suspected terrorists as “enemy combatants.”<sup>124</sup> Second, as noted above, the Court’s engagement with the law of war to determine whether the charged offense constituted a violation of the law of war so as to be triable by military commission represents the first instance of the most common procedural avenue through which the Supreme Court has engaged humanitarian law.<sup>125</sup>

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arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.”). While the Court quotes the War Department’s Rules of Land Warfare, it takes care to point out that its definition of lawful belligerent was lifted from the Hague Convention. *Id.* at 34. The Court does not make clear a hierarchy of authorities, though it does note that the United States had signed and ratified the 1907 Convention. *Id.*

122. *Id.* at 35–36 (noting the principle’s acceptance “in practice both here and abroad” and “as valid by authorities on international law”).

123. *Id.* at 36.

124. See LAWYERS COMM. FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11, 32 n.169 (2002) (noting the Bush Administration’s reliance on *Quirin*). For a critical appraisal of the Bush Administration’s reliance on *Quirin*, see Jonathan Hafetz, *Stretching Precedent Beyond Recognition: The Misplaced Reliance on World War II Cases in the War on Terror*, 28 REV. LITIG. 365, 367–76 (2008).

125. The Uniform Code of Military Justice (UCMJ), which displaced the Articles of War when it came into effect in 1951, includes a similar jurisdictional hook:

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 to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821, art. 21 (2006).

## B. HAGUE LAW IN THE CONTEXT OF NAVAL WAR

The Court drew on Hague law relating to naval war in two cases arising in the context of World War I.<sup>126</sup> In one instance, the Court found Hague law to embody the position of the U.S. government on the content of customary international law. In the other instance, the Court rejected the applicability of a different (unsigned) treaty in the face of a contrary congressional dictate. The use of Hague law in this context—though admittedly outside the narrow definition of quintessentially “humanitarian” law—further demonstrates the Court’s pragmatic use of humanitarian law treaties.

Exactly one month before the United States abandoned its long-standing policy of neutrality to enter what would later be known as World War I, the Supreme Court decided a case that tested U.S. neutrality.<sup>127</sup> In *Berg v. British & African Steam Navigation Co.*, a German cruiser captured a British steamship on the high seas.<sup>128</sup> Instead of proceeding to a German port or the nearest accessible neutral port, the Germans guided the vessel nearly 3000 miles to the U.S. port in Hampton Roads, Virginia.<sup>129</sup> The German Ambassador then notified the U.S. State Department that Germany intended to keep the ship in port for an unspecified period of time, and requested that the British crew be detained in the United States for the duration of the war.<sup>130</sup> The vessel’s owner soon filed suit in U.S. court to recover the ship, and the Supreme Court was eventually tasked with deciding whether this use of a U.S. port constituted “a breach of [U.S.] neutrality under the principles of international law.”<sup>131</sup> The Court answered in the affirmative.<sup>132</sup>

In describing the U.S. policy of neutrality, the Court drew on several provisions of the 1907 Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War.<sup>133</sup> These provisions laid out the limited circumstances under which a prize may dock in a neutral port, and required the neu-

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126. *Littlejohn & Co. v. United States*, 270 U.S. 215 (1926); *Berg v. British & African Steam Navigation Co.*, 243 U.S. 124 (1917).

127. *Berg*, 243 U.S. at 150.

128. *Id.* at 143–44.

129. *Id.* at 145.

130. *Id.* at 146. The prisoners were instead released. *Id.*

131. *Id.* at 146–47.

132. *Id.* at 153.

133. *Id.* at 150–52 (citing Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723 [hereinafter Thirteenth Hague Convention]).

tral power to release a prize brought into its ports under any other circumstance.<sup>134</sup> Importantly, the United States had entered a reservation to a provision of the Convention that would have allowed states to harbor prizes of war pending adjudication by a prize court.<sup>135</sup> The Court noted that the treaty was not binding for lack of ratification, but nonetheless went on to find it “very persuasive as showing the attitude of the American Government when the question is one of international law.”<sup>136</sup>

After the U.S. declaration of war against Germany on April 6, 1917, the Court again referenced Hague law—if only promptly and unsurprisingly to reject it.<sup>137</sup> *Littlejohn & Co. v. United States* began as a damages case arising from the collision of two steamships in New York Harbor.<sup>138</sup> After the collision, the question became one of ownership.<sup>139</sup> Pursuant to a Joint Resolution of Congress following the U.S. declaration of war against Germany, the United States purportedly took possession and title of one of the ill-fated ships—a German merchant ship docked in a U.S. port—and refitted it as an army transport.<sup>140</sup> If the United States indeed owned the vessel at the time of collision, precedent commanded dismissal of the damages claim against the United States.<sup>141</sup>

The Court rejected arguments rooted in provisions of the Hague Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities which afforded merchant ships belonging to a belligerent the opportunity to depart the hostile port at the commencement of hostilities.<sup>142</sup> This rejection is hardly surprising because the United States had not

134. Thirteenth Hague Convention, *supra* note 133, arts. 21–23; *see also Berg*, 243 U.S. at 150.

135. M. DELTENRE, RECUEIL GENERAL LOIS ET COUTUMES DE LA GUERRE 413 (1943); THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 219 (James Brown Scott ed., 1915).

136. *Berg*, 243 U.S. at 151. In fact, the United States acceded to the treaty on December 3, 1909. *See* DELTENRE, *supra* note 135, at 415; THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, *supra* note 135, at 217; *see also* Manley O. Hudson, *Present Status of the Hague Conventions of 1899 and 1907*, 25 AM J. INT’L L. 114, 115–16 (1931) (noting further that the Convention was accepted by the United States prior to August 1914).

137. *Littlejohn & Co. v. United States*, 270 U.S. 215, 226 (1926).

138. *Id.* at 218.

139. *Id.*

140. *Id.*

141. *Id.* at 224 (citing *The Western Maid*, 257 U.S. 419 (1922)).

142. Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities arts. 1, 2, *reprinted in* 2 AM. J. INT’L L. 127, 129 (Supp. 1908).

signed the treaty, and because Congress had directly spoken to the issue. Noting that “[t]he United States did not approve that Convention,” the Court concluded: “In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs.”<sup>143</sup> Although these cases reveal little of substance about humanitarian law, they further illustrate the Court’s flexible and pragmatic approach to humanitarian law treaties.

C. ASSESSING ALLEGED VIOLATIONS OF HAGUE LAW:  
INSTITUTIONAL RELUCTANCE

Three cases presented the Court with the opportunity to address alleged violations of the Hague Conventions. In all three cases, the Court declined to do so. Yet notwithstanding this reluctance to consider explicitly claims allegedly arising under Hague law, the Court drew several conclusions as to the substance of the Conventions.

In *Oetjen v. Central Leather Co.*, the Court responded to an action in replevin to recover a consignment of hides allegedly conveyed in violation of the Fourth Hague Convention.<sup>144</sup> The case arose from events of the Mexican Revolution, the relevant facts of which follow. After the assassination of President Francisco Madero, General Victoriano Huerta declared himself President of the Republic.<sup>145</sup> A month later, the governor of Coahuila, Venustiano Carranza, initiated a revolution against the Huerta government.<sup>146</sup> After capturing the Cuahuila town of Torreon, where the original owner of the goods at issue did business, Francisco Villa—a powerful revolutionary general opposed to the Huerta government—levied a tax on its inhabitants.<sup>147</sup> Loyal to the ill-fated Huerta government, the owner fled Torreon upon its capture and General Villa’s forces seized the hides to satisfy the military tax.<sup>148</sup> The plaintiff claimed title as the assignee of the original owner, while the defendant claimed to own the hides through purchase from a Texas corporation that allegedly acquired them from General Villa.<sup>149</sup>

143. *Littlejohn & Co.*, 270 U.S. at 226.

144. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 299, 301 (1918).

145. *Id.* at 299.

146. *Id.* at 300.

147. *Id.*

148. *Id.*

149. *Id.* at 299.

Petitioner claimed that because the property was taken in violation of Article 46 of the Regulations annexed to the Fourth Hague Convention, which provided that “private property cannot be confiscated,” no title to the goods passed to the Texas corporation and thus to respondent.<sup>150</sup> The Court declined to consider the validity of the tax levied by General Villa and thus decided the case on a mix of act of state and political question grounds.<sup>151</sup> It pointed out, however, that the language relied upon by petitioner “does not have the scope claimed for it” in view of other provisions of the Regulations, which recognized the right of the occupying power to levy “money contributions” under certain circumstances.<sup>152</sup> The Court also made the preliminary observation that “[i]t would, perhaps, be sufficient answer to this contention to say that the Hague Conventions are international in character, designed and adapted to regulate international warfare, and that they do not, in terms or in purpose, apply to a civil war.”<sup>153</sup> Therefore, although the Court concluded that it could not pass on the validity of the Hague Convention claim because General Villa was acting as an agent of the “legitimate” Mexican government,<sup>154</sup> it nonetheless engaged the Hague Convention to demonstrate that petitioner’s claim would likely fail on its own terms.<sup>155</sup>

In *Banco Nacional de Cuba v. Sabbatino*,<sup>156</sup> the standard citation case for the act of state doctrine, the Court speculated further about the expropriation at issue in *Oetjen* and elaborated on its statement in dicta that the Hague Convention did not prohibit it.<sup>157</sup> The *Sabbatino* Court observed that the expropriation by the then-rebel government would not violate in-

150. *Id.* at 301 (citing Fourth Hague Convention, *supra* note 33).

151. *Id.* at 302 (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”).

152. *Id.* at 301 (quoting Fourth Hague Convention, *supra* note 33, arts. 46, 49).

153. *Id.*

154. The United States had since recognized the Carranza government: [W]hen a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.

*Id.* at 302–03.

155. *See id.* at 303–04.

156. 376 U.S. 398 (1964).

157. *Id.* at 417.

ternational law even as applied to non-Mexicans.<sup>158</sup> Discussing the contemporaneous case of *Ricaud v. American Metal Co.*,<sup>159</sup> in which the Court passed on a similar seizure of property during the Mexican revolution, the *Sabbatino* Court stated of the seizure: the “declaration of legality in the Hague Convention, and the international rules of war on seizures, rendered the allegation of an international law violation in *Ricaud* sufficiently frivolous so that consideration on the merits was unnecessary.”<sup>160</sup> The Court thus expressed a clear view that the Fourth Hague Convention of 1907 and customary international law permitted governmental seizure of property during war in certain circumstances.<sup>161</sup> In this way, the Court interpreted the substance of the Fourth Hague Convention notwithstanding its reluctance to address individual claims that allegedly arose under it.

In a World War II-era case, the Court again declined to consider a claim allegedly arising under the Fourth Hague Convention. In a petition for writ of mandamus, Kumezo Kawato asked the Court to allow his suit for unpaid wages and other compensation to proceed against the owner of a vessel on which he worked.<sup>162</sup> The owners of the ship moved to abate the action on the ground that Kawato had become an enemy alien following the U.S. declaration of war against Japan, and hence had “no right to prosecute any action in any court of the United States during the pendency of said war.”<sup>163</sup> Kawato argued that Article 23(h) of the Fourth Hague Convention Regulations allowed him to proceed.<sup>164</sup> The Court declined to consider Kawato’s rights under “[a]pplicable treaties,” and dispensed with his Hague Convention argument in a footnote.<sup>165</sup> Noting that the question had never before been raised in the United States, the Court pointed out that the clause was added to a predecessor convention “without substantial discussion” and cited an Eng-

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158. *Id.* at 443 n.2.

159. 246 U.S. 304 (1918).

160. *Sabbatino*, 376 U.S. at 444 n.2.

161. *Id.* at 416–19.

162. *Ex parte Kawato*, 317 U.S. 69, 70 (1942).

163. *Id.* at 70–71 (internal quotation marks omitted).

164. Article 23(h) provides: “It is especially prohibited . . . to declare abolished, suspended, or inadmissible in a Court of law the rights and action of the nationals of the hostile party.” *Id.* at 72 n.1 (citing Fourth Hague Convention, *supra* note 33).

165. *Id.* at 72 & n.1 (“Applicable treaties are ambiguous and should not be interpreted without more care than is necessary in this case.”).

lish case that interpreted the provision to apply “solely in enemy areas occupied by a belligerent,” an interpretation that was “repeated with approval” in an address by a member of the House.<sup>166</sup>

Hague law again arose in the more recent sovereign immunity case of *Austria v. Altmann*. In *Altmann*, the Supreme Court held that the Foreign Sovereign Immunities Act (FSIA), and hence the restrictive theory of sovereign immunity, applied retroactively, allowing Altmann to bring her claim to recover paintings taken by the Nazis during the German occupation of Austria.<sup>167</sup> Altmann claimed that Austria’s acquisition of the paintings violated either customary international law or Article 56 of the Fourth Hague Convention<sup>168</sup> and hence fell within the FSIA’s expropriation exemption—depriving Austria of sovereign immunity “in any case” where it “is engaged in a commercial activity in the United States” and the case is one “in which rights in property taken in violation of international law are in issue.”<sup>169</sup> Only Justice Breyer, in a separate concurrence, specifically noted that the alleged violation of international law in question was the violation of the Hague provision or customary international law.<sup>170</sup> The Court emphasized the narrowness of its holding and expressly disclaimed reviewing the lower court’s pronouncement that the seizure was in violation of international law.<sup>171</sup> While the majority’s decision as to retroactivity of the FSIA cannot be read as a substantive pronouncement on the content of the Hague provision, the Court’s reticence to address the alleged violation of the treaty is in line with its approach in *Oetjen* and *Ex parte Kawato*.

In sum, the picture that emerges from the Court’s treatment of claims allegedly arising under Hague law is one of reserve. The Court is reluctant to find a violation of the Hague Conventions, or to decide what rights they may confer upon pe-

166. *Id.* at 72 n.1.

167. *Austria v. Altmann*, 541 U.S. 677, 688 (2004).

168. *Id.* at 707 (Breyer, J., concurring); see also Fourth Hague Convention, *supra* note 33, art. 56 (“All seizure of . . . works of art . . . is forbidden, and should be made the subject of legal proceedings.”).

169. *Altmann*, 541 U.S. at 706 (Breyer, J., concurring) (internal quotation marks omitted) (citing 28 U.S.C. § 1605(a)(3) (2006)).

170. *Id.* at 707.

171. *Id.* at 700. The Ninth Circuit held that the seizure “explicitly violated both Austria’s and Germany’s obligations under the Hague Convention,” and pointed to “[a] number of the treaty’s accompanying regulations [that] are directly on point,” namely articles 46, 47, and 56. *Altmann v. Republic of Austria*, 317 F.3d 954, 965 & n.3 (9th Cir. 2002).

tioners. Nonetheless, the Court does not always reject Hague arguments out of hand; even when abstaining, the Court offers varying levels of analysis of the provisions at issue. On one end of the spectrum, the Court went out of its way in *Oetjen* to point out that petitioner's reading of the Convention cannot withstand scrutiny.<sup>172</sup> In a later case, the Court elaborated on this point, making plain its view that Hague law does not categorically prohibit government seizure of property in war.<sup>173</sup> In the middle of the spectrum, the *Kawato* court referenced the drafting history of the 1899 Convention, but ultimately discounted petitioner's argument, providing no independent analysis and drawing no independent conclusions. On the other end of the spectrum, in *Altmann*, the Court altogether declined to address the alleged violation of the Hague Convention.<sup>174</sup> Apart from a baseline reticence to address alleged violations, therefore, the Court's approach is not amenable to simple categorization.

#### D. HAGUE LAW OUTSIDE OF ARMED CONFLICT: ISOLATED AND BRIEF

The Court has cited Hague law outside the context of armed conflict for a variety of propositions tangential to the outcomes of the cases. Such references suggest little more than that the Court is willing to resort to Hague law as persuasive authority as to non-dispositive matters.

At least one member of the Court has invoked Hague law outside of armed conflict in four cases. In a case involving a Federal Tort Claims Act suit against the United States, the Court cited the Second Hague Convention in referencing U.S. obligations as an occupying power following World War II.<sup>175</sup> In a First Amendment case, discussing the tension between the religion clauses, Justice Brennan juxtaposed the apparently one-dimensional mandate of Article XVIII of the 1899 Hague Regulations<sup>176</sup> with the "difficult problems in connection with

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172. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 301–02 (1918).

173. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–17 (1964).

174. *Altmann*, 541 U.S. at 700.

175. *Dalehite v. United States*, 346 U.S. 15, 19 n.2 (1953) (citing Second Hague Convention, *supra* note 57).

176. "Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 297 n.72 (Brennan, J., concurring) (citing Second Hague Convention, *supra* note 57). Justice Brennan took the quote from AMERICAN STATE PAPERS AND RELATED

chaplains and religious exercises in prisons” that have arisen in U.S. courts.<sup>177</sup> In a case involving the standards governing the preparation and review of reports by commissions appointed to determine just compensation in eminent domain proceedings, the Court cited the 1907 Hague Convention Relative to the Creation of an International Prize Court for the proposition that an arbitration award “must give the reasons on which it is based.”<sup>178</sup>

In a Cold War-era immigration case, *Harisiades v. Shaughnessy*, the Court—faced with the question of whether the government may constitutionally deport a resident alien for membership in the Communist Party—observed that a resident alien derives rights from both U.S. and international law, and is hence subject to a different set of obligations vis-à-vis the government than are citizens.<sup>179</sup> The Court cited the Fourth Hague Convention for one such difference: that the government cannot compel aliens “to take part in the operations of war directed against their own country.”<sup>180</sup> The Court ultimately adopted a very deferential stance, concluding that the government’s policy toward aliens is a political question in which the judiciary should not meddle: “Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”<sup>181</sup>

In none of these instances is the Court’s reliance on Hague law dispositive to the outcome of the case. In short, these cases demonstrate that the Court is willing to rely on Hague law as

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DOCUMENTS ON FREEDOM IN RELIGION 313 (William Addison Blakely ed., 4th rev. ed. 1949).

177. *Schempp*, 374 U.S. at 297 n.2. The Court thus ostensibly pointed to the Hague Convention as a document that does not have to navigate the difficult waters between “[e]stablishment” and “[f]ree exercise.” *Id.* at 296.

178. *United States v. Merz*, 376 U.S. 192, 199 n.4 (1964) (citing Thirteenth Hague Convention, *supra* note 133). Only after referencing Secretary of State Hughes’s characterization of the provision to President Harding did the Court go on to hold that the commissioners must state “not only the end result of their inquiry, but the process by which they reached it.” *Id.* at 199.

179. *Harisiades v. Shaughnessy*, 342 U.S. 580, 585–87 (1952).

180. *Id.* at 586 (citing Fourth Hague Convention, *supra* note 33, art. 23).

181. *Id.* at 587–89 (stating that expulsion of an enemy alien is “a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state . . . . It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government”); *see also id.* at 596 (Frankfurter, J., concurring) (“It is not for this Court to reshape a world order based on politically sovereign States.”).

persuasive authority as to non-dispositive matters. Even in this context, when using Hague law as support, rather than illustration, the Court has taken into account the views of the political branches. Not surprisingly, the Court's reliance on Hague law in this context does not yield much in the way of informative analysis.

#### E. CONCLUSIONS

The Supreme Court has referenced Hague law for a variety of reasons, both inside and outside the context of armed conflict. Several patterns emerge. First, the Court has invoked the Conventions for reasons of definition. This approach includes both seeking the definition of specific terms—legal occupancy in *MacLeod*—and seeking to define *concepts* embodied in the charges levied against detainees seeking their release, as in *Quirin*. Second, and relatedly, the Court uses Hague law as an aid in interpreting statutes. Again, *Quirin* is the paradigmatic example; there the Court relied on the Fourth Hague Convention's definition of "lawful belligerent" to infer the existence of the corollary category and thus render defendants triable by military commission and outside the scope of certain IHL protections. Third, the Court references Hague law when asked to consider an alleged breach of the Conventions or to redress rights allegedly arising thereunder, tasks it has proven very reluctant to undertake. The Court's treatment of Hague law is, unsurprisingly, pragmatic. The Court eschews lengthy disquisitions about the corpus of humanitarian law in favor of more discrete reliance on particular provisions for definitional or interpretive reasons. It is reluctant to assess alleged violations of Hague law and has dispensed with them where possible. Still, the Court has drawn on Hague law in a number of cases, and it has played a critical role in the disposition of several.

### III. GENEVA LAW

The Geneva Conventions of 1929 and 1949<sup>182</sup> develop a system of protection for civilians, noncombatants, and those

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182. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at

*hors de combat*—those “outside the fight,” including the sick, wounded, and detained.<sup>183</sup> The 1949 Conventions are the most widely recognized and universally accepted codification of humanitarian law.<sup>184</sup> It is unsurprising and appropriate, then, that the Supreme Court offers its most extensive analysis of humanitarian law in the form of analysis of the Geneva Conventions. This Part systematically reviews the Court’s treatment of Geneva Law—from its first engagement with the 1929 Convention in *Yamashita* and *Johnson v. Eisentrager* to its recent reliance on the 1949 Conventions in the “war on terror” detainee cases.

#### A. EARLY TREATMENT: *YAMASHITA* AND *EISENTRAGER*

In the wake of World War II, the Court decided two cases best known for their implications for constitutional war powers. *Yamashita* and *Eisentrager* required the Court to engage humanitarian law in several ways. First, the Court addressed alleged violations of the 1929 Geneva Convention. Second, as in *Quirin*, the Court probed humanitarian law to define the charges levied against petitioners to determine whether their trials by military commission were permissible under domestic law. This section reviews these issues in turn.

##### 1. Petitioners’ Geneva Claims

The Court’s first reference to the Geneva Conventions in *Yamashita* offered detailed analysis of applicable provisions, but concluded that the Conventions did not apply.<sup>185</sup> Four years later in *Eisentrager*, while affirming that the detainees in question were “entitled” to the protections of the Convention, the Court relied on its earlier holding to render them inapplicable.<sup>186</sup> The Court’s early view of the applicability of the 1929

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Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; First Geneva Convention, *supra* note 76.

183. For a brief summary of the history and core provisions of the 1949 Conventions, see Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59, 62–73 (2003).

184. According to the ICRC, the Geneva Conventions have achieved universal acceptance, with 194 states parties. Press Release, Int’l Comm. of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/geneva-conventions-news-210806?OpenDocument&style=custo\\_print](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/geneva-conventions-news-210806?OpenDocument&style=custo_print).

185. See *In re Yamashita*, 327 U.S. 1, 6, 20–24 (1946).

186. *Johnson v. Eisentrager*, 339 U.S. 763, 790 (1950) (relying on *Quirin* and *Yamashita* without providing additional analysis).

Convention seems at first blush to contrast markedly with its reading of the 1949 Conventions in the “war on terror” context, namely *Hamdan v. Rumsfeld*. Specifically, while *Hamdan* declared Common Article 3 applicable to the armed conflict in Afghanistan, *Yamashita* and *Eisentrager* suggest that the 1929 Convention is not judicially enforceable. This apparent discrepancy can be explained in part by the inclusion in the 1949 Conventions of enhanced individual rights provisions not present in the 1929 Convention.<sup>187</sup> Fully understanding the Court’s more recent opinions, however, requires a review of these earlier precedents. In short, *Yamashita* sets the parameters of the Court’s engagement with the Geneva Conventions and the *Eisentrager* Court leans heavily on that decision. *Eisentrager*, in turn, is the key precedent at issue in *Hamdan*’s treatment of humanitarian law.

The Court first referred to Geneva law in the infamous World War II-era case of *Yamashita*.<sup>188</sup> The Commanding General of the Japanese Army in the Philippine Islands, Yamashita became a prisoner of war upon his surrender to U.S. forces on September 3, 1945.<sup>189</sup> He was subsequently charged, tried, and convicted by military commission of violating the laws of war.<sup>190</sup> Yamashita’s habeas petition charged that his detention for the purpose of trial was unlawful because the military commission lacked jurisdiction.<sup>191</sup> Specifically, he argued that the military commission was not lawful because (1) it was created after the cessation of hostilities, (2) the procedure governing the trial violated domestic and international law, (3) the charge against him did not constitute a violation of the laws of war, and (4) the United States failed to notify the neutral power representing Japan, in violation of international law.<sup>192</sup> The

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187. Fourth Geneva Convention, *supra* note 182, art. 146; Third Geneva Convention, *supra* note 182, arts. 85, 102; *see also* GEOFFREY BEST, WAR AND LAW SINCE 1945, at 80–114 (1994). As explained below, the *Hamdan* Court emphasizes these differences between the 1929 and 1949 Conventions.

188. 327 U.S. at 6. Several pre-*Yamashita* detention cases in the World War II-era did not raise law of war issues because, for example, the detainee was held by civilian authorities, *Ex parte Endo*, 323 U.S. 283, 297–98 (1944), or the case was briefed solely on constitutional war powers issues, *Hirabayashi v. United States*, 320 U.S. 81, 83 (1943).

189. *Yamashita*, 327 U.S. at 5.

190. *Id.* For a biographical portrait and information about Yamashita’s trial, written by one of Yamashita’s lawyers, *see generally* A. FRANK REEL, THE CASE OF GENERAL YAMASHITA 17–175 (1949).

191. *In re Yamashita*, 327 U.S. at 5–6.

192. *Id.* at 6.

latter three rationales occasioned a discussion of humanitarian law by the Court.<sup>193</sup> Indeed, two of Yamashita's arguments centered on the Geneva Convention of 1929: that the admission of certain evidence violated Article 63, and that the failure to give advance notice of his trial to the neutral power representing Japan as a belligerent violated Article 60.<sup>194</sup>

Four years later in *Eisentrager*, the Court considered the habeas petitions of twenty-one German nationals that had been tried and convicted by military commission for their involvement in hostilities against the United States after Germany's surrender.<sup>195</sup> Like Yamashita, the German detainees claimed that their trial, conviction, and imprisonment violated Articles 60 and 63 of the Geneva Convention of 1929.<sup>196</sup>

Article 63 of the 1929 Geneva Convention provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."<sup>197</sup> Yamashita argued that because he was a prisoner of war, and because the Articles of War applied to the trial of any person in the U.S. armed forces, Article 63 afforded him the protections of Articles 25 and 38 of the Articles of War—that depositions not be admitted into evidence in a capital case and that the tribunal apply the "rules of evidence generally recog-

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193. *Id.*

194. *Id.* Yamashita also argued that (1) the commission was not lawfully created, (2) the commission failed to charge him with a violation of the laws of war, and (3) he was deprived of a fair trial in violation of the Due Process Clause of the Fifth Amendment. *Id.*

195. Specifically, the detainees were charged with collecting and furnishing intelligence about the movement of American forces to the Japanese. *Johnson v. Eisentrager*, 339 U.S. 763, 766, 785–86 (1950). The ultimate question in the case was whether civil courts could properly exercise habeas jurisdiction over aliens imprisoned abroad under sentences imposed by the executive through military tribunals. *See id.* A central point of contention between the majority and dissent, then, was the extent to which the Court could, and did, properly evaluate the petitions, as opposed to ruling on jurisdictional grounds. *Compare id.* at 791 ("[I]n the present application we find no basis for invoking federal judicial power in any district . . ."), *with id.* at 797 (Black, J., dissenting) ("Though the scope of habeas corpus review of military tribunal sentences is narrow, I think it should not be denied to these petitioners and others like them."). The Court ultimately decided that it could not exercise jurisdiction, and affirmed the district court's dismissal. *Id.* at 790–91.

196. *Id.* The *Eisentrager* petitioners, like Yamashita, also claimed violations of the U.S. Constitution. *Id.*

197. Convention Relative to the Treatment of Prisoners of War art. 63, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 Convention].

nized in the trial of criminal cases in the district courts of the United States," respectively.<sup>198</sup>

The Court categorically rejected this argument, concluding that the Geneva Conventions did not compel application of the Articles of War and thus "imposed no restrictions upon the procedure to be followed."<sup>199</sup> To reach this conclusion, the Court contextualized Article 63 by placing it alongside the other two parts of Chapter 3 of the 1929 Convention, which it asserted, "taken together," represented "a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offenses, and of the procedure by which guilt may be adjudged and pronounced."<sup>200</sup> The Court thus deemed it "clear" from this context that Article 63 applied only to proceedings against a prisoner of war "for offenses committed while a prisoner of war."<sup>201</sup> The Court rejected Yamashita's argument as to Article 60 of the Convention, also located in Chapter 3, for the same reason.<sup>202</sup>

In *Eisentrager*, the Court offered no further analysis of petitioners' Geneva claims, relying solely on its decisions in *Yamashita* and *Quirin*.<sup>203</sup> The Court, however, did make several further observations about the 1929 Convention. It pointed out that the prisoners did not claim, and that the Convention would not support, immunity from prosecution for war crimes; on the contrary, Article 75 of the Convention provided that detention was authorized for prisoners of war throughout trial and, if necessary, until the end of the punishment.<sup>204</sup> In a footnote, the Court affirmed that the prisoners were "entitled" to the substantive rights guaranteed by the 1929 Convention, but expressly disclaimed speaking to such rights.<sup>205</sup> Rather, responsibility for observing and enforcing these rights was the

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198. *In re Yamashita*, 327 U.S. at 20–21.

199. *Id.* at 20; *see also Eisentrager*, 339 U.S. at 790 (noting further that "no prejudicial disparity is pointed out as between the Commission that tried prisoners and those that would try an offending soldier of the American forces of like rank").

200. *In re Yamashita*, 327 U.S. at 22–23.

201. *Id.*

202. *Id.* at 24.

203. *Eisentrager*, 339 U.S. at 789–90 ("This claim the Court has twice considered and twice rejected, holding that such notice is required only of proceedings for disciplinary offenses committed during captivity and not in case of war crimes committed before capture.").

204. *Id.* at 789.

205. *Id.* at 789 n.14.

province of the political and military authorities: the rights of enemy aliens could be vindicated “only through protests and intervention of protecting powers.”<sup>206</sup>

In *Yamashita*, Justices Murphy and Rutledge lodged vigorous separate dissents.<sup>207</sup> Justice Rutledge argued against the majority’s contextual reading of Articles 60 and 63 of the Geneva Convention,<sup>208</sup> pointing out that it was undisputed that the Convention was binding upon the United States and further that the Convention had been followed during Yamashita’s internment.<sup>209</sup> Justice Rutledge went out of his way to address the argument that the Convention’s applicability was in doubt because Japan had not ratified it,<sup>210</sup> noting that “at the beginning of the war both the United States and Japan announced their intention to adhere to [its] provisions” and citing Article 82 and pertinent portions of the *travaux préparatoires* for the proposition that the Convention should be construed to mean that a state is “bound to apply [its] provisions to prisoners of war of nonparticipating states.”<sup>211</sup> This construction, he argued, should be adopted for the “security” of captured members of U.S. armed forces, “if for no other[ reason].”<sup>212</sup> In the alternative, Justice Rutledge urged that the treaty be viewed as strong

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206. *Id.* In *Hamdan*, the government relied upon this footnote for its argument that the 1949 Convention was not judicially enforceable. See Brief for Respondents at 9, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) [hereinafter *Hamdan Government Brief*].

207. For a thoughtful discussion about the impact of Justice Rutledge’s dissent on the Court’s later jurisprudence, see Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 154–70 (2006).

208. *In re Yamashita*, 327 U.S. 1, 74 & n.37 (1946) (Rutledge, J., dissenting) (“This conclusion is derived from the setting in which these Articles are placed. I do not agree that the context gives any support to this argument.”). Rutledge proceeded thoroughly to rebut the Court’s analysis, and concluded that “the meaning of subsection 3 . . . is related to the meaning of subsection 1; and subsection 1 is no more clearly restricted to punishments and proceedings in disciplinary matters than is subsection 3.” *Id.*

209. *Id.* at 72–73 & n.36 (noting that Yamashita was “interned in conformity with Article 9 of [the] Convention”).

210. In view of his statement that the Court “does not hold that the Geneva Convention is not binding upon the United States and no such contention has been made in this case,” *id.* at 72, there was little reason for Justice Rutledge to dwell on this point. Nonetheless, he devoted over five hundred words in a footnote to dispelling any such notion. *Id.* at 72 n.36.

211. *Id.* at 72 n.36

212. *Id.*

evidence of customary international law, and that it be held binding as such.<sup>213</sup>

Justice Rutledge emphasized the pragmatic and strategic implications of his reading of the Convention. He rooted his construction of Article 82—that the Convention is binding—on the safety of captured armed forces, and again cited the safety of captured U.S. soldiers in arguing that the provisions of the Articles of War applied to Yamashita.<sup>214</sup> Of the argument that U.S. noncompliance with the 1929 Geneva Convention merely gave Japan a right of indemnity and that Article 60 conferred no personal rights upon Yamashita, Justice Rutledge caustically pointed out that “[e]xecuted men are not much aided by post-war claims for indemnity.”<sup>215</sup> In short, he characterized the Geneva Convention of 1929 as “our law” and concluded that Yamashita’s trial was violative of it.<sup>216</sup>

## 2. Probing Humanitarian Law to Define War Crimes

As in *Quirin*, discussed above in reference to Hague law, the need to define the charges levied against General Yamashita and the *Eisenrager* petitioners provided the second impetus for the Court to approach humanitarian law in these cases. In addition to addressing petitioners’ claims allegedly arising under humanitarian law, the Court also drew on the Fourth Hague Convention and the 1929 Geneva Convention in defining these charges, and thus demonstrated that petitioners’ trials by military commission were permissible. The extent to which these humanitarian law treaties supported the proposition that the charges against petitioners stated an offense was a matter of intense disagreement between the majority and the dissents, particularly in *Yamashita*.<sup>217</sup> Interpretation of humanitarian law treaties thus became central to the resolution of the cases.

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213. *Id.*

214. Justice Rutledge argued that the Articles of War were applicable both on their own terms *and* as a function of Article 63 of the 1929 Geneva Convention. *See id.* at 61–72.

215. *Id.* at 77.

216. *Id.* at 78 (characterizing the failure to provide notice as required by Article 60 as “only another instance of the commission’s failure to observe the obligations of our law”).

217. The inquiry was thorny in part because the Hague Conventions and the 1929 Geneva Convention have few explicit penal provisions. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 81 (2d ed. 2001); *see also* Yves Sandoz, *Penal Aspects of International Humanitarian Law*, in 1 INTERNATIONAL CRIMINAL LAW 393, 395–99 (M. Cherif Bassiouni ed., 2d ed. 1999).

*a. Yamashita*

The Court in *Yamashita* echoed *Quirin*'s observation that Congress had "not attempted to codify the law of war or to mark its precise boundaries . . . [but rather] had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war."<sup>218</sup> Hence, Yamashita's trial by military commission was only appropriate if the charged offense was a violation of the law of war. Yamashita's challenge, then, tasked the Court with determining whether the crime charged was, in fact, such a violation.<sup>219</sup>

Yamashita was charged with "unlawfully disregard[ing] and fail[ing] to discharge his duty as commander to control the operations of the members of his command."<sup>220</sup> The Court engaged in a lengthy analysis, concluding that this charge was indeed recognized by the law of war.<sup>221</sup> The bill of particulars filed against Yamashita further specified the acts for which Yamashita was alleged to be responsible, including "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province . . . as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed."<sup>222</sup> The Court cited the Fourth Hague Convention Regulations in recognizing that these acts constituted violations of the law of war.<sup>223</sup> But because Yamashita did not himself commit these acts, the question was "whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are

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218. *Yamashita*, 327 U.S. at 7–8.

219. Apart from the charge against Yamashita, the Court also noted in dicta another violation of the law of war: "[I]t is a violation of the law of war . . . to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense." *Id.* at 24 n.10.

220. *Id.* at 13–14. The charge goes on: "[P]ermitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and . . . thereby violat[ing] the laws of war." *Id.* For a detailed description of the horrors committed by troops under Yamashita's command, see Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 178 n.100 (2000) (citing 4 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 4 (1948)).

221. See *In re Yamashita*, 327 U.S. at 14–18.

222. *Id.* at 14.

223. *Id.*

violations of the laws of war.”<sup>224</sup> The Court concluded that it did.<sup>225</sup>

To reach this conclusion, the Court reasoned that because the failure by a commander to check the excesses of his troops would almost certainly result in violations of the law of war, the purpose of the law would be undermined if the commander could neglect to take such measures with impunity.<sup>226</sup> The Court found support for this reasoning in several humanitarian law treaties. It cited the Fourth Hague Convention<sup>227</sup> and the Regulations attached thereto,<sup>228</sup> the Tenth Hague Convention relating to the bombardment of naval vessels,<sup>229</sup> and the Geneva Convention of 1929,<sup>230</sup> and found that these provisions “plainly imposed” on Yamashita “an affirmative duty” to take steps to protect prisoners of war and the civilian population.<sup>231</sup>

Justice Murphy filed a strong dissent, arguing that the charges against Yamashita were “unrecognized” in international law.<sup>232</sup> He chided the Court’s “vague and indefinite references” to the Hague and Geneva Conventions.<sup>233</sup> After reviewing various treatises on the laws of war to demonstrate that the term “responsible” in the context of the Hague provision relied upon by the majority was ambiguous, Justice Murphy concluded:

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224. *Id.* at 14–15.

225. *Id.* at 17.

226. *Id.* at 15 (“[T]he law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.”).

227. *Id.* (stating that lawful belligerents must be “commanded by a person responsible for his subordinates” (citing Fourth Hague Convention, *supra* note 33, art. 1)).

228. *Id.* at 16 (noting that Article 43 “requires that the commander of a force occupying enemy territory, as was petitioner, shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country” (internal quotation marks omitted)).

229. *Id.* (“[C]ommanders in chief of the belligerent vessels ‘must see that the above Articles are properly carried out.’” (citing Fourth Hague Convention, *supra* note 33, art. 19)).

230. *Id.* at 15–16 (noting that Article 26 “makes it the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles [of the convention], as well as for unforeseen cases” (brackets in original) (internal quotation marks omitted)).

231. *Id.* at 16. The Court goes on to point out that “[o]bviously charges of violations of the law of war . . . need not be stated with the precision of a common law indictment.” *Id.* at 17.

232. *See id.* at 35 (Murphy, J., dissenting).

233. *Id.* at 36.

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It is apparent beyond dispute that [the term] was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.<sup>234</sup>

The other provisions, Justice Murphy stated, were “on their face equally devoid of relevance.”<sup>235</sup>

Justice Murphy’s principal criticism was that the Convention provisions did not speak to the unique facts of the case: they were not relevant where “the troops of a commander commit atrocities while under heavily adverse battle conditions.”<sup>236</sup> Moreover, Justice Murphy interpreted language in the Army’s Basic Field Manual on Rules of Land Warfare to limit individual criminal responsibility for violations of the laws of war to “those who commit the offenses or who order or direct their commission.”<sup>237</sup> Both Justices Murphy and Rutledge concluded that the charge against Yamashita was unprecedented, without sufficient definition in international law, and hence could not support his trial by military commission.<sup>238</sup>

b. *Eisentrager*

In *Eisentrager*, the Court similarly analyzed the law of war to determine if the charged offense was cognizable by military commission. In that case, the Court considered habeas petitions from twenty-one German nationals who had been tried and convicted by military commission of violating the law of war by collecting and furnishing intelligence to the Japanese army about American troop movements after the German High Command’s unconditional surrender.<sup>239</sup> Repatriated to Germany to serve their sentences, the prisoners were held at Landsberg Prison, then under U.S. Army control, when the Supreme Court heard the case.<sup>240</sup>

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234. *Id.* at 37.

235. *Id.*

236. *Id.*

237. *Id.* at 37–38.

238. *Id.* at 40 (“The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history.”); *id.* at 43 (Rutledge, J., dissenting) (“I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in other internationally binding authority or usage.”).

239. *Johnson v. Eisentrager*, 339 U.S. 763, 765–66 (1950).

240. *Id.*

The *Eisentrager* petitioners claimed that the military commission lacked jurisdiction because the charge against them did not allege a violation of the law of war, and vaguely framed the issue as a violation of Articles I and III of the Constitution.<sup>241</sup> The Court cited *Quirin* and *Yamashita* in holding that the military commission was indeed a lawful tribunal in which to judge enemy offenses against the law of war.<sup>242</sup> As to petitioners' unclear constitutional challenge to the "jurisdiction" of the military commission, the Court pointed to Congress's constitutional power to "make rules concerning captures on land and water, which this Court has construed as an independent substantive power."<sup>243</sup> As in *Yamashita* and *Quirin*, the *Eisentrager* Court was thus tasked with surveying the law of war to determine whether the charged offense constituted a violation. As in these prior cases, the Court again answered in the affirmative.<sup>244</sup>

In reaching this conclusion, the Court cited "an old customary rule, since enacted by Article 35 of the Hague Regulations" that "capitulations must be scrupulously adhered to."<sup>245</sup> The Court took pains to point out, however, the very circumscribed role it played in finding that the offense validly charged a war crime: it was for the military commission to determine whether, in fact, petitioners had committed the war crime and whether the law of war applied in the first instance.<sup>246</sup> In short, the Court purported simply to survey the law of war and determine that the charged offense constituted a violation.

Three members of the Court argued in dissent that the issue of the sufficiency of the charge—and hence the Court's cita-

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241. *Id.* at 785–86.

242. *Id.* at 786.

243. *Id.* at 786–89 (citation omitted). The Court also rooted the commission in the Commander-in-Chief Clause, noting that petitioner's challenge thus represented a "challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible." *Id.*

244. *Id.* at 787 ("Breach of the terms of an act of surrender is no novelty among war crimes.").

245. *Id.* (quoting Fourth Hague Convention, *supra* note 33). The Court also cited, among other authorities, a treatise, which in turn quoted Secretary of State Daniel Webster: "If there is one rule of the law of war more clear and peremptory than another, it is that compacts between enemies, such as truces and capitulations, shall be faithfully adhered to . . ." *Id.* at 787 n.13 (quoting 7 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES, AND OTHER INTERNATIONAL AGREEMENTS 330 (1906)).

246. *Id.* at 788.

tion to humanitarian law—was “wholly irrelevant,” and the Court’s conclusions in this regard were “gratuitous.”<sup>247</sup> In this view, the only issue raised was whether a civilian court can hear the habeas petitions. Citing *Quirin* and *Yamashita*, the dissent noted that there was no blanket prohibition on the exercise of habeas jurisdiction over petitions by enemy alien belligerents. Rather, the “clear holding” of those cases was that habeas jurisdiction is available even to enemy aliens and cannot be denied merely because the prisoners were held outside U.S. territory.<sup>248</sup>

After explaining the impropriety of the majority’s inquiry, Justice Black, writing for the dissent, took issue with the substantive finding that the passing of information to the Japanese after Germany’s surrender in fact constituted a war crime. If, as the petition alleged, the prisoners were “under the control of the armed forces of the Japanese Empire” during the period at issue, the question of whether obedience to their Japanese commanders “constitute[ed] ‘unlawful’ belligerency . . . is not so simple a question as the Court presumes.”<sup>249</sup> Justice Black recalled the Court’s caution in *Quirin* that military tribunals can punish only “unlawful” combatants. “It must be remembered,” he wrote, “that legitimate ‘acts of warfare,’ however murderous, do not justify criminal conviction.”<sup>250</sup>

### 3. Understanding the Court’s Early Reliance on Geneva Law

The Court’s use of humanitarian law in *Yamashita* and *Eisenstrager* suggests several observations. First, the Court offered informative, if controversial, analysis of specific provisions of the Geneva (and Hague) Conventions. The Court’s application of law to the facts yielded substantive conclusions of law and pronouncements as to the content of humanitarian law. Second, the Court purported to analyze the entire corpus of the “laws of war” to determine whether the offenses charged constituted violations so as to be cognizable by military commission. Third, the Court affirmed that the *Eisenstrager* detainees are “entitled” to the protections of the 1929 Convention, but

247. *Id.* at 792–94 (Black, J., dissenting). The dissent further noted that, even if relevant, the war crimes question was not before the Court, as it was not reached by the trial court. *Id.* at 792–93.

248. *Id.* at 794–95. A variation of this view, of course, would be adopted by the Court over fifty years later in *Boumediene v. Bush*, 553 U.S. 723 (2008). See *infra* Part III.C.

249. *Eisenstrager*, 339 U.S. at 793 (Black, J., dissenting).

250. *Id.*

held the convention inapplicable by relying on *Yamashita's* contextual reading of the relevant provisions.

What emerges from the Court's analysis? First, in terms of substance, the *Yamashita* Court rooted the duty of command responsibility in humanitarian law and identified its breach as a war crime. While the principle did not originate during World War II, the decision can be seen as an important contribution to the development of the doctrine.<sup>251</sup>

One may counter, as did Justice Rutledge,<sup>252</sup> that the Court's use of humanitarian law represented a misapplication of the treaties and was designed to justify the imposition of the death penalty on a defeated enemy general after the conclusion of a wrenching world war. Indeed, the Court did not respond to Justice Rutledge's point-by-point refutation of its contextual reading of the Geneva Convention that rendered it inapplicable to General Yamashita and on which the Court relied in *Eisen-trager*.<sup>253</sup> Regardless of the soundness of *Yamashita's* textual analysis of the 1929 Geneva Convention, it is clear that the Court's reliance on humanitarian law to ratify Yamashita's trial and execution is a landmark in the Supreme Court's treatment of IHL.

Similarly, it is possible to read *Eisen-trager* as a modest contribution to humanitarian law jurisprudence through its somewhat less controversial identification of petitioners' passing of information to the Japanese following Germany's surrender as a violation of the law of war.<sup>254</sup> Justice Black took issue with this finding in dissent, but his criticism was more circumspect than the dissent in *Yamashita*, given that the parties did not brief or argue the point.<sup>255</sup> Although its declaration of a war crime is subject to some criticism, the Court relied on humanitarian law and reached a substantive legal conclusion based at least in part on this reliance.

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251. Command responsibility, of course, is properly located in the domain of international criminal law, not humanitarian law. Accordingly, the decision's *substantive* contribution is not to humanitarian law proper. For a summary of the roots of international criminal responsibility in humanitarian law, see RATNER & ABRAMS, *supra* note 217, at 80–107; see also Smidt, *supra* note 220, at 176 (“It was during the war crimes trials themselves that the doctrine of command responsibility developed. This was the basis for the defense allegation in [*Yamashita*] that prosecution based on a command responsibility theory was tantamount to ex post facto law.” (citations omitted)).

252. *In re Yamashita*, 327 U.S. 1, 6, 42–43 (1946) (Rutledge, J., dissenting).

253. *Eisen-trager*, 339 U.S. at 789.

254. *See id.* at 778.

255. *Id.* at 793–94 (Black, J., dissenting).

Second, in terms of procedure—*how* the Court invokes humanitarian law—*Yamashita* and *Eisentrager* solidified the approach initially adopted in *Quirin* and discussed above. Specifically, the Court offered robust analysis of humanitarian law in the course of assessing a charge levied against petitioners to determine if it properly alleged a violation of the law of war.<sup>256</sup> In both *Yamashita* and *Eisentrager*, in the course of finding petitioners' trials by military commission to be lawful, the Court explicitly applied the law of war—as embodied in the various Hague Conventions and 1929 Geneva Convention—to the facts behind the charges levied against them.<sup>257</sup>

Third, an important contribution of the Supreme Court to humanitarian law jurisprudence emerges in the interaction between majority and dissent on humanitarian law issues. Here, it is useful to return to this Article's point of departure. Humanitarian law treaties generally lack authoritative mechanisms for interpretation—a task principally left to state parties with some occasional guidance from the International Committee of the Red Cross. One might expect the Supreme Court to contribute to the global store of humanitarian law decisions by applying IHL provisions to the facts before it in traditional common-law fashion, thus yielding authoritative and precedential interpretations from which other bodies faced with similar issues might draw. And yet, because other interpretive bodies and mechanisms (treaty bodies, foreign courts, thematic mechanisms of the United Nations, and so on) do not perceive the Court's pronouncements as "binding," such bodies are likely to give dissenting opinions greater consideration in drawing on Supreme Court precedent as persuasive authority. While a united Court, of course, speaks more loudly than a lone dissenter, a more thorough humanitarian law analysis in a dissent may prove more useful to another interpretive body than an inferior analysis that garners a majority. In other words, to the

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256. Again, it is the law of war's incorporation into the Articles of War, *supra* notes 109–11 and accompanying text, and later into the UCMJ, *supra* note 125 and accompanying text, that prompts the Court's humanitarian law analysis.

257. It is the majority's application of the law to the facts that draws the dissent's strongest criticism. Black argues that the facts do not support the majority's hasty leap to the identification of a war crime. If petitioners were in fact under the control of the Japanese forces, their acts may have been "legitimate acts of warfare," which do not justify criminal conviction. *Eisentrager*, 339 U.S. at 793 (Black, J., dissenting). There is thus some question about how thoughtfully the Court applied the law to the facts. The point remains, however, that the Court offers explicit analysis of the facts against a well-defined legal standard. *See id.* at 787–88 (majority opinion).

extent one is interested in the content and quality of the humanitarian law analysis rather than the mere holding of the case, *Yamashita* and *Eisentrager* reveal that the Supreme Court's greatest institutional contribution to an international jurisprudence of humanitarian law may be that a fuller picture—a more thoughtful and nuanced articulation and application—of the treaty provisions at issue emerges through the combination of majority opinion and vigorous dissent.

In conclusion, the Court's opinions in *Yamashita* and *Eisentrager* are important milestones in the Supreme Court's adjudication of humanitarian law issues, which (1) offer a substantive contribution to humanitarian law jurisprudence, and (2) frame the Court's later engagements with humanitarian law. Both the majority opinions and the dissents engage in substantive analysis of humanitarian law instruments in the course of passing on petitioners' challenges. In terms of substance, the *Yamashita* Court's reliance on humanitarian law contributes to the development of international criminal law and demonstrates the flexibility of the humanitarian law regime by identifying *Yamashita's failure to prevent atrocities* as a war crime. *Eisentrager* similarly provides explicit precedent for the identification of a particular war crime.<sup>258</sup> In terms of procedure, *Yamashita* and *Eisentrager* exemplify the two avenues through which the Court addresses humanitarian law in the context of armed conflict: (1) directly adjudicating claims allegedly arising under the conventions, and (2) assessing charges levied against detainees challenging their trial by military commission. Having considered the Court's first engagement with Geneva law, this Part briefly reviews the Court's reliance on the Geneva Conventions outside the context of armed conflict. It then turns to the Court's most recent, and extensive, treatment of Geneva law in the "war on terror" detainee cases.

#### B. GENEVA LAW OUTSIDE OF ARMED CONFLICT

The Court has referred, on four occasions, to the Geneva Conventions outside the context of armed conflict. In two of these cases, the Court invoked the Geneva Conventions as a tool for interpreting the Eighth Amendment bar on "cruel and unusual" punishment.<sup>259</sup> In holding the death penalty unconsti-

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258. As discussed above in *supra* note 219, the Court also identified another violation of the law of war in dicta.

259. Such references to international law in adjudicating constitutional issues have a long and perhaps underappreciated history in Supreme Court ju-

tutional for a petitioner who was fifteen years old at the time of his crime, the plurality in *Thompson v. Oklahoma* cited Article 68 of the Fourth Geneva Convention as one of “three major human rights treaties explicitly [to] prohibit juvenile death penalties.”<sup>260</sup> Dissenting from the plurality’s holding to affirm the seventeen-year-old petitioner’s death sentence in *Stanford v. Kentucky*, Justice Brennan cited the Fourth Geneva Convention for the same proposition, and further pointed out that these treaties have been signed or ratified by the United States.<sup>261</sup> In a separate concurrence in *Thompson*, Justice O’Connor pointed to the ratification of Article 68 of the Third Geneva Convention as undermining the dissent’s inference of congressional intent (in the Comprehensive Crime Control Act) to authorize the death penalty for some fifteen year old felons.<sup>262</sup> Justice O’Connor reasoned that Congress’s having set a minimum age for capital punishment in other contexts—military occupation and for certain drug crimes—suggested that it did not intend to set a lower bar for juvenile felons.<sup>263</sup>

In the two other cases, the Court made fleeting reference to the Geneva Conventions outside the context of armed conflict. In *Department of Employment v. United States*, the Court referred to the American Red Cross’s “right and . . . obligation to meet this Nation’s commitments under various Geneva Conventions” in determining that it is an instrumentality of the United States for purposes of immunity from state taxation.<sup>264</sup> In *FTC v. A.P.W. Paper Co.*, the Court held that the paper company was not barred from using the Red Cross emblem and name on its products.<sup>265</sup> The Court rejected the argument that A.P.W.’s use of the emblem and name was prohibited by certain provisions of the Red Cross Act that reserved exclusive rights to the American Red Cross, holding that A.P.W.’s use was law-

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risprudence. See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006) (surveying exhaustively this history).

260. *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988).

261. *Stanford v. Kentucky*, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

262. *Thompson*, 487 U.S. at 851–52 (O’Connor, J., concurring). Justice O’Connor also pointed to federal legislation limiting application of the death penalty for certain drug offenses to persons at least eighteen years of age. *Id.*

263. *Id.*

264. *Dep’t of Emp’t v. United States*, 385 U.S. 355, 359 (1966) (citing Geneva Convention for the Amelioration of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940; First Geneva Convention, *supra* note 76; 1929 Convention, *supra* note 197).

265. *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 201–02 (1946).

ful because it antedated the Act.<sup>266</sup> Of the 1929 Geneva Convention's provision to "prevent the use by private persons" of the words or symbol, the Court stated simply that it "is a matter for the executive and legislative departments."<sup>267</sup>

The Court's reliance on Geneva law outside the context of armed conflict offers little substantive analysis of IHL. The Court's citation to Geneva law in this context, however, suggests several observations. First, references to the Third and Fourth Geneva Conventions in *Thompson* and *Stanford* can be read as evidence of a somewhat loose approach to international law. Strictly speaking, the Geneva Conventions are not human rights treaties. While the overlap between humanitarian law and human rights law is substantial and widely remarked,<sup>268</sup> these bodies of law are distinct and the *Thompson* plurality's citation to the Fourth Geneva Convention as one of "three major human rights treaties" is technically inaccurate.<sup>269</sup> Second, *A.P.W. Paper* is congruent with the Court's general reticence to treat as cognizable causes of action allegedly arising under the Geneva Conventions—or, as demonstrated in Part II, under the various Hague Conventions. As Paul Stephan recently noted, one might view the Court's statement about the 1929 Convention in *Eisentrager* as clarifying *A.P.W. Paper*'s murky treatment of the self-execution issue: the "obvious scheme" of the 1929 Convention, as the Court said in *Eisentrager*, was to direct responsibility for its enforcement to the political branches. The post-war Court, in other words, was unwilling to suggest that the Convention operated independently of its implementing statutes.<sup>270</sup> As discussed above, this theme runs throughout the Court's IHL jurisprudence.

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266. *Id.* at 200–01.

267. *Id.* at 203.

268. See, e.g., Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAEL L. REV. 310, 310 (2007) (discussing historical developments leading to the increasing overlap of the two bodies of law); Meron, *supra* note 48, at 243–51 (describing the impact of human rights on the development of humanitarian law and the growing convergence of the two spheres).

269. *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988); see also *Stanford v. Kentucky*, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting) (same), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

270. Stephan, *supra* note 11, at 13–14.

## C. GENEVA LAW IN THE “WAR ON TERROR”

The Court’s most remarkable discussion of humanitarian law has arisen in the years since September 11, 2001, specifically in the line of cases relating to detainees at Guantánamo Bay. Of the ten cases on the merits in which at least one member of the Court references the Geneva Conventions, four arise in the “war on terror” context.<sup>271</sup> Notably, since its 1950 decision in *Eisenrager*, save the few non-substantive references discussed above, the Court has largely ignored humanitarian law. This gap is, perhaps, unsurprising—as is the reality that the “particular dangers of terrorism in the modern age”<sup>272</sup> have confronted the Court with novel questions occasioning similarly novel analysis. In the Guantánamo context, the Court has recognized the likelihood that “common-law courts simply may not have confronted cases with close parallels.”<sup>273</sup>

The application of Geneva law to the war on terror has received extensive treatment elsewhere.<sup>274</sup> A few foundational principles that frame the Court’s analysis merit review here. First, Article 2, common to the four 1949 Conventions, specifies that those Conventions apply to armed conflict or occupation *between states*.<sup>275</sup> Second, as between warring states, persons of

271. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Munaf v. Geren*, 553 U.S. 674 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

272. See *Boumediene*, 553 U.S. at 752.

273. See *id.* The advent of this new age has, of course, also prompted a re-evaluation of constitutional law issues: “[b]ecause our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined.” *Id.* at 797–98.

274. See, e.g., M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION* 24–26 (2010); David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT’L L.J. 55, 70–94 (2006); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 10–19 (2003); Jordan Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 328–34 (2003); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328, 335–36 (2002) (discussing the import of the Geneva Conventions for military commissions); see also Mofidi & Eckert, *supra* note 183, at 79–90 (discussing treatment of detainees in the war on terror); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VA. J. INT’L L. 295, 298–317 (2006) (discussing the applicability of Geneva law to the Bush Administration’s practice of rendition).

275. Fourth Geneva Convention, *supra* note 182, art. 2 (“[T]he 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,

either state detained by the other are categorized as either prisoners of war or civilian internees.<sup>276</sup> The former category of persons is protected by the Third Geneva Convention while the latter category of persons is protected by the Fourth Geneva Convention.<sup>277</sup> Third, a different line of analysis is required if the relevant conflict is not between states, i.e., is “not of an international character.”<sup>278</sup> In each case reviewed in this section, the Court’s analysis suffers from its failure clearly to address these points.

1. *Hamdi v. Rumsfeld*

The Court first referenced Geneva law after September 11, 2001, in the 2004 case *Hamdi v. Rumsfeld*.<sup>279</sup> Hamdi, a U.S. citizen, was seized in Afghanistan, transferred to the U.S. naval base in Guantánamo Bay, and later transferred to a naval brig in Virginia after U.S. authorities learned of his citizenship.<sup>280</sup> The executive branch deemed Hamdi an “enemy combatant”

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even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”); Third Geneva Convention, *supra* note 182, art. 2; Second Geneva Convention, *supra* note 182, art. 2; First Geneva Convention, *supra* note 76, art. 2.

276. See INT’L COMM. OF THE RED CROSS, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., 1958) [hereinafter Pictet, CIVILIAN COMMENTARY] (“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can be outside the law.*”); see also Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT’L L. 499, 506 (2005) (“The Geneva Conventions are constructed so as to provide for no gaps in its coverage of enemy soldiers and civilians. The notion that someone who fails to qualify for POW status is therefore beyond the coverage of the Geneva Conventions is incorrect.”).

277. Fourth Geneva Convention, *supra* note 182, art. 4 (describing protected persons); Third Geneva Convention, *supra* note 182, art. 4 (same).

278. Fourth Geneva Convention, *supra* note 182, art. 3 (“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 . . . .”); Third Geneva Convention, *supra* note 182, art. 3; Second Geneva Convention, *supra* note 182, art. 3; First Geneva Convention, *supra* note 76, art. 3.

279. 542 U.S. 507 (2004) (plurality opinion).

280. *Id.* at 510.

and held him without access to an attorney in solitary confinement.<sup>281</sup>

Among other arguments against his detention, Hamdi raised one claim based on the Geneva Conventions.<sup>282</sup> He claimed that Article 5 of the Third Geneva Convention required him to be treated as a prisoner of war until a competent tribunal determined otherwise.<sup>283</sup> A deeply divided Supreme Court declined to consider that question.<sup>284</sup> Justice O'Connor, writing for a plurality of the Court, instead determined that the Constitution entitled Hamdi to judicial review of his detention.<sup>285</sup>

Strictly speaking, the opinion answered “only the narrow question” of whether the September 18, 2001, Authorization for the Use of Military Force (AUMF) authorized the detention of “enemy combatants,” such as Hamdi.<sup>286</sup> In answering this question, however, the plurality drew upon the law of war, including the Third Geneva Convention.<sup>287</sup> In a broad sense, then, the Court uses the Convention as an aid in statutory construction. A careful parsing of the opinion against the background of the

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281. *Id.*; see also Brief of Petitioners at 5–6, 10, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

282. Hamdi made the additional argument in the Fourth Circuit that his continued detention was prohibited by the Conventions because the international armed conflict had ended with the installation of the Karzai government. See Brief of the Petitioners/Appellees at 53–54, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (No. 02-7338).

283. *Id.* at 38–39.

284. *Id.*

285. *Hamdi*, 542 U.S. at 534 n.2 (“Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.”).

286. *Id.* at 516. The AUMF authorized “all necessary and appropriate force” to be used against “nations, organizations, or persons” associated with the 9/11 attacks. *Id.* at 510. By narrowly tailoring the question before it, the plurality did not reach the government’s argument that Article II provides the executive plenary detention authority. *Id.* at 517. Nor do any of the four opinions define “enemy combatant.” Rather, the plurality accepts, for the purpose of the case, the government’s definition as one who was “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* at 516 (internal quotation marks and citation omitted).

287. *Id.* at 518. The plurality finds the language of the AUMF to represent “explicit congressional authorization” for the detention of enemy combatants. *Id.* at 519 (“[I]t is of no moment that the AUMF does not use specific language of detention. . . . [I]n permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).

Court's prior treatment of humanitarian law, however, reveals that the plurality draws on humanitarian law in four different ways.

*a. Hamdi's Use of Humanitarian Law*

First, through reliance on its precedent, the Court interpreted the customary law of war to emphasize the centrality of detention to waging war.<sup>288</sup> Critical to the plurality's conclusion that the AUMF authorized Hamdi's detention was its intermediate finding that detention is a "fundamental incident of waging war."<sup>289</sup> This proposition allowed the plurality to conclude that detention was therefore necessarily contemplated in the "all necessary and appropriate force" language of the AUMF.<sup>290</sup> The plurality quoted *Ex parte Quirin* in noting that "universal agreement and practice" sanction detention of enemy belligerents during war,<sup>291</sup> and went on to frame the practice of wartime detention as a means to prevent belligerents from returning to the battlefield.<sup>292</sup> In short, the Court reaffirmed and emphasized its assessment in *Quirin* as to the content of the customary law of war.

Second, the plurality invoked the law of war as persuasive authority to support its conclusion that Hamdi's citizen status did not preclude his detention.<sup>293</sup> The plurality found no meaningful distinction between Hamdi and the citizen-detainee in *Quirin*<sup>294</sup> and cited for support the Lieber Code, which it understood to "contemplate[] . . . that 'captured rebels' would be

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288. *Id.*

289. *Id.* at 518–19.

290. *Id.* Concurring in the judgment, Justice Souter flatly rejected this claim, arguing that the Non-Detention Act required "clear congressional authorization before any citizen can be placed in a cell," which the vague language of the AUMF cannot be read to provide. *Id.* at 543, 547 (Souter, J., concurring).

291. *Id.* at 518–19 (plurality opinion).

292. The Court cited the following three authorities for the proposition that the purpose of wartime detention is to incapacitate the detainee, not to serve a punitive function: *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 788 (rev. 2d ed. 1920); Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) (quoting decision of Nuremberg Military Tribunal, *reprinted in* 41 AM. J. INT'L L. 172, 229 (1947)). Justice Scalia faulted the plurality's application of this principle to Hamdi because these sources do not speak to the detention of U.S. citizens. *Hamdi*, 542 U.S. at 574 n.5 (Scalia, J., dissenting).

293. *Hamdi*, 542 U.S. at 519 (plurality opinion).

294. *Id.* The plurality found it of no moment that *Quirin* petitioner Haupt was detained for the purpose of war crimes prosecution and Hamdi was detained solely to prevent his return to the battlefield. *Id.*

treated ‘as prisoners of war.’”<sup>295</sup> The inference, of course, is that the Lieber Code, the first modern codification of the law of war, offered precedent for the wartime detention of U.S. citizens.

Third, the plurality cited the Third Geneva Convention in assessing Hamdi’s claim that his detention was “indefinite.”<sup>296</sup> In contrast to the *Yamashita* Court’s analysis of the 1929 Convention, the plurality offered little textual analysis of the 1949 Convention. Rather, it simply recognized the “clearly established principle of the law of war that detention may last no longer than active hostilities”<sup>297</sup> and “agree[d] that indefinite detention for the purpose of interrogation is not authorized.”<sup>298</sup> The Court found, however, that Hamdi’s detention was not of this kind. “Longstanding law-of-war principles” guided the Court to construe the AUMF to authorize detention “for the duration of the relevant conflict,” which the plurality defined as the period “[U.S.] troops are still involved in active combat in Afghanistan.”<sup>299</sup>

The plurality hedged on this point, however, pointing out that its understanding that detention is permitted “for the duration of the relevant conflict” may change if the war on terrorism presents a situation not envisioned during the development of the laws of war.<sup>300</sup> The plurality thus explicitly tethered its pronouncement on the permissibility of Hamdi’s detention to the current state of the law of war.<sup>301</sup>

Fourth, the plurality mentioned the Third Geneva Convention in elucidating the kind of process required by the Constitution for citizen-detainees in Hamdi’s position.<sup>302</sup> Though the

295. *Id.*

296. *Id.* at 519–20. Specifically, the plurality responded to the suggestion that the AUMF does not authorize indefinite detention. *Id.*

297. *Id.* at 520 (employing the “see” cite to the Third Geneva Convention, *supra* note 182, and the “see also” cite to the Second Hague Convention of 1899, *supra* note 57, the Fourth Hague Convention, *supra* note 33, and the 1929 Geneva Convention, *supra* note 197).

298. *Id.* at 521.

299. *Id.*

300. *Id.* (“If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”).

301. Two years later Hamdan argued that his detention fell into precisely this category. See Brief for Petitioner at 34, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) [hereinafter *Hamdan Petitioner’s Brief*] (quoting *Hamdi*, 542 U.S. 507, and arguing that “this case presents the question *Hamdi* left open”).

302. *Hamdi*, 542 U.S. at 538.

plurality upheld Hamdi's detention, it found that the process proposed by the government was constitutionally inadequate,<sup>303</sup> and ultimately held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>304</sup> After elucidating the basic process implicit in this formulation,<sup>305</sup> the Court pointed out that these standards "could be met by an appropriately authorized and properly constituted military tribunal."<sup>306</sup> The plurality suggested that adequate process was already employed under current military regulations for detainees asserting prisoner of war status under the Third Geneva Convention.<sup>307</sup>

In sum, the plurality employed humanitarian law (1) through reliance on and elaboration of precedent interpreting the customary laws of war, (2) as persuasive authority to support its reading of *Quirin* that there is no bar on the detention of U.S. citizens, (3) as a tool of statutory construction in assessing Hamdi's claim that the AUMF does not authorize indefinite detention, and (4) to illustrate a context in which constitutionally adequate procedures to challenge one's detention exist.

*b. The Court's Reluctance to Engage Holistically the Corpus of IHL*

The *Hamdi* decision is complex and ambiguous, as evidenced by the Court's issuance of no fewer than four opinions,

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303. *Id.* at 532. The government had urged that the factual statements presented in a sole Defense Department declaration constituted sufficient fact-finding in part because Hamdi's seizure took place in a combat zone. *Id.* at 526–28. The plurality recognized both Hamdi's liberty interest and the "weighty and sensitive governmental interests" at stake and balanced the competing interests under the due process balancing test elucidated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Hamdi*, 542 U.S. at 528–32.

304. *Hamdi*, 542 U.S. at 533.

305. While the detainee must have an opportunity to be heard, "proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," which may entail admission of hearsay and a presumption in favor of the government's evidence. *Id.* The plurality envisioned a burden-shifting scheme in which the government must first proffer "credible evidence," which the alleged combatant detainee would then have an opportunity to rebut. *Id.* at 533–34.

306. *Id.* at 538.

307. These regulations make available military tribunals to render detainee-status determinations. *Id.* (citation omitted). This reference by the plurality is critical to Justice Roberts's invocation of the Geneva Convention in his *Boumediene* dissent. See *infra* Part III.C.3.

none of which garnered a majority. The complexities of humanitarian law are at the center of the plurality opinion's lack of clarity. As one commentator has pointed out, much confusion stems from the Court's "reluctance to grapple directly with the contours of international humanitarian law and from its failure to articulate clearly the relationship between that body of law and U.S. law."<sup>308</sup> The central problem with the plurality opinion's approach is its selective reliance on humanitarian law principles without placing such concepts in the broader context of this body of law. The consequence is a jurisprudential confusion of concepts.

The plurality alternatively did not recognize its reliance on humanitarian law and purported to rely on humanitarian law principles, but applied them without the necessary context. As one commentator argues, for example, the Court's recognition of the concept of "enemy combatant" demonstrated an unremarked reliance on humanitarian law.<sup>309</sup> While it may be more precisely stated that the plurality was relying on the Court's interpretation of humanitarian law in *Quirin*—recall that the terms "enemy combatant" and "unlawful belligerent" do not appear in the Conventions; rather, the *Quirin* Court used humanitarian law to *infer* the existence of such a category<sup>310</sup>—the point remains that the *Hamdi* plurality did not clearly articulate its use of humanitarian law.

Similarly, the plurality's reliance on the Third Geneva Convention as well as various provisions of Hague law for the principle that "detention may last no longer than active hostilities" is problematic—though here the analysis is more incomplete than inaccurate.<sup>311</sup> The plurality failed to consider explicitly two issues critical to the invocation of the Third Geneva Convention: whether the "relevant conflict" was the war between the United States and Afghanistan or between the Unit-

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308. Jenny S. Martinez, *International Decision: Availability of U.S. Court to Review Decision to Hold U.S. Citizen as Enemy Combatant—Executive Power in War on Terror*, 98 AM. J. INT'L L. 782, 785 (2004).

309. *See id.* at 785–86. One might counter that the plurality merely adopted the term as descriptive of Hamdi for the purposes of the case, and thus did not "import" any substantive concepts of humanitarian law.

310. *See supra* Part II.A.

311. *Hamdi*, 542 U.S. at 520. Depending on the nature of the underlying armed conflict, the relevant IHL provisions may offer only prohibitions, not affirmative grants of detention authority. *See Cerone, supra* note 43, at 410–12; Martinez, *supra* note 308, at 786. The cited provision actually states: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." Third Geneva Convention, *supra* note 182, art. 118.

ed States and al Qaeda, and whether Hamdi was a civilian or a combatant.

As noted above, all detainees captured during an international armed conflict are either prisoners of war or civilian detainees, while a separate, more limited, set of rules applies to conflicts “not of an international character.” The Court, however, did not clarify the “relevant conflict.” If, on the one hand, the relevant conflict was the U.S.-Afghanistan war, Article 2 was plainly satisfied because that conflict arose “between two or more of the High Contracting Parties.”<sup>312</sup> On this interpretation, Hamdi’s Article 5 argument should have prevailed, assuming the Geneva Conventions to be self-executing.<sup>313</sup> On the other hand, if the relevant conflict was the amorphous “war on terrorism,” or more specifically, the transnational armed conflict between the United States and al Qaeda, the Article 2 criteria may not have been met, rendering the provision cited by the plurality inapplicable in the first instance.<sup>314</sup> Moreover, the plurality’s silence as to Hamdi’s claim of prisoner of war status also raises a question of whether it properly invoked the Third Geneva Convention. If Hamdi in fact was not a belligerent, as he claimed, then the relevant instruments were the Fourth Geneva Convention and Additional Protocol I, though again this depends on the nature of the underlying conflict.<sup>315</sup> The Court’s

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312. Third Geneva Convention, *supra* note 182, art. 2. Still, the international armed conflict arguably ended with the installation of the Karzai government, thus requiring a separate legal basis for the continued applicability of the full provisions of the Convention. See Alec Walen & Ingo Venzke, *Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court’s Treatment of the Law of War in Hamdi v. Rumsfeld*, 67 HEIDELBERG J. INT’L L. 843, 851 (2007); Martinez, *supra* note 308, at 786–88 (citing *International Humanitarian Law and Terrorism: Questions and Answers*, INT’L COMMITTEE RED CROSS (May 5, 2004), available at <http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>).

313. Whether the Geneva Conventions are self-executing is a point of contention in the lower courts that the Supreme Court has so far declined to resolve. Compare *United States v. Khadr*, 717 F. Supp. 2d 1215, 1220 n.4 (Ct. Mil. Comm’n Rev. 2007) (noting that the Geneva Conventions are “generally viewed as self-executing treaties”), and *United States v. Lindh*, 212 F. Supp. 2d 541, 553 n.20 (E.D. Va. 2002) (same), with *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) (viewing the Geneva Conventions as non-self-executing), *rev’d on other grounds*, 542 U.S. 507 (2004).

314. See Walen & Venzke, *supra* note 312, at 850–52 (discussing the Court’s confusion of the “war on terror” with the war in Afghanistan).

315. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Fourth Ge-

decision not to address these issues may have been dispositive to the case.<sup>316</sup>

Ingrid Wuerth offers several further criticisms of the *Hamdi* plurality's use of humanitarian law.<sup>317</sup> First, she argues that *Quirin* and the other sources upon which the plurality relied<sup>318</sup> offer only weak support for the conclusion that detention is a "fundamental incident" of war.<sup>319</sup> The gist of this criticism is that the plurality misconstrued humanitarian law in interpreting the scope of the AUMF's detention authority.<sup>320</sup> Second, Wuerth argues that the plurality asked and answered the wrong question in concluding that the law of war provides "no bar" to the detention of U.S. citizens.<sup>321</sup> In terms of the AUMF, she argues, this approach would broaden the scope of authorization to include everything not specifically prohibited by the law of war, as opposed to authorizing only conduct "fundamental" to waging war.<sup>322</sup> Third, Wuerth recognizes that the plurality ignored the domestic status of the Geneva Conventions: it did not point out that the United States is a party to the treaties, consider whether the Conventions are self-executing, or

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neva Convention, *supra* note 182, art. 78; *see also* Walen & Venzke, *supra* note 312, at 854–57.

316. *See* Martinez, *supra* note 308, at 786–88 ("Even if the U.S. Congress, in enacting the AUMF, intended to authorize implicitly the detention of individuals to the extent customary under the laws of war, that authority would have ended with the termination of the international armed conflict . . ."). Martinez goes on to characterize the plurality's approach as "embark[ing] on a questionable path toward creating its own, new constitutional common law of war, ungrounded either in international humanitarian law or in any specific legislation enacted by the U.S. Congress." *Id.*

317. *See* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 307–19 (2005) (analyzing the use of international humanitarian law in the *Hamdi* plurality opinion).

318. *See supra* notes 289–92 and accompanying text.

319. *See* Wuerth, *supra* note 317, at 309–16 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion)).

320. *See id.* at 313–14 ("It is one thing to reason that Congress authorized the President to detain in ways affirmatively sanctioned and regulated (and thus also limited) by the law of war; it is quite another to rely on some law-of-war authorities to support the claim of congressional authorization for a detention that purportedly falls outside the scope of those authorities.").

321. *See id.* at 316–18 (quoting *Hamdi*, 542 U.S. at 519).

322. *See id.* at 317–18 (noting that the absence of a prohibition on such detention in the law of war and the purposes of detention were the "only evidence the plurality cited to support reading the AUMF to include" the detention of U.S. citizens).

suggest whether either feature is relevant in using humanitarian law to interpret the AUMF.<sup>323</sup>

Justice Souter offered the more substantial analysis of humanitarian law in a separate opinion, in which he concurred in the judgment.<sup>324</sup> He took a different view of Hamdi's Geneva claims, arguing that the Bush Administration did not act in accordance with the Geneva Conventions because it failed to treat Hamdi as a prisoner of war.<sup>325</sup> Citing Article 4 of the Third Geneva Convention, Justice Souter stated that Hamdi was "presumably" a Taliban detainee because "he was taken bearing arms on the Taliban side of a field of battle in Afghanistan" and would therefore "seem to qualify for treatment as a prisoner of war under the Third Geneva Convention."<sup>326</sup> Citing Article 5 of the Convention, Justice Souter noted that to the extent there was doubt about Hamdi's status, he was to be presumptively treated as a prisoner of war until a competent tribunal determined otherwise.<sup>327</sup> Yet Justice Souter remained circumspect in this analysis, openly admitting that "[w]hether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point."<sup>328</sup> Justice Souter rightly pointed to the presumption of prisoner-of-war status

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323. *See id.* at 318–19.

324. *See Hamdi*, 542 U.S. at 548–51 (Souter, J., concurring). Justice Souter joined the plurality to conclude that on remand Hamdi should have a meaningful opportunity to prove that he is not an enemy combatant. *See id.* at 553. In his concurrence, however, Justice Souter argued that the AUMF did not authorize Hamdi's detention and disclaimed speaking to the specifics of the plurality's due process analysis. *See id.* at 553–54 ("I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas procedural components suggested by the plurality." (citations omitted)).

325. *See id.* at 549 (arguing that the Administration's official position that Hamdi was not "entitled to prisoner of war status" is "at odds with its claim here to be acting in accordance with customary law of war"). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048, 2095–96 (2005) (arguing that Justice Souter confused the "distinction between international law rules that are conditions precedent for the exercise of authorized powers, and those that are not," and that if Hamdi was mistakenly classified as an unlawful combatant as opposed to a prisoner of war, then "that would simply mean that Hamdi's *treatment* was not statutorily authorized, not that Hamdi's detention was unauthorized").

326. *Hamdi*, 542 U.S. at 549 (citing Third Geneva Convention, *supra* note 182, art. 4).

327. *See id.* at 549–50.

328. *Id.* at 551.

under Article 5 of the Third Geneva Convention. In light of this analysis, his circumspection about the government's failure to comply with the "customary law of war" is puzzling.

In dissent, Justice Scalia argued that the "laws and usages of war" were inapplicable to Hamdi's detention because he is a U.S. citizen.<sup>329</sup> He called into question the plurality's determination that detention is a "fundamental incident of waging war," and thus its conclusion that the broad language of the AUMF constituted congressional authorization for Hamdi's detention.<sup>330</sup> The dispositive issue for Justice Scalia was Hamdi's status as a U.S. citizen.<sup>331</sup> He therefore skirted the issue of humanitarian law altogether; for him, the key inquiry was not what the Geneva Conventions guaranteed Hamdi, but what the Constitution guaranteed him.<sup>332</sup> Ultimately, in Justice Scalia's view, absent a formal suspension of the writ of habeas corpus, Hamdi should have been charged or released.<sup>333</sup>

Justice Thomas, in a separate dissent, proffered the most cryptic reference to humanitarian law. He agreed with the plurality's conclusion that the AUMF represented congressional authorization for Hamdi's detention, but argued that the plurality unduly restricted this authority by limiting it to periods of active combat.<sup>334</sup> "[T]he power to detain," Justice Thomas argued, "does not end with the cessation of formal hostilities."<sup>335</sup> He thus rejected the applicability of the Third Geneva Convention altogether, stating flatly, "I do not believe that we may diminish the Federal Government's war powers by reference to a treaty and certainly not to a treaty that does not apply."<sup>336</sup>

Justice Thomas did not explain why the Third Convention does not apply. Presumably, he adopted the Fourth Circuit's

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329. *See id.* at 567–68 (Scalia, J., dissenting) ("The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal.").

330. *See id.* at 574 n.5.

331. *See supra* note 329.

332. *See Hamdi*, 542 U.S. at 574 n.5 ("That captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens.").

333. *See id.* at 572.

334. *See id.* at 587–88 (Thomas, J., dissenting).

335. *Id.* at 588.

336. *See id.*

conclusion that the Convention is not self-executing.<sup>337</sup> A later footnote offered only the following clarification: “Hamdi’s detention comports with the laws of war, including the Third Geneva Convention.”<sup>338</sup> Justice Thomas also seemed to claim support for his expansive view of inherent executive wartime detention authority in the law of war.<sup>339</sup>

In sum, the dissenting Justices’ treatment of humanitarian law is as splintered as the plurality’s. Justice Scalia couched his disagreement in terms of the plurality’s misreading of its precedent and other authorities by not giving sufficient weight to the citizen/alien distinction.<sup>340</sup> He did not explicitly engage the majority’s reliance on *Quirin* for the proposition that detention as such is “a fundamental incident of war.”<sup>341</sup> Rather, Justice Scalia disagreed with the inference that such a proposition equally authorized detention for aliens and U.S. citizens alike.<sup>342</sup> Justice Scalia’s disagreement, therefore, does not seem to be with the majority’s emphasis on the centrality of detention to the law of war. Meanwhile, as evidenced by his cursory reliance on the government’s brief for the proposition that Hamdi’s detention “comports with . . . the Third Geneva Convention,”<sup>343</sup> Justice Thomas was plainly uninterested in the prospect that the Geneva Conventions might play any role in the Court’s decision.

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337. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 468–69 (4th Cir. 2003), *judgment vacated*, 542 U.S. 507 (2004). In a remarkable dissent from the Court’s denial of certiorari in *Noriega v. Pastrana*, Justice Thomas provided further clues as to how he would dispose of Geneva claims. 130 S. Ct. 1002, 1008–09 (2010) (suggesting that addressing the constitutionality of the Military Commissions Act’s proscription on detainees’ invocation of the Geneva Conventions would allow the Court to reach the question of whether the conventions are self-executing and judicially enforceable).

338. See *Hamdi*, 542 U.S. at 597 n.6 (Thomas, J., dissenting) (citing Brief for Respondents at 22–24, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)).

339. See *id.* at 597–98 (arguing that the difficulty in distinguishing between military necessity and expediency “does not serve to distinguish this case because it is also consistent with the laws of war to detain enemy combatants exactly as the Government has detained Hamdi. This, in fact, bolsters my argument [above] to the extent that the laws of war show that the power to detain is part of a sovereign’s war powers.”).

340. See *id.* at 569–72 (Scalia, J., dissenting).

341. See *id.* at 519 (plurality opinion) (citing *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942)); *id.* at 548–49 (Souter, J., concurring) (citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

342. See *id.* at 575 n.5 (Scalia, J., dissenting).

343. See *supra* note 338 and accompanying text.

The common thread underlying the Court's various opinions is that none undertakes a comprehensive analysis of the humanitarian law issues at stake. The opinions do not identify the relevant conflict, which in turn triggers the applicability of different provisions of the Conventions. Nor do they assess Hamdi's status under the law of war. The Court's treatment of IHL in *Hamdi* thus suggests that the Court is institutionally ill-equipped for—and some members of the Court patently uninterested in—systematically engaging the Geneva Conventions.

## 2. *Hamdan v. Rumsfeld*

The Court's most remarkable analysis of humanitarian law appears in *Hamdan v. Rumsfeld*.<sup>344</sup> Commentators have pointed to *Hamdan* as a landmark from the day it was handed down on June 29, 2006.<sup>345</sup> In the context of this Article, however, while noteworthy for its humanitarian law analysis, the decision was not as radical a procedural departure from the Court's historical reticence to consider Geneva law as might first appear. Justice Stevens's majority opinion made clear that the Court relied on the Geneva Conventions only to the extent the UCMJ incorporated the law of war.<sup>346</sup> Still, quite apart from the question of judicial enforceability, the decision is remarkable for its novel and controversial interpretation of the Geneva Conventions.<sup>347</sup>

344. 548 U.S. 557 (2006).

345. See, e.g., Walter Dellinger, *A Supreme Court Conversation: The Most Important Decision on Presidential Power. Ever.*, SLATE (June 29, 2006, 5:50 PM), <http://www.slate.com/id/2144476/entry/2144825>.

346. See *infra* notes 374–76 and accompanying text. The legislative response to the *Hamdan* decision, however, offers a strong argument in favor of judicial enforceability. See Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 76 n.30 (2007) (noting that the provisions of the Military Commissions Act “curtail[ing] judicial enforcement of the Geneva Conventions would be superfluous” if the Conventions were not judicially enforceable). For criticism of the Military Commissions Act in light of the Geneva Conventions, see James G. Stewart, *The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview*, 5 J. INT'L CRIM. JUST. 26 (2007). See also Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 FORDHAM INT'L L.J. 780, 820–21 (2007) (finding difficulty in construing the Military Commission Act provisions not to violate Common Article 3).

347. The *Hamdan* decision is long and complex. This Article addresses solely its engagement with humanitarian law. For a brief, yet comprehensive, summary of the decision, see Gregory E. Maggs, *Symposium on the New Face*

Hamdan was captured on the battlefield in Afghanistan during hostilities between the United States and the Taliban in November 2001, transported to Guantánamo Bay in June 2002, and charged in mid-2004 with one count of “conspiracy to commit . . . offenses triable by military commission.”<sup>348</sup> Hamdan’s January 2006 habeas petition alleged that the military commission convened to try him was unlawful because it violated the Third Geneva Convention.<sup>349</sup> The Supreme Court granted certiorari after a panel of the D.C. Circuit concluded that the Geneva Conventions are not judicially enforceable, and in any event, that Hamdan was not entitled to their protections.<sup>350</sup> The Court, by marked contrast, held that Common Article 3 applied to the military commission convened to try Hamdan, and that the commission was unlawful because it did not comply with its provisions.<sup>351</sup>

That the Court reached the merits is itself remarkable in light of several jurisdictional hurdles<sup>352</sup> and a history of judicial deference to the executive on questions of national security.<sup>353</sup> Indeed, the Court may well have declined to accept certiorari following the D.C. Circuit’s approval of the government’s posi-

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*of Armed Conflict: Enemy Combatants After Hamdan v. Rumsfeld*, 75 GEO. WASH. L. REV. 971, 976–83 (2007).

348. See *Hamdan*, 548 U.S. at 566 (internal quotation marks and citation omitted).

349. See Hamdan Petitioner’s Brief, *supra* note 301, at 36–50.

350. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–42 (D.C. Cir. 2005), *rev’d*, 548 U.S. 557 (2006). The panel based its opinion almost entirely on Justice Jackson’s footnote in *Eisentrager*, described in *supra* Part I, which stated that “responsibility for observance and enforcement of [the 1929 Geneva Convention] is upon the political and military authorities.” See *id.* at 39 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)).

351. See *Hamdan*, 548 U.S. at 625–35.

352. The Court rejected the government’s motion to dismiss on the ground that the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2738, deprived the Court of jurisdiction. See *Hamdan*, 548 U.S. at 572–84. The Court also rejected the applicability of the common-law rule that civilian courts should await final outcome of a military proceeding before passing on the legitimacy of the tribunal. See *id.* at 584–90.

353. See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426, 433–34, 451 (2004) (failing to consider whether the President has authority to detain a U.S. citizen as an “enemy combatant” while reversing and remanding on jurisdictional grounds). *But see Hamdi v. Rumsfeld*, 542 U.S. 507, 535–37 (2004) (plurality opinion) (holding that “due process demands some system for a citizen-detainee to refute his classification” as such); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (“[F]ederal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of [Guantanamo Bay detainees] who claim to be wholly innocent of wrongdoing.”).

tion.<sup>354</sup> Instead, the Court engaged humanitarian law in two ways: (1) by holding that the offense with which Hamdan was charged did not constitute a violation of the law of war, and (2) by holding that the military commission violated Common Article 3 of the Geneva Conventions. The following analyzes each determination in turn.

*a. Probing Humanitarian Law to Define “Conspiracy”*

In the absence of congressional authorization for the specific commission convened to try Hamdan, the Court looked to humanitarian law to define the charge levied against him.<sup>355</sup> Clarifying its prior pronouncements about the jurisdiction of military commissions, the Court distinguished between three types of commissions.<sup>356</sup> The jurisdiction of Hamdan’s commission, once established as an “incident to the conduct of war,” was limited to offenses against the law of war.<sup>357</sup> As in *Quirin*, *Yamashita*, and *Eisentrager*, then, the Court had to determine whether the charge against Hamdan stated a violation of the law of war.<sup>358</sup>

Justice Stevens wrote for a plurality of the Court on the question of whether the charge was triable by military commission;<sup>359</sup> having concluded that the commission violated Common Article 3, Justice Kennedy did not reach the issue.<sup>360</sup> Hamdan was charged with conspiracy to commit offenses in-

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354. See Peter J. Spiro, *International Decisions: Hamdan v. Rumsfeld*, 100 AM. J. INT’L L. 888, 892–93 (2006) (describing the Court’s “institutional fortitude” in light of prior judicial practice).

355. See *Hamdan*, 548 U.S. at 594–95 (holding that the UCMJ, AUMF, and DTA “at most” confer a general authority on the President to convene military tribunals “where justified under the ‘Constitution and laws,’ including the law of war” (citing the Detainee Treatment Act of 2005, § 1005(e)(3)(D)(ii))).

356. The three types of military commissions are identified as (1) those “substituted for civilian courts . . . where martial law has been declared,” see *id.* at 595 (plurality opinion); (2) those established “as part of a temporary military government over occupied” territory in the absence of civilian government, see *id.* at 595–96 (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946)); and (3) those established as an “incident to the conduct of war” as needed “to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war,” see *id.* at 596 (quoting *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942)) (internal quotation marks omitted).

357. See *id.* at 596–97.

358. See *id.* at 597.

359. See *id.* at 595–613.

360. See *id.* at 653–55 (Kennedy, J., concurring in part).

cluding attacking civilians and terrorism.<sup>361</sup> The alleged conspiracy extended from 1996 to November 2001 and included four overt acts ascribed to Hamdan, none of which in itself constituted a law-of-war violation.<sup>362</sup> To determine whether “conspiracy” constituted a violation of the law of war, the plurality drew on both domestic and international sources.<sup>363</sup> It relied, for example, on Winthrop’s treatise to conclude that the offense alleged must have been committed in a theater of war and during the relevant conflict, problems for the conspiracy charge as no overt act was alleged to have occurred after September 11, 2001.<sup>364</sup> The plurality also observed that the charge of conspiracy does not appear in the Geneva or Hague Conventions, while the Third Geneva Convention *does* extend liability for other acts.<sup>365</sup> After reviewing these sources, Justice Stevens concluded that the admittedly high threshold<sup>366</sup> for defining the charge as an offense against the law of war was not met, and therefore that the commission “lack[ed] authority to try Hamdan.”<sup>367</sup>

*b. Finding a Violation of Common Article 3*

The Court then determined that the procedures of Hamdan’s commission violated Common Article 3 of the Conventions. Notwithstanding the procedural caveat described above,

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361. The charging document stated that Hamdan “willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.” *Id.* at 569–70 (majority opinion) (citation omitted).

362. *See id.* at 570 (describing the acts and time frame); *id.* at 600 (“None of the overt acts that Hamdan is alleged to have committed violates the law of war.”).

363. The Court drew heavily from *Quirin*, which it characterized as the “high-water mark of military power to try enemy combatants for war crimes,” *id.* at 597, and later pointed to as *support* for Hamdan’s argument that conspiracy is not a violation of the law of war because it emphasized completed acts, unlike Hamdan’s nascent efforts, *id.* at 606–07.

364. *See id.* at 597–600.

365. *See id.* at 603–04 & n.36 (noting liability “for substantive war crimes to those who ‘orde[r]’ their commission” (citing Third Geneva Convention, *supra* note 182, art. 129)). The plurality also pointed out that the Nuremberg Tribunal refused to recognize conspiracy as a violation of the law of war. *See id.* at 610.

366. *See id.* at 603 (pointing out that the offense in *Quirin* was recognized as such by “universal agreement and practice” though admitting that the bar was “arguably” lower in *Yamashita*—a rather striking understatement).

367. *See id.* at 611–12.

this holding is indeed a landmark in the Court's humanitarian law jurisprudence. It represents the only time in its history that the Court clearly and explicitly has found any provision of Geneva law to apply to a petitioner—even if via its incorporation by statute, the UCMJ.<sup>368</sup> It also represents the Court's first and only reference to Common Article 3 of the 1949 Conventions.

The Court reviewed the D.C. Circuit's bases for dismissing Hamdan's Geneva claims one by one.<sup>369</sup> First, it reviewed the determination that the Geneva Conventions are not judicially enforceable.<sup>370</sup> Its analysis deftly sidestepped the question of whether the Conventions are self-executing.<sup>371</sup> Recognizing the circuit court's heavy reliance on certain language in *Eisentrager* to conclude that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court,"<sup>372</sup> the Court stated that this language is "[b]uried in a footnote of the opinion" and "[w]hatever else might be said about the *Eisentrager* footnote, it does not control this case."<sup>373</sup>

Still, the Court bent over backward to harmonize the *Eisentrager* footnote with its holding as to the applicability of Common Article 3, emphasizing that it was not addressing the rights conferred on Hamdan by the Geneva Conventions.<sup>374</sup> Rather, the law of war's incorporation into the UCMJ mandated compliance with the Geneva Conventions quite apart

368. *See id.* at 627–28 (noting that Article 21 of the UCMJ covers compliance with the law of war, including the Geneva Conventions).

369. In addition to the two bases discussed below, the D.C. Circuit also suggested that even if Hamdan is entitled to the protections of the Geneva Conventions, precedent demanded abstention from the question of whether the military commission violated Article 3 of the Third Geneva Convention. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557. The Supreme Court clarified the circuit court's conflation of these "two distinct inquiries" in rejecting its Article 3 argument on the merits. *See Hamdan*, 548 U.S. at 589 n.20.

370. *See Hamdan*, 548 U.S. at 626–28.

371. *See id.* (focusing on the fact that the Geneva Conventions are "part of the law of war" rather than considering whether the Conventions are self-executing).

372. *See id.* at 627 (quoting *Hamdan*, 415 F.3d at 40). For a summary of the *Eisentrager* footnote, see *supra* notes 205–06 and accompanying text.

373. *Hamdan*, 548 U.S. at 627.

374. *See id.* at 627–28 ("We may assume that 'the obvious scheme' of the 1949 Conventions is identical in all relevant respects to that of the 1929 Geneva Convention, and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right.").

from whatever rights they may or may not confer upon Hamdan.<sup>375</sup> In short, regardless of the Convention's effect were it invoked as an independent source of rights, the dispositive factor was its status as a component of the law of war, with which Article 21 of the UCMJ mandated compliance.<sup>376</sup> The Court thus evaded the question of whether the Convention is self-executing.<sup>377</sup> Therefore, while it went on to pronounce Article 3 applicable to Hamdan, the Court arguably left the nettlesome *Eisentrager* footnote unscathed.<sup>378</sup>

Adding another layer of complexity to its (non)treatment of the self-executing treaty issue, the Court cited a bevy of contrary authorities, which suggested (1) that the Court should *not* follow *Eisentrager* to “assume” that the “obvious scheme” of the 1929 Conventions was identical to that of the 1949 Conventions,<sup>379</sup> and (2) that Hamdan was *not*, in fact, “preclude[d]” from invoking the Conventions “as an independent source of law binding the Government’s actions”<sup>380</sup>—i.e., that the Conventions *did* furnish him with enforceable rights.<sup>381</sup> Unsurpri-

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375. See *id.* at 628 (“For regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.” (internal citations omitted)); see also *id.* at 642 (Kennedy, J., concurring in part) (“There should be no doubt . . . that Common Article 3 is part of the law of war . . .”).

376. See *id.* at 627–28.

377. See Aya Gruber, *Who’s Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1041–84 (2007) (criticizing the Court’s failure to address the self-executing treaty issue as going beyond mere judicial temperance and situating this approach in a broader context of jurisprudential and political isolationism).

378. But see *id.* at 1039–40 (describing the argument that the Court’s interpretation of the UCMJ implied that the Geneva Conventions are self-executing (citing *Hamdan*, 548 U.S. at 716–17)).

379. See *Hamdan*, 548 U.S. at 627 n.57 (majority opinion) (employing the “[b]ut see, e.g.” signal to reference the authoritative commentaries to the Third and Fourth Geneva Conventions, which state respectively that “[i]t was not . . . until the Conventions of 1949 . . . that the existence of ‘rights’ conferred on prisoners of war was affirmed,” Pictet, POW COMMENTARY, *supra* note 57, at 91, and that the 1949 Conventions were written “first and foremost to protect individuals, and not to serve State interests,” Pictet, CIVILIAN COMMENTARY, *supra* note 276, at 21).

380. See *id.* at 627–28.

381. See INT’L COMMENTARY OF THE RED CROSS, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952) [hereinafter Pictet, FIELD COMMENTARY]; *Hamdan*, 542 U.S. at 628 n.58 (employing the “[b]ut see generally” signal to refer to a brief and commentaries supporting the proposition that Hamdan was furnished enforceable rights under the Geneva Conventions) (citing Brief for Louis Henkin et al. as Amici Curiae Supporting Peti-

singly, the Court was unwilling to denounce the *Eisentrager* footnote or to clarify the domestic status of the 1949 Conventions notwithstanding this profusion of contrary authority.

Second, the Court addressed the D.C. Circuit's holding that even if Hamdan were able to invoke the Geneva Conventions, he would not be entitled to their protections because he was captured in the war with al Qaeda—a conflict that “evades [the Conventions’] reach” because al Qaeda is not a “high contracting party,” as required by Article 2.<sup>382</sup> The Court sidestepped this argument entirely: “We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.”<sup>383</sup> That provision is Common Article 3, which applies to conflicts “not of an international char-

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tioner, *Hamdan v. Rumsfeld*, 548 U.S. 507 (2006) (No. 05-184); Pictet, POW COMMENTARY, *supra* note 57; Pictet, CIVILIAN COMMENTARY, *supra* note 276). The Court particularly highlighted language from the official commentary to the First Geneva Convention stating that “[i]t should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered the violation.” *Id.* (quoting Pictet, CIVILIAN COMMENTARY, *supra* note 277, at 84).

382. See *Hamdan*, 548 U.S. at 628–29 (citing *Hamdan v. Rumsfeld*, 415 F.3d 33, 41–42 (D.C. Cir. 2005)). Arguing that the war with al Qaeda was separate from the war with the Taliban, the Bush Administration contended that because Article 2 makes applicable the full protections of the Conventions only to “all cases of declared war or of any other armed conflict which may arise between two or more High Contracting parties,” and because al Qaeda is not a high contracting party, the full protections of the Geneva Conventions did not apply. See *Hamdan* Government Brief, *supra* note 206, at 38–39 (quoting Third Geneva Convention, *supra* note 182, art. 2). Nor did the provisions of Common Article 3 apply because the war against al Qaeda is not an “armed conflict not of an international character,” given its global reach. See *id.* at 48 (quoting Third Geneva Convention, *supra* note 182, art. 3); see also Memorandum from George W. Bush, U.S. President, to Richard Cheney, U.S. Vice President et al., On the Humane Treatment of Taliban and al Qaeda Detainees para. 2 (Feb. 7, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (citing Third Geneva Convention, *supra* note 182, art. 3) (setting forth the Bush Administration’s official position on the applicability of certain Geneva Convention provisions to al Qaeda or Taliban detainees).

383. *Hamdan*, 548 U.S. at 629. Because the Court determined that the military commission was unlawful for other reasons, it “reserved” the question of whether Hamdan was entitled to be treated as a prisoner of war under Article 5 of the Third Geneva Convention until a “competent tribunal” determined otherwise. See *id.* at 629 n.61. But see Michael W. Lewis, *International Myopia: Hamdan’s Shortcut to “Victory,”* 42 U. RICH. L. REV. 687, 700–01 (2008) (arguing that the Court’s interpretation of Common Article 3 “effectively foreclosed” the possibility of revisiting the applicability of Common Article 2—and hence the full provisions of the Convention—to the war with al Qaeda).

acter.”<sup>384</sup> The Court characterized Common Article 3 as “aford[ing] 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 signatory.”<sup>385</sup>

In effect, the D.C. Circuit had agreed with the Bush Administration’s argument that Hamdan fell into a gap between Articles 2 and 3. On the one hand, Article 2—and hence the full provisions of the Convention—was not applicable because al Qaeda is not a state.<sup>386</sup> On the other hand, Article 3 was not triggered because the conflict with al Qaeda is “international in scope.”<sup>387</sup> Without clarifying the relevant conflict, the Court applied Common Article 3 broadly to encompass “the armed conflict during which Hamdan was captured.”<sup>388</sup> The term “conflict not of an international character,” the Court held, simply means a conflict not between states.<sup>389</sup> The Court’s analysis was textual: it compared the functioning of Article 3 to that of Article 2 to establish the applicability of the former.<sup>390</sup> Throughout its discussion the Court made liberal use of the Commentaries to the Third and Fourth Conventions, and also quoted the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>391</sup> and the International Court of Justice (ICJ), the latter through reliance on a U.S. Army JAG Law of War Textbook.<sup>392</sup>

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384. Third Geneva Convention, *supra* note 182, art. 3.

385. *Hamdan*, 548 U.S. at 630.

386. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005), *rev’d*, 548 U.S. 557.

387. *See id.* at 41–42.

388. *See Hamdan*, 548 U.S. at 628.

389. *See id.* at 630 (“The term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations.”); *see also* Anthony Clark Arend, *Who’s Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld*, 22 AM. U. INT’L L. REV. 709, 718–21 (2007) (discussing the Court’s use of sources to determine that Article 3 applied to the conflict in which Hamdan was captured).

390. *See Hamdan*, 548 U.S. at 630.

391. *See id.* at 631 n.63 (citing Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>).

392. *See id.* (citing BRIAN J. BILL ET AL., INT’L AND OPERATIONAL LAW DEPT; JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK 228 n.26 (2000), available at <http://permanent.access.gpo.gov/lps34259/LOW%20Deskbook%202000.pdf>).

The Court's textual understanding of Common Article 3—though supported with authorities provided by Hamdan (in the mere three pages of his brief that addressed the provision)<sup>393</sup> and by Professors Ryan Goodman, Derek Jinks, and Anne-Marie Slaughter in an amicus brief<sup>394</sup>—seems to have been lifted primarily from D.C. Circuit Judge Williams's one-page concurrence, which itself cited no authority beyond the text for its analysis. Judge Williams explained:

Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*.<sup>395</sup>

Having determined that Common Article 3 applied, the Court set about interpreting its language,<sup>396</sup> concluding that

393. See Hamdan Petitioner's Brief, *supra* note 301.

394. Brief for Professors Ryan Goodman, Derek Jinks, & Anne-Marie Slaughter as Amici Curiae Supporting Petitioner at 18–27, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184) [hereinafter Hamdan Brief].

395. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005), *rev'd* 548 U.S. 557.

396. Article 3 provides:

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:

(1) 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.

the military commission violated Article 3's mandate that Hamdan be tried by a "regularly constituted court."<sup>397</sup> For the meaning of "regularly constituted court," the Court relied on the Pictet Commentary,<sup>398</sup> the Red Cross's study on Customary International Humanitarian Law,<sup>399</sup> and Justice Rutledge's dissent in *Yamashita*, which described a military commission as a court "specially constituted for the particular trial."<sup>400</sup>

Similarly, the Court found that the military commission did not meet Article 3's requirement that the tribunal afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>401</sup> To define this phrase the Court looked to customary international law,<sup>402</sup> of which it found Article 75 of Additional Protocol I to the 1949 Geneva Conventions to be a part.<sup>403</sup> The Court viewed Article 75 as an elaboration on Common Article 3's "all the judicial guarantees" provision.<sup>404</sup> One of the guarantees listed in Article 75 is the

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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.

Third Geneva Convention, *supra* note 182, art. 3.

397. *Hamdan*, 548 U.S. at 632–33.

398. *Id.* at 632 (citing Pictet, CIVILIAN COMMENTARY, *supra* note 276, at 340, for the proposition that a regularly constituted court "definitely exclud[es] all special tribunals").

399. *Id.* (citing ICRC, CIHL, *supra* note 80, at 355, for the proposition that a "regularly constituted court" is one "established and organised in accordance with the laws and procedures already in force in a country").

400. *Id.* (quoting *In re Yamashita*, 327 U.S. 1, 44 (1946) (Rutledge, J., dissenting)); *see also* Green, *supra* note 207, at 158–69 (describing the import of Justice Rutledge's dissent on Justice Stevens's—a former Rutledge law clerk—majority opinion).

401. *Hamdan*, 548 U.S. at 633 (quoting Third Geneva Convention, *supra* note 182, art. 3(1)(d)).

402. *Id.* (arguing that the phrase "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law").

403. *Id.* at 633–34 (observing that the Commission "dispense[s] with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must . . . be present for his trial and must be privy to the evidence against him"); *see also* Additional Protocol I, *supra* note 315, art. 75.

404. *Hamdan*, 548 U.S. at 633 (quoting Third Geneva Convention, *supra* note 182, art. 3(1)(d)).

“right to be tried in [one’s] presence.”<sup>405</sup> Acknowledging that the United States has not ratified Additional Protocol I, the Court observed that the United States nonetheless does not object to it.<sup>406</sup> Indeed, the Court cited a law review article noting the U.S. view that the provision reflects customary international law,<sup>407</sup> and further stated that the United States is a party to other instruments which contain “the same basic protections” as those listed in Article 75.<sup>408</sup> The Court concluded, therefore, that although the requirements of Common Article 3 “are general ones, crafted to accommodate a wide variety of legal systems,” they are “requirements . . . nonetheless” and Hamdan’s military commission failed to meet them.<sup>409</sup>

*c. The Wrong Course to the Right Conclusion?*

Criticism of *Hamdan*’s application and analysis of the Geneva Conventions abounds. The opinion has been described as a departure from the Court’s usual “exceptionally thorough analyses when international law issues are involved.”<sup>410</sup> In contrast to its lengthy past treatment of international law issues, the *Hamdan* court expends only a few pages to define the scope of Common Article 3, determine the requirements of a “regularly constituted court,” and identify the “judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>411</sup> Still, judged not by the Court’s approach to international law issues generally, but by its past treatment of humanitarian law, the amount of analysis the Court devoted to Geneva law issues is substantial. Apart from quantity, how sound is its analysis?

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405. *Id.* at 633–34 (quoting Additional Protocol I, *supra* note 315, art. 75(4)(e)).

406. *Id.* at 633.

407. *Id.* (citing Taft, *supra* note 12, at 322).

408. *Id.* at 633 n.66 (citing International Covenant on Civil and Political Rights art. 14(3)(d), Mar. 23, 1976, 999 U.N.T.S. 171).

409. *Id.* at 635.

410. Lewis, *supra* note 383, at 689, 694–95 (reviewing the Court’s historical approach to international law issues, particularly treaty interpretation, and concluding that it “traditionally displays a very broad and deep consideration of sources when interpreting both customary and international law and international treaties”). *But cf.* Arend, *supra* note 389, at 722–29 (arguing that *Hamdan*’s approach is congruent with the Court’s prior approach to treaty interpretation).

411. *Hamdan*, 548 U.S. at 625–35; *see also* Lewis, *supra* note 383, at 705–06 (noting the comparatively cursory treatment of Geneva law issues).

On one end of the spectrum, some criticize the substantive finding that Article 3 applies to what may most accurately be termed a transnational armed conflict.<sup>412</sup> The Court's holding stands in marked contrast to the traditional view that Common Article 3 applies only to intrastate wars.<sup>413</sup> Indeed, states' historical reluctance to admit of Article 3's application because of the corresponding impingement on sovereignty highlights the significance of this holding.<sup>414</sup> By finding, in effect, that Article 3 applies regardless of how one characterizes the underlying conflict, the Court eschews the traditional international/non-international bifurcation.

On the other end of the spectrum, others accept the substantive result that Article 3 applies to the armed conflict with

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412. See, e.g., Ingrid Detter, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049, 1080–85 (2007); Julian Ku & John Yoo, *Hamdan v. Rumsfeld, The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 190–91 (2006) (“Thinking on the law of war at [the time of the drafting] simply had not developed to the point where it could consider the status of conflicts fought by non-state actors such as al Qaeda.”). A former State Department Legal Advisor has expressed similar skepticism. See John Bellinger, *Contemporary Practice of the United States Relating to International Law: State Department Legal Advisor Finds Gaps in Legal Regime for Detention of Transnational Terrorists*, 102 AM. J. INT’L L. 367, 368 (2008) (“While the U.S. Supreme Court decision in *Hamdan v. Rumsfeld* held that the conflict with al Qaeda . . . is a non-international conflict covered by Common Article 3, I think many international legal scholars would question that conclusion.” (alteration in original)). One may argue that this criticism is premature, however, given the Court’s failure clearly to identify the relevant conflict, as described below.

413. The authoritative Commentaries, for example, are filled with references to Article 3 as being applicable to “civil wars,” “insurrection[s],” or conflicts “of an internal character” involving “insurgents” or “rebels.” See INT’L COMM. OF THE RED CROSS, COMMENTARY, II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 33–39 (Jean S. Pictet ed., 1960); Pictet, CIVILIAN COMMENTARY, *supra* note 276, at 26–34; Pictet, FIELD COMMENTARY, *supra* note 381, at 38–61; Pictet, POW COMMENTARY, *supra* note 57, at 28–44; see also Sean D. Murphy, *Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants,”* 75 GEO. WASH. L. REV. 1105, 1115 (2007); Rona, *supra* note 19, at 58–59. While the Commentaries hardly settle the matter—as Justice Stevens points out, they also state that “the scope of application of the Article must be as wide as possible,” *Hamdan*, 548 U.S. at 631 (quoting Pictet, POW COMMENTARY, *supra* note 57, at 36)—they strongly suggest that the drafters did not contemplate the application of Article 3 to conflicts like the one at issue in *Hamdan*. But see Jinks, *supra* note 274, at 12 (arguing that Common Article 3 is applicable to the conflict between the United States and al Qaeda).

414. Fionnuala Ní Aoláin, *Hamdan and Common Article 3: Did the Supreme Court Get It Right?*, 91 MINN. L. REV. 1523, 1543–45 (2007).

al Qaeda, but criticize the Court's failure to grapple explicitly with the nuances of humanitarian law.<sup>415</sup> Principal among the opinion's shortcomings in this respect is its failure to identify the relevant conflict. While most commentators and, significantly, the Bush Administration, have read the opinion to identify an armed conflict between the United States and al Qaeda,<sup>416</sup> the opinion by its terms does not specify that Article 3 applies to the broader war against al Qaeda or the "war on terrorism" generally. Indeed, the opinion leaves unclear precisely the group of persons to whom Article 3 applies.<sup>417</sup> On its face, *Hamdan* forecloses neither the possibility that other Geneva law provisions apply to Hamdan nor the possibility that Article 3 is inapplicable to those detained outside of Afghanistan.<sup>418</sup> This resolution was understandably attractive to the Court: it allowed the majority at once to rebuff the Bush Administration's view that certain individuals are outside the scope of IHL

415. See, e.g., Lewis, *supra* note 383, at 706–15 (arguing that a "more complete reading of the Geneva Conventions as a whole and their accompanying Commentaries" reveals a principle of individual accountability—"the protections of Common Article 3 are earned"—that sits in tension with the principle of universal applicability highlighted by the Court); Ní Aoláin, *supra* note 414, at 1529 (noting the absence of any treatment in the plurality opinion of the drafting history of Article 3); *id.* at 1547–48 (suggesting that a consideration of Common Article 3's potential status as customary international law would have bolstered the Court's conclusions as to the substantive rights at issue). For a discussion as to whether Common Article 3 has assumed customary law status, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 33–62 (1989).

416. U.S. DEP'T OF DEF., DIR. NO. 2310.01E ¶¶ 2.2, 4.2 (Sept. 5, 2006), available at [http://www.defenselink.mil/pubs/pdfs/Detainee\\_Prgm\\_Dir\\_2310\\_9-5-06.pdf](http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf) (stating that in "all armed conflicts, however such conflicts are characterized, and in all other military operations," U.S. forces "shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949"); see also Bellinger, *supra* note 412, at 368 ("*Hamdan v. Rumsfeld* held that the conflict with al Qaeda . . . is a non-international conflict covered by Common Article 3 . . . ." (emphasis in original)).

417. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; see also Ní Aoláin, *supra* note 414, at 1551–52. Justice Kennedy, however, refers more specifically to "our Nation's armed conflict with al Qaeda in Afghanistan" and "our Nation's armed conflict with the Taliban and al Qaeda." *Hamdan*, 548 U.S. at 642–43, 646 (Kennedy, J., concurring in part); see also Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld's Analysis of the Laws of Armed Conflict*, 21 EMORY INT'L L. REV. 601, 608 n.40 (2007).

418. *Hamdan*, 548 U.S. at 628–30; see also Murphy, *supra* note 413, at 1139 & n.139. But see Lewis, *supra* note 383, at 701 (stating that the Court's opinion effectively forecloses revisiting the applicability of Article 2).

and to skirt thorny political and legal questions about the extent and nature of the underlying conflict.

Yet the price of this desirable result—that IHL provides baseline protections in all conflicts—is the clarity of the Court’s analysis. Above all, *Hamdan*’s treatment of humanitarian law seems to be result driven.<sup>419</sup> As in *Hamdi*, the Court sacrificed precision by importing provisions of humanitarian law without clearly explaining *why* such provisions are applicable. The Article 3 holding can usefully be understood as an attempt to seek a politically palatable middle ground. While clearly a repudiation of the government’s position, the opinion’s studious avoidance of a more rigorous IHL analysis may have sidestepped an even bigger defeat for the Bush Administration, namely, a reprise of the district court’s conclusion that Article 2 “covers the hostilities in Afghanistan” and hence that Hamdan was entitled to prisoner-of-war status.<sup>420</sup> By intimating, without clearly deciding, that the global war with al Qaeda is non-international, the Court may have effectively foreclosed future claims by suspected terrorists to prisoner of war status, a category that does not exist in non-international armed conflicts.<sup>421</sup>

Questions about the ultimate policy implications of the Court’s reasoning notwithstanding,<sup>422</sup> the substance of the Court’s Article 3 holding represents an unmistakable contribution to the international jurisprudence of humanitarian law. Since the 1949 Conventions, humanitarian law has increasingly moved toward the regulation of armed conflicts between states and non-state actors.<sup>423</sup> In *Hamdan*, the Court goes

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419. Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 352 (2009) (characterizing the Court’s reasoning: “[W]e need a baseline humanitarian standard applied to these detainees; [Common Article 3] provides such a standard; we can get [Common Article 3] by finding a possibly global armed conflict with Al Qaeda.”).

420. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 160, 165 (D.D.C. 2004) (“[Hamdan is] entitled to the protections of the Third Geneva Convention as a prisoner of war . . . unless and until the ‘competent tribunal’ referred to in Article 5 concludes otherwise.”), *rev’d*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 548 U.S. 557 (2006).

421. See Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 49 (2009) (arguing for no status-based categories in non-international armed conflicts); Cerone, *supra* note 43, at 404 (same).

422. See, e.g., Gruber, *supra* note 377, at 1064 (“*Hamdan* allowed Congress to rubber stamp procedures in violation of the Geneva Conventions, while retaining the pretense of respect for Geneva’s principles.”).

423. Bradley & Goldsmith, *supra* note 325, at 2069 & n.92. The 1977 Protocols, for example, regulate a number of such conflicts. *E.g.*, Additional Protocol I, *supra* note 315, art. 1(4).

beyond other bodies in making an important contribution to this trend. In addition to the Commentaries, the Court supported its broad reading of Article 3 with references to the similarly expansive interpretations by the ICTY and ICJ.<sup>424</sup> Yet as even petitioner's brief suggests, these bodies relied on Common Article 3 as a manifestation of customary international law, not treaty law.<sup>425</sup> The ICJ, for example, in describing Article 3 as a "minimum yardstick" applicable to all conflicts, plainly framed this understanding as a matter of customary international law.<sup>426</sup> The ICTY, in turn, relied heavily on this judgment in noting that "the character of the conflict is irrelevant" for Article 3 purposes.<sup>427</sup> The *Hamdan* majority, by contrast, did not even broach the question of Article 3's status as customary international law.<sup>428</sup> Because the Court applies Article 3 as a matter of treaty law—through the notion of its incorporation by statute—it goes beyond the international sources on which it relies.<sup>429</sup> The implication of the Court's decision is difficult to overstate. Whether one views *Hamdan* as a positive step toward international law's increasing regulation of non-state actors or a dangerous encroachment into political branch preroga-

424. *Hamdan*, 548 U.S. at 631 n.63.

425. See *Hamdan* Brief, *supra* note 394, at 49.

426. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 113–14 (June 27) (judging the United States "according to the fundamental general principles of humanitarian law . . . [of which] the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles" and hence declining to consider the role of the U.S. reservation to the Convention); see also *id.* at 537 (Jennings, J., dissenting) ("[T]here must be at least very serious doubts whether [the Geneva Conventions] could be regarded as embodying customary law. Even the Court's view that the common Article 3, laying down a 'minimum yardstick' for armed conflicts of a non-international character, are applicable as 'elementary considerations of humanity', is not a matter free from difficulty." (citation omitted)).

427. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> ("In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character. Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant." (citation omitted)).

428. Ní Aoláin, *supra* note 414, at 1547–48.

429. Shamir-Borer, *supra* note 417, at 612.

tives, the decision is a clear contribution to the international jurisprudence of humanitarian law.<sup>430</sup>

### 3. *Boumediene* and *Munaf*

Issued on the same day, the opinions in *Boumediene v. Bush* and *Munaf v. Geren* made peripheral mention to humanitarian law in ways not dispositive to the holdings in either case. Writing for a unanimous Court in *Munaf*, Chief Justice Roberts made a single reference to “the Geneva Convention.”<sup>431</sup> In holding that the writ of habeas corpus provided no relief to U.S. citizens who voluntarily traveled to Iraq and allegedly committed crimes there,<sup>432</sup> Justice Roberts noted that “[i]n accordance with Article 5 of the Geneva Convention, [petitioner] was permitted to hear the basis for his detention, make a statement, and call immediately available witnesses.”<sup>433</sup>

In *Boumediene*, while not mentioned in the majority opinion, Geneva law appeared on the periphery in Justice Roberts’s dissent. The *Boumediene* majority held that alien detainees at Guantánamo could invoke the Suspension Clause, allowing them to file habeas petitions, and that section 7 of the Military Commissions Act of 2006 (MCA)<sup>434</sup> violated that provision by supplanting federal habeas jurisdiction with a constitutionally insufficient substitute.<sup>435</sup> As to the detainee’s access to the Suspension Clause, the Court engaged in a historical analy-

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430. It is not clear, however, that the development is a positive one for either the integrity of IHL or the practical administration of justice. See Anderson, *supra* note 419, at 352 (“The attempt by US courts to reach conclusions which satisfy many different practical realities of US counter-terrorism, but doing so by an excursion through the Geneva Conventions, might yield good behavioural rules and results, but at risk of deforming the law of war as it applies to ‘ordinary’ armed conflicts.”); Ní Aoláin, *supra* note 414, at 1551 (arguing that the Court’s failure to address the nature of the underlying conflict may, “in the longer term, create more problems for administration of justice in the context of the U.S.-led ‘war on terror’ than it solves”).

431. *Munaf v. Geren*, 553 U.S. 674, 681 (2008).

432. *Id.* at 680.

433. *Id.* at 681. This process was afforded during petitioner’s designation as a “security internee” and “enemy combatant in the war on terrorism” by military tribunal. *Id.* at 682.

434. Pub. L. No. 109-366, 120 Stat. 2600. Section 7 expressly applied the DTA’s jurisdiction-stripping provision to both future and pending habeas petitions. In effect, this provision meant that detainees whose petitions were pending at the time of the DTA could not invoke the federal habeas statute.

435. *Boumediene v. Bush*, 553 U.S. 723, 793–95 (2008). The substitute was the system of judicial review by Combatant Status Review Tribunal (CSRT) and possible appellate review by the D.C. Circuit, as established by the DTA. *Id.* at 783–92.

sis—ultimately inconclusive—as to the extraterritorial application of that Clause.<sup>436</sup> The Court held that neither the status nor the location of petitioners could deny them the protections of the writ.<sup>437</sup> As to whether section 7 of the MCA constituted a suspension of the writ, the Court found that the Detainee Treatment Act of 2005 (DTA) / Combatant Status Review Tribunal system of review unquestionably limited detainees’ process without providing an adequate substitute.<sup>438</sup> Neither of these holdings relied on humanitarian law. Indeed, the Court emphasized that “our opinion does not address the content of the law that governs petitioners’ detention.”<sup>439</sup> Nonetheless, humanitarian law questions were indeed before the Court. Petitioners argued that humanitarian law limited the government’s detention authority to members of the armed forces and citizens who participate directly in hostilities.<sup>440</sup> The Court did not address this question, and thus left unresolved the scope of detention authority under IHL.

While IHL was not center stage, it played a background role in the Court’s adjudication of the case. Justice Roberts in dissent referred to the Geneva Conventions to bolster his argument that the DTA system of review was “adequate to vindicate whatever due process rights petitioners may have.”<sup>441</sup> In making the point that DTA procedures restricting detainee access to classified material were more than constitutionally adequate, Justice Roberts pointed out that prisoners challenging their status under the Geneva Conventions are not entitled to such access, and that “the prisoner-of-war model is the one *Hamdi* cited as consistent with the demands of due process for

436. *Id.* at 739–52.

437. *Id.* at 753–55, 765–71.

438. *Id.* at 770–92. For a brief summary of the process afforded to detainees in the CSRT system, see Richard H. Fallon, Jr. & Daniel Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2100 n.286 (2007).

439. *Boumediene*, 553 U.S. at 798.

440. Petition for a Writ of Certiorari at 26–27, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195).

441. *Boumediene*, 553 U.S. at 808, 816–17 (Roberts, C.J., dissenting). Chief Justice Roberts also observed that the DTA system of review met the majority’s standard of “a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law.” *Id.* at 815 (alteration in original) (quoting *id.* at 779 (majority opinion)). Chief Justice Roberts would not have framed the question in terms of whether the DTA procedure was an adequate “substitute” for habeas; rather, the relevant inquiry in his view was: (1) What constitutional rights do aliens captured abroad have, and (2) do the DTA procedures adequately protect them? *Id.* at 801–03.

*citizens.*"<sup>442</sup> If it is good enough for citizens, Justice Roberts reasoned, surely it is good enough for the alien petitioners. Similarly, encouraging the reader to "[s]tep back and consider what, in the real world, Congress and the Executive have actually granted aliens captured by our Armed Forces overseas and found to be enemy combatants," Justice Roberts listed "[t]he ability to challenge the bases of their detention before military tribunals modeled after Geneva Convention procedures."<sup>443</sup>

Justice Roberts's references to Geneva law in *Munaf* and *Boumediene* offered no substantive analysis of the Geneva Conventions. In *Munaf*, he merely acknowledged that petitioners had been afforded the opportunity to challenge the basis for their detention, congruent with the Conventions, a point made repeatedly by the government in its filings before the Court.<sup>444</sup> In *Boumediene*, Justice Roberts used Geneva law to rhetorical effect and as an aid in constitutional interpretation. In essence, the Chief Justice suggested that the DTA procedure's similarities to Geneva Convention procedures militated in favor of their constitutional adequacy.

The foregoing sections demonstrate that even when explicitly relying on IHL provisions, the Court has been deeply reluctant to address any more of that body of law than necessary. A recent dissent from the Court's denial of certiorari written by Justice Thomas stands in marked contrast to that trend. While it is far from clear that the dissent portends a change in the Court's general approach to humanitarian law, it does suggest that at least two members of the Court are willing—indeed eager—to address several issues surrounding the Geneva Conventions.

#### 4. An Emerging Change of Heart on Geneva Issues?

The Court's 2010 refusal to hear an appeal stemming from a habeas petition brought by Manuel Noriega, former head of the Panamanian Defense Forces, occasioned a vigorous dissent

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442. *Id.* at 817 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004)). Roberts read *Hamdi* to be "of pressing relevance" as establishing the procedures required for American citizens detained as enemy combatants. *Id.* at 812. If the DTA system "looks a lot like the procedure *Hamdi* blessed [for citizens]," *id.*, then "surely the Due Process Clause does not afford *non-citizens* . . . greater protection than citizens are due." *Id.* at 804.

443. *Id.* at 825.

444. *E.g.*, Petition for Writ of Certiorari at 14 n.4, *Munaf v. Geren*, 553 U.S. 674 (2008) (No. 07-394).

from Justice Thomas, joined by Justice Scalia.<sup>445</sup> While the denial of certiorari may itself be unremarkable,<sup>446</sup> the strongly worded dissent is doubly surprising against the backdrop of the Court's historical reluctance to engage the Geneva Conventions. Justice Thomas, in short, appeared eager to adjudicate Noriega's Geneva law claims.

After his conviction in federal court of various narcotics-related offenses, Noriega argued that the United States should treat him as a prisoner of war, and thus afford him all the protections of the Geneva Conventions. The district court agreed. After years in custody as a prisoner of war and shortly before his parole and expected extradition to France to face criminal charges, Noriega argued that the Third Geneva Convention barred his extradition. On appeal, the Eleventh Circuit agreed with the government's view that section 5 of the MCA barred Noriega from invoking the Geneva Convention in his habeas proceeding.<sup>447</sup> In declining to hear Noriega's case, therefore, the Court decided not to entertain his claim that section 5 violated the Supremacy and Suspension Clauses of the U.S. Constitution by working a "complete repudiation" of the Third Geneva Convention and an "effective[]" suspension of the writ of habeas corpus under *Boumediene*, respectively.<sup>448</sup>

While Justice Thomas put forth several reasons why the Court should have engaged Noriega's MCA arguments, he seemed concerned principally with "provid[ing] courts and the political branches with much needed guidance on issues we left open in *Boumediene*," issues with which the lower courts have been grappling with since that decision.<sup>449</sup> In highlighting the

445. *Noriega v. Pastrana*, 130 S. Ct. 1002 (2010) (Thomas, J., dissenting from denial of certiorari).

446. Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 729 (2001) (noting that the Court accepts certiorari in less than three of every one hundred cases).

447. *Noriega*, 130 S. Ct. 1004 (Thomas, J., dissenting from denial of certiorari).

448. *Id.* at 1005.

449. *Id.* at 1006, 1009 ("A decision upholding MCA § 5(a) would obviate the need for detainees, the Government and federal courts to struggle (as they did here) with Geneva Convention claims in habeas corpus proceedings."). For critiques of the district court and D.C. Circuit jurisprudence to which Justice Thomas refers, see HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT, HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTÁNAMO CASES (2010), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Habeas-Works-final-web.pdf>; BENJAMIN WITTES ET AL., BROOKING INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2010) available at <http://www.brookings.edu/>

need for such guidance, Justice Thomas pointed to recent executive branch pronouncements about the broad applicability of Common Article 3 and contemplated legislation clarifying the extent to which detainees can enforce Geneva Convention obligations against the United States. Noting that these proposals have been “complicated by uncertainty over [questions] in this case,” Justice Thomas saw Noriega’s petition as an opportunity to address these issues in order to “avoid years of litigation and uncertainty.”<sup>450</sup>

Justice Thomas further speculated that ruling on the constitutionality of section 5 of the MCA “could well allow [the Court] to reach the question we left open in *Hamdan*—whether the Geneva Conventions are self-executing and judicially enforceable.”<sup>451</sup> Noriega’s case would have enabled the Court to approach the Geneva Conventions differently than in previous cases because it was not governed by the UCMJ provisions implicated in *Hamdan*. Indeed, if the Court were to conclude that the conventions are self-executing and judicially enforceable, it would face two additional questions: “whether federal courts may classify [noncitizen] detainees as POWs under the Third [Geneva] Convention, and whether any of the conventions require the United States immediately to repatriate detainees” released from custody.<sup>452</sup>

The dissent is remarkable not for its analysis of the Geneva Conventions—although this is more than Justice Thomas has ever observed about the Conventions in a majority or dissenting opinion—but rather for its willingness, indeed eagerness, to reach Noriega’s Geneva claims. Justice Thomas seemed to favor providing what would amount, in effect, to an advisory opinion on the judicial enforceability of the conventions for the benefit of the political branches and the lower courts. This willingness to engage Geneva law—seemingly engendered by lower court and political branch difficulties in operationalizing *Boumediene* and *Hamdi*—is truly a novel development.

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papers/2010/0122\_guantanamo\_wittes\_chesney.aspx; Nathaniel H. Nesbitt, Note, *Meeting Boumediene’s Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244 (2010).

450. *Noriega*, 130 S. Ct. at 1008–09 (Thomas, J., dissenting from denial of certiorari).

451. *Id.* at 1009.

452. *Id.*

## CONCLUSION

The Supreme Court has invoked humanitarian law—whether customary or treaty-based—from its earliest days, though only in a relatively small number of cases. The Court's references to customary humanitarian law predate the Lieber Code, but, perhaps unsurprisingly, become more numerous during and after the Civil War. Further, the Court recognizes foundational humanitarian law principles, including the principle of distinction, well before codification of humanitarian law at the Hague and in Geneva. These features suggest that the Court has some role to play in interpreting and developing humanitarian law.

Broadly speaking, the Court has invoked humanitarian law (1) to address claims allegedly arising under the Hague and Geneva Conventions, (2) as a tool of constitutional interpretation, and (3) as a tool of statutory construction, or, stated differently, for reasons of definition—both to define particular concepts and to concretize charges levied against an accused allegedly subject to trial by military tribunal. As to addressing claims arguably arising under IHL, the Court has been very reluctant to find a violation of the Conventions or to recognize rights allegedly conferred on individuals thereby. As to the Hague Conventions, this reluctance does not push the bounds of judicial restraint: the Court's approach is justifiable on the facts of each case. Yet as to the Geneva Conventions, the treaty-based component of IHL to receive the Court's most sustained attention, the question is a closer one. The Court engaged in elaborate textual gymnastics in *Yamashita* to render the 1929 Convention inapplicable, but reversed course in *Hamdan* to reach the novel conclusion that Common Article 3 of the 1949 Conventions applies as a matter of treaty law (albeit one incorporated via statute) to an arguably transnational armed conflict. A cynic thus might suggest that the Court's willingness to find a violation of the Conventions may change with the political winds.

Recourse to humanitarian law treaties to interpret the Constitution is infrequent. The Court has drawn on the conventions only once in a majority opinion to interpret the Eighth Amendment bar on cruel and unusual punishment. In the armed conflict context, *Hamdi* opened the door to the suggestion that detention procedures compliant with the conventions also satisfy the Constitution's due process requirements, a point since raised as a sword in dissent by Justice Roberts.

The Court's use of humanitarian law as a tool of statutory construction is further evidence of its reluctance to rely directly on the Conventions. In this regard, the Court's early holdings that the 1929 Convention did not reach petitioners in *Yamashita* and *Eisentrager*—findings rooted in the Court's Hague-law-based decision in *Quirin*—set the parameters of the Court's humanitarian law analyses in the detainee cases of the “war on terror.” In each case, the Court takes care to point out that its reliance on humanitarian law is necessitated by the law of war's incorporation into domestic law by statute. The Court is thus able consistently to evade the issue of whether the Conventions are self-executing. In the process of consulting humanitarian law to define the charges against petitioners, the Court offers informative if controversial analysis of particular provisions of the Hague and Geneva Conventions, including rooting the principle of command responsibility in humanitarian law.

The Court's IHL analysis is sometimes haphazard—emphasizing certain concepts while ignoring others—and never comprehensive. In short, the Court often leaves humanitarian law issues unresolved, even questions essential to the resolution of issues that it *does* address. In the post-September 11, 2001, detainee cases, for example, the Court's analysis suffers from its steadfast refusal clearly to identify the underlying conflict. The Court's single most significant contribution to humanitarian law jurisprudence is undoubtedly its holding that Article 3 applies to the war with al Qaeda.<sup>453</sup> Notwithstanding the host of potent criticisms to be levied against the Court's analysis, the substance of this holding advances a core principle of IHL: that all persons are entitled to some baseline of protection.

One reason that the Court's treatment of IHL is significant is the widely accepted proposition that the United States plays a major role in the development of customary international humanitarian law.<sup>454</sup> The Court's interpretation of Hague and Geneva law may thus contribute to the establishment of *opinio juris* or, indirectly, U.S. practice. This review of the Court's humanitarian law jurisprudence suggests, however, that the Court is profoundly reluctant to root its holdings in humanitarian law treaties. Indeed, it is the incorporation of the law of war

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453. As discussed in *supra* notes 412–18 and accompanying text, the opinion does not compel this result. Nonetheless, this reading has been adopted by the government and most commentators.

454. See, e.g., Skordas, *supra* note 15, at 319.

into domestic statute that occasions the Court's most extensive analysis of IHL. On the facts before it, the Court has explicitly found only one violation of humanitarian law, which it likewise found to be compelled by statute. These features urge caution in attempting to establish *opinio juris* as to U.S. compliance with humanitarian law by reference to the Court's jurisprudence.

In sum, the Supreme Court may not be institutionally well-suited to interpret and develop humanitarian law. Notwithstanding Justice Thomas's recent display to the contrary, the Court is deeply reluctant to rely on humanitarian law treaties and does so rarely, haphazardly, and minimally, eschewing comprehensive analysis of the text, structure, and history of the relevant provisions. Moreover, from *Yamashita* to *Hamdan*, the Court's use of humanitarian law often seems result-driven, calculated to achieve a politically palatable outcome. Indeed, this feature may partially explain the lack of clarity in the Court's IHL analysis. It is tempting to identify these tendencies as unsurprising features of a common-law court historically suspicious of international legal authority, and conclude accordingly that the Court has only a minimal role to play in the development of IHL.<sup>455</sup> Yet this conclusion would be premature. The Court's role in the development of humanitarian law is not insubstantial. Even when declining formally to address a claim allegedly arising under the Geneva or Hague Conventions, for example, the Court sometimes offers explicit analysis in the form of application of the relevant treaty provisions to the facts before the Court, thus producing authoritative and precedential interpretations of IHL. Throughout this process the Court has unearthed various substantive provisions of humanitarian law and offered a novel interpretation of at least one of them. While the Supreme Court's role in developing IHL will continue to be limited by its reluctance directly to engage the body of law, the Court's preeminence in a state crucial to shaping the international legal order ensures that it has an important role to play.

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455. The Court's role in developing the law should be sharply distinguished from how it perceives the judicial task. As one recent characterization of the Court's postwar treaty jurisprudence put it: "The Court that emerges is one that decides cases, not one that sees its primary function as our instruction and illumination." Stephan, *supra* note 11, at 8.