AUTOMATIC RIGHTS OR PERMISSIVE ONES? THE STATUS OF ARTICLES 4 AND 5 OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

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I. INTRODUCTION

In the aftermath of the United States' armed conflict with Afghanistan, the detention and maltreatment of hundreds of alleged Taliban and al-Qaeda members has sparked ongoing media attention, heated debates, and an onslaught of articles from legal scholars regarding the Bush Administration's (the Administration) policies toward the detainees. Initially, the Administration determined that the Geneva Conventions[1] did not apply to either the Taliban or al-Qaeda. It then changed its stance and acknowledged that the Conventions apply to the Taliban because "[a]lthough [it] never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention."[2] However, the Administration went on to state that, like al-Qaeda, Taliban members do not meet the requirements for prisoner-of-war status under Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) because they are "unlawful" combatants given that they did not wear uniforms distinguishing them from civilians and they deliberately killed civilians.[3] Thus, while the Administration has provided the detainees

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1. The Geneva Conventions establish guidelines and protections for the treatment of various categories of individuals during wartime. This international agreement consists of four conventions adopted on August 12, 1949, in light of the atrocities that occurred during World War II. The four conventions are: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), and The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV). *The Geneva Conventions*, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions.

2. U.S. DEP'T OF STATE, STATUS OF DETAINEES AT GUANTANAMO (Feb. 7, 2002), *available at* http://www.state.gov.

3. U.S. DEP'T OF DEFENSE, *News Briefing: Secretary of Defense Donald H. Rumsfeld* (Jan. 11, 2002), *available at* http://www.defense.gov/transcripts/2002/jan2002.html. *See also* Katharine Q.

with some of the POW protections, it has explicitly stated that Geneva III does not require such provisions.[4]

As detainees began challenging their classification as enemy combatants, as well as the Administration's authority to detain them, questions arose in the courts regarding the status of Geneva III, particularly with respect to U.S. citizen detainees.[5] As these cases brought Geneva III into the spotlight, numerous scholars expressed their sentiments as to whether the Administration correctly analyzed it.[6] Some scholars focused on the entire treaty in addressing whether the status of Geneva III is self-executing or non-self-executing.[7] Other scholars addressed particular provisions of the treaty, but ignored the POW status question.[8] Still others argued that Geneva III binds the United States domestically under customary international law.[9] Two scholars recently concluded that most of the articles of Geneva III are self-executing under the Supremacy Clause and judicial doctrines used to examine treaty status.[10] Even though they pointed out that the majority of the lower courts came to the same conclusion, the scholars did not explore the inconsistencies of those courts in making their determinations or the absence of a U.S. Supreme Court decision on this issue.[11] This Comment examines the status of Geneva III's provisions in the context of these lower court decisions and discusses the ramifications of the decisions' inconsistencies.

The status of Geneva III as a self-executing or non-self-executing

Seelye, *A Nation Challenged: Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6; U.S. DEP'T OF DEFENSE, FACT SHEET ON GUANTANAMO DETAINEES (Feb. 13, 2004), http://www.defense.gov/news/Apr2004.

4. FACT SHEET ON GUANTANAMO DETAINEES, *supra* note 3.

5. *See infra* Part III and accompanying text.

6. *See, e.g.*, Omar Akbar, Note, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195 (2003); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127 (2003); Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT'L L. 475 (2002); Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 HARV. INT'L L.J. 301 (2003).

7. *See, e.g.*, Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 HARV. INT'L L.J. 503 (2003).

8. *See, e.g.*, McDonald & Sullivan, *supra* note 6 (discussing applicability of articles 17 and 118); Azubuike, *supra* note 6 (examining whether members of al Qaeda and the Taliban meet the specific requirements of article 4); Murphy, *supra* note 6 (same).

9. *See, e.g.*, Akbar, *supra* note 6; Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987).

10. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

11. *Id.* at 121-29. Furthermore, the authors mainly focused on whether the President has the constitutional authority to violate specific provisions of the Convention.

treaty has important consequences for its enforceability domestically.[12] Interpretation of Geneva III's status also has consequences internationally because courts in countries around the world routinely look to the United States Supreme Court's decisions as a model for shaping precedent in their own constitutional cases, especially in the international human rights area.[13] This point is particularly crucial in the context of war and armed conflict. Our process of determining whether to provide POW protections to captured individuals may cause retaliation in the form of mistreatment of captured U.S. soldiers and citizens. Furthermore, incorrectly designating Geneva III as non-self-executing may interfere with our international obligations under it.[14]

Over the years, U.S. courts have employed several tests to ascertain whether treaties are self-executing.[15] However, the U.S. Supreme Court has remained silent on the issue for almost a century.[16] As a result, inconsistent opinions emerged from the lower courts, as has been true regarding Geneva III. The lower courts recently discussed the status of Geneva III in three cases regarding U.S. citizen detainees from the Afghanistan conflict: *Hamdan v. Rumsfeld*,[17] *Hamdi v. Rumsfeld*,[18] and *United States v. Lindh*.[19] The district courts in *Lindh* and *Hamdan* differed from the U.S. Court of Appeals for the Fourth Circuit in *Hamdi* regarding Geneva III's status.[20]

Although the U.S. Supreme Court vacated the Fourth Circuit's ruling in *Hamdi* and remanded the case, the plurality did not address Geneva III's self-executing status.[21] Instead, the Supreme Court discussed Geneva III by referring to customary international law.[22] Geneva III is

12. *See infra* Part II.

13. Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 55 (1990) (describing the impact U.S. constitutionalism has had on developing international human rights law and the role international law has played in shaping U.S. constitutionalism); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985) (discussing the status of international human rights law, especially customary international law, in domestic courts).

14. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 63 (1990) (noting the recent U.S. trend to declare treaties non-self-executing and the consequences of delay and frustration that may result).

15. *See infra* Part II.

16. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 722 (1995).

17. 344 F. Supp. 2d 152 (D.D.C. 2004).

18. 316 F.3d 450 (4th Cir. 2003).

19. 212 F. Supp. 2d 541 (E.D. Va. 2002).

20. *See infra* Part III.

21. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

22. While not addressing the status of Geneva III as a whole or the status of particular provisions, the plurality noted that article 118 of Geneva III, dealing with the timely release of prisoners

binding on the United States because it has become part of the law of war under customary international law, regardless of whether or not it is self-executing.[23] This fact, however, does not resolve the issue of the domestic enforceability of Geneva III as a self-executing treaty. Furthermore, the self-executing analysis is crucial for treaties that are not part of customary international law, yet are executory.[24]

The analyses utilized by the *Hamdi*, *Lindh*, and *Hamdan* courts raise the following questions: (1) Which POW status test, if any, should courts apply when examining Geneva III?; (2) Should the test be applied to the entire document or to specific provisions of it?; and, (3) Is Geneva III self-executing? This Comment explores these questions by discussing the existing POW status tests and applying them to only those conditions required to trigger the protections enumerated in Geneva III: articles 4(A)(1), 4(A)(2), and 5, the POW requirements.

Part II of this Comment describes distinctions between self-executing and non-self-executing treaties and the various tests courts use to determine a treaty's status. Part III describes the requirements for POW status under Geneva III and examines how the courts have dealt with Geneva III. Part IV applies the relevant treaty analyses to determine whether Geneva III's provisions are self-executing. Part V concludes that articles 4(A)(1), 4(A)(2), and 5 of Geneva III are self-executing and urges the U.S. Supreme Court to clarify this area of jurisprudence.

II. THE DOCTRINE OF SELF-EXECUTING TREATIES

Treaties have both an international and domestic aspect.[25] The international aspect concerns the nature of a contracting party's international obligation, whereas the domestic aspect involves the manner in which a contracting party carries out those obligations.[26]

of war once conflict has ended, is a "clearly established principle of the law of war." *Id.* at 520 (O'Connor, J.). Justice Thomas, however, did not believe Geneva III applied in this situation. *Id.* at 588 (Thomas, J., dissenting).

23. *Id.* at 538 (noting that the military has incorporated Geneva III into its Army Regulations pertaining to Enemy Prisoners of War); Justice Souter also stated that Geneva III is part of customary international law and has been adopted by the military. *Id.* at 548-51 (Souter, J. concurring in part, dissenting in part, and concurring in the judgment) (joined by Ginsburg, J.); *see also* Jinks & Sloss, *supra* note 10, at 104; Meron, *supra* note 9.

24. In fact, in the hierarchy of federal law, treaties are thought to be above customary international law because they receive Senate approval. Jinks & Sloss, *supra* note 10, at 104; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. d (1987) [hereinafter RESTATEMENT].

25. *See* HENKIN, *supra* note 14, at 62; Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal*: Win at Any Price?*, 74 AM J. INT'L L. 892, 896-98 (1980).

26. *See id.*

This latter aspect is an issue of each contracting party's home law.[27] In the United States, a crucial determination for the domestic implementation of any treaty is whether it is self-executing.[28]

In the United States, differences exist between treaties that are self-executing and those that are not. Self-executing treaties automatically become law upon ratification, subsequent to the advice and consent of the Senate, and are constitutionally equivalent to a statute.[29] Furthermore, if a self-executing treaty conflicts with a pre-existing statute, the treaty prevails under the last-in-time doctrine.[30] Non-self-executing treaties, on the other hand, require implementing legislation following ratification in order to take effect.[31] Thus, courts cannot enforce a non-self-executing treaty absent congressional mandate. Therefore, whether a treaty is self-executing or not has important consequences in terms of its authority and enforcement in the U.S. courts. The judiciary has interpreted the Supremacy Clause to provide the framework for this determination.

A. The Supremacy Clause

The Supremacy Clause of the Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."[32] This clause reflects the Framers' concern with state violations of treaties.[33] Prior to the adoption of the Constitution, the colonies followed Great Britain's practice regarding treaties.[34] In Great Britain, all treaties were non-self-executing, regardless of their content or the intent of the parties; therefore, all treaties required implementing legislation before they were domestically enforceable.[35] Under this standard, a colony could thwart unfavorable treaties simply by passing

27. *See id.*

28. *See id.*

29. Foster v. Neilson, 27 U.S. 253, 314 (1829); *In re* Head Money Cases, 112 U.S. 580 (1884); HENKIN, *supra* note 14, at 63; Vázquez, *supra* note 16.

30. Chae Chan Ping v. United States, 130 U.S. 581, 600-02 (1889); Whitney v. Robertson, 124 U.S. 190, 194-95 (1888); *In re Money Head Cases*, 112 U.S. at 597-99; Cook v. United States, 288 U.S. 102 (1933); *see also* RESTATEMENT, *supra* note 24, § 115(2); HENKIN, *supra* note 14, at 63; Vázquez, *supra* note 16, at 696; Akbar, *supra* note 6, at 207.

31. *Id.*

32. U.S. CONST. art. VI, cl.2.

33. Vázquez, *supra* note 16, at 698.

34. *Id.*

35. *Id.* at 697-98.

conflicting legislation after a treaty had been adopted.[36] In response, the Framers incorporated the antithesis to Great Britain's stance in the Supremacy Clause by stipulating that treaties automatically become domestic law upon ratification.[37]

Based on this plain-text reading of the Supremacy Clause, the analysis of Geneva III is simple: as a signed and ratified treaty, it is binding domestic law. The earliest cases following the adoption of the Constitution interpreted treaties in this manner.[38] However, a passage by Chief Justice Marshall in *Foster v. Neilson*,[39] decided in 1829, sparked the self-executing/non-self-executing distinction:[40]

> In the United States a different principle [than other nations] is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, *whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court*.[41]

Despite arguments that Marshall's statement is consistent with the Supremacy Clause because it merely reflects the knowledge that other countries apply treaties differently, the distinction within the United States has persisted.[42] Theoretically, treaties should thus be assumed to be self-executing unless the treaty states otherwise, the Senate explicitly declares it to be non-self-executing, or a subsequently enacted, inconsistent statute trumps it.[43] However, courts and scholars alike have acknowledged that determining the status of treaties is an area subject to confusion and, in some instances, controversy.[44] As a result, various tests emerged for analyzing treaties.

36. *Id.* at 698.

37. *Id.* at 698-99.

38. For examples, see Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988).

39. 27 U.S. 253 (1829).

40. Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

41. *Foster*, 27 U.S. at 314 (emphasis added).

42. *See generally* Paust, *supra* note 38; Iwasawa, *supra* note 40.

43. Jinks & Sloss, *supra* note 10.

44. *See, e.g.*, Vázquez, *supra* note 16; Paust, *supra* note 38; United States v. Noriega, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (stating that the doctrine of self-execution "is complex and not particularly well understood"); United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979) (noting that "[t]he self-execution question is perhaps one of the most confounding in treaty law").

B. Judicial Tests for Determining Treaty Status

Courts examine the status of treaties using four distinct doctrines: (1) the intent-based doctrine; (2) the justiciability doctrine; (3) constitutionality; and (4) the private right of action doctrine.[45] This Comment analyzes articles 4(A) (1), 4(A) (2), and 5 under each of these doctrines in Part IV. First, each will be briefly described here.

1. The Intent-Based Doctrine

The intent-based doctrine of treaty analysis stems from Justice Marshall's famous quote in *Foster*, and implicates the language of the treaty.[46] Thus, a treaty is non-self-executing if the parties express this intent in the wording of the treaty. For instance, the treaty could expressly provide that it will only become enforceable through implementing legislation. Alternatively, the treaty could, through linguistic tools such as using future tense instead of present tense, implicitly suggest that it is non-self-executing.

2. The Justiciability Doctrine

Independent of intent, some courts invoke the justiciability doctrine to determine treaty status.[47] Under this doctrine, a treaty is non-self-executing if it imposes only aspirations on the parties, rather than actual obligations. The rationale behind this notion is that the courts cannot enforce rights or obligations that do not exist without violating separation-of-powers principles. Instead, only the legislature can provide substance to non-self-executing treaty provisions before the judiciary can enforce them.[48] A few lower courts have gone further, explaining that the political question doctrine may preclude a treaty from achieving self-executing status because the realm of foreign affairs belongs to the political branches.[49] This latter view generally results in deference to the political branches, particularly the Executive, by claiming the treaty is nonjusticiable in order to avoid controversy.[50]

45. Vázquez, *supra* note 16.

46. *Id.* at 700.

47. *Id.* at 711 n.73.

48. *Id.* at 712.

49. For examples, see *id.* at 712 n.101.

50. *See, e.g.*, Akbar, *supra* note 6, at 203; Iwasawa, *supra* note 40, at 652; Vázquez, *supra* note 16, at 715. Some scholars note that while the courts should consider the views of the Executive on a particular treaty's status, Article III of the Constitution explicitly affords the judiciary the role of interpreting and enforcing treaties. Thus, courts should not use the political question doctrine to avoid

3. The Constitutionality Doctrine

The constitutionality doctrine suggests that a treaty cannot be self-executing if it "purports to accomplish what is within the exclusive lawmaking power of Congress."[51] For instance, an international treaty that calls for the United States to provide monetary support or brings the United States into a state of war cannot be enforced domestically without congressional implementation because the Constitution specifically delegates this power to Congress.[52]

4. The Private Right of Action Doctrine

Courts are increasingly using the private right of action doctrine as a tool for determining treaty status.[53] This doctrine is premised on the idea that a treaty is self-executing only if it confers a private right of action upon those individuals invoking the treaty.[54]

III. GENEVA III

Geneva III was adopted in Geneva, Switzerland, on August 12, 1949.[55] It revised and expanded earlier versions of the Geneva Convention[56] to take into account events from World War II not contemplated in previous versions and included broader categories of persons eligible for POW status.[57] The Commentary to article 4 of Geneva III suggests that the definition of POW is the "key" to Geneva III and that, to ensure clarity and understandability, its drafters "considered, from the outset, that the Convention should specify the

determining treaty status or to automatically deem a treaty executory unless exceptional circumstances require it. Vázquez, *supra* note 16, at 717.

51. *Id.* at 718.

52. *Id.* at 718-19; Paust, *supra* note 38, at 778-81; RESTATEMENT, *supra* note 24, § 111 cmt. i, § 115(3).

53. Vázquez, *supra* note 16, at 719.

54. *Id.*; Iwasawa, *supra* note 40, at 646.

55. The United States ratified Geneva III in 1955. Geneva Convention (III), Treaty on the Protection of War Victims: Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

56. The first Geneva Convention was created in 1864 and subsequently updated by the Hague Conventions of 1899, 1907, and the Geneva Convention of 1929. International Committee of the Red Cross (ICRC), Commentary to Art.4 of the Convention (III) Relative to the Treatment of Prisoners of War, http://www.icrc.org/ihl.nsf/ [hereinafter Geneva Commentary]; DOCUMENTS ON THE LAWS OF WAR 243 (Adam Roberts & Richard Guelft eds., 3d ed. 2000) [hereinafter DOCUMENTS].

57. ICRC, The Geneva Conventions: the Core of International Humanitarian Law, (Mar. 6, 2004), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions; DOCUMENTS, *supra* note 56, at 243.

categories of protected persons and not merely refer to the Hague Regulations [of 1907]."[58] Article 4 is critical because it sets forth the requirements necessary for POW status. If captured individuals do not meet these requirements, they are not entitled to the protections enumerated in the rest of Geneva III, including the right to humane treatment,[59] certain due process rights in the wake of sanctions,[60] and release and repatriation after hostilities cease.[61] Captured individuals who do not qualify as POWs may only receive these protections if the capturing state chooses to provide them.[62]

The relevant provisions of article 4 are as follows:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly; [and,]
> (d) that of conducting their operations in accordance with the laws and customs of war.[63]

If a captured individual's status is unclear under article 4, article 5 provides that "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[64] Initially, this paragraph of article 5 stated that a "responsible authority" would determine POW status in cases of doubt.[65] In Geneva in 1949, however, parties decided to change the

58. The Hague Regulations of 1907 deemed those who take up arms during international conflict as "belligerents" and categorized them into three classes. Geneva Commentary, *supra* note 56, at 47-49.

59. Geneva III, *supra* note 55, art. 13.

60. *Id.* art. 99-108.

61. *Id.* art. 117-18.

62. Even if captured individuals do not fall within the POW requirements, they may still be entitled to protection under the Convention Relative to the Protection of Civilian Persons in Time of War. *See* Jinks & Sloss, *supra* note 10, at 123.

63. 6 U.S.T. 3316, 3320.

64. *Id.* at 3324.

65. ICRC, Commentary to Art. 5 of the Convention (III) Relative to the Treatment of Prisoners

phrase.[66] They contemplated replacing it with "military tribunal," but some members felt that "to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention."[67] Instead, "competent tribunal" replaced "responsible authority."[68] The lower courts' treatment of Geneva III is addressed below.

A. Recent Cases

1. *Hamdan v. Rumsfeld*[69]

Salim Ahmed Hamdan, a U.S. citizen, was captured by U.S. military forces in Afghanistan in 2001 and detained at Guantanamo Bay, Cuba.[70] He was charged with conspiracy to commit various war crimes, including attacking civilians and terrorism.[71] In response to the government's plan to try him before a military commission, Hamdan petitioned for a writ of habeas corpus,[72] which the government moved to dismiss.[73] The United States District Court for the District of Columbia denied the government's motion and granted Hamdan's petition in part.[74] In one of eight counts in his petition, Hamdan asserted that the nature and duration of his detention violated Geneva III.[75] The government asserted, among other things, that Geneva III is not self-executing because it does not create a private right of action.[76] In a memorandum opinion, Judge Robertson rejected the government's argument that Geneva III did not apply to Hamdan.[77]

The district court used both the private right of action doctrine and

of War, http://www.icrc.org/ihl.nsf.

66. *Id.*

67. *Id.*

68. *Id.*

69. 344 F. Supp. 2d 152 (D.D.C. 2004) (mem).

70. *Id.* at 155.

71. *Id.* at 155-56.

72. A writ of habeas corpus is a procedural tool used by a detained person to challenge the legal authority of his detention. CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 53 (5th ed. 1994).

73. *Hamdan*, 344 F. Supp. 2d at 155.

74. *Id.*

75. *Id.* at 156.

76. *Id.* The Government also argued Geneva III did not apply because it did not cover al-Qaeda and Hamdan did not meet the requirements of article 4(A)(2) as determined by the Combatant Status Review Tribunal. *Id.*

77. *Id.* at 161-63.

intent-based doctrine in holding that Geneva III is self-executing.[78] In so doing, it referenced the treaty as a whole instead of isolating any particular provisions.[79] The court stated that the legislative history of the ratification of Geneva III indicated that the Senate did not believe that it required implementing legislation, with the exception of four provisions.[80] The court noted that the articles Hamdan asserted, articles 5 and 102, were not among the few non-self-executing provisions of the treaty.[81] Judge Robertson stated:

> Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.[82]

In *Hamdan*, the court addressed two of the applicable treaty status tests in reaching the conclusion that Geneva III is self-executing: the intent-based doctrine and the private right of action doctrine.[83] Other lower courts interpreting Geneva III applied different tests and reached inconsistent results.

2. *Hamdi v. Rumsfeld*[84]

Yaser Esam Hamdi, also a U.S. citizen, was seized by Northern Alliance forces in Afghanistan in 2001.[85] Military officials originally sent him to Guantanamo Bay, Cuba, but later transferred him to the Norfolk Naval Station Brig in Virginia.[86] The government detained Hamdi and denied him access to counsel and family for more than two years.[87] Hamdi's father filed a petition for a writ of habeas corpus on

78. *Id.* at 164.
79. *Id.* at 163-64.
80. *Id.* at 164.
81. *Id.*
82. *Id.* at 165.
83. *Id.*
84. 316 F.3d 450 (4th Cir. 2003).
85. *Id.* at 460.
86. *Id.*
87. Hamdi v. Rumsfeld, 524 U.S. 507, 510-11 (2004).

Hamdi's behalf, challenging Hamdi's detention.[88] The D.C. district court granted Hamdi immediate and unfettered access to counsel.[89] The Fourth Circuit reversed and instructed the lower court to conduct a narrow and deferential inquiry into Hamdi's status as an enemy combatant.[90] The district court then found the government's affidavit supporting Hamdi's detention was insufficient and ordered the government to produce further information.[91]

The Fourth Circuit again reversed the district court's order and remanded with instructions to dismiss Hamdi's challenge to his detention, deferring to the Executive's perceived broad war-making authority.[92] In reaching its decision, the appellate court discussed the status of Geneva III.[93] In one of his arguments, Hamdi contended that he deserved to have a competent tribunal determine his status as an "enemy belligerent" pursuant to article 5 of Geneva III.[94] The court found this argument lacking, declaring that Geneva III is non-self-executing based on the private right of action doctrine.[95]

Rather than focus on the particular provision raised by Hamdi, the Fourth Circuit reasoned that the Geneva Convention, as a whole, did not evince intent to provide a private right of action and did not explicitly provide for enforcement of private petitions.[96] The court further noted that "other courts of appeals" had determined it was non-self-executing.[97] The "other courts" cited by the Fourth Circuit were the Sixth Circuit in *Huynh Thi Anh v. Levi*[98] and the D.C. Circuit in *Holmes v. Laird*.[99] However, the Fourth Circuit's reliance on these cases was

88. Hamdi v. Rumsfeld, 316 F.3d at 460.

89. *Id.*

90. *Id.* at 461.

91. *Id.* at 462.

92. *Id.* at 467-68. The U.S. Supreme Court granted certiorari and determined that under the applicable congressional authorization, the President is authorized to detain individuals he deems to be enemy combatants, but citizen-detainees are entitled to notice and a fair opportunity to challenge the factual basis of their detentions before an impartial tribunal. Scholars have questioned the Executive's assertions regarding the reach of the Commander-in-Chief power during wartime. *See, e.g.*, Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567 (2004).

93. *Hamdi*, 316 F.3d at 468-69.

94. *Id.* at 468.

95. *Id.*

96. *Id.* The court quoted Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992), for the proposition that the treaty should be examined in its entirety as opposed to particular provisions. *Id.*

97. *Id.*

98. 586 F.2d 625 (6th Cir. 1978).

99. 459 F.2d 1211 (D.C. Cir. 1972).

misplaced because neither involved Geneva III and the provisions at issue were not comparable to those in *Hamdi*.[100]

Regarding enforcement, the court stated that article 11 instructed Geneva Convention parties only, not private individuals, to rely on diplomatic means to settle any disputes.[101] Additionally, the court noted that article 132 provides that any violations of the treaty should be "resolved by a joint transnational effort" from interested parties.[102] Furthermore, the court suggested that, even if article 5 was self-executing, its application to Hamdi was questionable.[103] Hence, the court concluded that "[f]or all these reasons, we hold that there is no purely legal barrier to Hamdi's detention."[104]

3. *United States v. Lindh*[105]

John Walker Lindh is a U.S. citizen who attended a terrorist organization's military training camp in Pakistan. Subsequently, he joined the Taliban in Afghanistan where U.S. forces captured him in November 2001.[106] He was indicted for conspiracy to murder U.S. nationals and for conspiracy to provide support, resources, and services to the Taliban, al-Qaeda, and another foreign terrorist organization.[107] Lindh challenged his indictment on several grounds in the U.S. District Court for the Eastern District of Virginia, asserting that the indictment should be dismissed because he was a member of the Taliban and thus a lawful combatant "entitled to the affirmative defense of lawful combatant immunity."[108] In addressing Lindh's "lawful combatant" argument, the court focused on Geneva III, holding that it controls

100. *Huynh Thi Anh* involved a custody case in which Vietnamese citizens invoked two articles of the Fourth Geneva Convention Relative to the Protection of Persons in Time of War in challenging an adoption proceeding. The court found the articles listed aspirations, not concrete obligations, and therefore those articles were not self-executing. The court made no general statements regarding the status of the other articles or the other Geneva Conventions. 586 F.2d at 629. Likewise, *Holmes* revolved around a completely different treaty, the NATO Status of Forces Agreement. The D.C. Circuit held the treaty was non-self-executing because it provided for relief through diplomacy, and thus a private individual could not invoke it in the courts. 459 F.2d at 1212.

101. *Hamdi*, 316 F.3d at 468.

102. *Id.*

103. *Id.* at 469.

104. *Id.*

105. 212 F. Supp. 2d 541 (E.D. Va. 2002) (mem.).

106. *Id.* at 545.

107. *Id.* at 547.

108. *Id.* at 552. Lawful combatants are "subject to capture and detention *as prisoners of war* by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Ex parte* Quirin, 317 U.S. 1, 31 (1942) (emphasis added).

because its provisions encompass the lawful combatant immunity doctrine.[109] The court specifically addressed articles 87 and 99, which regulate the prosecution of soldiers. Article 87 provides that combatants "may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts."[110] Article 99 states that "[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."[111] Focusing solely on these two provisions, the *Lindh* court noted that inclusion of the lawful combatant immunity doctrine was "particularly important" because those portions of Geneva III are self-executing and thus binding under the Supremacy Clause as domestic law.[112] The court utilized the intent-based doctrine of treaty analysis in finding that the language of articles 87 and 99 did not "invite nor require congressional action and hence fall properly into the self-executing category."[113]

The court also addressed the issue of the treaty's justiciability under the political question doctrine. The court applied the factors set forth by the United States Supreme Court in *Baker v. Carr*[114] and determined that interpreting treaties was within the purview of the judiciary.[115] The court then shifted its analysis to determining whether Lindh was in fact a lawful combatant under Geneva III. Ultimately, the court agreed with the President's determination that the Taliban did not meet the criteria set forth in article 4(A)(2).[116]

That the court did not hesitate to state that Geneva III is a self-

109. *Lindh*, 212 F. Supp. 2d at 553.

110. *Id.* (quoting Geneva III, art. 87).

111. *Id.* (quoting Geneva III, art 99).

112. *Id.* at 553-54.

113. *Id.* at 553 n.20.

114. 369 U.S. 186 (1962). The Court identified the following factors that establish a nonjusticiable political question: 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving the question; 3) the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion; 4) the impossibility of a court's undertaking independent resolution of the issue without expressing a lack of the respect due coordinate branches of government; 5) an unusual need for unquestioning adherence to a political decision already made; and, 6) the potentiality of embarrassment from multifarious pronouncements by various departments on the question. *Id.* at 217.

115. The government argued that since the President decided that Taliban members were unlawful combatants and not entitled to POW status under Geneva III and that, as a result of the President's exercise of his Commander-in-Chief and foreign affairs power, the judiciary could not review this determination because it was a nonjusticiable political question. The court found this argument unpersuasive because the factors triggering the political question doctrine were either weak or lacking altogether. *Lindh*, 212 F. Supp. 2d at 555-56.

116. *Id.* at 558.

executing treaty binding on the United States is significant. The court did not elaborate on this finding beyond the framework established in *Foster*—courts are to presume a treaty is self-executing and binding unless the language of the treaty states otherwise. Additionally, the court pointed out that prior cases[117] supported this presumption of self-execution and that the government essentially conceded this point.[118] The court's statement and lack of discussion behind it strongly suggest that particular provisions of Geneva III may be self-executing.

Using different tests, the district courts in *Hamdan* and *Lindh* reached different results than the Fourth Circuit in *Hamdi*. The *Hamdan* court based its findings on the private right of action and intent-based doctrines, while the *Lindh* court used the intent-based and justiciability doctrine. The Fourth Circuit in *Hamdi* utilized the private right of action doctrine and reached the opposite conclusion. The varied outcomes in these cases and the methodologies used to reach them are prime examples of the confusion in the lower courts regarding treaty analysis. Courts in prior cases referencing Geneva III also reached differing conclusions as to its status.

B. Earlier Cases

The district court in *Lindh* cited a case from another district, *United States v. Noriega*,[119] as support for the notion that provisions of Geneva III are self-executing.[120] General Manuel Noriega was the leader of the Panamanian Defense Forces (PDF) captured in Panama by U.S. forces during the U.S. armed conflict in Panama.[121] Noriega was convicted of narcotics-related offenses and sentenced to imprisonment in a federal penitentiary under the Bureau of Prisons.[122] Noriega raised a Geneva III issue by arguing that his confinement in a federal penitentiary violated the Convention because he was a POW.[123] Although Geneva III's status was not directly at issue, the *Noriega* court recognized that in order to recommend where Noriega should be detained, it would need to address the treaty's status because of Noriega's dual position as both a convicted felon and an alleged prisoner of war.[124] The court focused on articles 2,

117. *Id.* at 554 n.22 (citing United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992)).
118. *Id.*
119. 808 F. Supp. 791 (S.D. Fla. 1992).
120. *Lindh*, 212 F. Supp. 2d at 553 n.22.
121. *Noriega*, 808 F. Supp. at 794.
122. *Id.* at 791.
123. *Id.* at 793.
124. *Id.* at 794.

4, and 5 of Geneva III in determining Noriega's POW status and on various other provisions regarding his confinement facility.[125] Unlike the Fourth Circuit in *Hamdi*, the *Noriega* court noted that it is a widely accepted practice to focus only on particular provisions of a treaty to determine their status, as embodied in the Restatement (Third) of Foreign Relations Law of the United States: "Some provisions of an international agreement may be self-executing and others non-self-executing."[126] The court went on to say that if the issue of Geneva III's status was presented, it would hold most of its provisions to be self-executing.[127]

The *Noriega* court applied the intent-based doctrine and private right of action doctrine in making its determination regarding the Convention's status. With respect to the intent-based doctrine, the court acknowledged that the relevant provisions were silent as to implementing legislation.[128] Therefore, based on the Supremacy Clause and the holding in *Foster*, the provisions were assumed to be self-executing. The *Noriega* court also believed that a treaty must provide a private right of action to individuals to be deemed self-executing. The court opined that the whole purpose of Geneva III is to protect individuals:

> [I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations.[129]

The court's reasoning suggests that the purpose of Geneva III would be turned on its head if at least some of its provisions were not considered self-executing.

The district court in *Linder v. Calero Portocarrero*[130] and Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*,[131] however, offered a different viewpoint of the status of Geneva III's provisions. Both the court in *Linder* and Judge Bork in *Tel-Oren* applied the intent-based doctrine of treaty analysis in finding that Geneva III "expressly

125. *Id.* at 794-95.
126. *Id.* at 797 n.8.
127. *Id.* at 797.
128. *Id.* at 798.
129. *Id.* at 799.
130. 747 F. Supp. 1452 (S.D. Fla. 1990), *rev'd*, 963 F.2d 332 (11th Cir. 1992).
131. 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring).

call[s] for implementing legislation."[132] Again, these lower court cases demonstrate the confusion and disagreement by the judiciary in the area of treaty analysis. These conflicts leave the question of Geneva III's status unresolved.

IV. THE STATUS OF ARTICLES 4(A)(1), 4(A)(2), AND 5

This Comment proceeds by proposing that sections of treaties may be self-executing while other sections may be isolated and determined to be non-self-executing, without the treaty being analyzed as a whole. Although not always followed, this is a well-accepted principle supported by the courts in *Hamdan*, *Noriega*, and *Lindh*, the Restatement (Third) of Foreign Relations Law of the United States, and numerous scholars.[133] Analyzing the relevant provisions of articles 4 and 5 under each of the applicable status doctrines reveals that the provisions are self-executing. Articles 4 and 5 of the treaty do not implicate the constitutionality doctrine because they do not require a party to commit an act proscribed by the Constitution; therefore, this doctrine is omitted from this discussion.

A. The Articles and the Intent-Based Doctrine

The language in articles 4 and 5 does not include any explicit phrasing that they are non-self-executing. Following the approach to treaty interpretation intended by the Framers and embodied in the Supremacy Clause, this absence of executory language indicates the provision is self-executing. Some courts look to other factors beyond the language of the treaty to determine intent.[134] The Seventh Circuit, in *Frolova v. U.S.S.R.*,[135] suggested that courts rely on the following six indicators to determine intent:

> 1) the language and purposes of the agreement as a whole; 2) the circumstances surrounding its execution; 3) the nature of the obligations imposed by the agreement; 4) the availability and feasibility of alternative enforcement mechanisms; 5) the implications of permitting a private right of action; and 6) the capability of the judiciary to resolve the dispute.[136]

132. *Linder*, 747 F. Supp at 1463; *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring).

133. *See, e.g.*, Akbar, *supra* note 6, at 210; Paust, *supra* note 38, at 782; Iwasawa, *supra* note 40, at 675 (stating that "[e]ach treaty provision must be examined separately").

134. For an in-depth discussion of these factors, see generally Iwasawa, *supra* note 40.

135. 761 F.2d 370 (7th Cir. 1985).

136. *Id.* at 373.

Clearly, the third and sixth factors comprise the justiciability doctrine, discussed below. Similarly, the fifth factor is equivalent to the private right of action doctrine.

Of the remaining factors, the suggestion that the treaty be read as a whole partially resembles the reasoning of the Fourth Circuit in *Hamdi*.[137] Similarly, the district court in *Linder* and Judge Bork's concurrence in *Tel-Oren* stated that Geneva III was not self-executing because it explicitly requires implementing legislation. Although the *Linder* court and Bork failed to specify the exact language of Geneva III that allegedly indicates it is non-self-executing, they presumably relied on the language of the articles governing grave breaches.[138] If this was the case, their reliance reflects a misunderstanding of the international context in which treaties are signed. Commonly, these types of clauses "merely provide that each State Party shall adopt the measures that are required by its constitution to give the provisions of the treaty their effect."[139] This reasoning makes sense given that many countries, unlike the United States, require some sort of implementing legislation before treaties can take effect. Therefore, a "domestic implementation clause merely reinforces the customary international law rule that a state which has contracted a valid treaty is bound to take every measure necessary to give full effect to the treaty."[140]

The purposes of Geneva III as a whole relate to the circumstances surrounding its inception.[141] As noted above, the committee broadened Geneva III from earlier human rights treaties in response to the atrocities of WWII to encompass more categories of captives.[142] Additionally, the committee made regulations more explicit and comprehensive, and definitions more precise, because "[e]xperience had shown that the daily life of prisoners depended specifically on the interpretation given to the general regulations."[143] Thus, it is hard to imagine the drafters of the treaty rendered these changes to the Hague Convention if they intended the changes to be non-self-executing, meaning its signatories could theoretically avoid their application by foregoing implementing legislation. In sum, no matter how intent is measured, the result reveals that the drafters intended the articles to be self-executing.

137. *See supra* Part III.A.2.

138. Jinks & Sloss, *supra* note 10, at 125-26.

139. Iwasawa, *supra* note 40, at 660.

140. *Id.*

141. *See supra* Part III.

142. ICRC, Introduction to Convention (III) Relative to the Treatment of Prisoners of War, http://www.icrc.org/ihl.nsf.

143. *Id.*

B. The Articles and the Justiciability Doctrine

As discussed above in Part II, the concept of justiciability generally consists of two aspects, one treaty-driven and one politics-driven. The former aspect analyzes whether a treaty imposes actual obligations on the contracting parties rather than goals or ideals. The latter aspect suggests that in some circumstances treaties are off-limits to courts' adjudicatory power because they are politically controversial or impinge upon the duties of the Executive or Congress. In relationship to articles 4 and 5, both the language and the history behind them indicate they are not merely aspirational. Instead, article 4 lays out the specific requirements to designate individuals as POWs. Likewise, article 5 clearly mandates intervention by a competent tribunal where POW status is in doubt. Furthermore, article 2, one of the general introductory provisions of Geneva III, provides:

> [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, 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. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto *shall remain bound* by it in their mutual relations. They *shall furthermore be bound* by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[144]

The use of the words "shall" and "bound" indicates that the drafters were not simply generating ideals they hoped the signatories would follow. Taken together, these three provisions concretely identify the preliminary steps the contracting parties must take regarding those individuals seized during war or armed conflict.

The political question doctrine presents a larger barrier to the self-executing argument, though by no means an insurmountable one. Given the foreign relations involved, the government is likely to argue that "the interpretation and application of the Convention are political questions, not reviewable by the court."[145] This notion was evident in *Hamdan*, *Hamdi*, and *Lindh* as the government argued in each case that the courts could not question the President's determinations but must instead defer to the Executive as commander-in-chief.[146] *Baker v. Carr* set forth

144. 6 U.S.T. 3316, 3318 (emphasis added).

145. Akbar, *supra* note 6, at 206. *See also* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) (arguing same).

146. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004); Hamdi v. Rumsfeld, 316 F.3d

several criteria to determine whether an issue is a nonjusticiable political question, which can be grouped into three categories: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) a "lack of judicially discoverable and manageable standards for resolving an issue," or (3) "institutional difficulties, enforcement problems, or excessive controversy if the judiciary were to decide the case."[147] As the district court in *Lindh* pointed out, "searching scrutiny" requiring "careful consideration" of the political question factors should be applied to any argument that calls for prohibiting the judicial branch from exercising its constitutionally enumerated duty of review.[148] The court did not find any textually demonstrable constitutional commitment to a coordinate political department or any indication that applying Geneva III to Lindh's situation would create a lack of judicially discoverable and manageable standards.[149] In fact, the court found just the opposite and cited judicial support for the notion that "treaty interpretation does not implicate the political question doctrine and is not a subject beyond judicial review."[150] The Constitution bolsters the power of the judiciary to interpret treaties by explicitly extending judicial authority to "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[151]

Furthermore, while lower courts commonly rely on the political question doctrine in foreign affairs to deem issues nonjusticiable, the Supreme Court has only found a nonjusticiable political question in one case since *Baker*.[152] Indeed, the Supreme Court in *Hamdi* responded to the government's argument that separation-of-powers principles demanded application of a "very deferential" standard by balancing the

450, 463-68 (4th Cir. 2003); United States v. Lindh, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002).

147. 369 U.S. 186, 217 (1962). The factors lumped into the third category by Akbar, *supra* note 6, at 205-06, are:

> [T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

148. 212 F. Supp. 2d at 555.

149. *Id.* at 555-56.

150. *Id.* at 556. The court cited several cases finding the same. *Id.* at 556 n.30 (citations omitted).

151. U.S. CONST. art. III, § 2, cl.1.

152. HENKIN, *supra* note 14, at 89; Akbar, *supra* note 6, at 206. The U.S. Supreme Court found a nonjusticiable political question in *Nixon v. United States*, 506 U.S. 224, 224 (1993), which involved the Senate's discretion over impeachment proceedings. Akbar, *supra* note 6, at 206 n.39.

competing interests, not by refraining from reviewing the detention issues or automatically deferring to the Executive.[153] Thus, in regards to articles 4(A)(1), 4(A)(2), and 5 of Geneva III, the Executive's opinion on their status is not dispositive, although it may be taken into account.

C. The Articles and the Private Right of Action Doctrine

The private right of action test of treaty interpretation developed by the courts refers to enforcement in domestic courts.[154] For an individual to have standing to invoke a treaty, the treaty must establish a private right or cause of action for individuals wishing to do so.[155] However, even if a treaty does not create an affirmative cause of action, individuals may still invoke the treaty defensively if they are being prosecuted in a manner that violates the treaty.[156] In these cases, courts do not need to interpret the treaty as providing a private right of action since the treaty is not being invoked to pursue or maintain a claim.[157] Whether an individual raises articles 4(A)(1), 4(A)(2), and 5 to initiate an action or as a defense, these articles are self-executing under this doctrine. As the commentary to Geneva III and the district court in *Noriega* point out, the purpose of articles 4 and 5 is to define the parameters of those captured individuals entitled to the POW protections enumerated in the other provisions of Geneva III. Therefore, an individual must be able to raise them in disputes over POW status. Procedurally, this will often take the form of inclusion of the articles in a count of a petition for a writ of habeas corpus or raised as a defense when a detainee is being prosecuted, as in *Hamdan.*[158]

V. CONCLUSION

Examination of the lower courts' treatment of Geneva III reveals a lack of uniformity, both in the appropriate treaty analysis tests to be used as well as whether to apply it to the entire treaty or just specific provisions. Although scholars have argued that none of the tests is appropriate to discern a treaty's status based on the Supremacy Clause, courts are unlikely to adopt this view.[159] However, articles 4(A)(1),

153. Hamdi v. Rumsfeld, 524 U.S. 507, 527, 28 (2004).

154. Vázquez, *supra* note 16, at 720; Iwasawa, *supra* note 40.

155. *Id.*

156. Vázquez, *supra* note 16, at 720; Akbar, *supra* note 6, at 210.

157. *Id.*

158. Akbar, *supra* note 6, at 210.

159. HENKIN, *supra* note 14, at 90; Vázquez, *supra* note 16.

4(A)(2), and 5 of Geneva III are self-executing no matter which treaty doctrine a court utilizes given the language, obligations, and purposes they exemplify. Moreover, the constitutional mandate in Article III regarding the judiciary's role in interpreting treaties and the Supreme Court's long-standing tendency against declaring issues nonjusticiable indicate that interpretation and application of these articles are within the courts' province.

Nonetheless, the Supreme Court should clarify lower courts' confusion with respect to the doctrine of self-executing treaties, Geneva III in particular. The Court's continued silence results in several ramifications. First, applying different tests to the same treaty provides no predictability for parties in similar situations because the outcomes vary depending on the court. Second, allowing the lower courts to pick and choose which tests to apply and under which scope to apply them (i.e. entire treaty versus specific provisions) prevents uniformity. Most significantly, these problems severely affect those individuals who seek the protections of Geneva III. In one case, if the individual meets the POW requirements and the treaty is self-executing, he will automatically be entitled to the treaty's protections. Conversely, if the treaty is non-self-executing, an individual who meets the POW requirements can only gain POW protections if the treaty is accompanied by domestic implementation—which the United States has not provided—or if that governmental party decides to afford the protections on its own accord. The Court's actions, or inactions, in resolving this issue may influence other nations in their application of Geneva III.[160]

The U.S. Supreme Court must either adopt a comprehensive approach to determine the status of Geneva III and other treaties, perhaps encompassing the factors set forth in *Frolova,*[161] or enunciate a standard identifying the circumstances when courts should apply a specific test. Whatever solution the Court reaches, whether an individual is automatically entitled to POW treatment is too important an issue to allow the lower courts' lack of uniformity to continue.

160. Indeed, the Court in *Hamdan* reported that "other governments have already begun to cite the United States' Guantanamo policy to justify their own repressive policies." Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 163 (D.D.C. 2004) (citing LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 77-80 (2003), http://www.ciaonet.org/book/lch12/lch12.html). Thus, how the Supreme Court approaches the detainee situation, and thereby Geneva III, continues to be imperative.

161. *See supra* Part IV.A.