Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II

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"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[1]

The Supreme Court has spoken, and the message was clear: the military commissions are not as "full and fair" as the government has been asserting since their inception. In a rejection of the course of action chosen by President George W. Bush to provide criminal sanction to al Qaeda operatives, the Court held that the procedural construct of the military commission violated both domestic constitutional limits on executive authority and the international law of war reflected in Common Article 3 of the four Geneva Conventions of 1949 (Common Article 3).[2] A plurality of the Court also concluded that the allegation of conspiracy to violate the law of war failed to properly state an offense because no such conspiracy offense has been recognized by international law.[3]

Much ink has already been spilled in response to this decision, characterized by many as "landmark."[4] A cursory review of editorials and internet blogs reveals that the post-decision commentary has focused on the following three primary areas: the scope of executive power, the "way ahead" for dealing with al Qaeda detainees, and the impact of the decision on the legal regulation of the conflict with al Qaeda.[5] The long term consequence of this decision is yet to be seen, but there seems little doubt that some cooperative endeavor between the President and Congress will redefine the paradigm related to the criminal sanction of individuals detained during the Global War on Terror.

Any such redefinition will invariably have to address the "fundamental guarantees" analysis of the *Hamdan* opinion. That analysis relied on Common Article 3,[6] and to a lesser extent Article 75 of Additional Protocol I,[7] to conclude that the procedures established for the military commissions were inconsistent with the minimally acceptable standards established by the law of war.[8] This conclusion was essential for the holding of the Court. Determining that the law of war established such minimal standards of procedural fairness led to the conclusion that these procedural standards were incorporated by Congress, through Article 21 of the Uniform Code of Military Justice (UCMJ),[9] to apply to military commissions empowered to adjudicate alleged law of war violations. According to Justice Anthony Kennedy's concurring opinion,

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[1] Thomas Paine, *Dissertations on First Principles of Government* (July 7, 1795), *in* JOSEPH LEWIS, INSPIRATION AND WISDOM FROM THE WRITINGS OF THOMAS PAINE (1954).

[2] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2754-59 (2006).

[3] *Id*. at 2779-82.

[4] *See, e.g.*, Warren Richey, *Supreme Court Rejects Military Tribunals*, CHRISTIAN SCI. MONITOR, June 30, 2006; *A Supreme Court Conversation, Still "the Most Important Decision on Presidential Power,"* SLATE, June 30, 2006, http://www.slate.com/id/2144476/entry/0/.

[5] *See, e.g.*, Lionel Beehner, *The Impact of Hamdan v. Rumsfeld*, Council on Foreign Relations, June 29, 2006, http://www.cfr.org/publication/11025/impact_of_hamdan_v_rumsfeld.html; Human Rights First, *Hamdan v. Rumsfeld* Background Information on Legal Issues in the Case, http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_hamdan_bg.htm (last visited Aug. 9, 2006); John Yoo & Glen Sulmasy, Hamdan v. Rumsfeld: *The Supreme Court Manages to Overlook Centuries of U.S. History*, SAN DIEGO UNION TRIB, Aug. 6, 2006, *available at* http://www.signonsandiego.com/uniontrib/20060806/news_mz1e6sulmasy.html: *A Victory for Law, The Supreme Court Checks the Bush Administration's Attempt to Invent itsOwn Rules for War*, WASH. POST, June 30, 2006, at A26.

[6] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea art. 3, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 3, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75 (4), Dec. 12, 1977, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

[8] *Hamdan*, 126 S. Ct. at 2796-97.

[9] 10 U.S.C.S. § 821 (LEXIS 2006); UCMJ art. 21 (2005).

> The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. That provision is Common Article 3 of the four Geneva Conventions of 1949. It prohibits, as relevant here, "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The provision is part of a treaty the United States has ratified and thus accepted as binding law. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. There should be no doubt, then, that Common Article 3 is part of the law of war as that term is used in § 821.[10]

The determination that the minimal standards established by the law of war are incorporated into Article 21, UCMJ, mandated analysis of two predicate issues. First, whether military operations conducted by the United States against al Qaeda were properly characterized as an "armed conflict" that triggered application of the law of war. Although many experts have questioned the legitimacy of characterizing the war on terror as an "armed conflict,"[11] the Court seemed to almost summarily accept this proposition without analysis.[12] Having thus decided to assess the legality of the military commissions through the lens of the law of war, the Court then addressed the subsequent predicate issue: whether the armed conflict fell under the regulatory umbrella of Common Article 3. The Court's answer to this question was, contrary to the assertion of the government, "yes."[13]

Analyzing the applicability of Common Article 3 to the armed conflict with al Qaeda was necessitated by the Bush administration's rejection of the long accepted Department of Defense presumption that the principles reflected in this article applied to all "armed conflicts." This determination was based on the fact that the armed conflict with al Qaeda was "international" in scope, and therefore Common Article 3—a treaty provision intended to apply to internal armed conflicts—was inapposite. Because this interpretation resulted in the inapplicability of Common Article 3 to Hamdan,[14] it placed the question of Common Article 3's applicability to the armed conflict with al Qaeda squarely before the Court. Only by resolving this issue could the Court reach the question of whether the military commission procedures complied with the law of war. For practitioners and scholars versed in the law of war, this aspect of the opinion was perhaps the most profound. For the first time in our nation's history, the Supreme Court analyzed the applicability of Common Article 3 to an ongoing armed conflict, rejected the narrow interpretation proffered by the Commander in Chief, and endorsed the broad application of the principle of humane treatment that has served as a cornerstone for Department of Defense law of war policy for decades.

The Court ultimately concluded that Common Article 3 did indeed apply to the armed conflict with al Qaeda, rejecting the government's "international scope" inapplicability theory. A plurality of the Court then proceeded to analyze the meaning of the Common Article 3 "regularly constituted court" mandate. In perhaps the most remarkable portion of the opinion, Justice John Paul Stevens, writing for the plurality, looked to Article 75 of Additional Protocol I to illuminate the meaning of this mandate. Article 75, "Fundamental Guarantees," was included in Additional Protocol I to ensure that no person affected by *international* armed conflict is left without humanitarian protection. It was motivated by the recognition that "gaps" existed between the categories of protections for victims of war established by the four Geneva Conventions of 1949.[15]

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[10] *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring in part).

[11] *See, e.g.*, Christopher Greenwood, *International Law and the "War Against Terrorism,"* 78 INT'L AFFAIRS no. 2, at 301-18 (2002); *see also* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (Jan. 2004) (discussing the complex challenge of conflict categorization related military operations conducted against highly organized non-state groups with trans-national reach); Kirby Abott, *Terrorists: Combattants, Criminals, or . . . ?, in* THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS, AND VALIDITY, PROCEEDINGS OF THE 31ST ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW, OTTAW, OCTOBER 24-26 (2002).

[12] *Hamdan*, 126 S. Ct. at 2795-96.

[13] *Id.* at 2795-97.

[14] *See* Memorandum, President of the United States, to Vice President, et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf [hereinafter Humane Treatment Memorandum].

[15] *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 861-875 (1987) [hereinafter PROTOCOL COMMENTARY].

These gaps were the result of an odd anomaly—when the four Geneva Conventions were drafted, they did not include an express common "fundamental guarantee" article. Unlike the Hague Convention of 1907, the drafters of the Geneva Conventions chose not to include a "Martens Clause"–type general humanitarian protection provision in the preamble to the treaties. This was a break from past law of war codification efforts, which used such a provision to extend the general humanitarian purpose of these prior treaties to any person affected by a conflict not expressly covered by the provisions of these treaties.[16] As the International Committee of the Red Cross (ICRC) Commentary indicates, such a "purpose statement" was proposed by the ICRC during the drafting of the 1949 Conventions. The proposed purpose statement was clear: to emphasize the humanitarian principles that served as the foundation for all provisions in the treaties and to ensure ignorance of the law or "treaty aversion" would not deprive victims of war of this most basic protection.

> However carefully the texts were drawn up, and however clearly they were worded, it would not have been possible to expect every soldier and every civilian to know the details of the odd four hundred Articles of the Conventions, and to be able to understand and apply them. Such knowledge as that can be expected only of jurists and military and civilian authorities with special qualifications. But anyone of good faith is capable of applying with approximate accuracy what he is called upon to apply under one or other of the Conventions, provided he is acquainted with the basic principle involved. Accordingly the International Committee of the Red Cross proposed to the Powers assembled at Geneva the text of a Preamble, which was to be identical in each of the four Conventions. It read as follows:
>
> "Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.
>
> Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed 'hors de combat' by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality. . . . "[17]

This proposal was ultimately rejected, not based on any substantive objection to articulating the pervasive application of the principle of humanity to armed conflicts but because of disputes related to linking the statement of principles to divine origin.[18] As a result, even though the ICRC Commentary indicates that Common Article 3 served as an implicit statement of this underlying humanitarian principle,[19] the Geneva Conventions lacked an explicit application of this principle to all

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[16] Known as the "Martens Clause" in honor of Feodor Martens, the Russian diplomat responsible for first proposing the language in the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November /11 December 1868. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 6 n.36 (1996). A similar version of this provision was included in the Preamble of the Hague Convention of 1899 and has also been replicated in subsequent law of war treaties. *See id.* at 7 n.37.

> 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 Hague Convention No. IV Respecting the Laws and Customs of War on Land pmbl., Oct.18, 1907, 36 Stat. 2277, T.S. 539, *reprinted in* U.S. DEP'T OF THE ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956).

Although omitted from the Geneva Conventions of 1949, the Martens Clause subsequently reappeared in a somewhat modified form in Additional Protocol I to the Geneva Conventions:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

See Additional Protocol I, *supra* note 7, art. 1.

[17] *See* 1 COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 21 (Jean S. Pictet ed., 1960).

[18] *Id.* at 22.

[19] According to the Commentary:

> The Preamble having been finally abandoned (apart from the dry introductory formula reproduced at the beginning of this Chapter), it may be asked why there should be so much to say on the subject. The answer is that, in spite of its not having been proclaimed at the head of the Conventions, the expression of the guiding principle underlying them has not been altogether discarded. The possible application of this principle to conflicts other than international wars was considered by the Conference in connection with what ultimately became articles 2 and 3 of the present Convention. The drafts submitted to the Conference provided for full application of the Conventions even in cases of civil war, colonial conflicts or wars of religion, which was admittedly going very far. The States, as it proved, were not prepared to bind themselves in advance by all the provisions of the Conventions in the case of their own nationals

persons affected by international armed conflicts. Instead, the articulation of the humane treatment mandate took the form of Common Article 3, which by its express terms applied only to non-international armed conflicts.[20]

Article 75 of Additional Protocol I is best understood as an express extension of the Common Article 3 humane treatment mandate to international armed conflicts.[21] Article 75 also expanded the non-exclusive list of requirements required to implement the humane treatment obligation. The basic purpose of Article 75 was clear: eliminate the Common Article 3 anomaly by dispelling any doubt about the application of this mandate to all persons affected by international armed conflicts. The ICRC Commentary to Additional Protocol I provides the following:

> A number of fundamental rules applicable to all persons defined in paragraph 1 are pronounced here. The other paragraphs of the article cover certain more restricted categories which are duly defined. This pronouncement is directly inspired by the text of common Article 3 of the Conventions which applies to conflicts not of an international character. . . . [22]

This inherent relationship between Common Article 3 and Article 75 explains why a plurality of the Court would look to Article 75 to illuminate the meaning of Common Article 3. What seemed even more significant to the plurality was the more extensive treatment by Article 75 of the "regularly constituted" tribunal aspect of the humane treatment mandate.[23] Article 75 amplifies extensively the meaning of a "humane" adjudication of alleged criminal misconduct, and in particular the right of a defendant to be present during the trial.[24]

> rebelling and launching a civil war; but they were nevertheless at one in recognizing the "indivisibility" of the principle underlying the Conventions. They agreed that in the case of non-international conflicts such as civil wars, a minimum of humanitarian provisions should be respected; and in defining that minimum they very naturally reverted to the essential elements of the draft Preambles, which had been so fully discussed and so strangely rejected . . . .

Id. at 23.

[20] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[21] PROTOCOL COMMENTARY, *supra* note 15, at 861.

[22] *See id.* at 871-72.

[23] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797-98 (2006).

[24] The exact terms of Article 75 are:

> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
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> (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
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> (e) anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) no one shall be compelled to testify against himself or to confess guilt;
>
> (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
>
> (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
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> (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

Additional Protocol I, *supra* note 7, art. 75 (4).

It is critical to note that the plurality did not look to this provision as a source of binding treaty obligation, but instead concluded that Article 75 reflected principles *indisputably* part of customary international law.[25] These principles were then relied upon to define the content of the Common Article 3 "regularly constituted tribunal" requirement. According to Justice Stevens,

> Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, ¶ 1(d)). Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I).[26]

Prior to U.S. military response to the attacks of 11 September 2001, characterizing Article 75 as a reflection of customary international law binding on the United States would have been relatively uncontroversial among legal experts responsible for advising U.S. military planners and commanders. Until the initiation of military operations related to the Global War on Terror, DOD legal experts accepted the proposition that Article 75, perhaps more than any other provision of Additional Protocol I, reflected principles of international law binding on the United States irrespective of President Ronald Reagan's rejection of Additional Protocol I.[27] The post-11 September 2001 legal determinations made by President Bush regarding the applicability of law of war provisions to the conflict with al Qaeda, however, radically altered this article of faith.[28] A much more textual approach prevailed when interpreting law of war treaty obligations.[29] As a result, President Reagan's rejection of Additional Protocol I led to a much more cautious approach to the status of provisions of Additional Protocol I vis-à-vis U.S. operations. When coupled with the anomaly created by the absence of a statement of underlying principles in the 1949 Geneva Conventions and the emphasis on the express limitation of Common Article 3 to non-international armed conflicts, this revised interpretation of Article 75 contributed to the conclusion that the armed conflict with al Qaeda was outside the scope of the legally mandated requirement to treat captured personnel humanely.

This revised approach to interpreting the status of provisions of Additional Protocol I is reflected by comparing treatment of this treaty in the law of war chapter of the *Operational Law Handbook*,[30] which is perhaps the most widely-relied upon reference for military legal practitioners supporting ongoing operations. The current version of the *Handbook* provides the following:

> 1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Additional Protocol I] and II, 155 nations have ratified [Additional Protocol] I. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. This difference in obligation has not proved to be a hindrance to U.S./allied or coalition operations since promulgation of AP I in 1977.[31]

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[25] *Hamdan*, 126 S. Ct. at 2756.

[26] *Id.*

[27] *See* Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987) [hereinafter Letter of Transmittal].

[28] *See* Humane Treatment Memorandum, *supra* note 14 (announcing the President's determination that although the conflict against Afghanistan triggered the Geneva Conventions, captured Taliban forces were not entitled to prisoner of war status because they failed to meet the implied requirements imposed by the Convention on members of the regular armed forces).

[29] Perhaps the most compelling illustration of this textual analytical approach was reflected in the analysis provided by the Department of Justice Office of Legal Counsel to the President and the General Counsel for the Department of Defense on the applicability of the Geneva Conventions to individuals detained by U.S. forces during military operations. *See* Memorandum, Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002), *available at* http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf.

[30] Produced by the U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS), International and Operational Law Department, and revised annually, the *Operational Law Handbook* is perhaps the most widely relied upon practitioners resource for legal issues associated with military operations and is regarded throughout the Department of Defense and other executive branch agencies as a concise (although not necessarily authoritative) summary of the law applicable to U.S. forces. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, JA 422, OPERATIONAL LAW HANDBOOK (Aug. 2006) [hereinafter OPERATIONAL LAW HANDBOOK].

[31] *See id.* ch. 2, at 2.

Although this excerpt does not explicitly indicate a rejection of prior interpretations of obligation vis-à-vis Additional Protocol I, it clearly does not explicitly assert such an obligation. The full significance of this excerpt is only apparent when compared to the description of Additional Protocol I in prior editions of the *Operational Law Handbook*. For example, the 2003 edition states the following:

> 1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Geneva Protocol] I and II, judge advocates must be aware that approximately 150 nations have ratified the Protocols (thus most of the 185 member states of the [United Nations]). The Protocols will come into play in most international operations. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. *Furthermore, the U.S. considers many of the provisions of the Protocols to be applicable as customary international law.*[32]

Comparison of these two versions of the *Operational Law Handbook* is indicative of a general "rollback" by the executive branch of the treatment of Additional Protocol I provisions.[33] Numerous experts and government legal advisers have argued for years that many of these provisions, and in particular Article 75, reflect binding norms of customary international law. Unfortunately, opponents of this proposition have relied on the repudiation of Additional Protocol I by President Reagan. These opponents assert this repudiation is particularly relevant vis-à-vis the armed conflict with al Qaeda because it was motivated in large part by the U.S. concern that Additional Protocol I unjustifiably extended law of war protections to terrorist operatives.

Because only a plurality endorsed the interpretation of Article 75 as a reflection of customary international law, this aspect of the *Hamdan* opinion will very likely exacerbate the debate over the status of Additional Protocol I. Critics have already contrasted the plurality's reliance on Article 75 as a source of binding customary international law with President Reagan's rejection of the treaty to bolster their "judicial overreaching" condemnation of the decision.[34] These critics will no doubt draw inspiration from Justice Kennedy's criticism of the plurality's reliance on Article 75:

> There should be reluctance, furthermore, to reach un-necessarily the question whether, as the plurality seems to conclude, *ante*, at 70, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol. For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court—deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings—as the basis for finding the military commissions lack authorization under 10 U. S. C. § 836 and fail to be regularly constituted under Common Article 3 and § 821.[35]

By relying on an article from a treaty rejected by the United States, the customary nature of which has been subject to significant re-assessment by the executive branch, the plurality may have armed opponents of the fundamental guarantee aspect of the *Hamdan* opinion with a compelling, and perhaps unnecessary, basis to attack the ruling. It seems clear, however, that the purpose of citation to Article 75 was to identify a concise articulation of the content of the customary international law principle of humane treatment as it relates to the trial of detainees. This is the only viable explanation for citing a treaty that the United States has rejected and that is applicable by its terms exclusively to international armed conflicts—a category of armed conflict distinct from the type of conflict the Court concluded characterizes military operations against al Qaeda.

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[32] *Id.* at 5.

[33] The TJAGLCS International and Operational Law Department teaches, however, that the United States views much of Additional Protocol I and almost all of Additional Protocol II as reflective of customary international law. Also, the Department's *Law of War Documentary Supplement* includes both a summary of Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L & POL'Y 419 (1987) and Memorandum, W. Hays Parks, LCDR Michael F. Lohr, Dennis Yoder, and William Anderson, to Assistant General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (8 May 1986). *See* INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 385-87, 388-90 (2005).

[34] During the post-*Hamdan* episode of the McLaughlin Group, Tony Blankley noted the invalidity of relying on Additional Protocol I in light of President Reagan's rejection of this treaty.

[35] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2809 (2006).

An additional articulation of the content of the principle of humane treatment the plurality did not consider is contained in Additional Protocol II.[36] This treaty provides a valuable indication of the meaning of humane treatment when analyzing the minimally required procedures associated with the criminal adjudication of a war crime allegation and is perhaps even more significant in relation to al Qaeda detainees than Article 75. This greater significance is the result of three principal considerations: the relationship between Common Article 3 and Additional Protocol II; the longstanding executive branch position on Additional Protocol II; and the specific articulation of fundamental guarantees in Article 6 of Additional Protocol II that are analogous to those guarantees reflected in Article 75.

Before considering Additional Protocol II, however, it is necessary to address the express limit on its scope of application. This limit provides the most obvious retort to the argument that Additional Protocol II is relevant to the analysis of legal issues associated with the armed conflict between the United States and al Qaeda. Article 1 of Additional Protocol II establishes conditions for the treaty's application that are more restrictive than Common Article 3.

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[37]

Application of the treaty, therefore, is by its terms limited to situations where a dissident group actually controls a portion of the territory of the government it is challenging, a condition obviously not satisfied by al Qaeda. The drafters of the treaty, however, also acknowledged that Common Article 3 applied to a broader category of non-international armed conflicts, hence the qualification that nothing in Additional Protocol II modifies the existing conditions of Common Article 3 application. This point is emphasized by the ICRC Commentary, which indicates "the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, *which applies in all situations of non-international armed conflict.*"[38] Thus, as a preliminary matter, Additional Protocol II supports by implication the application of Common Article 3 to non-international armed conflicts that *do not* satisfy the strict "territory" requirement of Additional Protocol II's scope provision. Although not relied on in the *Hamdan* opinion, this more restrictive scope provision of Protocol II actually bolsters the Court's decision to reject the government's "international scope" inapplicability theory for Common Article 3.

This scope also obviously disables any assertion that the armed conflict with al Qaeda is regulated by Additional Protocol II as a matter of treaty obligation. It does not, however, undermine the value of this treaty as an additional source of authority for understanding the content of the customary international law norm of humane treatment applicable to all armed conflicts. Because the Court treated the conflict between the United States and al Qaeda as a non-international armed conflict, the principles reflected in this treaty, which were developed to enhance humanitarian protections during internal armed conflicts (at the time of drafting the most common type of non-international armed conflict and the area believed to be most needy of additional regulation), are arguably even more significant than their international armed conflict counterparts. Furthermore, the reaction by the United States to this treaty only serves to enhance this significance, a reaction that was markedly different from the reaction to Additional Protocol I.

Unlike Additional Protocol I, Additional Protocol II is immune from the "U.S. rejection" attack relied on by opponents of the application of Article 75 to the Global War on Terror. This immunity is significant not only because it impacts the analysis of the principles reflected in this treaty, but also because with respect to providing content to the principle of humane treatment, the provisions of Additional Protocol II are virtually identical to Article 75, Additional Protocol I. Drafted at the same time as Additional Protocol I, Additional Protocol II expanded upon the minimal humanitarian regulation of non-international armed conflicts previously provided exclusively by Common Article 3. As the ICRC Commentary notes, this was the entire purpose for the treaty. "[I]n order to reinforce and increase the protection granted to victims of non-

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[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

[37] *Id.* art. 1 (1).

[38] *See* PROTOCOL COMMENTARY, *supra* note 15, at 1348 (emphasis added).

international armed conflict—the 'raison d'être' of Protocol II—it develops and supplements the brief rules contained in common Article 3. . . ."[39]

The United States was a strong proponent of this expansion of non-international armed conflict humanitarian regulation, a position that has never been abandoned. In fact, in the same transmittal document used by President Reagan in 1986 to reject Additional Protocol I, Additional Protocol II was submitted to the Senate for advice and consent to allow the President to ratify the treaty. The significance of this action by President Reagan is twofold. First, unlike Additional Protocol I, the President's action reflected the executive branch's willingness to accept and become a party to Additional Protocol II. Second, the transmittal to the Senate included the U.S. reaction to the more restricted scope of Additional Protocol II compared to Common Article 3. This reaction indicates that the United States supported a much broader application of the principle of humane treatment reflected in Common Article 3 and supplemented by the provisions of Additional Protocol II. When President Reagan submitted the treaty to the Senate for advice and consent,[40] he indicated that the United States considered the scope restriction unjustified and would therefore assert coextensive application of the Protocol with Common Article 3.[41] According to the Letter of Transmittal:

> The final text of Additional Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerilla operations over a wide area. We are therefore recommending that the U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts) which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence).[42]

While this language refers to "traditionally defined" non-international armed conflicts, it also reflects U.S. opposition to narrowly defining the scope of application of the humanitarian protections reflected in Common Article 3 and Additional Protocol II. The intent seemed apparent—exclude only "non-conflict" internal matters from this scope of application, but ensure anything crossing the threshold of armed conflict is subject to humanitarian regulation. While it is unlikely that the executive branch experts who formulated this position contemplated the type of transnational armed conflict exemplified by the current conflict with al Qaeda, there is little basis to infer from the President's reaction to Additional Protocol II that such a conflict would have been regarded as beyond the scope of humanitarian regulation. On the contrary, the objection to the treaty's restrictive scope of application when compared to the broad scope of Common Article 3 suggests the opposite conclusion.

It is well known that the Senate has yet to grant the advice and consent to Additional Protocol II requested by President Reagan. It is less well known that President Reagan was not the only President to seek this advice and consent to bind the United States to the Protocol. In 1999, President Clinton also requested advice and consent for ratifying this treaty.[43] This effort also reflects the executive branch's desire for expansive application of humanitarian regulation to all armed conflicts.

> Because the United States traditionally has held a leadership position in matters relating to the law of war, our ratification would help give Protocol II the visibility and respect it deserves and would enhance efforts to further ameliorate the suffering of war's victims--especially, in this case, victims of internal armed conflicts. I therefore recommend that the Senate renew its consideration of Protocol II Additional and give its advice and consent to ratification, subject to the understandings and reservations that are described fully in the report attached to the original January 29, 1987, transmittal message to the Senate.[44]

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[39] *Id.* at 1350 (noting ICRC Commentary).

[40] Additional Protocol II, *supra* note 36.

[41] Letter of Transmittal, *supra* note 27.

[42] *Id.*

[43] *See* Letter of Transmittal from President William Clinton, to the Senate for Ratification of the Hague Convention for the Protection of Cultural Property in the Event of Armed conflict (The Convention) and for Accession, the Hague Protocol, Concluded on May 14, 1954, and entered into force on August 7, 1956 with Accompanying Report from the Department of State on the Convention and the Hague Protocol, S. Treaty Doc. No. 106-1, 106th Cong., 1st Sess., at III (1999).

[44] *Id.*

What is significant about these manifestations of support for Additional Protocol II by both Presidents Reagan and Clinton is that they indicate support for a broad application of the principle of humane treatment implemented by this treaty. The fact that neither ratification effort expressly endorsed application of the treaty to a "transnational" non-international armed conflict, such as the conflict with al Qaeda, seems far less significant than the continuing executive effort to maximize application of the humane treatment mandate to armed conflicts. In fact, it is not surprising that these efforts emphasized application to all *internal* armed conflicts, because at the time of both efforts non-international armed conflicts were exclusively of the *internal* variety. Within this historical context, the effort to ensure maximum application of the humanitarian protections reflected in Additional Protocol II supports the conclusion that the principle of humane treatment articulated by this treaty should be understood to apply to *all* armed conflicts, regardless of whether they fall under the express terms of Common Article 3 or Common Article 2. At a minimum, these ratification efforts support the conclusion that the United States views Additional Protocol II as applying coextensively with Common Article 3, and therefore a determination that an armed conflict that falls under the umbrella of Common Article 3 should justify consideration of the provisions of Additional Protocol II to illuminate the humanitarian protections applicable during such a conflict.

Reliance upon Additional Protocol II as a source of the definition for the principle of humane treatment points to the same conclusion as the analysis of Article 75. Like Additional Protocol I, Additional Protocol II also includes "fundamental guarantee" provisions that address the implementation of the humane treatment mandate vis-à-vis criminal adjudications. Unlike Additional Protocol I, Additional Protocol II affords protections to individuals subject to prosecution in a distinct article, Article 6, titled "Penal Prosecutions," which establishes the following requirements:

> 1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
>
> 2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
>
> (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> (e) anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) no one shall be compelled to testify against himself or to confess guilt.
>
> 3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
>
> 4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.
>
> 5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[45]

[45] Additional Protocol II, *supra* note 36, art. 6.

This provision is virtually identical to Article 75 of Additional Protocol I.[46] Both Article 75 and Article 6 of Additional Protocol II include the provision relied upon by the *Hamdan* plurality opinion to reinforce the conclusion that the procedures of the military commission violated the customary law of war—the right of the defendant to be present at his trial. What seems particularly compelling about the inclusion of "Article 75" type trial guarantees in Additional Protocol II is that this treaty was developed to apply to internal challenges to the authority of a government. Because such conflicts represent perhaps the most significant challenge to the sovereign authority of the State, the imposition of these procedural protections for a defendant is a powerful indication that they are central to the concept of humane treatment. It is also an indication that the States that negotiated Additional Protocol II did not believe affording these protections would compromise the ability to hold individuals accountable for violations of the law of war. Had there been significant concern for such compromise, it is unlikely States would have accepted the imposition of these requirements to purely internal conflicts.

The relationship between Article 6 and the principle of humane treatment reflected in Common Article 3—the principle integral to the opinion of the Court that the military commission procedures violated their constitutive law—simply bolsters the conclusion of the plurality. According to the ICRC Commentary discussion of Article 6,[47] humane treatment requires, *in all conflicts,* that criminal defendants be afforded basic procedural guarantees.

> The whole of Part II '(Humane treatment)' is aimed at ensuring respect for the elementary rights of the human person in non-international armed conflicts. *Judicial guarantees play a particularly important role, since every human being is entitled to a fair and regular trial, whatever the circumstances*; . . .
>
> The text repeats paragraph 1, sub-paragraph (1)(d) of Common Article 3, with a slight modification. *The term "regularly constituted court" is replaced by "a court offering the essential guarantees of independence and impartiality".* In fact, some experts argued that it was unlikely that a court could be "regularly constituted" under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, which was accepted without opposition.
>
> This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. *This right can only be effective if the judgment is given by "a court offering the essential guarantees of independence and impartiality".*[48]

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[46] The penal adjudication provision of Article 75 requires:

> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> (e) anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) no one shall be compelled to testify against himself or to confess guilt;
>
> (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
>
> (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
>
> (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

See Additional Protocol I, *supra* note 7, art. 75.

[47] Additional Protocol II, *supra* note 36, art. 6.

[48] PROTOCOL COMMENTARY, *supra* note 15, at 1396-97 (emphasis added).

The language from the Commentary dispels any doubt that a regularly constituted tribunal is central to the concept of fundamentally fair justice and, accordingly, compliance with the principle of humane treatment. Of particular relevance is Article 6's apparent contemplation of the use of military commissions.

> Just like Common Article 3, Additional Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect . . . .[49]

Thus, it seems that even when resort is made to "special" tribunals or jurisdictions to deal with violations of the law during an armed conflict (such as the creation of the military commissions), procedural legitimacy remains the sine qua non of compliance with the principle of humane treatment. Because Article 6 was obviously drafted with full knowledge of the need to accommodate the ability of governments to prosecute criminal misconduct associated with non-international armed conflicts and the reality that such prosecutorial efforts might involve the creation of "special" tribunals, its mandate seems particularly relevant in assessing the compliance of the military commission with the law of war. Both these considerations were obvious factors in the development of the military commission course of action and will most likely animate any government analysis of a "way ahead" to reconcile the *Hamdan* decision with the need to hold al Qaeda operatives accountable for violations of the law of war. Article 6 should serve as a compelling indication that these considerations cannot justify deviation from minimal procedural protections.

The *Hamdan* decision may have "shut down" the military commission, but it has not resolved the underlying issue of how to adjudicate alleged misconduct by members of trans-national terrorist organizations engaged in armed conflict with the United States. It is likely that this underlying issue will be the subject of continuing debate and analysis and, hopefully greater cooperation between the political branches of our government. It is essential that this process produce a legitimate reconciliation between the desire to provide swift justice for wrongdoers and the humane treatment obligation to provide a fundamentally fair process. Article 75 of Additional Protocol I is an important indication of the "process that is due" in accordance with the law of war. Article 6 of Additional Protocol II, however, also provides compelling insight into both the international and longstanding U.S. understanding of the process associated with a "humane" adjudication of criminal misconduct during non-international armed conflicts. Scope provision notwithstanding, proponents of the "fundamental guarantee" aspect of *Hamdan* should not overlook the principles reflected in this treaty; a treaty never rejected by the United States and intended to apply to the most distinctly "sovereign" of armed conflicts.

[49] *Id.*