

1-1-2008

International Myopia: Hamdan's Shortcut to "Victory"

Michael W. Lewis

Ohio Northern University Claude W. Pettit College of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [International Humanitarian Law Commons](#), [International Law Commons](#), [Law and Economics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Michael W. Lewis, *International Myopia: Hamdan's Shortcut to "Victory"*, 42 U. Rich. L. Rev. 687 (2008).

Available at: <https://scholarship.richmond.edu/lawreview/vol42/iss3/6>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

INTERNATIONAL MYOPIA: *HAMDAN'S* SHORTCUT TO "VICTORY"

Michael W. Lewis *

"Yes, but if we have such another victory, we are undone."

—Pyrrhus¹

The Supreme Court's decision in *Hamdan v. Rumsfeld*² was hailed by many as a victory for international law.³ Basing part of its decision on the Geneva Conventions, the Court was seen as forcing a reluctant administration to recognize and comply with international law. However, a closer look at the opinion's Geneva Conventions analysis would have called that conclusion into question even before the legislative response that has placed international law further outside the consideration of American courts.⁴

* Assistant Professor of Law, Ohio Northern University Claude W. Pettit College of Law; B.A., 1986, John Hopkins University; J.D., 1998, Harvard Law School, *cum laude*.

This article evolved from lectures on the international law features of the *Hamdan* opinion that I delivered at the UC Davis School of Law, the University of the Pacific McGeorge School of Law, the University of Notre Dame Law School and the Ohio State University Moritz College of Law and from my public debates on the subject with Dean John Hutson of the Franklin Pierce Law Center and Professor Brad Roth of Wayne State University Law School. I would like to thank Professor John Paul Jones of the University of Richmond School of Law and Professor Bobby Chesney of the Wake Forest University School of Law for their review of this article.

1. FRANCIS BACON, *Apophthegms*, in THE WORKS OF FRANCIS BACON 107, 118 (Parry & McMillan 1859) (Apophthegm 193).

2. 126 S. Ct. 2749 (2006).

3. See, e.g., Press Release, Amnesty Int'l, USA: Supreme Court's Ruling—A Victory for Human Rights (June 29, 2006), available at <http://web.amnesty.org/library/index/eng.amr511012006>; see also Jefferson Morley, World Opinion Roundup, Guantanamo Reax: Court Ruling a Victory for U.S. Ideals, http://blog.washingtonpost.com/worldopinionroundup/2006/07/guantanamo_reaction_seen_as_us.html (July 5, 2006, 11:12 EST).

4. Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631 (2006) (to be codified at 28 U.S.C. § 2241 note) (prohibiting the invocation of the Geneva Conventions in any habeas proceeding or other civil action against the United States or its officers in any court of the United States, its States, or territories); see also *Boumediene v. Bush*, 476 F.3d 981, 986–87 (D.C. Cir. 2007) (finding that Congress's passage of the Military Commissions Act ("MCA") clearly and affirmatively strips federal courts of

Ignoring its own canons of treaty interpretation, expansively reading new protections into the Convention, and employing inflammatory and inaccurate comparisons between current U.S. conduct and that of the Japanese during World War II, the Court may have contributed to the legislative (over)reaction and added further support to criticism that international law is actually no more than policy by another name.

Captured in Afghanistan, Salim Hamdan is alleged to have been Osama bin Laden's driver and bodyguard.⁵ He was charged with a violation of the laws of war and was to be tried by a military commission.⁶ Hamdan filed a habeas corpus petition challenging his detention and the validity of the military commission.⁷ Hamdan won at the district court level, lost in the Court of Appeals for the D.C. Circuit, and thus brought to the Supreme Court a whole host of issues including his contention that the commission's procedures violated international law.⁸ The Supreme Court, through Justice Stevens, upheld Hamdan's challenge on several grounds.⁹ On the international law issues, the Court declared that Hamdan was entitled to protection under the Geneva Conventions and that the military commission's procedures violated basic rights guaranteed by those Conventions.¹⁰

Because of international law's disaggregated and diffuse nature, it develops as often through national courts' opinions as it does through the pronouncements of international or regional bodies, such as the International Court of Justice ("ICJ") or the European Court of Human Rights ("ECHR").¹¹ As a result, any opinion rendered by a nation's high court can influence the international understanding of treaty obligations or the scope of cus-

habeas corpus jurisdiction over Guantanamo detainees); *Zalita v. Bush*, No. 05-1220, slip op. at 1 (D.D.C. Apr. 19, 2007).

5. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 (2006).

6. *See id.* at 2760-61.

7. *Id.* at 2759.

8. *See id.* at 2761-62.

9. *See id.* at 2786, 2798.

10. *See id.* at 2798.

11. While the ECHR handles an ever increasing docket, the ICJ, and the fledgling International Criminal Court ("ICC"), produce only a handful of opinions each year. List of Cases, International Court of Justice, <http://www.icj-cij.org/docket/index.php?pl=3&p2=2> (last visited Nov. 26, 2007); Hearing Schedule and Transcripts, International Criminal Court, http://www.icc-cpi.int/cases/Hearing_Schedule/.html (last visited Nov. 26, 2007). At the time of publication, the ICJ has 12 cases pending. Pending Cases, International Court of Justice, <http://www.icj-cij.org/docket/index.php?p1=3&p2=1> (last visited Nov. 26, 2007).

tomary international law. The Supreme Court of the United States has generally respected its role in international law by providing exceptionally thorough analyses when international law issues are involved.¹² In departing from this traditional approach, the *Hamdan* Court gave an incomplete and at times cursory analysis of critical issues involving the Geneva Conventions' scope and the substantive protections the Conventions provide. This analytical failure assured that questions about the Geneva Conventions' scope and substance would resurface, as they have done in the recent Fourth Circuit opinion of *Al-Marri v. Wright*, a case that is destined to require the Court to revisit these issues.¹³

Part I of this article will look at how the Supreme Court of the United States historically has dealt with international law issues, and specifically how it interprets international treaties. Part II will describe the relevant portions of the 1949 Geneva Conventions, particularly Common Articles 2 and 3, the 1977 Additional Protocols to the Geneva Conventions, and the Conventions' Commentaries. Part III will review the portion of the Court's *Hamdan* opinion that interprets the scope and application of the Geneva Conventions. Part IV will describe how a more traditionally thorough approach to international treaty interpretation would have changed the contours of the opinion and what the implications of those changes would have been for international law.

I. INTERPRETING INTERNATIONAL LAW IN AMERICAN COURTS

American courts were dealing with issues of international law before the federal judiciary was even created.¹⁴ Although jurists

12. See generally, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999); *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988); *Air France v. Saks*, 470 U.S. 392 (1985); *The Paquete Habana*, 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); see also *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (providing a thorough analysis of the international law issue, but concluding there was no violation of the extradition treaty between the United States and Mexico).

13. See 487 F.3d 160, 184–86 (4th Cir. 2007).

14. See, e.g., *Republica v. de Longchamps*, 1 U.S. (1 Dall.) 111 (1784). The Court of Oyer and Terminer in Philadelphia was asked to determine whether an affront suffered by the secretary to the French ambassador at the hands of a French citizen on American soil was a violation of the law of nations and, based upon that determination, what entity should be empowered to pass sentence on the defendant for his conduct. See *id.* at 115. The international relations implications of this case were a cause of grave concern for Thomas Jefferson who commented on the need for swift action in this matter in a letter to

over the years have disagreed on the influence that international law should have on American constitutional interpretation, they have almost uniformly approached the task of interpreting international law with a procedural and historical thoroughness that at times exceeds that afforded to questions of domestic law.¹⁵ In contrast, one of the most striking features of *Hamdan's* treatment of the Geneva Conventions is its brevity. While brevity itself is no vice and prolixity no virtue, Justice Stevens's discussion of the Geneva Conventions represents a significant departure from the much more detailed approaches taken by other Justices, from Gray¹⁶ to Ginsburg,¹⁷ when examining issues of international law.

In *United States v. Smith*, Justice Story produced perhaps the longest footnote in Supreme Court history to catalog the myriad of sources consulted to determine how international law defined piracy.¹⁸ The footnote on page 163 of the opinion covers eighteen pages and lists over twenty-five commentaries, court opinions, statutory interpretations and descriptions of state practice including that of England, Scotland, France, Italy and Spain, all of which Justice Story consulted and summarized in order to support the Supreme Court's certification to the circuit court that Smith's actions were piracy as defined by the law of nations.¹⁹

Eighty years later in the celebrated case of *The Paquete Habana*, the Court, through Justice Gray, stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction For this purpose . . . resort must be had to the customs and usages of civilized nations."²⁰ In determining the law of nations with respect to the capture and condemnation of fishing vessels during wartime, Justice Gray's analysis spanned over twenty pages and considered wartime naval practices, commentaries and treatises,

James Madison. See Letter from Thomas Jefferson to James Madison (May 25, 1784), in 4 THE WORKS OF THOMAS JEFFERSON, 363, 364-65 (Paul Leicester Ford ed., 1904).

15. This is true particularly with regard to treaty interpretation. See *Air France*, 470 U.S. 392 (1985); see also *Maximov v. United States*, 373 U.S. 49 (1963).

16. See generally, *The Paquete Habana*, 175 U.S. 677 (Justice Gray).

17. See generally, *El Al Israel*, 525 U.S. 155 (Justice Ginsburg).

18. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n. a (1820).

19. *Id.*

20. *The Paquete Habana*, 175 U.S. at 700.

foreign and domestic prize court rulings, and historical and contemporary treaties.²¹

Justice Gray began with a historical review of the fifteenth century conflicts between England and France, and sixteenth century conflicts between France and the Holy Roman Empire and between France and Holland.²² Justice Gray also discussed the seventeenth century French commentary “Us et Coutumes de la Mer,” which outlines a custom that prevailed during the subsequent war between France and Holland in the seventeenth century.²³ In describing eighteenth century state practice towards coastal fishing vessels, Justice Gray turned to U.S. and French conduct during the American Revolution, to treaties that the United States entered into with Prussia on the subject, and to English high court decisions discussing fishing vessels’ prize status during the war between England, France and Holland.²⁴ His treatment of nineteenth century developments was equally extensive, analyzing naval conduct during the Mexican-American War (1846), the Crimean War (1854), the Franco-Prussian War (1870), and the Sino-Japanese War (1894).²⁵ Upon completing this historical review of relevant naval conduct during conflict, Justice Gray also felt compelled to complete a thorough review of treatises and commentaries discussing coastal fishing vessels’ prize status.²⁶ This included commentaries from British, French, Dutch, Spanish, Argentine, German, Austrian, and Italian writers that Justice Gray viewed as “too important to be passed by without notice.”²⁷

In addition to the detailed description of material supporting his conclusion, Justice Gray explicitly addressed examples of contrary naval conduct that ignored the customary treatment afforded coastal fishing vessels, and he evaluated the weight that those exceptional actions should carry when articulating the reach of international custom.²⁸ He found that the French actions in 1793 against English fisherman and the English actions dur-

21. *Id.* at 687–710.

22. *Id.* at 687–88.

23. *Id.* at 688–89.

24. *Id.* at 689–94.

25. *Id.* at 695–700.

26. *See id.* at 701–08.

27. *Id.* at 706.

28. *See id.* at 691–96, 699–700.

ing the Crimean War against Russian fishing vessels were both subsequently corrected by the respective nations and that these exceptions did not undermine his finding that customary international law protected coastal fisherman.²⁹

It might be argued that the extensive reviews of treatises, commentaries, and historical state practices found in *The Paquete Habana* and *United States v. Smith* were either creatures of a different time or were dictated by the difficulties inherent in defining nebulous concepts such as “the law of nations” and customary international law, a task that the Court did not necessarily have to contend with in *Hamdan*. However, recent cases involving international treaty interpretation, other than *Hamdan*, exhibit characteristically broad and deep consultation of sources.³⁰

Justice O'Connor, writing for a unanimous Supreme Court, in *Air France v. Saks* articulated the standard for international treaty interpretation when she declared that it is the Court's “responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.”³¹ In *Air France*, the Supreme Court was asked to define the term “accident” as used by the Warsaw Convention³² to decide if it encompassed injuries to airline passengers that resulted from normal aircraft operations.³³ This required the Court to determine the contemporary French legal meaning of the term “accident” because the “Warsaw Convention was drafted in French by continental jurists.”³⁴ Much like Justice Story and Justice Gray before her, Justice O'Connor's analysis spanned eleven pages in explaining what the term “accident” meant as it appeared in the Warsaw Convention.³⁵ She reviewed the text of the treaty,³⁶ its

29. *See id.*

30. *See, e.g.,* *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) (interpreting the Warsaw Convention); *Air France v. Saks*, 470 U.S. 392 (1985) (also analyzing and applying the Warsaw Convention).

31. *Air France*, 470 U.S. at 399 (Justice Powell took no part in the decision).

32. Convention for the Unification of Certain Rules Relating to International Transportation by Air art. 17, Oct. 12, 1929, 49 Stat. 3000, 3018, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

33. *See Air France*, 470 U.S. at 396.

34. *Id.* at 399 (citing Andrew F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498–500 (1967)).

35. *See id.* at 397–407.

36. *Id.* at 397–98.

commentaries and minutes,³⁷ the rejected proposals of various delegations to the conference,³⁸ judicial decisions from England and France,³⁹ as well as the discussions and negotiations from the Guatemala City and Montreal Protocols that subsequently modified the Warsaw Convention.⁴⁰

Other cases interpreting the Warsaw Convention received similarly thorough treatment from Justices Marshall and Ginsburg. In *Eastern Airlines, Inc. v. Floyd*, Justice Marshall spent eighteen pages determining whether the phrase “lésion corporelle” allowed compensation for mental or psychic injuries unaccompanied by physical injuries.⁴¹ Just as Justice O’Connor did in *Air France*, Justice Marshall, also writing for a unanimous Court, consulted contemporary French legal dictionaries,⁴² legislative histories,⁴³ court opinions,⁴⁴ treatises,⁴⁵ the minutes of the Convention⁴⁶ and the subsequent protocols from the Hague, Guatemala City, and Montreal Conventions.⁴⁷ In addition to accurately defining *lésion corporelle*, Justice Marshall distinguished an Israeli court’s opinion on the scope of Article 17,⁴⁸ reviewed the German, Austrian, and Swiss translations from the original French,⁴⁹ and contrasted the language of the Warsaw Convention with the clear language employed by the Berne Convention on International Rail, which explicitly allows recovery for purely psychic injuries.⁵⁰

Similarly, in *El Al Israel Airlines v. Tsui Yuan Tseng*, Justice Ginsburg devoted ten pages to determining whether the exclusivity provisions of Article 24 of the Warsaw Convention precluded Tseng from bringing a personal injury action under local law.⁵¹

37. *See id.* at 400–03.

38. *See id.* at 402.

39. *Id.* at 400.

40. *Id.* at 403–04.

41. *See E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 533, 535–52 (1991).

42. *Id.* at 536.

43. *See id.* at 542–43.

44. *Id.* at 538–39.

45. *Id.* at 539.

46. *Id.* at 544.

47. *Id.* at 547–50.

48. *Id.* at 550–52.

49. *Id.* at 541.

50. *Id.* at 545 (citing International Convention Concerning the Carriage of Passengers and Luggage by Rail art. 28, Oct. 25, 1952, 242 U.N.T.S. 355, 390).

51. *See* 525 U.S. 155, 160, 167–76 (1999).

Justice Ginsburg, writing for eight, consulted the drafting history of the Convention, including the minutes of the Warsaw Conference that outlined the proposals of various delegations.⁵² She also considered an opinion from the British House of Lords interpreting the reach of the Czechoslovak delegation's proposal that the circuit court relied on in determining the scope of Article 24,⁵³ and the effect of Article 24's amendment by the Montreal Protocol.⁵⁴ Additionally, Justice Ginsburg discussed at length the primary and "complementary" purposes of the Convention to properly understand the balance struck by the drafters between the competing interests underlying the Warsaw Conference.⁵⁵ This understanding appropriately informed Justice Ginsburg's ultimate interpretation of Article 24's exclusivity provisions.

These treaty interpretation standards are not limited to cases involving the Warsaw Convention. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, Justice O'Connor again applied the *Air France* standard for treaty interpretation when determining the scope of Article 1 of the Hague Service Convention, which deals with international service of process.⁵⁶ She reviewed the Convention's negotiating history to determine whether the terms "notification" and "signification" were intended to carry the same meaning as the United States' definition of service of process.⁵⁷ She also consulted the proposals of the German, French and Yugoslav delegations to determine whether the Convention envisaged reliance on the law of the forum state to determine the effectiveness of service abroad.⁵⁸ Additionally, while canvassing the service vehicles employed by various nations at the time of the Convention, Justice O'Connor acknowledged the importance attached to the Convention's stated objectives.⁵⁹

The Supreme Court traditionally displays a very broad and deep consideration of sources when interpreting both customary

52. *See id.* at 159, 172-73.

53. *Id.* at 173-74 (citing *Sidhu v. British Airways* [1997] 1 All E.R. 193).

54. *Id.* at 174-75.

55. *Id.* at 169-71.

56. 486 U.S. 694, 699-700 (1988).

57. *See id.* at 700-01.

58. *See id.* at 701-02.

59. *See id.* at 702-04 (noting that the conference intended to eliminate the use of *notification au parquet* practiced by France, the Netherlands, Greece, Belgium, and Italy at the time of the conference, but that the application of internal law might undermine this objective).

international law and international treaties. Specifically, when the Court interprets treaties that present ambiguities or uncertainties, it routinely has gone beyond the text of the treaties to consider supplemental agreements, state practice, the preparatory work and negotiating history of the treaties, and broader rules of customary international law that might be relevant to defining the treaties' terms. This is not only the Court's traditional practice, but it is also a practice that follows the guidelines for treaty interpretation established by the Vienna Convention on the Law of Treaties.⁶⁰

II. THE GENEVA CONVENTIONS

With the recent accessions of the Republic of Nauru and the newly formed Republic of Montenegro, the 1949 Geneva Conventions became the only international treaty to achieve universal acceptance.⁶¹ Drafted after World War II, the 1949 Geneva Conventions greatly expanded the protections previously afforded by the 1929 Geneva Convention.⁶² In turn, the 1929 Convention was itself a compilation and expansion of the protections provided to prisoners of war by the 1899 and 1907 Hague Regulations and other special agreements entered into by the belligerents during World War I.⁶³ The 1929 Geneva Convention focused almost exclusively on the treatment of prisoners of war with but a single article, Article 17, devoted to the treatment of certain classes of civilians traveling with the armed forces.⁶⁴ To remedy this, the 1949 drafters created four separate conventions, each designed to protect a different group: the sick and wounded on land; the sick, wounded, and shipwrecked at sea; prisoners of war; and civil-

60. See Vienna Convention on the Law of Treaties, arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691–93.

61. See Press Release, Int'l Comm. of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/geneva-conventions-news-210806>.

62. See The ICRC Since 1945: The Geneva Conventions of 1949, Int'l Comm. of the Red Cross, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/icrc-genevaconventions-revision-1949> (last visited Nov. 26, 2007).

63. See Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929—Introduction, Int'l Comm. of the Red Cross, <http://www.icrc.org/ihl.nsf/INTRO/305?OpenDocument> (last visited Nov. 26, 2007).

64. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field art. 17, July 27, 1929, 47 Stat. 2074, 2088, 118 L.N.T.S. 303, 323.

ians.⁶⁵ The first three articles of all four Conventions are identical and are therefore known as Common Articles 1, 2, and 3.⁶⁶

In 1977, Additional Protocols I and II were added to the 1949 Geneva Conventions.⁶⁷ These protocols further expanded the protections afforded to all four categories covered by the 1949 Conventions and, perhaps surprisingly, were the first international agreements to specifically forbid the targeting of civilians.⁶⁸ While these Additional Protocols have gained wide acceptance, they have not approached the universal acceptance of the 1949 Geneva Conventions.⁶⁹ That said, nations that have refused to sign or ratify the Additional Protocols because of reservations regarding certain provisions, recognize much of their content as a statement of customary international law.⁷⁰

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

66. See Geneva I, *supra* note 65, 6 U.S.T. at 3116–18, 75 U.N.T.S. at 32–34; Geneva II, *supra* note 65, 6 U.S.T. at 3220–22, 75 U.N.T.S. at 86–88; Geneva III, *supra* note 65, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38; Geneva IV, *supra* note 65, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90.

67. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391, [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 [hereinafter Protocol II].

68. See Protocol I, *supra* note 67, 1125 U.N.T.S. at 26–27, 16 I.L.M. at 1413–14; Protocol II, *supra* note 67, 1125 U.N.T.S. at 615–16, 16 I.L.M. at 1447–48.

69. As of the publication of this article, 167 of 194 states are parties to Protocol I, and 163 states are parties to Protocol II. State Parties to the Following International Humanitarian Law and Other Related Treaties as of 22-Oct-2007, ICRC, [www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$file/IHL_and_other_related_treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$file/IHL_and_other_related_treaties.pdf). The United States has signed both Additional Protocols but neither has been ratified by the Senate. David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 111 (2006). This is partially due to executive disagreement with the provisions of Protocol I that provide greater protections to irregular armed groups than previously found in the Geneva Conventions. On the other hand, the Senate has declined to give its advice and consent to Protocol II in spite of two executive transmittals requesting consent to ratify or accede to the treaty. For more on the ratification history of these treaties see Geoffrey Corn, *Taking the Bitter with the Sweet: A Law of War Based Analysis of the Military Commission*, 35 STETSON L. REV. 811, 858–60, 871 (2006).

70. See generally Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1 (discussing the extent to which the United States recognizes the Additional Protocols as customary international law).

It is the interplay between Common Articles 2 and 3, the substantive protections of Common Article 3, and the incorporation of Article 75 of Protocol I into the protections provided by Common Article 3 that underlie the Court's opinion in *Hamdan*.

Historically, Common Article 2 can trace its roots back to Article 2 of the Hague Convention of 1899, which applied the provisions "in case of war."⁷¹ While the title of both the 1907 and 1929 Geneva Conventions made it clear that they were intended for use during wartime, the changing nature of warfare and the increasing frequency of undeclared wars persuaded the drafters that a more explicit and expansive definition of warfare was required by 1949.⁷² Thus, Common Article 2 established the scope of the four Conventions by stating:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.⁷³

Article 2 describes what, for want of a better term, might be considered a "traditional war." Whether declared as a war or not, the Geneva Conventions cover the conduct of all parties to any armed conflict between States. Therefore, all of the Conventions' protections apply to any such armed conflict and are binding on the armed forces—however constituted—of all parties to the conflict.

71. See JEAN DE PREUX ET AL., COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 19 (Jean S. Pictet ed., A.P. de Heney trans., 1960) [hereinafter GENEVA III COMMENTARY]. There are two significant sources for the drafting history of the Geneva Conventions: the three volume Final Record of the Diplomatic Conference of Geneva of 1949, and the Commentaries, which were produced by a number of attendees and edited by Jean Pictet, who was appointed Director of the International Committee of the Red Cross in 1946 and took charge of the preparatory work that led to the adoption of the 1949 Conventions. 1-3 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 (William S. Hein & Co., Inc. 2004) [hereinafter FINAL RECORD]. While the Commentaries are not considered "official" interpretations, they are designed to make the principles underlying the Conventions more accessible. This is done by organizing the discussion and the development of the Conventions on an article-by-article basis rather than chronologically listing the events of the conference as done by the Final Record. This article cites to the more readable text of the Commentaries, but many of the footnotes will contain references to the Final Record to reflect the nations taking the positions discussed in the Commentaries.

72. See GENEVA III COMMENTARY, *supra* note 71, at 19.

73. Geneva I, *supra* note 65, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Geneva II, *supra* note 65, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Geneva III, *supra* note 65, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva IV, *supra* note 65, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

Although the concept of applying the Geneva Conventions' essential principles to non-international conflicts, such as civil wars, was first discussed at the 1938 London International Red Cross Conference, Common Article 3 was a creation of the 1949 Conventions.⁷⁴ It began as the French delegation's proposal for a preamble to Geneva Convention IV relative to the Protection of Civilians in Time of War.⁷⁵ Ultimately, the inability to arrive at a unanimously accepted preamble prevented its adoption in that form.⁷⁶ Before reaching this impasse, however, the French delegation drew on an earlier Italian suggestion and attempted to settle the intense debate about applying the Geneva Conventions' principles to civil wars by proposing that all non-international conflicts should be subject to the provisions of the preamble to Geneva IV.⁷⁷ Once the decision was reached to eliminate the preamble, a modified version of the proposed preamble received a clear majority of votes for inclusion as Common Article 3.⁷⁸ Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regu-

74. See GENEVA III COMMENTARY, *supra* note 71, at 29–30.

75. *Id.* at 14.

76. *Id.* at 16; see also 2 FINAL RECORD, *supra* note 71, at 561.

77. GENEVA III COMMENTARY, *supra* note 71, at 33.

78. *Id.* at 34.

larly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. . . .

. . . .

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁷⁹

Common Article 3 has been referred to as a “Convention in miniature” because as a single, stand-alone article, it provides certain baseline protections to individuals involved in non-international conflicts.⁸⁰ The stated purpose of this Article was to expand the Geneva Conventions’ underlying “principle of respect for human personality” to “aid the victims of civil wars and internal conflicts.”⁸¹

III. THE *HAMDAN* OPINION

The *Hamdan* opinion is long, wide-ranging, and complex. It deals with separation of powers issues, the limits of both executive and legislative power, the scope of habeas corpus rights, and questions of legislative intent respecting retroactivity.⁸² It briefly examines judicial abstention⁸³ and also addresses the United States’ internal criminal procedures related to the laws of war.⁸⁴ Additionally, it examines the extent to which the Uniform Code of Military Justice (“UCMJ”) provides the definitive boundaries for these procedures when applied to both American citizens and

79. Geneva I, *supra* note 65, 6 U.S.T. at 3117–18, 75 U.N.T.S. at 32–34; Geneva II, *supra* note 65, 6 U.S.T. at 3220–22, 75 U.N.T.S. at 86–88; Geneva III, *supra* note 65, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38; Geneva IV, *supra* note 65, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90.

80. GENEVA III COMMENTARY, *supra* note 71, at 34; 2 FINAL RECORD, *supra* note 71, at 326. The delegation from the Soviet Union used this term somewhat derisively, implying that the protections offered by Common Article 3 to non-international conflicts paled in comparison to those offered by the Geneva Conventions as a whole to international conflicts. See 2 FINAL RECORD, *supra* note 71, at 326.

81. GENEVA III COMMENTARY, *supra* note 71, at 28; see also 2 FINAL RECORD, *supra* note 71, at 40–43 (containing one example of the discussions concerning applicability to civil wars).

82. See generally *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

83. See *id.* at 2769–72.

84. See *id.* at 2775–86.

aliens.⁸⁵ Lastly, and perhaps most enduringly, it interprets the scope and substance of Common Article 3.⁸⁶

Justice Stevens answered three fundamental questions about Common Article 3. First, he determined the scope of Common Article 3 relative to Common Article 2 by defining the term “conflict not of an international character.”⁸⁷ Second, he determined that the military commissions, as constituted, could not be considered a “regularly constituted court” as that term is used in subparagraph (1)(d) of Common Article 3.⁸⁸ Finally, Justice Stevens, now writing for a plurality of four, decided that the military commissions did not afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁸⁹

A. *The Scope of Common Articles 2 and 3*

The threshold question for this portion of the opinion is whether the Geneva Conventions apply to the conflict between al Qaeda and the United States, and if so, which specific provisions apply.⁹⁰ The Court claimed to have postponed a merits decision of the Government’s argument that the conflict is outside the scope of Common Article 2.⁹¹ It based this postponement on its finding that the conflict is covered by Common Article 3 and that the military commissions failed to provide the protections mandated by that Article.⁹² In arriving at this conclusion, the Court examined the scope of both Articles.⁹³ As noted above, Common Article 2 applies “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contract-

85. *See id.* at 2786–93.

86. *See id.* at 2795–98.

87. *See id.* at 2795–96.

88. *See id.* at 2796–97 (citing Common Article 3, subparagraph 1(d), Geneva I, *supra* note 65, 6 U.S.T. at 3118, 75 U.N.T.S. at 34; Geneva II, *supra* note 65, 6 U.S.T. at 3222, 75 U.N.T.S. at 88; Geneva III, *supra* note 65, 6 U.S.T. at 3320, 75 U.N.T.S. at 138; Geneva IV, *supra* note 65, 6 U.S.T. at 3520, 75 U.N.T.S. at 290).

89. *See id.* at 2797–98 (quoting Common Article 3, Geneva I, *supra* note 65, 6 U.S.T. at 3118, 75 U.N.T.S. at 84; Geneva II, *supra* note 65, 6 U.S.T. at 3222, 75 U.N.T.S. at 88; Geneva III, *supra* note 65, 6 U.S.T. at 3320, 75 U.N.T.S. at 138; Geneva IV, *supra* note 65, 6 U.S.T. at 3520, 75 U.N.T.S. at 290).

90. *See id.* at 2793–95.

91. *See id.* at 2795.

92. *See id.* at 2795–98.

93. *See id.* at 2795–96.

ing Parties,”⁹⁴ while Common Article 3 concerns “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁹⁵ The Court concluded that while Common Article 2 applies to clashes between nations, Common Article 3’s application to “conflict[s] not of an international character” acts as a point of “contradistinction to a conflict between nations.”⁹⁶ Adopting the reasoning of Judge Williams’s concurrence in the court below,⁹⁷ the Court found that the term “international” bears its literal meaning in this context and therefore Common Article 3 applies to all armed conflicts not covered by Common Article 2.⁹⁸ This finding, and the Court’s subsequent application of Common Article 3 protections to Hamdan,⁹⁹ effectively foreclosed any revisitation of the Common Article 2 question on which the Court purportedly “postponed” consideration.¹⁰⁰

After acknowledging that the discussion of Common Article 3 in the Commentaries to the Geneva Conventions focuses primarily on the protection of rebels in internal conflicts and civil wars, the Court relied on a general statement from the Commentaries “that the scope of the Article must be as wide as possible” and on the fact that language limiting Common Article 3 to civil wars, colonial conflicts, or wars of religion was omitted from the final version.¹⁰¹ In the following footnote, the Court further supported this interpretation with a second reference to the Commentaries on Common Article 3, a reference to the Commentaries on Geneva IV dealing with the protection of civilians, a quote from the Department of the Army’s Law of War Handbook, and a statement by the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) that the “character of the conflict is irrelevant” when determining the scope of Common Article 3.¹⁰² Based on

94. Geneva I, *supra* note 65, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Geneva II, *supra* note 65, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Geneva III, *supra* note 65, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva IV, *supra* note 65, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

95. Geneva I, *supra* note 65, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Geneva II, *supra* note 65, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Geneva III, *supra* note 65, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva IV, *supra* note 65, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

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

97. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J. concurring).

98. *See Hamdan*, 126 S. Ct. at 2796.

99. *Id.*

100. *See id.* at 2795.

101. *Id.* at 2796 (citing GENEVA III COMMENTARY, *supra* note 71, at 36–37, 42–43).

102. *Id.* at 2796 n.63 (quoting *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the

these authorities the Court found that Hamdan must be afforded the protections provided by Common Article 3.¹⁰³ After making this determination, the Court then set about determining what those protections are.¹⁰⁴

B. *Regularly Constituted Courts*

The Court first examined the requirement that Common Article 3 defendants must be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁰⁵ Because the requirement is not further defined in either Common Article 3 or its Commentary, the Court relied on a definition of regularly constituted tribunals found in the Commentary to Article 66 of the Fourth Geneva Convention and an International Committee of the Red Cross (“ICRC”) treatise on customary international law.¹⁰⁶ The Geneva Convention Commentary states that “ordinary military courts of the Occupying Power” fulfill the requirement for a court to be considered regularly constituted,¹⁰⁷ thereby supporting the Court’s conclusion that the military commissions must be conducted in accordance with the UCMJ. The ICRC Treatise states that a regularly constituted court is one that is “established and organised in accordance with the laws and procedures already in force in a country.”¹⁰⁸

Without examining the underlying context for either of these definitions, the Court found that the military commissions’ failure to conform to them means that the commissions are not “regularly constituted” as that term is used in Common Article

Defense Motion for Interlocutory Appeal on Jurisdiction ¶ 102 (Oct. 2, 1995)).

103. *Id.* at 2796.

104. *See id.* at 2796–98.

105. *See id.* (quoting Common Article 3, Geneva I, *supra* note 65, 6 U.S.T. at 3118, 75 U.N.T.S. at 34; Geneva II, *supra* note 65, 6 U.S.T. at 3222, 75 U.N.T.S. at 88; Geneva III, *supra* note 65, 6 U.S.T. at 3322, 75 U.N.T.S. at 136, Geneva IV, *supra* note 65, 6 U.S.T. at 3520, 75 U.N.T.S. at 290).

106. *See id.* at 2796–97.

107. OSCAR M. UHLER ET AL., COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 340 (Jean S. Pictet ed., Ronald Griffon & C.W. Dumbeton trans., 1958) [hereinafter GENEVA IV COMMENTARY].

108. 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC TREATISE].

3.¹⁰⁹ Before moving on to address indispensable judicial guarantees, however, Justice Stevens paused to note that the Government only provided a “cursory defense of Hamdan’s military commission in light of Common Article 3.”¹¹⁰ Whether Justice Stevens did this to explain his own abbreviated treatment of the issue, or merely as further support for Justice Kennedy’s concurring opinion, is unclear. In the extensive briefing undertaken by the parties in this case, the respondent devoted only a single paragraph of their brief and the petitioner devoted no more than a few pages of his brief to the issue of regularly constituted courts, with neither addressing the scope of Common Article 3’s requirement for “judicial guarantees.”¹¹¹

C. Indispensable Judicial Guarantees

The final Geneva Conventions issue that Justice Stevens addressed was whether the military commissions provide all the judicial guarantees which are recognized as indispensable by civilized peoples.¹¹² Because the indispensable judicial guarantees are not enumerated in Common Article 3, Justice Stevens incorporated the “barest of those trial protections that have been recognized by customary international law” into Common Article 3.¹¹³ He concluded that Article 75 of Additional Protocol I properly enumerates these barest of trial protections.¹¹⁴ Although the

109. See *Hamdan*, 126 S. Ct. at 2797.

110. *Id.*

111. See Brief for the Respondents at 49–50, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) [hereinafter Brief for the Respondents]; Brief for the Petitioner at 48–50, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) [hereinafter Brief for the Petitioner]. Additionally, neither party attempted to define the scope of these protections in their briefs to the D.C. Circuit either. Brief for Appellee at 48–49, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393); Reply Brief for Appellants at 22, *Hamdan*, 415 F.3d 33 (No. 04-5393).

112. *Hamdan*, 126 S. Ct. 2797. Having found in his concurrence that the military commissions were not regularly constituted, Justice Kennedy found it unnecessary to reach the question of indispensable judicial guarantees and declined to join Justice Stevens’s plurality opinion on that issue. See *id.* at 2799–2800 (Kennedy, J., concurring).

113. *Id.* at 2797 (majority opinion).

114. *Id.* The relevant paragraph is Protocol I, Article 75, paragraph 4 which provides the following:

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 af-

United States has not ratified Protocol I, Justice Stevens pointed out that the United States' objections were not to Article 75, and moreover, that the United States has recognized these provisions of Article 75 as being declarative of customary international law.¹¹⁵ Justice Stevens quoted subparagraph 4(e) of Article 75, which provides for the right to be tried in one's presence, but his analysis and supporting opinions dealt more with a defendant's right to be heard, be apprised of the evidence against him, and to cross examine witnesses providing that evidence.¹¹⁶

In support of the proposition that the right to be present is a fundamental common law right recognized by American constitutional law, Justice Stevens cited several domestic cases.¹¹⁷ *Crawford v. Washington* specifically deals with the Sixth Amendment

ford 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.

Protocol I, *supra* note 67, 1125 U.N.T.S. at 37-38, 16 I.L.M. at 1424.

115. *Hamdan*, 126 S. Ct. at 2797 (quoting William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003)).

116. *See id.* at 2797-2798 & nn.66-67.

117. *See id.* at 2798 n.67.

right to confrontation and cross examination of witnesses.¹¹⁸ The second cited case, *Joint Anti-Fascist Refugee Committee v. McGrath*, is actually based on a challenge to an administrative determination that certain groups should be placed on watch lists without their knowledge or opportunity to oppose such a determination.¹¹⁹ Justice Frankfurter's concurrence in that case focused on the defendant's right to be heard, not his right to be present.¹²⁰ In *Diaz v. United States*, a defendant's absence for a portion of trial did not constitutionally undermine his conviction, although in reaching that decision the court reaffirmed the importance of a defendant's presence at trial.¹²¹ Lastly, the Court in *Lewis v. United States* found that the defendant had a right to view the entire jury panel before exercising his preemptive strikes.¹²²

These cases address American due process requirements, or perhaps more broadly speaking, common law due process requirements. While their value in furthering the Court's understanding of Common Article 3's requirements may be questioned, they do indicate which protections Justice Stevens is most concerned about providing. It is the right of confrontation—the right to confront and cross examine witnesses and evidence against the defendant—rather than the defendant's right merely to be present. This guarantee of the right to cross examine opposing witnesses is found in subparagraph 4(g) of Article 75.¹²³

D. Summary

As described above, the Court has traditionally displayed considerable thoroughness when deciding issues of international law. Justice Story spent eighteen pages defining the term "piracy" in *United States v. Smith*;¹²⁴ Justice Gray spent over twenty pages determining how the law of nations treated captured fishing vessels in *The Paquete Habana*;¹²⁵ Justice O'Connor spent eleven

118. See generally 541 U.S. 36, 38 (2004).

119. See generally 341 U.S. 123, 124–25 (1951).

120. See *id.* at 168 (Frankfurter, J., concurring).

121. See 223 U.S. 442, 453–59 (1912).

122. See 146 U.S. 370, 372–76 (1892).

123. Protocol I, *supra* note 67, 1125 U.N.T.S. at 38, 16 I.L.M. at 1424.

124. 18 U.S. (5 Wheat.) 153, 163 n.a (1820); see *supra* notes 18–19 and accompanying text.

125. 175 U.S. 677, 687–710 (1900); see *supra* notes 20–29 and accompanying text.

pages defining the term “accident” in *Air France*;¹²⁶ and Justice Marshall spent seventeen pages defining the term “lésion corporelle” in *Eastern Airlines v. Floyd*.¹²⁷ In contrast, the *Hamdan* Court defined armed “conflict not of an international character,” determined the requirements of a regularly constituted court, and decided what judicial guarantees are recognized as indispensable by civilized peoples in just over five pages.¹²⁸ The *Hamdan* Court arrived at its conclusions without significantly reviewing the drafting history of Common Article 3 and the Additional Protocols, or investigating any state practice outside of this country.¹²⁹ It did cite to an authoritative ICRC Treatise on customary international law, but it failed to provide any examination of the sources used or the conclusions drawn by that treatise.¹³⁰ Additionally, the Court did not mention the *Air France* standard for treaty interpretation that commends such an investigation.¹³¹ This departure from the traditionally thorough consideration of international treaty issues prevented an identification and analysis of the competing purposes underlying the Geneva Conventions. It also eschewed any examination of the sources used to define the substantive rights being granted. Both of these oversights came at a price for international law.

IV. THE SCOPE OF COMMON ARTICLE 3—UNIVERSALITY VERSUS ACCOUNTABILITY

This portion of the article explores whether the brevity of the *Hamdan* Court’s opinion on the Geneva Conventions issues substantively affected its outcome and how the analysis and results might have been different.

Justice Stevens concluded that *Hamdan* was entitled to Common Article 3’s protections because he found that the conflict between al Qaeda and the United States is a “conflict not of an in-

126. 470 U.S. 392, 397–407 (1985); see *supra* notes 31–40 and accompanying text.

127. 499 U.S. 530, 535–52; see *supra* notes 41–50 and accompanying text.

128. See *Hamdan*, 126 S. Ct. at 2793–98. This is an estimated length in United States Reporter pagination as that version of the opinion has not been published as of this publication.

129. See *id.*

130. *Id.* at 2796–97; see *supra* note 106 and accompanying text.

131. *Hamdan*, 126 S. Ct. 2793–98.

ternational character.”¹³² The very language of Common Article 3’s first sentence invites exploration of the conflict’s “character” to determine its scope.¹³³ Yet, for the reasons described below, Justice Stevens was right to conclude that the “‘character of the conflict is irrelevant’ in deciding whether Common Article 3 applies.”¹³⁴ However, because the drafting history shows that the primary purpose of Common Article 3 was to extend humanitarian law to internal conflicts and civil wars, commentators—and in this case the Government¹³⁵—continue to examine the nature of the conflict when considering Common Article 3’s application.¹³⁶

A more complete reading of the Geneva Conventions as a whole and their accompanying Commentaries demonstrates that it is not the nature of the conflict, but rather the nature of the combatant, or more specifically the combatant’s organization that should be considered when determining the scope of protections provided by Common Article 3. This is particularly true if the treaty is interpreted using the *Air France* standard, which requires consideration of the “shared expectations of the contracting parties” when determining the scope and meaning of a treaty.¹³⁷

From the very beginning, there was a sharp disagreement among the nations about whether international humanitarian law should “interfere” with the conduct of internal conflicts.¹³⁸ While this debate was officially about the character of the conflict, the underlying discussion is actually based upon the charac-

132. *Id.* at 2795–96.

133. See Geneva I, *supra* note 65, 6 U.T.S. at 3116, 75 U.N.T.S. at 32; Geneva II, *supra* note 65, 6 U.T.S. at 3220, 75 U.N.T.S. at 86; Geneva III, *supra* note 65, 6 U.T.S. at 3318, 75 U.N.T.S. at 136; Geneva IV, *supra* note 65, 6 U.T.S. at 3518, 75 U.N.T.S. at 288.

134. See *Hamdan*, 126 S. Ct. at 2796 n.63 (quoting *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995)); see also GENEVA III COMMENTARY, *supra* note 71, at 35 (stating that the observance of Common Article 3 “does not depend upon preliminary discussions on the nature of the conflict”).

135. GENEVA III COMMENTARY, *supra* note 71, at 28; see also 2 FINAL RECORD, *supra* note 71, at 40–43.

136. See Brief for the Respondents, *supra* note 111, at 48–49; see generally Corn, *supra* note 69, at 836–61 (discussing the Article 2/3 paradigm for triggering law of war protections); Ved P. Nanda, *Terrorism as an “Internal Conflict” Under the 1977 Geneva Protocol: Defining “Enemy Combatant” and the International/Domestic Consequences*, 14 MICH. ST. J. INT’L L. 27, 30–33 (2006) (focusing on the gaps of the Geneva Conventions and the implications of these gaps in relation to the United States war on terrorism).

137. See *Air France v. Saks*, 470 U.S. 392, 399 (1985).

138. See GENEVA III COMMENTARY, *supra* note 71, at 28–29, 32.

ter of the combatants.¹³⁹ The discussions revolved around the threshold at which Common Article 3 would be found to apply, and for many nations this threshold was based upon the cohesiveness of the rebel organization.¹⁴⁰ Those nations opposed to adopting any form of Common Article 3 feared that "it would cover all forms of insurrections, rebellion, and the break-up of States, and even plain brigandage. Attempts to protect individuals might well prove to be at the expense of the equally legitimate protection of the State."¹⁴¹ After making the familiar point that one man's rebel is another man's freedom fighter, the nations supporting adoption argued that:

[T]he behaviour of the insurgents in the field would show whether they were in fact mere felons, or, on the contrary, real combatants who deserved to receive protection under the Conventions. . . . It was not possible to talk of "terrorism," "anarchy" or "disorder" in the case of rebels who complied with humanitarian principles.¹⁴²

The argument of those supporting adoption of Common Article 3 thus specifically disavows any intention of providing protections for terrorists or anarchists. This makes it clear that the "shared expectation of the parties" was that the protections of Common Article 3 are earned, that some individuals fell outside those protections (however minimal), and that the limitation on those protections was based upon the character and conduct of the combatants themselves. This fundamental consideration was central to the drafters of Common Article 3 and it was readily accessible to the *Hamdan* Court, appearing only two pages before passages

139. See *id.* at 32-33.

140. See, e.g., 2 FINAL RECORD, *supra* note 71, at 331-32 (statements of the Danish and Swiss delegations indicating that the scale of the conflict would determine when such protections would attach).

141. GENEVA III COMMENTARY, *supra* note 71, at 32; see also 2 FINAL RECORD, *supra* note 71, at 46, 49 (delegations for the United States, Italy, and Monaco discussing the importance of reciprocity in the form of respect for the Convention exhibited by the rebels); *id.* at 90 (statement of Mr. Siordet of the ICRC confirming that the article intended to bind insurgents). *But see id.* at 49-50 (delegations of Italy and Australia indicating their reservations about incorporating a requirement for reciprocity into draft Article 2, paragraph 4, which became Common Article 3).

142. GENEVA III COMMENTARY, *supra* note 71, at 32-33; see also 2 FINAL RECORD, *supra* note 71, at 48, 99, 129, 330, 331, 333 (statements of the Soviet, Australian, Joint Committee, Burmese, Danish, and Venezuelan delegations indicating that these protections were not applicable to mere bandits, partisans, or criminals).

cited by the Court.¹⁴³ Given the nature of al Qaeda, this is a point that should have been examined.

Although the Court did not directly address it, the opinion does give an indication of how the Court would likely have addressed this question. In footnote 63, alongside the citations to the Common Article 3 Commentary and the aforementioned opinions establishing that the nature of the conflict is irrelevant, Justice Stevens quotes the Commentary to Geneva Convention IV, which states that “[n]obody in enemy hands can be outside the law.”¹⁴⁴ By itself this is a powerful statement, and an initial look at the surrounding language found just before that quotation, which declares that everyone must have a status under international law, would seem to make the case even stronger that no one during wartime falls outside the Geneva Conventions’ basic protections.¹⁴⁵

Which of these concepts should prevail? Is it more important to respect the idea that the Conventions’ protections are earned and therefore may be lost, a concept which I will refer to as accountability,¹⁴⁶ or to ensure that the Geneva Conventions’ protections are universal? The first step in making this determination must be to compare statements like the one just quoted to the internal logic of the Conventions as a whole. Although the Court only addressed Hamdan’s right to Common Article 3 protections, it is necessary to explore the Conventions as a whole to determine whether the principle of universal application adopted by Justice Stevens fits within that framework. After reviewing the state-

143. Text discouraging the application of the Geneva Conventions’ protections to terrorists and anarchists appears on pages thirty-two and thirty-three of the Commentary for the Third Geneva Convention, whereas the *Hamdan* Court cited page thirty-five of the same Commentary. GENEVA III COMMENTARY, *supra* note 71, at 32–33; *see also* *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 n.63.

144. *Id.* at 2796 n.63 (2006) (quoting GENEVA IV COMMENTARY, *supra* note 107, at 51).

145. *See* GENEVA IV COMMENTARY, *supra* note 107, at 51.

146. What I describe as accountability is in some ways similar to Derek Jinks’s “second-order reciprocity.” *See* Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorism,”* 46 VA. J. INT’L L. 165, 193–95 (2005). Jinks finds that the Geneva Conventions do not currently contain a requirement for “second-order reciprocity” (i.e. the loss of protections based on a group’s failure to observe the Conventions) and partially bases this conclusion on the idea that the lack of enemy understanding of the legal rewards and punishments prevents this from being a desirable enforcement mechanism. *See id.* at 194. Contrasting this and leaving aside the often discussed use of “lawfare” by al Qaeda and its co-sympathizers, which indicates that such an understanding may exist, my conclusion is merely that accountability (or second-order reciprocity) was a driving consideration of the Conventions’ drafters, particularly in 1949.

ments and logic of 1949, it will be necessary to do the same with 1977 to determine whether similar statements contained in the Additional Protocols are binding explications of the Geneva Conventions' scope or merely broad aspirational statements.

The Geneva IV Commentary indicates a belief that:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention.¹⁴⁷

Taken by itself, this clearly contradicts the notion advanced by the Geneva Convention III Commentary that Common Article 3's protections are earned.¹⁴⁸ When viewed within the overall context of the Geneva Conventions, however, it becomes apparent that this description is oversimplified, and the broad conclusion that "nobody in enemy hands can be outside the law" may be incorrect.

Geneva III specifically deals with prisoners of war ("POWs"), and Article 4 of that Convention describes the requirements that an individual must meet to be considered a prisoner of war.¹⁴⁹ The relevant sections provide that:

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:

. . . .

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, . . . provided that such militias or volunteer corps, including such organized resistance movements, fulfil [sic] 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;
- (d) that of conducting their operations in accordance with the laws and customs of war.¹⁵⁰

147. GENEVA IV COMMENTARY, *supra* note 107, at 51.

148. *See supra* pp. 707-08.

149. *See* GENEVA III COMMENTARY, *supra* note 71, at 49.

150. Geneva III, *supra* note 65, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

Much of the Article 4 Commentary concerns the extensive discussions between the contracting parties about the treatment of partisans and other militias and resistance movements.¹⁵¹ The final product allows for their treatment as POWs if they meet the four requirements outlined in paragraph 2, the most important of which requires that their organization conduct its operations “in accordance with the laws and customs of war.”¹⁵² The Commentary describes this as “an essential provision” and specifically states that compliance with subparagraph (d) means that “[t]hey may not attack civilians or disarmed persons.”¹⁵³ This implies that members of groups failing to meet these requirements would *not* be entitled to treatment as POWs. The obvious question left open by Article 4 is who decides?

This question is answered (perhaps unintentionally) by Article 5, paragraph 2, which provides the mechanism for determining Article 4 status while adding a safeguard against arbitrary determinations.¹⁵⁴ This paragraph requires that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.¹⁵⁵

Although Article 5 was mainly concerned with ensuring that POWs received proper treatment from the moment they were captured until their repatriation,¹⁵⁶ and paragraph 2's predicted purpose was to “apply to deserters, and to persons who accompany the armed forces and have lost their identity card,”¹⁵⁷ Article 5 is generally viewed as providing the basis for some form of initial status review. Once an Article 5 hearing determines that the individual does not belong to any Article 4 category, however, it would seem hard to argue that the Geneva Conventions expect that the individual would continue to be treated as a POW.

If it is accepted that individuals can fail an Article 5 hearing by, for example, belonging to a militia or organized resistance

151. See GENEVA III COMMENTARY, *supra* note 71, at 49–50, 52–61.

152. Geneva III, *supra* note 65, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

153. GENEVA III COMMENTARY, *supra* note 71, at 61.

154. See *id.* at 77–78.

155. Geneva III, *supra* note 65, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–42.

156. *Id.* 6 U.S.T. at 3322, 75 U.N.T.S. at 140.

157. GENEVA III COMMENTARY, *supra* note 71, at 77.

movement that directly targets civilians, it becomes difficult to credit the previously mentioned statement from the Geneva Convention IV Commentary that every person must be either a POW covered by the Third Convention, a civilian covered by the Fourth, or a member of the medical personnel of the armed forces covered by the First Convention.¹⁵⁸ If that were the case, then a militia or resistance movement engaging in belligerent acts that place its members outside the category of people classified as POWs actually *benefits* from this by having its members granted the generally superior protections afforded civilians and medical personnel by the Fourth and First Conventions, respectively. Alternatively, organizations that routinely practice forbidden acts such as targeting civilians could be discouraged from doing so by not granting their members such status. Of these two choices, it would seem reasonable to believe that the latter choice is more in keeping with the overall purpose of the Conventions and the shared expectations of the drafting parties in 1949.

The interpretation of the Geneva Conventions is not static, however, and the mere fact that the 1949 statements of universality may not be squared with the internal logic of the 1949 Conventions does not mean that such statements of universality are not valid today. The other significant benchmark against which such statements can be measured is the 1977 Additional Protocols.

Additional Protocol I addresses POW status in Articles 43 and 44.¹⁵⁹ These articles were designed to expand the categories of POWs beyond those described in Article 4 of Geneva III and explicitly state that they may not be interpreted to prejudice the right of anyone claiming POW status under Article 4.¹⁶⁰ To this end, they significantly relaxed the requirements for militias and other irregular forces to qualify for POW status.¹⁶¹ This change was cited as a principle reason for the United States administration's recommendation against ratification.¹⁶²

158. See GENEVA IV COMMENTARY, *supra* note 107, at 51.

159. See Protocol I, *supra* note 67, 1125 U.N.T.S. at 23, 16 I.L.M. at 1410–11.

160. See *id.* 1125 U.N.T.S. at 23, 16 I.L.M. at 1411.

161. See Abraham D. Sofaer, *The U.S. Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims: The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784, 785–86 (1988);

162. See *id.*; see also 1 ICRC TREATISE, *supra* note 108, at 388–89.

Article 43 defines armed forces as:

[A]ll organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.¹⁶³

It is important to understand that Article 43's focus is on the *organization* and not the individual. The Commentary relating to Article 43 makes clear that an individual does not lose his status as a combatant, or his right to be treated as a POW, based on his own actions, but rather his right to that status is inextricably linked to the group that he belongs to and whether that group or unit satisfies the terms of Article 43.¹⁶⁴

Members of armed forces that satisfy this threshold definition are then subject to the further requirements of Article 44, the primary purpose of which is to protect the civilian population by requiring combatants to distinguish themselves from civilians.¹⁶⁵ Strikingly, the failure to meet those requirements may not result in any change in status.¹⁶⁶ More importantly, even when an individual's failure to comply with these standards results in a

163. Protocol I, *supra* note 67, 1125 U.N.T.S. at 23, 16 I.L.M. at 1410.

164. See CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 513-14 (Yves Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY].

165. See Protocol I, which provides:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) During each military engagement, and
- (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Protocol I, *supra* note 67, 1125 U.N.T.S. at 23, 16 I.L.M. at 1410-11.

166. Protocol I, Article 44, paragraph 2 provides:

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

Id.

change of status, that change may not affect the individual's treatment.¹⁶⁷ This clearly enunciated but rather jarring concept, that the failure to comply with such an important requirement as carrying arms openly in order to distinguish oneself from the civilian population can have no practical effect upon one's treatment, supports the view that the latest version of the Geneva Conventions may favor universality over creating behavioral incentives through accountability.

The debate between universality and behavioral accountability is further complicated by the Commentary to Article 43. Within the same paragraph, the Commentary confirms the unanimity behind the essential requirement, that a group have an internal disciplinary system to enforce compliance with international humanitarian law, and states that members of an organization failing to comply with this requirement are to be treated as civilians.¹⁶⁸ While the Commentary makes treatment as a civilian seem disadvantageous because a civilian "can be punished for the sole fact that he has taken up arms,"¹⁶⁹ a civilian is not subject to detention merely because he belongs to a militia group until the cessation of hostilities. Moreover, civilians are entitled to all the procedural trial protections of the municipal criminal law system and therefore must be freed if the evidentiary requirements or procedural technicalities established by that system are not met. Such an occurrence is likely to be relatively commonplace for individuals detained in a combat or near combat environment.

The underlying purpose of the Geneva Conventions is to protect basic human rights during wartime, even the rights of com-

167. Protocol I, paragraphs 4 and 5 state that:

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

Id.

168. See PROTOCOL COMMENTARY, *supra* note 164, at 513-14.

169. See *id.* at 514.

batants that do not comply with those Conventions.¹⁷⁰ However, it is difficult to reconcile this purpose with the concept that a group which targets civilians may benefit from that very behavior, by being afforded all the rights of the civilians it targets. This is particularly true when such a group is contrasted with members of armed forces that do respect Article 43's essential disciplinary requirements and who are liable for detention until the cessation of hostilities. These considerations make the question of which principle should predominate, universality or accountability, a close one, and one that the Court does not even address.

Because it is a close question, there is arguably justification and support for both the principle of universality and the Court's decision to extend Common Article 3 protections to an individual that has failed an Article 5 hearing. Therefore, although not based on an investigation or even an apparent recognition of the two alternatives, Justice Stevens's decision to choose universality of application over accountability is defensible, yet clearly not mandated by the broader goals of the Geneva Conventions and their Additional Protocols.

While this analysis concludes that the Court's decision regarding the scope of Common Article 3 may be correct, it does not mean that the Court's lack of analysis did not come at a price. Once it is determined that Common Article 3's protections are to be provided, the analysis just completed should inform the expansiveness with which those protections are read. If universality were the sole illuminating principle of the Geneva Conventions, then an expansive reading of the protections might be appropriate. But where, as here, the principles of universality and accountability are in tension, a less expansive reading is called for because expansiveness comes at a price to accountability.

How then should we view Justice Stevens's substantive conclusions concerning regularly constituted courts and judicial guarantees which are recognized as indispensable by civilized people?

A. *Regularly Constituted Courts*

Justice Stevens viewed the requirements for regularly constituted courts and judicial guarantees as separate but intertwined

170. See Protocol I, *supra* note 67, 1125 U.N.T.S. at 23, 16 I.L.M. at 1410-11.

concepts.¹⁷¹ He first determined that the military commissions are not regularly constituted based on the definition in the Geneva IV Commentary, Article 66, and a 2005 ICRC Treatise.¹⁷² Justice Stevens then separately considered whether the military commissions offer the necessary judicial guarantees.¹⁷³ A closer look at these sources and the Commentary for Common Article 3 calls into question both the view that these are two separate requirements and the expansiveness with which these protections are read.

Common Article 3's Commentary contains only one reference to the protections provided by paragraph 1(d).¹⁷⁴ While Justice Alito in his dissent cited this reference,¹⁷⁵ the majority did not consider it.¹⁷⁶ The Commentary recognizes the importance of "safeguards aimed at eliminating the possibility of judicial errors," and clarifies this requirement by stating that "[w]e must be very clear about one point; it is only 'summary' justice which it is intended to prohibit."¹⁷⁷ This clarification, coupled with the plain language of Common Article 3's other protections, should serve as a guide to how broadly those protections ought to be read. Common Article 3's subparagraphs (a) through (c) prohibit murder, mutilation and torture, the taking of hostages, and humiliating and degrading treatment.¹⁷⁸ Reading subparagraph (d) to prohibit "summary justice" is consonant with the other protections afforded by the Article. The Court's more expansive reading of subparagraph (d), to prohibit convictions without the full disclosure of all sources and methods used to collect classified evidence against the defendant, seems less so. This reading is all the more troubling in light of the significant tension between universality and accountability,¹⁷⁹ and the subsequent loss of accountability to which such an expansive reading will lead.

171. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796–98 (2006).

172. See *id.* at 2796–97.

173. See *id.* at 2797–98.

174. GENEVA III COMMENTARY, *supra* note 71, at 39–40.

175. See *Hamdan*, 126 S. Ct. at 2854 (Alito, J., dissenting).

176. See *generally id.* at 2757–98 (majority opinion) (failing to cite Common Article 3's Commentary).

177. GENEVA III COMMENTARY, *supra* note 71, at 40.

178. Geneva I, *supra* note 65, 6 U.S.T. at 3116–18, 75 U.N.T.S. at 32–34; Geneva II, *supra* note 65, 6 U.T.S. at 3222, 75 U.N.T.S. at 88; Geneva III, *supra* note 65, 6 U.N.T.S. at 3320, 75 U.N.T.S. at 138; Geneva IV, *supra* note 65, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

179. See *supra* Part IV.

Rather than focusing on the language of Common Article 3 and its Commentary, however, Justice Stevens turned to Geneva IV, specifically Article 66,¹⁸⁰ which addresses the requirements for the trial of civilians who are accused of violating ordinances established by an occupying power.¹⁸¹ The purpose of Article 66 is to reinforce the legislative powers of the occupying forces “by judicial powers designed to make good the deficiencies of the local courts, should this be necessary.”¹⁸² It allows for the use of military courts as long as those courts sit within the occupied territory.¹⁸³ While the Commentary does state that the courts must be regularly constituted and that “[i]t is the ordinary military courts of the Occupying Power which will be competent,”¹⁸⁴ the application of this definition to the composition of war crimes tribunals seems misplaced.

This sense that the definition is misapplied is supported by the ICRC Treatise. *Customary International Humanitarian Law* is a two volume treatise produced by the ICRC that gathers relevant treaties, state practice, national legislation, national and international judicial decisions, and the practice of international organizations to define the contours of customary international law.¹⁸⁵ Among the three stated purposes for its production is to “help in the interpretation of treaty law.”¹⁸⁶ While this treatise has been criticized, the criticism has primarily been that it takes an overly expansive view of customary international law, rather than that it is overly restrictive.¹⁸⁷ Justice Stevens relied on the Treatise’s statement that a regularly constituted court with respect to Common Article 3 is a court “established and organized in accordance with the laws and procedures already in force in a country.”¹⁸⁸ He did not look beyond this statement.

180. See *Hamdan*, 126 S. Ct. at 2797.

181. Geneva IV, *supra* note 65, 6 U.S.T. at 3558–60, 75 U.N.T.S. 328–30; see GENEVA IV COMMENTARY, *supra* note 107, AT 339–40.

182. GENEVA IV COMMENTARY, *supra* note 107, at 340.

183. Geneva IV, *supra* note 65, 6 U.S.T. 3558–60, 75 U.N.T.S. at 328–30.

184. GENEVA IV COMMENTARY, *supra* note 107, at 340.

185. See generally 1–2 ICRC TREATISE, *supra* note 108.

186. See Jakob Kellenberger, *Foreword* to 1 ICRC TREATISE, *supra* note 108, at ix–x.

187. See Letter from John Bellinger III, Legal Adviser, U.S. Dep’t of State, and Jim Haynes II, Gen. Counsel, U.S. Dep’t of Def., to Dr. Jakob Kellenberger, President, Int’l Comm. of the Red Cross (Nov. 3, 2006), available at <http://www.state.gov/s/l/rls/82630.htm>.

188. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (quoting 1 ICRC TREATISE, *supra* note 108, at 355). The Government asserts that military commissions are established and or-

The ICRC Treatise does not contain separate sections for “regularly constituted courts” and “essential judicial guarantees.” The sentence Justice Stevens quoted is found in a section entitled “Definition of a fair trial affording all essential judicial guarantees,” the primary focus of which is on the right to be tried by an independent and impartial tribunal.¹⁸⁹ A review of the sources relied upon by the ICRC is telling. The military manuals of eleven nations were reviewed and ten of the eleven specifically mention the essential guarantees of independence and impartiality, while only two mention the term regularly constituted court.¹⁹⁰ Likewise, a review of national legislation indicates an overwhelming concern with the tribunal’s independence and impartiality and the relative lack of concern with the procedures surrounding the tribunal’s creation.¹⁹¹ Lastly, other international or regional human rights covenants also focus on the requirements of independence and impartiality without reference to the mechanical requirements of a regularly constituted court.¹⁹²

The ICRC Treatise discusses the requirement for independence and impartiality and describes the test for these attributes.¹⁹³ Independence is determined by the relationship between the judiciary and the other branches of government, especially the executive.¹⁹⁴ Impartiality is viewed from both a subjective viewpoint, that the judge must be free from preconceptions about the matter

ganized in accordance with laws and procedures already in force in this country, specifically referencing 10 U.S.C. § 821, which allows for the use of military commissions to try offenses against the law of war. *See* Brief for the Respondents, *supra* note 111, at 17–18, 49–50.

189. *See* 1 ICRC TREATISE, *supra* note 108, at 354–57.

190. *See* 2 ICRC TREATISE, *supra* note 108, at 2404–06 (explaining that the manuals of Argentina, Belgium, Canada, Croatia, the Netherlands, New Zealand, Spain, the United Kingdom, and the United States all mention the guarantees of independence and impartiality, and the Swiss manual describes the guarantees of “an impartial and regularly constituted tribunal”).

191. *See id.* at 2406–07 (reviewing the national legislation in the Czech Republic, Georgia, Germany, Kenya, Kuwait, Kyrgyzstan, Lithuania, and Slovakia, which all reference the essential guarantees of a court’s independence and/or impartiality; with only legislation in Germany and the Netherlands referencing regularly constituted courts, and the Dutch reference is a quote from Common Article 3.)

192. *See, e.g.*, International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 U.N.T.S. 171, 176–77, 6 I.L.M. 368, 372–73 (1967).

193. 1 ICRC TREATISE, *supra* note 108, at 354–57.

194. *Id.* at 356.

before him, and the objective viewpoint, that there may be no legitimate doubt about its impartiality.¹⁹⁵

While Justice Stevens did not address this broad international emphasis on independence and impartiality, Justice Kennedy in his concurrence more fully defined the term regularly constituted court in a manner that purportedly accounts for this requirement. Justice Kennedy found that the term regularly constituted court requires the use of regular court-martial procedures unless there is a practical legislative or executive explanation for deviating from them.¹⁹⁶ He expressed three main concerns over the military commission's deviations from regular court-martial procedure. First, that the presiding officer is a judge advocate rather than a military judge; second, that interlocutory questions are certified to the convening authority instead of to the Court of Criminal Appeals; and lastly, that the current process allows for as few as three members on a military commission whereas the regular court-martial procedures mandate five members.¹⁹⁷

The first and third of these concerns do not call into question the independence and impartiality of the commission. The only qualitative difference between a judge and a judge advocate is that the former has completed a three week certification course at the Judge Advocate General school, which would have little if any impact on independence and impartiality.¹⁹⁸ Likewise, there is no significant difference between a military commission with a panel of three members and one of five. While a smaller panel might "affect the deliberative process,"¹⁹⁹ it seems unlikely to affect its independence and impartiality. The true focus of Justice Kennedy's concern appears to be the difference in the appointing authority.²⁰⁰ While regular courts-martial are appointed by the Judge Advocate General (and certified questions go to the Court of Criminal Appeals that is also appointed by the Judge Advocate

195. *See id.*

196. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2804 (2006) (Kennedy, J., concurring).

197. *See id.* at 2805–06.

198. Telephone Interview with Major Sean Watts, Judge Advocate General's School, in Charlottesville, Virginia. (Mar. 8, 2007).

199. *Hamdan*, 126 S. Ct. at 2806 (Kennedy, J., concurring).

200. *See id.* at 2805–06.

General), the appointing authority for the military commissions is the Secretary of Defense.²⁰¹

It is unusual, and somewhat ironic, for a military tribunal's independence to be questioned because it is subject to a *greater* degree of civilian oversight. The ICRC Treatise cites numerous examples questioning the independence of military tribunals.²⁰² The main basis for questioning these tribunals' independence is a concern about an insufficient separation between the executive and judicial functions.²⁰³ While there can be no question that military commissions convened by the Secretary of Defense might be criticized for a lack of such separation, it is hard to see how this is materially different from commissions convened by a service Judge Advocate General. Service Judge Advocate Generals are appointed by the Secretary of Defense or his subordinates.²⁰⁴ Justice Kennedy thus found that trials convened under the UCMJ by a service Judge Advocate General whose interlocutory appeals are heard by the Court of Criminal Appeals, also appointed by a service Judge Advocate General, are sufficiently independent and impartial.²⁰⁵ In contrast, trials convened by an appointee of the Secretary of Defense which utilize military judges and lawyers and refer interlocutory appeals to the same convening authority, are not sufficiently independent and impartial.²⁰⁶

As the ICRC Treatise and Justice Kennedy indicate, the true touchstone of regularly constituted courts is independence and impartiality, not a mechanical requirement related to the court's creation. Where international law is concerned, this goal of independence and impartiality is generally enhanced by increased civilian oversight of military tribunals. Whatever political misgivings one might have had about the quality of the civilian oversight that existed when the *Hamdan* decision was passed down, the Court's opinion insulating future military tribunals from aspects of that oversight may ultimately be viewed as undermining those goals.

201. *See id.*

202. *See* 2 ICRC TREATISE, *supra* note 108, at 2408–15 (citing mostly situations that occur in African nations in which the military's compliance with civilian oversight is far from well established).

203. *See id.*

204. Telephone Interview with Major Sean Watts, *supra* note 198.

205. *See Hamdan*, 126 S. Ct. at 2806 (Kennedy, J., concurring).

206. *See id.* at 2806–07.

B. *Indispensable Judicial Guarantees*

Justice Stevens's plurality opinion determines that Common Article 3's requirement that tribunals provide "judicial guarantees which are recognized as indispensable by civilized peoples" is designed to incorporate the "barest of those trial protections that have been recognized by customary international law."²⁰⁷ He found that these barest of protections are enumerated in Article 75 of Protocol I and that the military commissions fail to provide these protections.²⁰⁸ An examination of both the text and scope of the Additional Protocols calls this conclusion into question.

Protocol I explicitly applies to Common Article 2 conflicts and therefore should not apply to the conflict in *Hamdan*.²⁰⁹ While Justice Stevens rightly pointed out that Article 75 of Protocol I is recognized as customary international law,²¹⁰ that recognition does not expand Protocol I's scope beyond Common Article 2 conflicts. Customary international law may allow the substantive provisions of international treaties to mature, but it should not affect their scope or triggering mechanisms. This is particularly true when Article 75's explicit reference to Protocol I's scope is considered.²¹¹

If there were no alternative enumerations of indispensable judicial guarantees available, then turning to Article 75 of Protocol I might have some merit. It could be argued that although on its face these protections are only applicable to Common Article 2 defendants, the international consensus surrounding these guarantees is sufficient to extend them to Common Article 3 defendants as well. This reasoning cannot be applied to *Hamdan* because an explicit enumeration of judicial guarantees applicable to Common Article 3 defendants has already been created by Protocol II.

207. *Id.* at 2797.

208. *See id.* at 2797-98.

209. *See* Protocol I, *supra* note 67, 1125 U.N.T.S. at 7, 16 I.L.M. at 1397 (providing that "[t]his Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions").

210. *Hamdan*, 126 S. Ct. at 2797-98.

211. *See* Protocol I, *supra* note 67, 1125 U.N.T.S. at 37, 16 I.L.M. at 1423 (stating that Article 75 applies to persons "[i]n so far as they are affected by a situation referred to in Article 1 of this Protocol").

Protocol II explicitly covers Common Article 3 conflicts, and it defines its scope as covering all armed conflicts not covered by Protocol I.²¹² Not only does it amplify the very protections that the Court has indicated are involved in this case, but Article 6 of Protocol II and Article 75 of Protocol I actually enumerate the judicial guarantees provided by Common Article 3 in an almost identical manner.²¹³ It is striking that Protocol II was not discussed in the *Hamdan* opinion or by many commentators since then.²¹⁴ It is particularly surprising that this conflation of the laws governing international and non-international armed conflicts has been largely ignored when the existence of a meaningful distinction between these types of conflicts has been so often reaffirmed.²¹⁵

The impetus for the 1977 Additional Protocols can be traced back twenty years to the 1957 ICRC Conference in New Delhi, when the ICRC submitted draft rules from that conference to national governments.²¹⁶ After the national governments ignored this overture, the ICRC created a second draft proposal that was amended by the Conference of Government Experts in June

212. Article 1 of Protocol II states that Protocol II

develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, [and it] 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).

Protocol II, *supra* note 67, 1125 U.N.T.S. at 611, 16 I.L.M. at 1443.

213. Compare Protocol II, *supra* note 67, 1125 U.N.T.S. at 613, 16 I.L.M. at 1445–46, with Protocol I, *supra* note 67, 1125 U.N.T.S. at 37–38, 16 I.L.M. at 1423–24.

214. *But see* Corn, *supra* note 69, at 875–79; Corn, *supra* note 70, at 1. These in depth treatments of Protocol II in the *Hamdan* context dismiss the differences between the protections enumerated by Protocol I and Protocol II, and instead find that they are both supportive of the greater goal of impartiality.

215. *See, e.g.*, Al-Marri v. Wright, 487 F.3d 160, 184–85 (2007) (finding that international law does not recognize “enemy combatants” in non-international armed conflicts); Jack Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorist Operations*, 101 AM. J. INT’L L. 56, 63–64 (2007) (criticizing the Military Commissions Act for conflating the rules governing international and non-international armed conflicts); Hans-Peter Gasser, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT’L L. 910, 919 (1987) (urging the United States ratification of Protocol I based in part on the fact that Protocol I “has nothing to say about noninternational armed conflicts”); Alec Walen & Ingo Venzke, *Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court’s Treatment of the Law of War in Hamdi v. Rumsfeld*, 15–24 (Apr. 10, 2007), available at SSRN: http://works.bepress.com/alec_walen/1/ (discussing the difference in determination of combatant status in international and non-international armed conflicts).

216. *See* 1 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL 1 TO THE 1949 GENEVA CONVENTIONS xiii (1979) [hereinafter WAR VICTIMS].

1973.²¹⁷ It was this draft that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts began considering in 1974.²¹⁸ Approximately 125 nations were represented when the conference opened.²¹⁹ Four sessions, lasting between two and three months each, were convened over the next four years during which both Protocols were debated, discussed, and extensively revised.²²⁰

Concerns about Protocol II's application to internal conflicts and its potential interference with state sovereignty resulted in sweeping changes to that Protocol.²²¹ While some nations favored equating participants in international conflicts with those involved in internal struggles, others adamantly opposed such equality.²²² An exchange during the second session in 1975 is illustrative of these divisions. During a committee meeting on the scope of draft Article 10 (the article which would ultimately become Article 6 that enumerates the judicial guarantees at issue in *Hamdan*), the Swedish delegation stated that combatants captured during internal conflicts "should be placed on a more equal footing with prisoners of war in international conflicts."²²³ The Canadian delegation proposed a redraft of the entire Protocol. In the explanatory notes accompanying this proposal, the Canadians cited their opposition to this concept as one of the four principal reasons for overhauling the Protocol.²²⁴ Canada felt that, "Nothing in the Protocol should suggest that dissidents must be treated legally other than as rebels. To move in the direction of recognizing the military activities of the rebels as having some degree of legitimacy, is to invite the expectation or even demand for Prisoner-of-War status on capture."²²⁵

217. *See id.*

218. *See id.* at xiii–xiv.

219. *Id.* at xiv.

220. *See id.* Neither of the relevant articles retained their initial numbering. Article 75 of Protocol I was initially designated Article 65 of the draft protocols and it retained this number throughout the drafting and discussion sessions. Similarly Article 6 of Protocol II resulted from the combination of draft Articles 9 and 10. The new designation as Article 6 did not occur until the simplified version of Protocol II was adopted in 1977.

221. *See* THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 3–8 (Howard S. Levie ed., 1987) [hereinafter LEVIE PROTOCOL II].

222. *See id.* at 3 (referencing criticism of Draft Protocol II).

223. *Id.* at 257.

224. *See id.* at x–xi, 9.

225. *Id.* at 9 (explanatory comments of Canadian delegation of April 4, 1975).

After four years of discussion and amendments, the deep division over this issue threatened to block Protocol II entirely.²²⁶ Led in part by Pakistan, a number of delegations supported a simplified draft of Protocol II.²²⁷ This simplified draft was adopted in 1977, leaving only eighteen of the original thirty-nine substantive articles intact.²²⁸ Any examination of the judicial guarantees afforded to Common Article 3 defendants should be undertaken with these underlying concerns in mind.

The enumerated judicial guarantees described in the two Protocols are found in paragraph 4 of Article 75 in Protocol I²²⁹ and in paragraph 2 of Article 6 in Protocol II.²³⁰ A careful comparison of the two articles reveals very few differences. The introductory paragraphs are similar. Paragraph 4 of Article 75 states that the offence must be "related to the armed conflict" and it requires an "impartial and regularly constituted court."²³¹ Paragraph 2 of Article 6 does not explicitly require a relationship between the offence and the armed conflict and it does not use the term regu-

226. *See id.* at 3-4.

227. *See id.*

228. *See id.* at x.

229. Protocol I, *supra* note 67, 1125 U.N.T.S. at 37-38, 16 I.L.M. at 1424.

230. Paragraph 2 of Article 6 in Protocol II provides:

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.

Protocol II, *supra* note 67, 1125 U.N.T.S. at 613-14, 16 I.L.M. at 1445-46.

231. Protocol I, *supra* note 67, 1125 U.N.T.S. at 37, 16 I.L.M. at 1424.

larly constituted court but instead requires that the court offer “the essential guarantees of independence and impartiality.”²³² This phrasing further supports the argument made in Part IV.A that Common Article 3’s requirement of a regularly constituted court is more directed towards the substantive protections provided (independence, impartiality, and enumerated procedural guarantees) than to the mechanics underlying the court’s creation.²³³

The principal difference between the subparagraphs is simply their number. Article 75, paragraph 4 contains ten subparagraphs (a) through (j),²³⁴ while Article 6, paragraph 2 has only six, (a) through (f).²³⁵ All but one of the common subparagraphs are identical and the differences between the two subparagraph (c)’s are superficial.²³⁶ The additional guarantees provided for in Article 75 that are not provided for in Article 6 can be summarized as cross-examination and calling witnesses subparagraph (g), double jeopardy subparagraph (h), the public pronouncement of the judgment subparagraph (i), and notification of appellate rights subparagraph (j).²³⁷ While nothing in the negotiating histories of these articles specifically addresses why these guarantees were included in Protocol I and not in Protocol II, it is clear that both committees extensively shared drafts throughout the process.²³⁸ In fact, Committee Three of the Protocol I Working Group reported that the judicial guarantees enumerated in Protocol I were modeled after those found in Protocol II before it added the last four guarantees.²³⁹ Given this close interaction between the

232. Protocol II, *supra* note 67, 1125 U.N.T.S. at 613, 16 I.L.M. at 1445–46; 1 ICRC TREATISE, *supra* note 108, at 354–55.

233. See *supra* Part IV.A.

234. Protocol I, *supra* note 67, 1125 U.N.T.S. at 37–38, 16 I.L.M. at 1423–24.

235. Protocol II, *supra* note 67, 1125 U.N.T.S. at 613–14, 16 I.L.M. at 1445–46.

236. Compare Protocol I, *supra* note 67, 1125 U.N.T.S. at 37–38, 16 I.L.M. at 1424, with Protocol II, *supra* note 67, 1125 U.N.T.S. at 613–14, 16 I.L.M. at 1445–46. Article 6, paragraph 2(c) states that no one may be “held guilty” of an offence, while Article 75 paragraph 4(c) provides that no one may be “accused or convicted” of an offence. Also, Article 75, paragraph 4(c) uses the phrase “under the national or international law to which he was subject,” which Article 6, paragraph 2(c) replaces with simply “under the law.” Protocol I, *supra* note 67, 1125 U.N.T.S. at 37–38, 16 I.L.M. at 1424; Protocol II, *supra* note 67, 1125 U.N.T.S. at 613–14, 16 I.L.M. at 1445.

237. See Protocol I, *supra* note 67, 1125 U.N.T.S. at 38, 16 I.L.M. at 1424.

238. See LEVIE PROTOCOL II, *supra* note 221, at 249–55 (Brazilian, Italian, Polish and New Zealand delegations urging that a portion of draft Article 9 of Protocol II be aligned with draft Article 65 of Protocol I).

239. See 4 WAR VICTIMS, *supra* note 216, at 63–64.

drafting committees, and the widely held sense that there was to be some difference between the rules governing international and non-international conflicts, it is reasonable to infer that the differences between the judicial guarantees enumerated by Article 75 of Protocol I and those enumerated by Article 6 of Protocol II were intentional.

This difference between the guarantees enumerated by Protocol I and those enumerated by Protocol II should have affected the plurality's opinion on the protections afforded Common Article 3 defendants. While Justice Stevens only specifically addressed paragraph 4(e) of Article 75 (the right to be tried "in his presence" that is found in both Protocols),²⁴⁰ the basis for his finding that the military commissions fall short of this requirement implicate more than just that requirement. Justice Stevens focused on the fact that "information used to convict a person of a crime must be disclosed to him."²⁴¹ This access-to-evidence requirement goes beyond mere presence at trial, and is more fairly encompassed by the right to cross examine witnesses to ascertain the basis for their evidence. That right is guaranteed by paragraph 4(g) of Protocol I, Article 75, but is not protected by Article 6 of Protocol II.²⁴²

In addition to citing a litany of cases that confirm the common law right to cross examine witnesses (which is somewhat irrelevant to an international law analysis), Justice Stevens cited two international bases for finding that Hamdan must be afforded the right to examine the witnesses and evidence against him.²⁴³ He first cited an article by William H. Taft, the legal advisor to the State Department, to assert the proposition that the United States regards Article 75's protections as applying to "all persons in the hands of an enemy."²⁴⁴ While arguably persuasive for that proposition, another Taft statement was cited for a different proposition—that Hamdan was entitled to Common Article 2 protections.²⁴⁵ Hamdan's brief quoted Taft as saying that the Geneva

240. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006).

241. *Id.* at 2798 (mentioning the necessity for access to evidence twice on one page).

242. Compare Protocol I, *supra* note 67, 1125 U.N.T.S. at 38, 16 I.L.M. at 1424, with Protocol II, *supra* note 67, 1125 U.N.T.S. at 613–14, 16 I.L.M. at 1445–46.

243. See *Hamdan*, 126 S. Ct. at 2797–98 n.66.

244. *Id.* at 2797 (quoting William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003)).

245. See Brief for the Petitioner, *supra* note 111, at 46 (citing memorandum from Wil-

Conventions do not recognize a distinction between the conflict with the Taliban and the conflict with al Qaeda.²⁴⁶ Considering the Government's recognition that the Geneva Conventions cover the Taliban conflict, if Taft's statement carried sufficient weight to bind the Government, Hamdan would be entitled to Common Article 2 protections. Yet, Justice Stevens did not agree. It would be incongruous, then, to find Taft's opinion sufficient to expand Article 75 of Protocol I protections to Common Article 3 defendants.

The second international basis for Justice Stevens's conclusions involves the Allied war crimes trials of Japanese defendants after World War II. In footnote 66, Justice Stevens mentioned two trials where Japanese defendants were convicted by Allied war crimes tribunals for, among other things, conducting summary trials that failed to "apprise accused individuals of all evidence against them."²⁴⁷ Once one reads the summaries of these trials cited by Justice Stevens, the comparison can only be described as shocking.

In one case, Sergeant-Major Shigeru Ohashi was convicted of the summary beheading of eighteen civilians that the Japanese charged with sabotage.²⁴⁸ Including the ten minutes of deliberations, their collective trial lasted for approximately fifty minutes.²⁴⁹ The accused were not provided with defense counsel and the beheadings began one hour after the termination of the trial.²⁵⁰ Further, Ohashi's trial did not involve any claim by the defense that the eighteen victims were ever denied access to evidence against them.²⁵¹

In the other case, General Tanaka Hisakasu was convicted of authorizing the trial and execution of Major Houck of the United States Army Air Force.²⁵² Major Houck was shot down over Hong

liam H. Taft, IV, to Counsel to the President ¶ 3 (Feb. 2, 2002), available at <http://www.fas.org/sgp/othergov/taft.pdf>.

246. See *id.*

247. See *Hamdan*, 126 S. Ct. at 2797 n.66.

248. See Trial of Sergeant-Major Shigeru Ohashi and Six Others, 5 Law Reports of Trials of War Criminals 25, 25 (1946).

249. *Id.*

250. *Id.*

251. See *id.* at 28.

252. See Trial of General Tanaka Hisakasu and Five Others, 5 Law Reports of Trials of War Criminals 66, 66-67 (1946).

Kong while attacking Japanese naval forces in the harbor.²⁵³ Major Houck was accused of bombing and intentionally destroying a civilian vessel as well as killing eight civilians.²⁵⁴ The Major was not provided with defense counsel, was tried in less than two hours, sentenced to death, and executed the next day.²⁵⁵ In its list of four factors that the military commission considered illustrative of the illegal nature of this trial, there was no mention of the *withholding* of evidence from Major Houck's inspection.²⁵⁶ In fact, the summary of Major Houck's trial provided by the war crimes tribunal indicates that Major Houck was given access to the reports (written in Japanese) prepared for his prosecution by both the Japanese military authorities and the Hong Kong police.²⁵⁷

Justice Stevens used these two examples to support his holding that a defendant is personally entitled to examine all classified evidence against him in an unfiltered form.²⁵⁸ This borders on the ridiculous. The military commissions that were struck down by the *Hamdan* court not only provided the defendant with counsel, but required that his counsel be given access to all evidence proffered against him.²⁵⁹ The only grounds for withholding unfiltered evidence from the accused would be for the protection of witnesses or for national security interests threatened by the revelation of classified means and methods of intelligence collection.²⁶⁰ Even if Justice Stevens's only point was to cite the fact that Allied war crimes prosecutors *mentioned* the right of access to evidence in passing, comparisons between these summary executions and the military commissions at issue do not lead to the conclusion reached by Justice Stevens.

253. *Id.* at 66.

254. *See id.* at 67.

255. *See id.* at 67–69.

256. *See id.* at 70–71. The Commission convicting General Hisakasu cited the following four factors in support of its opinion: (1) lack of defense counsel, (2) no opportunity to prepare a defense or secure evidence on his own behalf, (3) no witnesses were allowed to appear and the Tribunal ignored Houck's evidence concerning the intent of his attack, (4) the brevity of the proceedings. *See id.*

257. *See id.* at 67.

258. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 & n.66, 2798.

259. *See U.S. Dep't of Def., Military Comm'n Order No. 1, §§ 5(D)–(E), 6(B)(3)* (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (requiring that defense counsel is made available to the accused, evidence to be presented by the prosecution is provided to the defense counsel, and any information withheld from the accused is made available to the appointed defense counsel).

260. *See id.* § 6(B)(3).

In summary, the *Hamdan* Court ignored the protections explicitly provided for Common Article 3 defendants by Protocol II. Instead, the Court relied upon customary international law to extend the Article 75 protections to Common Article 3 defendants. This runs contrary to Article 75 itself and to the Additional Protocols as a whole. A careful examination of the Protocols and their drafting history indicates that the shared expectation of the parties was that Common Article 3 defendants, like Hamdan, are entitled to the more basic protections of Protocol II and not the full protections of Protocol I.

V. CONCLUSION

Far from the victory for international law that many have proclaimed it, the Court's treatment of the international law issues in *Hamdan* can more appropriately be seen as a missed opportunity. Although the issues concerning the scope and substance of Common Article 3 rights were not extensively briefed, the Supreme Court's own principles of treaty interpretation required it to seek the "shared expectations of the contracting parties."²⁶¹ Little effort was made to determine that expectation in this context, which resulted in a cursory examination of three close and substantively significant issues presented by the Geneva Conventions.²⁶² That these issues, involving the treatment of detainees charged with war crimes in the global war on terror, are of particular importance in today's international environment makes the inattention all the more baffling.

By deviating from its typically thorough approach in this area, the Court failed to address important considerations underlying the scope of Common Article 3's protections, particularly the tension between behavioral accountability and universal application. It also based its analysis of Common Article 3's substantive protections on the concept that customary international law could expand the reach of Protocol I's protections beyond the boundaries that Protocol I's drafters established.²⁶³ This was done in spite of Protocol II's clear applicability to this case. Finally, the

261. *Air France v. Saks*, 470 U.S. 392, 399 (1985); see *supra* note 31 and accompanying text.

262. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2793–98 (2006).

263. See *id.* at 2797–98.

Court's use of inflammatory comparisons between World War II summary executions and the procedural protections offered by the military commissions²⁶⁴ reflected little credit on its analysis while potentially inviting the heavy-handed legislative response that followed.²⁶⁵

264. *Id.* at 2797 n. 66.

265. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified at 28 U.S.C. § 2241 note).