

## A Treaty We Can Live with: The Overlooked Strategic Value of Protocol II

Colonel Michael W. Meier<sup>1</sup>

### Introduction

The Global War on Terror (GWOT) has dominated the consciousness of the United States and the world since the horrific attacks on September 11, 2001. Many aspects of this war have been the subject of vigorous debate, but the status and treatment of detainees has been a lightning rod for controversy since the arrival of the first detainees in Guantanamo Bay, Cuba (GTMO) in early 2002. Legal scholars, pundits, and human rights groups have all struggled with the following questions: What rights, if any, should detainees receive? Are they prisoners of war? How long can the United States hold them? Can the detainees challenge their detention in federal court? These questions have been transformed into numerous legal challenges in U.S. courts, including the recent U.S. Supreme Court decision in *Hamdan v. Rumsfeld*.<sup>2</sup>

Not surprisingly, the *Hamdan* ruling did not resolve the debate, but merely advanced it to the next step. The Supreme Court determined, in part, that Common Article 3 to the Geneva Conventions<sup>3</sup> is applicable to the armed conflict with al Qaeda and the GWOT.<sup>4</sup> However, the Court left unclear the standard of treatment required to satisfy this “humane treatment” obligation. A plurality of the Court did, however, look to Article 75 of Protocol I to the Geneva Conventions to illuminate the meaning of “fundamental guarantees” required by the law of armed conflict.<sup>5</sup> The meaningful guidance with respect to military commission trial procedures did little to clarify treatment standards outside the courtroom and neither has the subsequent response by the Bush Administration and Congress.<sup>6</sup>

In spite of this apparent vacuum of guidance on detainee treatment standards, there is one law of armed conflict treaty that, thus far, all parties appear to have overlooked: Protocol II to the Geneva Conventions.<sup>7</sup> This treaty provides expanded guidance on the implementation of the “humane treatment” mandate found in Common Article 3. Protocol II, unlike its counterpart Protocol I, was forwarded to the Senate for advice and consent by President Reagan.<sup>8</sup> President Clinton also requested action on it.<sup>9</sup> Ironically, the only significant objection the United States raised to this treaty—the restrictive scope provision<sup>10</sup>—actually supports application of Protocol II to the GWOT. The Senate’s failure to act and enable U.S.

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<sup>1</sup> Judge Advocate. U.S. Army. Presently assigned as the Staff Judge Advocate, Fort Carson, Colorado. Prior to this assignment, Colonel Meier served as the Principal Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff where his portfolio included the law of armed conflict and detainee operations. This article was submitted in partial completion of the Master of Strategic Studies requirements of the U.S. Army War College, Carlisle Barracks, Pennsylvania. The author wishes to thank Professor Geoffrey S. Corn, Colonel (COL) (Ret.) Richard Jackson, COL Michael W. Hoadley, and Ms. Ashley S. Deeks for their generous assistance while writing this article.

<sup>2</sup> 126 S. Ct. 2749 (2006).

<sup>3</sup> See Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field art. 3, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter CG III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

<sup>4</sup> *Hamden v. Rumsfeld*, 126 S. Ct. 2749, 2796-97 (2006).

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3, 37-38 [hereinafter Protocol I].

<sup>6</sup> In response to the *Hamdan* decision, Congress enacted the Military Commission Act and the Department of Defense published its Detainee Program directive. Both will be discussed in detail later in this article. See Military Commission Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA]; U.S. DEP’T OF DEFENSE. DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DOD DIR. 2310.01E].

<sup>7</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>8</sup> See PRESIDENT RONALD REAGAN, LETTER OF TRANSMITTAL, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON 10 JUNE 1977, S. TREATY DOC. NO. 2, 100th Cong., at 7 (1987) [hereinafter REAGAN LETTER OF TRANSMITTAL].

<sup>9</sup> See PRESIDENT WILLIAM CLINTON, LETTER OF TRANSMITTAL, TO THE SENATE FOR RATIFICATION OF THE HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (THE CONVENTION) AND, FOR ACCESSION, THE HAGUE PROTOCOL, CONCLUDED ON MAY 14, 1954, AND ENTERED INTO FORCE ON AUGUST 7, 1956 WITH ACCOMPANYING REPORT FROM THE DEPARTMENT OF STATE ON THE CONVENTION AND THE HAGUE PROTOCOL, S. TREATY DOC. NO. 106-1, 106th Cong., at iii-v, xi [hereinafter CLINTON LETTER OF TRANSMITTAL].

<sup>10</sup> Protocol II, *supra* note 7, art. 1.

ratification seems an insufficient justification for omitting analysis of the treaty in relation to the ongoing detainee treatment debate.

This article examines the development of the current U.S. detainee policy and the existing policy toward treatment of detainees since the *Hamdan* decision, including the recently enacted Military Commission Act of 2006 (MCA).<sup>11</sup> The article then analyzes the relevance of Protocol II to this legal and policy landscape, ultimately concluding with three recommendations. First, that the Bush Administration should immediately apply the provisions of Protocol II, even though not legally required because of its narrow applicability,<sup>12</sup> to all detainees including those al Qaeda terrorists and supporters captured during the GWOT. Second, that the Bush Administration should move to obtain Senate advice and consent for Protocol II and ratify the treaty with the understanding it will apply to all non-international armed conflicts covered by Common Article 3. Finally, that the Bush Administration should, while working with U.S. allies, propose that the Protocol be amended to explicitly expand the scope of application to all non-international armed conflicts, regardless of geographic location. Implementing these recommendations would advance U.S. national strategic objectives by providing an international law foundation for detainee treatment that will be supported and understood by our allies. Advocating an expanded application of Protocol II will also go a long way in restoring the U.S. role as a leader with respect to international law in the international community.

### Background

The United States is engaged in a war against al Qaeda, the Taliban, and their affiliates and supporters. Though the events of September 11, 2001, brought the war to the American public, the United States has been engaged in this conflict for over the past decade and, arguably, for the past twenty-five years.<sup>13</sup> The facts surrounding the attacks on September 11, 2001, are well known and undisputed. Nineteen al Qaeda terrorists collaborated on an attack with four planes. Three of the planes crashed into the World Trade Center and the Pentagon. The fourth plane, allegedly headed for Washington, D.C., was brought down in a field in Shanksville, Pennsylvania due to the heroic actions of passengers to retake the plane. The four attacks resulted in the death of over 3000 people of seventy-eight different nationalities.<sup>14</sup>

On 7 October 2001, President George W. Bush announced that “the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”<sup>15</sup> These actions were undertaken to “disrupt the use of Afghanistan as a terrorist base of operations” and “designed to clear the way for sustained, comprehensive and relentless operations to drive them out and bring them to justice.”<sup>16</sup> On 13 November 2001, the President issued his military order regarding the detention, treatment, and trial of individuals detained in the war on terrorism. The order determined that the attack of September 11 had “created a state of armed conflict.”<sup>17</sup> It authorized the detention and prosecution of detainees by military tribunals,<sup>18</sup> and set forth the minimum standards of treatment for detainees.<sup>19</sup>

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<sup>11</sup> MCA, *supra* note 6.

<sup>12</sup> Protocol II will be discussed in further detail later in this article. Essentially, Protocol II applies to only those non-international armed conflicts in which an organized armed group, “under responsible command, exercise . . . control over part of its territory” to carry out sustained military operations. The narrow “scope” of Article effectively excludes from the scope of the treaty many non-international armed conflicts, to include the conflict with al Qaeda. The United States objects to this narrow view and has stated that if it ratifies the treaty, it will apply this Protocol to those conflicts covered by Common Article 3 and will encourage other states to do so as well. *See* REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 11.

<sup>13</sup> *See* MidEast Web.org, *Osama Bin Laden’s Jihad and Text of Fatwahs and Declaration of War*, available at [www.mideastweb.org/osamabinladen1.htm](http://www.mideastweb.org/osamabinladen1.htm) (last visited Oct. 17, 2007). In 1996, Osama bin Laden issued a fatwa declaring war on the United States. Further, in 1998, he reiterated the fatwa calling on Muslims worldwide to kill Americans, whether military or civilian, wherever they could be found. *Id.*

<sup>14</sup> *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 6, 2005, Comm. Against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention, Addendum, United States of America*, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005), available at <http://www.state.gov/documents/organization/62175.pdf> [hereinafter CAT].

<sup>15</sup> President George W. Bush, Address to the Nation (Oct. 7, 2001), available at [www.johnstonsarchive.net/terrorism/bush911d.html](http://www.johnstonsarchive.net/terrorism/bush911d.html).

<sup>16</sup> *Id.*

<sup>17</sup> Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

<sup>18</sup> *Id.* § 1(e).

<sup>19</sup> *Id.* § 3. According to Section 3

Any individual subject to this order shall be—

With the initiation of military operations in Afghanistan, the United States and allied forces immediately began capturing members of al Qaeda and the Taliban. Their capture and detention touched off a heated debate within the U.S. government on whether the Geneva Conventions applied and how detainees should be classified and treated. The Department of Justice (DOJ), acting on behalf of the Attorney General—the official responsible for making definitive legal interpretations on behalf of the executive branch—concluded that the Geneva Conventions, in particular the Geneva Convention Relative to the Treatment of Prisoners of War (GC IV), did not apply to the conflict in Afghanistan. Regarding al Qaeda, the DOJ reached two conclusions. First, the Geneva Convention applies only between state actors, and not between a state and non-state actors like al Qaeda. Accordingly, al Qaeda detainees could not qualify for prisoner of war status under any circumstances. Second, because the conflict with al Qaeda was “one of an international character” and not “internal,” it fell outside the scope of Common Article 3.<sup>20</sup>

The Department of State (DOS) countered that the President should apply the Geneva Conventions to the conflict in Afghanistan. By applying the Geneva Conventions, it would reaffirm United States practice over the past fifty years. Additionally, it would be consistent with existing UN Security Council resolutions.<sup>21</sup> Secretary of State Colin Powell and his legal advisor, Mr. William H. Taft IV, argued that applying the conventions would demonstrate that the U.S. bases its conduct on its legal obligations, not just its policy preferences. The DOS emphasized that any small benefit for the United States resulting from the DOJ interpretation would be outweighed by the cost to the U.S. armed forces in combat, negative international reaction with adverse consequences on U.S. foreign policy, and public support.<sup>22</sup> Nevertheless, on 7 February 2002, President Bush, acting on the advice of his legal counsel, Mr. Alberto Gonzales, accepted the interpretation provided by the DOJ. Accordingly, he determined that none of the provisions of the Geneva Conventions applied to the conflict with al Qaeda in “Afghanistan or elsewhere throughout the world,” since al Qaeda is not a “High Contracting Party” to the conventions.<sup>23</sup> However, President Bush found that the provisions of the Geneva Convention would apply to the Taliban. In determining the conflict was one of international scope, President Bush explicitly rejected the application of Common Article 3 to either the Taliban or members of al Qaeda. Specifically, he determined:

I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to “armed conflict not of an international character.”<sup>24</sup>

Since military operations began in 2001, the United States and its allies have captured or detained thousands of individuals. Because most of these captured personnel did not qualify as enemy prisoners of war (EPWs), the United States characterized them as “unlawful enemy combatants.” This term has frequently been used in the past to apply to actors such as spies and saboteurs who are not entitled to prisoner of war status if detained during conflict.<sup>25</sup> Many of those captured have been released; others remain detained in Afghanistan and Iraq. The “worst of the worst” of those detainees were selected for detention at GTMO.<sup>26</sup> The first group of enemy combatants arrived at GTMO in January 2002.<sup>27</sup> Since 2002,

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- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
  - (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
  - (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
  - (d) allowed the free exercise of religion consistent with the requirements of such detention; and
  - (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

<sup>20</sup> Memorandum, Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002), available at <http://news.findlaw.com/hdocs/docs/torture/powtorturememos.html>.

<sup>21</sup> Memorandum, William H. Taft IV, Legal Advisor, Department of State, to Alberto R. Gonzales, Counsel to the President, subject: Comments on Your Paper on the Geneva Convention (2 Feb. 2002); Memorandum, Colin L. Powell, Secretary of State, to Counsel to the President and Assistant to the President for National Security Affairs, subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan (26 Jan. 2002), available at [www.slate.com/features/whatistorture/legalmemos.html](http://www.slate.com/features/whatistorture/legalmemos.html).

<sup>22</sup> *Id.*

<sup>23</sup> Memorandum, President George W. Bush, to Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), available at [www.slate.com/features/whatistorture/legalmemos.html](http://www.slate.com/features/whatistorture/legalmemos.html).

<sup>24</sup> *Id.* at 2.

<sup>25</sup> See John B. Bellinger, III, State Dep’t Legal Advisor, *Opinio Juris*, *Unlawful Enemy Combatants*, Jan. 17, 2007, <http://www.opiniojuris.org/posts/1169000173.shtml>.

<sup>26</sup> See Bill Dedman, MSNBC.com, *GITMO Interrogations Spark Battle over Tactics*, Oct. 23, 2006, <http://www.msnbc.msn.com/id/15361458>.

<sup>27</sup> CAT, *supra* note 14, at 50.

many detainees have been released or transferred to their home country or another country that has agreed to accept them. Currently, the United States holds approximately 375 detainees at GTMO.<sup>28</sup>

### *Hamdan v. Rumsfeld*<sup>29</sup>

One of the principal reasons GTMO was selected as the location to detain enemy combatants was to ensure that they would not be entitled to U.S. judicial review of their status. In spite of the Bush Administration position that GTMO is outside the jurisdiction of U.S. courts, the stream of litigation has been non-stop. As of December 2006, approximately 350 of the current detainees at GTMO have habeas corpus cases pending in federal court.<sup>30</sup> Four cases have been decided by the Supreme Court.<sup>31</sup> The most recent case was the June 2006 decision in *Hamdan v. Rumsfeld*.<sup>32</sup>

Salim Ahmed Hamdan, a Yemeni national, is in custody at GTMO. He was captured in November 2001 in Afghanistan by militia forces and turned over to the U.S. military. He was sent to GTMO in June 2002 and selected by President Bush for trial by military commission in 2003 on one count of conspiracy “to commit . . . offenses triable by military commission.”<sup>33</sup> Hamdan filed petitions for writs of habeas corpus and mandamus to challenge his detention and the charges against him.

There are many interesting aspects of the *Hamdan* decision, to include the Court’s invalidation of the military commissions.<sup>34</sup> However, the most militarily significant impact of the decision was the Court’s interpretation of Common Article 3 with respect to al Qaeda.

The text of Common Article 3, in part, reads as follows:

In the case of an *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 . . . .<sup>35</sup>

The Court accepted the Administration’s position that Hamdan was captured in connection with the conflict against al Qaeda, but disagreed with the President’s determination that this conflict was beyond the “reach of the Geneva Conventions.”<sup>36</sup> The Court specifically rejected the narrow view taken by the Administration that the conflict was international in scope and, that therefore, Common Article 3 was inapplicable.<sup>37</sup> In rejecting the Bush Administration’s interpretation that the conflict was not one of an international character, the Court held that the term “non-international” was used in contradistinction to a conflict between nations. Common Article 2 to the Geneva Conventions provides that the conventions will apply to all cases of conflict; however, they are characterized by the parties, between “two or more High Contracting Parties,”<sup>38</sup> an international legal synonym for states. In contrast, according to the Court, Common Article 3 was developed to provide baseline humanitarian protections to persons involved in any armed conflict not falling within the scope of Common Article 2. Though the Administration was correct in asserting that the drafters of Common Article 3 were motivated by concerns over purely internal armed conflicts, such as a civil war, the Court noted that the commentaries

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<sup>28</sup> Global Security.org, *Military: Guantanamo Bay Detainees*, June 19, 2007, [http://www.globalsecurity.org/military/facility/guantanamo-bay\\_detainees.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm).

<sup>29</sup> 126 S. Ct. 2749 (2006).

<sup>30</sup> E-mail from Ms. Karen Hecker, Department of Defense Office of General Counsel, to author (Dec. 19, 2006, 12:14PM) (on file with author).

<sup>31</sup> See *Rasul v. Bush*, 542 U.S. 466 (2004) (the Supreme Court found that enemy combatants could challenge their detention); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); and, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (Justice O’Connor wrote that a “state of war is not a blank check for the President . . .”).

<sup>32</sup> 126 S. Ct. 2749 (2006).

<sup>33</sup> *Id.* at 2759.

<sup>34</sup> Geoffrey S. Corn, Hamdan, *Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1. As explained by Professor Corn, the decision focuses on three primary areas: “scope of executive power, the ‘way ahead’ for dealing with al Qaeda detainees, and the impact of the decision on the legal regulation of the conflict with al Qaeda.” *Id.* at 1.

<sup>35</sup> GCs I-IV, *supra* note 3, art. 3 (emphasis added).

<sup>36</sup> *Hamdan*, 126 S. Ct. at 2794-95.

<sup>37</sup> Corn, *supra* note 34, at 2.

<sup>38</sup> *Hamdan*, 126 S. Ct. at 2796; GC I, *supra* note 3, art. 2; GC II, *supra* note 3, art. 2; GC III, *supra* note 3, art 2; GC IV, *supra* note 3, art. 2.

explaining the conventions also emphasized that the “scope of the Article must be as wide as possible.”<sup>39</sup> Having determined that Common Article 3 was applicable to the conflict with al Qaeda, the Court ruled that Common Article 3 required Hamdan to be tried by “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>40</sup>

A plurality of the Court then analyzed the meaning of a “regularly constituted court,” relying on the text of Article 75 of Protocol I.<sup>41</sup> This article is best viewed as an extension of the humane treatment standards of Common Article 3. Its primary purpose was to ensure that the humane treatment standard set forth in Common Article 3 was applicable to international armed conflicts (a response to the anomaly that Common Article 3 was not made explicitly applicable to such conflicts). In addition, Article 75 expands and provides more detailed guidance than the general provisions of Common Article 3.<sup>42</sup>

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<sup>39</sup> *Hamdan*, 126 S. Ct. at 2796.

<sup>40</sup> *Id.* at 2797.

<sup>41</sup> *Corn*, *supra* note 34, at 2.

<sup>42</sup> Article 75 provides the following fundamental guarantees:

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
  - (a) Violence to the life, health, or physical or mental well-being of persons, in particular:
    - (i) Murder;
    - (ii) Torture of all kinds, whether physical or mental;
    - (iii) Corporal punishment ; and
    - (iv) Mutilation;
  - (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
  - (c) The taking of hostages;
  - (d) Collective punishments; and
  - (e) Threats to commit any of the foregoing acts.
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
  - (a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
  - (b) No one shall be convicted of an offence except on the basis of individual penal responsibility;
  - (c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
  - (d) Anyone charged with an offence is presumed innocent until proved guilty according to law;

This relationship between Common Article 3 and Article 75 certainly explains why the Court would look to Article 75 to illuminate the meaning of Common Article 3. However, the reliance by the plurality on Article 75 is problematic for two reasons. First, the provisions of Protocol I specifically apply to international armed conflicts, the type of conflict the Court determined was contradistinct from a Common Article 3 conflict.<sup>43</sup> Second, Protocol I has been rejected by the United States for well defined policy reasons. It was therefore unsurprising that the plurality's reliance on Article 75 triggered substantial criticism as an unjustified act of judicial interference with Executive decision making.<sup>44</sup>

The decision in *Hamdan* posed two problems for the Bush Administration. First, the Department of Defense (DOD) needed to evaluate the existing detainee policies to ensure that they complied with Common Article 3. Second, President Bush would need to work with Congress to correct the deficiencies in the military commission process.

### **Administration Actions after *Hamdan***

#### DOD Directive 2310.01E, *The Department of Defense Detainee Program*

The DOD took prompt action to ensure its policies complied with the determination that Common Article 3 applied to the conflict with al Qaeda. In July 2006, Deputy Secretary of Defense Gordon England issued a memorandum to ensure that

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- (e) Anyone charged with an offence shall have the right to be tried in his presence;
  - (f) No one shall be compelled to testify against himself or to confess guilt;
  - (g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
  - (i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
  - (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.
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
- (a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
  - (b) Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Protocol I, *supra* note 5, art. 75.

<sup>43</sup> See *Hamdan*, 126 S. Ct. at 2795; Corn, *supra* note 34, at 6.

<sup>44</sup> Rich Lowery, *Judicial Interference: The Supreme Court Goes to War*, NAT'L REV. ONLINE, June 30, 2006, available at <http://article.nationalreview.com/print/?q=ZjU3OTUyY2JhYWQ2MDhjYTEyZTBjZmY4YjgxZTM2OTE>; see Corn, *supra* note 34, at 6; see also *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

all DOD personnel would adhere to those standards of Common Article 3. He also called for a prompt review of all “relevant directives, regulations, policies, practices and procedures” to ensure that they complied with Common Article 3.<sup>45</sup>

In September 2006, the DOD published DOD Directive 2310.01E, *The Department of Defense Detainee Program*, its long-awaited directive on detainee treatment.<sup>46</sup> This directive provides the overarching DOD policy with respect to detainee operations. The revision sets out policy guidance not only for detention operations in traditional conflicts, but now includes treatment standards for individuals detained in the GWOT by incorporating the numerous lessons learned and taking into account the recommendations in the twelve major investigations conducted by the DOD of its detention operations.<sup>47</sup>

This directive specifically incorporates references to Common Article 3 and provides that all detainees will be treated humanely and in accordance with U.S. law, policy and the laws of war. Paragraph 4.2 of the directive specifically provides:

All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee’s legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949 [ . . . ], as construed and applied by U.S. law, and those found in Enclosure 4, in the treatment of detainees, until their final release, transfer out of DOD control, or repatriation. Note that certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed in Common Article 3 . . . .<sup>48</sup>

In addition to the treatment standards of Common Article 3, enclosure 4 of the directive contains many other requirements, some which exceed the standards articulated in Common Article 3, that the DOD considered essential to ensure the humane care and treatment of detainees.<sup>49</sup> For example, detainees will also be entitled to “adequate food, drinking water, shelter, clothing, and medical treatment.”<sup>50</sup> They will also be free to “exercise their religion, consistent with the requirements of detention.”<sup>51</sup> Finally, paragraph E4.1.1.3 provides:

All detainees will be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive.<sup>52</sup>

The release of this directive was an important step in ensuring that DOD detention policies complied with Common Article 3. It provided a baseline standard of treatment for all detainees. Its release, especially in combination with the new manual on interrogation,<sup>53</sup> was widely perceived as a repudiation of the harsh interrogation tactics and treatment standards approved subsequent to the attacks of September 11.<sup>54</sup>

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<sup>45</sup> Memorandum, Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (July 7, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf>.

<sup>46</sup> DOD DIR. 2310.01E, *supra* note 6.

<sup>47</sup> Charles “Cully” Stimson et al., *Department of Defense Directive on Detainee Operations, the Release of the Army Field Manual for Human Intelligence Collection and an Update on Military Commissions*, Foreign Press Center Briefing, Sept. 7, 2006, available at <http://fpc.state.gov/fpc/71958.htm>.

<sup>48</sup> DOD DIR. 2310.01E, *supra* note 6, para 4.2, at 2.

<sup>49</sup> Stimson, et al., *supra* note 47, encl. 4, at 2.

<sup>50</sup> DOD DIR. 2310.01E, *supra* note 6, para. E4.1.1.3, at 11.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* para. E4.1.1.3.

<sup>53</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) [hereinafter FM 2-22.3]. The new field manual replaced FM 34-52. It incorporates many of the lessons learned from the GWOT and is broader than FM 34-52. It incorporates a single standard of treatment for detainees regardless of their status, prohibits torture and cruel, inhuman, or degrading treatment. It authorizes eighteen interrogation techniques which, consistent with the Detainee Treatment Act of 2005, are the only interrogation techniques authorized for any detainee, whether lawful or unlawful combatants. See Stimson et al., *supra* note 47, at 4.

<sup>54</sup> Josh White, *New Rules of Interrogation Forbid Use of Harsh Tactics*, WASH. POST, Sept. 7, 2006, at A1.

### *Military Commission Act of 2006*

With the Supreme Court's invalidation of the existing military commissions, President Bush moved quickly to correct the deficiencies identified by the Court. In *Hamdan*, the Court did not specifically decide whether the President had the authority to convene military commissions without Congressional approval. It found instead that even if he did have such powers, the military commissions did not comply with minimum legal requirements, either under the Uniform Code of Military Justice or the Geneva Conventions.<sup>55</sup> In so holding, the Court essentially invited the President to work with Congress to provide the legislative framework and structure necessary for bringing the military commissions into compliance with domestic and international law.<sup>56</sup>

The response to this invitation was swift and decisive. On 17 October 2006, the President signed into law the Military Commission Act of 2006 (MCA),<sup>57</sup> at which time he stated:

[T]he legality of the system I established was challenged in court, and the Supreme Court ruled that military commissions needed to be explicitly authorized by the United States Congress.

And so I asked Congress for that authority, and they have provided it. With the Military Commission Act, the legislative and executive branches have agreed upon a system that meets our national security needs. These military commissions will provide a fair trial, in which the accused are presumed innocent, have access to an attorney, and can hear all the evidence against them.<sup>58</sup>

This law authorized the President to establish military commissions, and empowers these commissions to try "alien unlawful enemy combatants" who engaged in hostilities against the United States for violations of the law of war and other offenses.<sup>59</sup> The MCA also addressed some of the other concerns raised by the *Hamdan* decision: it entitles a defendant to access to exculpatory evidence; prohibits government use of evidence not provided to the defense (although it does not require disclosure of evidence not used at trial that is not exculpatory); provides a defendant a right to counsel; and prohibits the use of evidence that may have been obtained by torture.<sup>60</sup>

In addition to establishing the procedures for trial by military commissions, the MCA also addressed the treatment of detainees under Common Article 3. Since the Administration viewed the provisions of Common Article 3 as being vague, the MCA purports to specify treatment standards required to comply with this treaty provision. First, it set out nine violations of Common Article 3 that trigger criminal liability under U.S. law, including torture, inhumane treatment, rape, medical experimentation, taking of hostages, and kidnapping.<sup>61</sup> For treatment not falling into one of these categories, the MCA created a "catch-all" prohibition against any conduct that amounts to "cruel, inhuman, or degrading treatment or punishment" as the United States has defined in its reservations and understanding of the Convention Against Torture.<sup>62</sup>

In spite of this effort to provide necessary meaning to Common Article 3, the enactment of the MCA did not end the international debate over the treatment of detainees. As Mr. John Bellinger, Legal Adviser to the Secretary of State, acknowledged in a briefing:

But, I do think that while I don't see a greater support for U.S. policies, that there is a better understanding of the difficult legal framework and the difficulties in treating international terrorists and that we're beginning to see more and more statements coming out of European officials acknowledging that without a

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<sup>55</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2790-98 (2006).

<sup>56</sup> John B. Bellinger, III, State Dep't Legal Advisor, Foreign Press Center Briefing, The Military Commission Act of 2006, Oct. 19, 2006, available at <http://fpc.state.gov/fpc/74786.htm>.

<sup>57</sup> MCA, *supra* note 6.

<sup>58</sup> Office of the President of the United States, *President Bush Signs Military Commissions Act of 2006*, Oct. 17, 2006, available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

<sup>59</sup> See MCA, *supra* note 6, § 948b, 120 Stat. at 2602.

<sup>60</sup> See Bellinger, *supra* note 56, at 2; MCA, *supra* note 6, §§ 948r, 949a, 949a(c), 949j, 120 Stat. at 2606-09, 2615.

<sup>61</sup> See Bellinger, *supra* note 56, at 1-2; MCA, *supra* note 6, § 6, 120 Stat. at 2633-34.

<sup>62</sup> See Bellinger, *supra* note 56, at 2; MCA, *supra* note 6, § 6(c), 120 Stat. at 2635.

doubt the legal framework applicable to dealing with international terrorists who are outside of our borders, not people who are inside our own countries, but who attack our countries from outside our borders is quite a difficult one and a difficult public policy problem for all of us.<sup>63</sup>

Nor has the enactment of the MCA silenced domestic criticism of detainee treatment policies. After the November 2006 elections, Congress has attempted to revisit the Act in order to address some of the more contentious provisions, such as the provision stripping detainees of the right to habeas corpus review.<sup>64</sup>

This continued criticism of U.S. detainee treatment policies is not without merit and reflects the compromise nature of much of the MCA. The basic dilemma confronted by the Bush Administration in the early days following the attacks of September 11 has not been eliminated. There remains a need to develop a policy framework for detainee treatment that satisfies the legitimate security interests of the United States while protecting the basic fundamental right of humane treatment for individual detainees. Without such a framework, the United States will risk continued diminishing domestic and international credibility for the GWOT. Although the MCA was a step in the right direction, a broader approach remains necessary, in part because Common Article 3 provides a relatively limited framework for detainee treatment. Ironically, a treaty that has been pending ratification by the United States for nearly two decades may provide that framework. That treaty is Protocol II.<sup>65</sup>

### Protocol II to the Geneva Conventions

Protocol II was drafted at the same time as Protocol I. It was negotiated over a period of four years and finally signed on 10 June 1977.<sup>66</sup> The purpose of the Protocol was to expand the basic humanitarian provisions of Common Article 3 applicable to non-international armed conflicts by providing more comprehensive and specific guarantees for detainees and others.<sup>67</sup> The International Committee of the Red Cross (ICRC) notes in its commentaries that the entire purpose of the treaty was to “reinforce and increase the protections granted to victims of non-international armed conflict—the ‘raison d’etre’ of Protocol II—it develops and supplements the brief rules contained in Common Article 3 . . . .”<sup>68</sup>

The humane treatment standards set forth in Articles 4, 5, and 6 provide the primary protections for detainees. Article 4 sets out fundamental guarantees for everyone affected by armed conflict, whether combatant or civilian.<sup>69</sup> It ensures humane treatment for detainees and others and protection from violence, such as murder, torture, mutilation, or corporal punishment; the taking of hostages; acts of terrorism; slavery; and outrages upon personal dignity, in particular humiliating and degrading treatment, rape, prostitution, or indecent assault.<sup>70</sup> Article 5 deals specifically with persons who are detained and provides that detainees shall receive appropriate medical care, food and drinking water, and free exercise of religion.<sup>71</sup> Further, women shall be held separately from men, unless they are accommodated together as a family.<sup>72</sup> Detainees must be allowed to receive and send mail, except when limited as necessary.<sup>73</sup> Finally, detention facilities must be located away from the battlefield.<sup>74</sup> Article 6 provides fundamental due process and penal protections for persons who may be prosecuted and

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<sup>63</sup> See Bellinger, *supra* note 56, at 4.

<sup>64</sup> See The Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong. (2007); see also *Treatment of Detainees on Democrats’ Agenda*, WASH. TIMES, Dec. 29, 2006, at A6.

<sup>65</sup> Protocol II, *supra* note 7.

<sup>66</sup> *Id.* Protocol II was negotiated by a diplomatic conference convened by the Swiss Government in Geneva, which met in four annual sessions from 1974–77. See REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 7.

<sup>67</sup> See REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 7.

<sup>68</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1350 (1987) [hereinafter PROTOCOL COMMENTARY]; see Corn, *supra* note 34, at 8.

<sup>69</sup> Protocol II, *supra* note 7, art. 4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* art. 5.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

punished for offenses related to the armed conflict.<sup>75</sup> According to this article, an accused must be informed of the charges against him; presumed innocent; be tried in his presence; not be compelled to testify against himself; and be advised of the judicial or other remedies that are available to him.<sup>76</sup>

Even though the Treaty was concluded in 1977, it has not been ratified by the United States. However, unlike Protocol I, this is not the result of a conclusion that the treaty is fatally flawed. Nonetheless, while this treaty has been submitted to the Senate for advice and consent, one aspect was considered particularly troubling: its limited scope of application. According to Article 1(1) of Protocol II,

This Protocol, which develops and supplements Article 3 Common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed group which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>77</sup>

By requiring a State party to apply the Protocol to only those non-international armed conflicts in which an organized armed group, “under responsible command, exercise[s] . . . control over part of [that State’s] territory” to carry out sustained military operations, Article 1 excluded from the scope of the treaty many non-international armed conflicts. It was this narrow application of the treaty that triggered the primary U.S. concern.<sup>78</sup> Both President Reagan, in 1986, and President Clinton, in 1999, recommended ratification of the treaty subject to the understanding that the United States would apply the Protocol to all conflicts covered by Common Article 3.<sup>79</sup> This would appear to include any non-international armed conflict involving armed groups that do not control territory, but conduct sporadic operations over a wide area.

Interestingly, it is the narrow scope to which the United States objected that would ostensibly exclude the conflict with al Qaeda from application of the Protocol.<sup>80</sup> Accordingly, and particularly in light of the Supreme Court conclusion that conflict with al Qaeda falls under the scope of Common Article 3, the application of Protocol II to the GWOT seems logically derived from the longstanding U.S. view of that treaty.

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<sup>75</sup> *Id.* art. 6.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* art. 1.

<sup>78</sup> Memorandum, Major General Wilton B. Persons, Jr., The Judge Advocate General of the Army, to The Secretary of the Army, subject: Adoption of Protocols Updating Law of War—Information Memorandum (1 July 1977). Tab B of this memorandum includes the statement by Ambassador George H. Aldrich, United States Representative to the Fourth Session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Ambassador Aldrich expressed the United States’ disappointment at the high threshold for applicability of Protocol II as follows:

[M]y Government sought a Protocol II with a low threshold of violence to bring it into effect. We are disappointed that the Conference adopted a Protocol II with a relatively high threshold. We fear that, while the Protocol should not in any significant way infringe upon the sovereignty of any state, and therefore should be widely accepted, the high threshold of violence required by Article 1 will serve as a convenient excuse to refuse to admit its applicability except in very limited situations. Accordingly, while welcoming Protocol II, we are forced to question the extent to which it advances the cause of humanitarianism in non-international armed conflicts beyond that already embodied in Article 3 common to the Geneva Conventions of 1949.

Nevertheless, we can hope that Protocol II will prove to be a significant force for greater humanity in civil wars. Only time will tell. My Government, in any event, will support this protocol and hopes it will be broadly supported by the nations of the world.

*Id.* Tab B.

<sup>79</sup> See REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 2-3, 8, 36-37, 48; CLINTON LETTER OF TRANSMITTAL, *supra* note 9, at iii-v, xi.

<sup>80</sup> See Protocol II, *supra* note 7, art. 1(1); Corn, *supra* note 34, at 7.

## Recommendations for Retooling the Current Detainee Strategy

Protocol II provides the logical legal framework for dealing with individuals detained in the non-international armed conflict with al Qaeda, and will provide a framework that protects U.S. national security interests while complementing the strategic goal of preserving U.S. credibility. Therefore, the Bush Administration should take the following three steps: (1) Immediately announce that the United States will treat all detainees, including al Qaeda terrorists and its supporters, in accordance with Protocol II; (2) Ensure ratification of Protocol II to the Geneva Conventions; and (3) Propose a modification of the scope provision of Article 1(1) to ensure that all other nations can not avoid application of this treaty.

### *Immediately Announce that the United States Will Treat All Detainees, Including al Qaeda Terrorists and Supporters, in Accordance with Protocol II*

Protocol II, like Article 75 of Protocol I, includes a “fundamental guarantees” provision that addresses humane treatment. However, unlike Article 75, Protocol II was developed to specifically supplement Common Article 3; and includes a specific provision, Article 6, establishing the standards for the prosecution and punishment of offenses related to non-international armed conflict.<sup>81</sup>

Article 6 does not prohibit the use of military commissions. It provides that a detainee must be tried by “a court offering the essential guarantees of independence and impartiality.”<sup>82</sup> In fact, according to the commentary, the drafters contemplated the use of military commissions.

Just like Common Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsible organized body must, and can, respect . . . .<sup>83</sup>

Use of such tribunals is permissible contingent upon respect for basic procedural safeguards. Article 6 sets out these safeguards, all of which are implemented by the MCA.<sup>84</sup> For example, in both, a defendant is presumed innocent; has the right to be present throughout the trial and to see all the evidence admitted in trial; the right to cross-examine witnesses; access to counsel, to include the right to represent himself; and, a defendant may not be compelled to incriminate himself or testify.<sup>85</sup> However, by invoking the authority of Protocol II, the United States will substantially bolster the international credibility of the MCA.

Adherence to Protocol II also would add international legal credibility to the humane treatment standards already implemented by the DOD. Because DOD Directive 2310.01E, enclosure 4, sets out standards for detainee treatment that either meet or exceed the standards set forth in Protocol II, applying this treaty to the GWOT will result in virtually no new requirements.<sup>86</sup> For example, pursuant to this directive, detainees at GTMO receive medical and dental care comparable to what U.S. Soldiers receive.<sup>87</sup> They are also provided three meals a day that meet cultural dietary requirements, adequate shelter, and outside recreation. Plans are underway for expanded communal living and exercise opportunities, such as soccer, volleyball, and ping-pong.<sup>88</sup> These are the same requirements of Article 5(1) of Protocol II.<sup>89</sup>

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<sup>81</sup> See Corn, *supra* note 34, at 9.

<sup>82</sup> Protocol II, *supra* note 7, art. 6(2).

<sup>83</sup> PROTOCOL COMMENTARY, *supra* note 68, at 1396-97; see Corn, *supra* note 34, at 11.

<sup>84</sup> MCA, *supra* note 6, §§ 948b(f), 948j, 948k, 948l, 948q, 948r.

<sup>85</sup> See PROTOCOL COMMENTARY, *supra* note 68, at 1398-1400; MCA, *supra* note 6, §§ 948r, 949a, 949a(c), 949j, 120 Stat. at 2606-09, 2615.

<sup>86</sup> DOD DIR. 2310.01E, *supra* note 6, para. E.4.1.1.1.

<sup>87</sup> See Dep’t of State Cable, *Detainee Talking Points* (Oct. 24, 2006) (on file with author) [hereinafter Dep’t of State Cable].

<sup>88</sup> See *id.* at 8.

<sup>89</sup> Protocol II, *supra* note 7, art. 5(1).

Another analogous provision ensures detainees the right to freely exercise their religion, consistent with the requirements of detention.<sup>90</sup> At GTMO, detainees each receive a copy of the Koran in one of five languages, as well as prayer beads and a rug.<sup>91</sup> Once the call to prayer is played over loud speakers, detainees are provided twenty minutes of time to worship and an arrow showing the direction to Mecca is stenciled on the floors.<sup>92</sup>

The similarity between the obligations of Protocol II and current DOD policies indicate the wisdom of invoking this treaty in a formal manner as the legal framework for U.S. detainee policies. Doing so will have the double effect of validating existing policy and enhancing the international credibility of future actions.

### *Ensure Ratification of Protocol II to the Geneva Conventions*

The 2006 U.S. National Security Strategy is founded upon two pillars: (1) promoting freedom, justice, and human dignity; and (2) confronting the challenges of our time by leading a growing community of democracies.<sup>93</sup> As part of this strategy, the President recognizes that the United States must strengthen alliances to defeat global terrorism.<sup>94</sup> If the United States is to be successful, it must demonstrate those values to the world at large. Ratifying Protocol II will substantially contribute to this objective.

The United States has historically been in the forefront of advances in international law. As a superpower, the United States is often held to a higher standard by many in the world when it comes to the laws of war or human rights. Protocol II was seen as a humanitarian advancement with respect to non-international armed conflicts. As stated by President Reagan, ratification would “assist us in continuing to exercise leadership in the international community.”<sup>95</sup> It was this consideration that motivated President Reagan to seek Senate authorization to bind the United States to this treaty, even in light of his objection regarding the unjustifiably narrow scope of applicability.

It is unlikely that the Reagan Administration contemplated the type of armed conflict characterized by the conflict with al Qaeda when considering the benefits of Protocol II. However, it remains significant that both President Reagan and President Clinton advocated a broad application of the principles of humane treatment set out in the treaty. Both of these administrations clearly believed Protocol II must apply coextensively with Common Article 3.<sup>96</sup> By concluding that Common Article 3 is not territorially limited, the Supreme Court has effectively endorsed this logic and provided an additional rationale for supplementing Common Article 3 with the provisions of Protocol II.<sup>97</sup>

The National Security Strategy recognizes that terrorism, especially that of militant Islamic radicalism, is the “great ideological conflict” of the early 21st Century.<sup>98</sup> While the United States continues to encourage “our partners to expand liberty, and to respect the rule of law and the dignity of the individual,” the United States recognizes it “must lead by deed as well as by example.”<sup>99</sup> By ratifying Protocol II with the understanding that it will be applied to al Qaeda detainees (as well as other similar non-state actors in future conflicts), the United States will capitalize on accepted international law to bolster its policies, and in so doing demonstrate its commitment to the rule of law.

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<sup>90</sup> See DOD DIR. 2310.01E, *supra* note 6, para. E4.1.1.2.

<sup>91</sup> See Dep’t of State Cable, *supra* note 87, at 8. Copies of the *Koran* are provided in Arabic, Dari, Pashtu, Russian, and Farsi.

<sup>92</sup> *Id.*

<sup>93</sup> OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA ii (2006) [hereinafter NATIONAL SECURITY STRATEGY].

<sup>94</sup> *Id.*

<sup>95</sup> See REAGAN LETTER OF TRANSMITTAL, *supra* note 8, at 2.

<sup>96</sup> *Id.* at 2, 7; see CLINTON LETTER OF TRANSMITTAL, *supra* note 9, at iv, xi.

<sup>97</sup> *Corn*, *supra* note 34, at 9.

<sup>98</sup> NATIONAL SECURITY STRATEGY, *supra* note 93, at 36.

<sup>99</sup> *Id.* at 36, 49.

*Propose a Modification of the Scope Provision of Article 1(1) to Ensure That All Other Nations Cannot Avoid Application of This Treaty*

Even if the United States does ratify Protocol II with the understanding that it will apply the provisions of the treaty to al Qaeda, other nations are not legally bound to apply these principles. The United States should therefore take the lead in amending the remaining textual impediment to allow a more logical and comprehensive application of the treaty to all non-international armed conflicts.<sup>100</sup>

Considering a revision to the Geneva Conventions and their Protocols is not an outrageous idea. During his confirmation hearing for the office of Attorney General, Alberto Gonzales acknowledged that it was appropriate to “revisit whether or not Geneva should be revisited.”<sup>101</sup> Though the critics may argue that the Bush Administration would seek to weaken these treaties, making Protocol II coextensive with Common Article 3 could only enhance humanitarian protections. While it is unclear whether the current political realities would make such a revision possible,<sup>102</sup> one thing seems certain: the United States would be better positioned to pursue such a change only after it ratifies Protocol II and sets the example for other nations by applying Protocol II to the GWOT.

### Conclusion

The treatment of detainees is a critical component in the war on terrorism. By all accounts, this issue has had a significant negative impact on international perceptions of the United States. Despite domestic opposition and pleas from allies, the Bush Administration has consistently resisted recommendations to apply even the baseline protections of the Geneva Conventions to al Qaeda detainees. The recent Supreme Court decision in *Hamdan* provides the Bush Administration a perfect opportunity to change this approach. The decision affirmed the right of the United States to detain enemy combatants in the war on terror and upheld the ability, when properly constituted, to prosecute those detainees for violations of the law of war. It also, however, made avoiding the international legal mandate of humane treatment for these detainees legally impossible.

The Detainee Treatment Act of 2005, the MCA of 2006, and DOD Directive 2310.01E are all important components in establishing detainee treatment standards. However, while these authorities collectively provide most of the treatment standards set forth in Protocol II, they do not have the same international standing. Further, they do not overcome the perception, domestically and internationally, that the United States is failing to comply with the laws of war. The Bush Administration should announce that it will immediately apply the humane treatment standards set forth in Protocol II to all detainees. Doing so would require few modifications to existing policy, but would contribute immensely to the credibility of that policy. This should be followed by an effort to obtain immediate action by the Senate to enable ratification of the treaty. With the Democrats assuming control of Congress and already stating they are going to revisit some of the aspects of the MCA, obtaining advice and consent seems particularly feasible.

Ratification of Protocol II will contribute to the success of the U.S. National Security Strategy. The defeat of terrorism necessitates close cooperation among all democratic nations. The detainee policy for the past five years has impeded this

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<sup>100</sup> In amending Article 1, the United States should propose the following language:

Article 1

*Material field of application*

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are covered by Article 3 common to the Geneva Conventions of 12 August 1949.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

This language would eliminate the restrictions of requiring the conflict to occur within the territory of a High Contracting Party, responsible command, and exercising control over part of its territory and carrying out sustained and concerted military operations. It does not, however, address the United States' concern over “wars of national liberation” from Protocol I. Unfortunately, attempting to achieve international agreement that these types of conflicts are non-international conflicts would almost prove impossible, just as it did in 1977.

<sup>101</sup> Peter Wallsten, *Geneva Convention Overhaul Considered*, L.A. TIMES, Jan. 7, 2005, available at <http://www.commondreams.org/headlines05/0107-08.htm>.

<sup>102</sup> *Id.*

cooperation. Many countries in Europe and around the world have an unfavorable impression of the United States' handling of detainees. The Bush Administration has been expending tremendous effort in trying to explain how its policies comply with the law of war. By adopting the recommendations of this article, the United States can bolster its policies using a standard most countries have accepted and all will understand. As stated in the National Security Strategy, "America must lead by deed as well as example."<sup>103</sup> Ratifying Protocol II will allow the United States to once again reassert its rightful and expected place as a leader in international law.

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<sup>103</sup> NATIONAL SECURITY STRATEGY, *supra* note 93, at 54.