
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE MOTION TO
) DISMISS FOR VIOLATION OF
) ART. 103 OF THE THIRD
) GENEVA CONVENTION OF
) 1949
)
) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. The Military Commission find that the protections granted under Article 103 of the Third Geneva Convention apply to Mr. Hamdan and that the Government's delay of more than 8 months in charging and bring Mr. Hamdan to trial after placing him in conditions amounting to pre-trial confinement violates Article 103's requirement that under no circumstance shall pre-trial confinement exceed 3 months and dismiss the charge against Mr. Hamdan.

3. Overview. The government held Mr. Hamdan in pre-trial segregation for 8 months without informing him of the charge against him. Article 103 of the Third Geneva Convention provides that "judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible." In the event that a prisoner of war is placed in confinement that, Article 103 further provides that "in no circumstances shall this confinement exceed three months". Mr. Hamdan is entitled to protections of Article 103 as he is presumed to be a prisoner of war under Article 5 of the Third Geneva Convention and U.S. Army Regulation 190-8, until such time as his status has been determined by competent tribunal. To date, Mr. Hamdan has not received such a tribunal and must accordingly be presumed to be a POW for the purposes of protection under Article 103.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President determined were subject to the order.

b. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States government ever since.

- c. On or about July 2002, Mr. Hamdan was transferred from Afghanistan to Guantanamo Bay where he was initially held in Camp Delta.
- d. Camp Delta consists of cell block units holding XXXX detainees in individual cells, is open to the air, and permits conversations between detainees.
- e. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.
- f. On or about 14 December 2003, Mr. Hamdan was transferred on order of Commander, JTF Guantanamo to Camp Echo into pre-trial segregation, pursuant to preparation for trial by Military Commission.
- g. On 15 December 2003, The Chief Prosecutor for Military Commissions requested that the Chief Defense Counsel detail counsel to Mr. Hamdan for the limited purpose of negotiating a pre-trial agreement.
- h. On 18 December 2003, the Chief Defense Counsel detailed LCDR Charles D. Swift, JAGC, USN, as Mr. Hamdan's military Defense Counsel.
- i. On 31 January 2004, Detailed Defense Counsel met with Mr. Hamdan and explained his rights in conjunction with Military Commission and the governments stipulation that detailed defense counsel's access was conditioned on Mr. Hamdan's willingness to enter into pre-trial negotiations.
- j. On 12 February 2004, Detailed Defense Counsel on behalf of Mr. Hamdan submitted a demand for charges and for a speedy trial.
- k. On 23 February 2004, the Legal Advisor to the Appointing Authority denied the applicability of Article 10 of the UCMJ, without further explanation or charges.
- l. Following Defense demand for speedy trial, CDR XXXX, JAGC, USN, Detailed Prosecutor in the subject case, orally stated to Detailed Defense Counsel that Mr. Hamdan's case was going to be "moved to the back of the stack."
- m. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.
- n. The first session of Mr. Hamdan's Military Commission was held on 24 August 2004.

5. Law.

- a. The Geneva Conventions Bar This Trial

1. Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“GPW”), provides in pertinent part that

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances* shall this confinement exceed three months. *Id.* art. 103, 6 U.S.T. at 3394 (emphasis added).

2. This speedy trial provision is mandatory: “in no circumstances” may the detaining power decide midstream whether to charge an enemy combatant with a crime—such decisions must be made within three months of the prisoner’s initial confinement or the trial is explicitly barred by the Geneva Conventions. In this case, Mr. Hamdan has been held in pre-commission solitary confinement for over nine months prior to being brought to trial. This conduct violates Article 103 of the Geneva Convention (GPW).

b. Article 103 Applies to Mr. Hamdan

1. Regardless of whether Mr. Hamdan is ultimately determined to be a prisoner of war or not, he is currently entitled to the protections of Article 103. The 1949 Geneva Convention mandates, in Article 5, that, “[s]hould 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 [entitled to POW protections], such persons shall enjoy the protection of the present convention *until such time* as their status has been determined by a competent tribunal.” GPW art. 5, 6 U.S.T. at 3324 (emphasis added). The United States signed the GPW in 1949 and the United States Senate ratified it in 1955.

2. Moreover, Articles 5 and 103 *have been implemented* in the domestic law of the United States through binding regulations promulgated by every department of the U.S. Military:

All persons taken into custody by U.S. forces will be provided with the protections of the GPW *until* some other legal status is determined by competent legal authority. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), available at http://www.apd.army.mil/pdffiles/r190_8.pdf [hereinafter AR 190-8] (emphasis added).¹

¹ This regulation was jointly promulgated by the Headquarters of the departments of the Army, Navy, Air Force, and Marine Corps in Washington, D.C. on October 1, 1997. The regulation itself explicitly states that its purpose is to implement international law as set forth in the GPW: “This regulation implements international law, both customary and codified, relating to EPW [enemy prisoners of war], RP [retained personnel], CI [civilian internees], and ODs [other detainees], which includes those persons held during military operations other than war.

In addition to this general statement implementing the GPW, both Article 5 and Article 103 is the subject of specific, detailed sections of AR 190-8, which closely track the language of the GPW. For example, AR 190-8 § 1-6 provides:

1-6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

3. Thus, the mere assertion by the detainee of protected status is sufficient to require military authorities to afford the detainee the protections of the GPW pending a determination by a competent tribunal. The provisions that immediately follow, § 1-6 (c)-(g), describe in detail the procedures that should be followed in implementing GPW Article 5. In his concurring opinion in *Hamdi v. Rumsfeld*, Justice Souter, joined by Justice Ginsburg, correctly noted that these regulations were "***adopted to implement the Geneva Convention.***" 124 S.Ct. 2633, 2658 (June 28, 2004) (emphasis added).

4. Likewise, AR 190-8 § 3-7(h) tracks almost exactly the language of Article 103:

h. Confinement. A pretrial investigation of an offense alleged to have been committed by a detainee will be conducted as soon as circumstances permit so that trial, if warranted, will take place as soon as possible. A detainee will not be confined while awaiting trial unless a member of U.S. Armed Forces would be so confined if accused of a similar offense, or unless national security would be served. ***In no case will this confinement exceed 3 months.***

i. Retention of Geneva Benefits. Persons prosecuted for an act committed before capture will retain, even if convicted, the protections of the Geneva Convention. Id. (emphasis added).

5. The phrase "Retention of Geneva Benefits" in § 3-7(i) is also highly significant, indicating that detainees are afforded the protections of the GPW at the

The principal treaties relevant to this regulation are:...(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)." AR 190-8 § 1-1(b).

beginning of their detention, and do not lose them subsequently.² These regulations and their predecessors have long been included in U.S. Military training manuals, which provide further evidence of implementation.³

6. The legislative history of the GPW also establishes that the provisions at issue here have been implemented. In its Report recommending that the Senate give its advice and consent to ratification of the 1949 Geneva Conventions, the Senate Committee on Foreign Relations stated: "[I]t appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." S. Exec. Rep. No. 84-9 (1955) [hereinafter "Ratifying Report"] at 30. The Committee identified only four areas where additional implementing legislation would be required, none of which are relevant here.⁴ With respect to the GPW Articles relating to "grave breaches," the Committee noted:

The committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedure for those violations of the conventions which have been considered in this portion of the report. Ratifying Report at 27.

7. Furthermore, "[t]here can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it." *Id.* As noted above, the Ratifying Report expressly stated that this

² AR 190-8 § 3-7(i) tracks the language of GPW Article 85.

³ See, e.g., Dep't of the Army, Field Manual no. 27-10, *The Law of Land Warfare*, ch. 3 § I ¶ 71 (1956) ([Article 5] applies to any person not appearing to be entitled to prisoner-of-war status...who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists") (unchanged by 1976 revision), available at www.adtdl.army.mil/cgi-bin/adtldll/fm/27-10/Ch.3.htm; Dep't of the Navy, *The Commander's Handbook on the Law of Naval Operations* § 11.7 (1995) ("Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and have the question adjudicated"); The Judge Advocate General's School, *Operational Law Handbook* 22 (William O'Brien, ed., 2003) (instructing judge advocates to "advise commanders that, *regardless of the nature of the conflict*, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status has been determined") (emphasis added).

⁴ The implementing legislation deemed necessary was as follows: (1) modification of 18 U.S.C. § 706 relating to the commercial use of the Red Cross emblem, (2) legislation to provide workmen's compensation for civilian internees, (3) legislation to exempt relief shipments from import, customs, and other duties, and (4) appropriate penal measures to enforce provisions that only POW or internment camps be identified by the letters PW, PG, or IC. Ratifying Report at 30-31.

is precisely the situation in this case, as very little new legislation was deemed necessary to implement the GPW in its entirety.⁵

8. Because it is undisputed that (1) there has been no determination by an Article 5 tribunal that Hamdan is not entitled to the protection of the GPW, and (2) he has been held in pre-trial solitary confinement for over 8 months (without charges having been preferred against him for 7 months), this commission should find as a matter of law that the Government has violated the GPW.

c. The Provisions of the GPW at Issue in this Action are Self Executing

1. Self-execution is not even important to this challenge, since the government is relying on international law as the source of authority for these commissions. Having designed a procedure to enforce international law, they are bound by its procedures and limitations.

2. In any event, even if one were to disregard that, and to disregard also the fact that the military's own regulations implement Article 5 and Article 103 of the Geneva Convention, it would still not help the Government because those provisions of the Geneva Convention are self-executing. The Supremacy Clause of the United States Constitution declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made*, or which shall be made, under the authority of the United States, shall be the *supreme* law of the land." Art. VI.

3. A self-executing treaty is one that operates as law without requiring implementing legislation or Executive action.

Courts in the United States are bound to give effect to...international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.

An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without enactment of implementing legislation, (b) if the Senate in giving advice and consent to a treaty, or Congress by resolution requires implementing legislation, or (c) if implementing legislation is constitutionally required. Restatement § 111 ¶¶ 3-4 (1987).

"Whether an international agreement is self-executing is a matter of interpretation to be determined by the courts," *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (citing Restatement (Second) of Foreign Relations § 154 (1965)). "If a treaty contains language clearly indicating its status as self-executing, courts regard that language as conclusive." *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107

⁵ "In fact, Congress has rarely refused to implement an admittedly valid international agreement." Restatement § 111, Rpt.'s Note 7.

(D.C. Cir. 2001). It is well established that some provisions of a treaty may be self-executing, and others not. *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001) (citing cases and quoting Restatement § 111); *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979) ("A treaty need not be wholly self-executory or wholly executory").

4. "A treaty may create judicially enforceable rights if the signing parties so desire." *Cardenas v. Smith*, 733 F.2d 909, 918, (D.C. Cir. 1984). "When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring) (suggesting that treaties that "speak in terms of individual rights" may be regarded as self-executing).

Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing. Moreover, when Congressional action is required but delayed, the United States may be in default on its international obligation. Therefore, if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.) In that even, a finding that the treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided.

In general, agreements that can readily be given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest. ***Obligations not to act, or to act only subject to limitations, are generally self-executing.*** Restatement §111, Rpt.'s Note 5 (emphasis added).

5. In an opinion characterized by the Supreme Court as "very able" (see *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), the Kentucky Court of Appeals stated:

When it is provided by treaty that certain acts shall **not** be done, or that certain limitations or restrictions shall **not** be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land." *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1978) (emphasis added).

6. The Supreme Court has long recognized that individual rights established by treaty are directly enforceable in federal courts, even in the absence of implementing legislation:

[A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.... ***A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.*** *The Head Money Cases*, 112 U.S. 580, 598 (1884) (emphasis added)⁶; *see also* *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing claim under a treaty as a defense against state action in taking of property); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty provisions to uphold issuance of a writ of mandamus against state official); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924) (recognizing private right of action for injunctive relief against enforcement of municipal ordinance in violation of treaty with Japan); *Chew Hong v. United States*, 112 U.S. 536 (1884) (holding that habeas petitioner could properly claim rights to leave the country and return as established by treaty with China); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding that private rights established by treaty are enforceable).

7. In this case, both the plain language and the history of the GPW demonstrate that the Convention (1) was intended to confer rights on private individuals, and (2) is self-executing in many of its provisions, including those at issue here. First, the language of the GPW clearly creates judicially enforceable rights held by individual detainees. For example, GPW Article 5 expressly secures rights to "persons...having fallen into the hands of the enemy" and provides that "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." 6 U.S.T. at 3324. Article 6 states that no agreement between or among nations "shall adversely affect the situation of prisoners of war, as defined by the present Convention, ***nor restrict the rights that it confers upon them.***" *Id.* (emphasis added). Article 7 provides that POWs "may in no circumstances renounce in part or in entirety ***the rights secured to them*** by the present Convention." *Id.* (emphasis added). Article 78 provides that prisoners "shall have the right to make known to the military authorities" their requests and complaints regarding the conditions of their captivity. *Id.* at 3566. This article authorizes prisoners acting directly, not through their nation's diplomats, to bring their claims to the attention of the detaining power. Thus, there can be no serious doubt that the GPW confers rights on private individuals, and not just on nations.

8. In revising the Geneva Conventions of 1929, which had failed to provide adequate protection during World War II, the United States sought "to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations." *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of

⁶ In *The Head Money Cases*, the Supreme Court analyzed different provisions of a treaty separately to determine whether they were self-executing.

law...."). The legislative history of the GPW also bears this out. The authors of the Ratifying Report noted that "[e]xperience acquired during 1939-45 amply demonstrated the necessity of bringing [earlier treaties] up to date, making them susceptible of more uniform application and more definite in interpretation, and further improving them so as to provide greater and more effective protection for the persons whom they were intended to benefit.... The function of the new texts [including the GPW] is to provide better protection...." Ratifying Report at 2. The 1929 Geneva Convention failed because of its reliance on reciprocity and diplomatic protest, principles that the GPW replaced with legally binding injunctions. As the Committee noted, "[t]he practices which [the present Conventions] *bind* nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the *injunctions* of a formal treaty obligations." Ratifying Report at 32 (emphasis added). The Committee recommended that consent to ratification be given, despite "the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the *obligations* of decent treatment which it has freely assumed in these instruments. *Id.* (emphasis added).

9. Thus, the intent and the acknowledgement of the United States in ratifying the GPW was that it was a binding obligation. This is also apparent from new language in the GPW requiring the contracting parties "to ensure respect for the present Convention in all circumstances." This language, absent from the 1929 Convention, was placed in the very first Article of the GPW. As the official ICRC commentary to the Convention explains:

By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity.... It is rather a series of *unilateral engagements* solemnly contracted before the world as represented by the other Contracting Parties. *Official ICRC Commentary* at 17-18 (emphasis added).

10. This result is further confirmed by analyzing the criteria for self-execution set forth in Restatement § 111. None of the conditions recognized as characteristic of a non-self-executing provision exists with respect to Article 103 or Article 5. That is, (1) the GPW does not "manifest an intention that it shall not become effective as domestic law without the enactment of implementing legislation," (2) the Senate, in giving consent to the treaty, did not "require implementing legislation" for those Articles, and (3) implementing legislation is not "constitutionally required." Restatement § 111 ¶ 4.

11. Moreover, the right secured to Hamdan by Article 103 is the right *not* to be held in pretrial incarceration for more than 3 months. As such, it falls squarely within that category of treaty provisions described in *Hawes* that "certain acts shall not be done, or certain limitations or restrictions shall not be disregarded or exceeded." *Hawes*, 76 Ky. (13 Bush) at 702-03. Such provisions do not need additional legislative or executive implementation, and are readily enforceable in the federal courts. Accordingly, Article 103 should be deemed self-executing. Article 5 is likewise a provision that a certain act *not* be done, specifically, a detainee shall not be stripped of the protections of the GPW unless a competent tribunal determines that the detainee is not a protected person under the terms of the Convention.

12. Here again, no implementing legislation is required to give effect to this provision. Rather, because GPW Articles 5 and 103 "prescribe a rule by which the rights of the

private citizen or subject may be determined," federal courts can and must enforce these treaty obligations, even without implementing legislation. *The Head Money Cases*, 112 U.S. at 598; see also *Asakura*, 265 U.S. at 341 ("The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinance or state laws.... It operates itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.").

13. In sum, the Geneva Conventions require that, "*In no circumstances shall this confinement exceed three months.*" But Mr. Hamdan has been held for far, far, longer, and in solitary confinement to boot. This Commission, which is evidently constituted to enforce international law, is bound by it as well. And the Geneva Conventions require that this prosecution be dismissed for this flagrant violation of the law.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defense's support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

a. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

b. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), available at http://www.apd.army.mil/pdffiles/r190_8.pdf

c. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2658 (June 28, 2004)

d. Art VI, United States Constitution

e. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976)

f. *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107 (D.C. Cir. 2001)

g. *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001)

h. *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979)

i. *Cardenas v. Smith*, 733 F.2d 909, 918, (D.C. Cir. 1984)

- j. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984)
- k. *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)
- l. *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1978)
- m. *The Head Money Cases*, 112 U.S. 580, 598 (1884)
- n. *Kolovrat v. Oregon*, 366 U.S. 187 (1961)
- o. *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928)
- p. *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924)
- q. *Chew Hong v. United States*, 112 U.S. 536 (1884)
- r. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833)
- s. *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992)
- t. *Official ICRC Commentary*

9. Witnesses and/or Evidence Required. The Defense may call one or more of the following witnesses in support of this motion: XXXX, and/or XXXX (all Curriculum Vitae's are attached as available). All of these individuals are experts in the area of international human rights law including the Geneva Conventions. The expert testimony is probative to a reasonable person under the circumstances presented, specifically based on the individual's skill, knowledge, training, and education. They each possess specialized knowledge of the laws of international human rights and as they are applied in the United States. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, the expert testimony provided by one or more of the above named individuals will assist the Commission members in understanding and determining whether the President's Military Order of 13 November 2001 violates the Geneva Conventions.

10. Additional Information. The Defense is in the process of identifying which of the above experts are available for a 8 November hearing date and will identify from the above list the expert(s) intended to be called by the Defense at the earliest opportunity.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions