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UNITED STATES OF AMERICA)	PROSECUTION RESPONSE TO
)	DEFENSE MOTION TO
v.)	DISMISS FOR LACK OF
)	JURISDICTION – Challenging
DAVID M. HICKS)	the President’s Military Order on
)	the grounds that it violates the
)	U. S. Constitution’s Equal
)	Protection Clause
)	
)	18 OCTOBER 2004

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.
2. Position on Motion. The Defense motion should be denied.
3. Facts Agreed upon by the Prosecution: The Prosecution disagrees with the Defense’s characterization of the facts.
4. Facts.
 - a. The Accused is not a citizen of the United States. He is an Australian citizen.
 - b. On July 3, 2003, the President determined that the Accused is subject to the President’s Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.
 - c. On June 9, 2004, the following charges were approved and referred to this military commission: Charge 1: Conspiracy to attack civilians; to attack civilian objects; to commit murder by an unprivileged belligerent; to commit the offense of destruction of property by an unprivileged belligerent; and to commit the offense of terrorism; Charge 2: Attempted Murder; and Charge 3: Aiding the Enemy.
5. Legal Authority Cited:
 - a. The President’s Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism
 - b. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, (1973)
 - c. U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990)
 - d. Hamdi v. Rumsfeld, 316 F.3d 450, (4th cir. 2003)
 - e. Al Odeh v. United States, 321 F.3d 1134 (D.C. Cir. 2003)

- f. Rasul v. Bush, 124 S.Ct. 2686 (2004)
- g. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)
- h. Handel v. Artukovic, 601 F.Supp. 1421 (C.D. Cal. 1985)
- i. War Crimes Act of 1996, 18 U.S.C. § 2441
- j. The Geneva Convention on Prisoners of War
- k. International Covenant on Civil and Political Rights
- l. 138 Cong. Rec. S 4781 (April 2, 1992)
- m. Humanitarian Law and the Protection of War Victims (1975)
- n. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004)
- o. Wesson v. Warden, 305 F.3d 343, 348 (5th Cir. 2002)
- p. Johnson v. Eisentrager, 339 U.S. 763 (1950)

6. Discussion

The Defense asserts that the Accused's case should be dismissed because the President's Military Order violates equal protection under the Fifth Amendment of the United States Constitution as the commissions are available to try only non-citizens. Alternatively, they suggest that the President's Military Order is also invalid under the International Covenant on Civil and Political Rights (ICCPR) and The Geneva Conventions. The Defense assertions are without merit. Non-resident aliens have no recourse to the United States Constitution, so the Accused's constitutional claim must fail. Additionally, the ICCPR and the Geneva Conventions have no application in this context.

a. Non-resident aliens are not entitled to Constitutional Protections.

The Supreme Court determined in Johnson v. Eisentrager, 339 U.S. 763 (1950), that the Fifth Amendment does not afford protection to aliens outside the United States. In that case, the United States captured German citizens who were engaged in unlawful combat in China. Id. at 766. After a military commission convicted them of war crimes, the United States transported them to Germany for imprisonment. Id. While in Germany, they filed habeas corpus petitions challenging their detention on grounds that it violated the Fifth Amendment. Id. Although the Supreme Court ultimately concluded that it lacked jurisdiction to entertain their habeas petitions, id. at 777-778, the Court asserted that the Fifth Amendment does not apply to non-resident aliens. The Court said:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. Cf. *Downes v. Bidwell*, 182 U.S. 244 [21 S.Ct. 770, 45 L.Ed. 1088 (1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784.

The Supreme Court has, however, also held that aliens are entitled to some constitutional rights. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 (1990) (Citing *Plyer v. Doe*, 457 U.S. 202, 211-212 (1982)(illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590-596 (1953) (resident alien is a “person” within the meaning of the Fifth Amendment); *Bridges v. Wixson*, 326 U.S. 135, 148 (1945)(resident aliens have First Amendment Rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)(Just Compensation Clause of Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)(resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)(Fourteenth Amendment protects resident aliens). Each of the cases cited by the *Verdugo-Urquidez* court, though, stand only for the proposition that aliens may gain limited constitutional rights after coming within the territory of the United States and developing substantial connections with this country. Id.

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.

Id.

In *Verdugo-Urquidez*, United States and Mexican Officials arrested Rene Martin Verdugo-Urquidez in Mexico and brought him to the United States for trial. At the time, Verdugo-Urquidez was a both a citizen and resident of Mexico. Id. at 262. At his trial, Verdugo-Urquidez sought to exclude evidence obtained by searching his residences in Mexico on grounds that the searches violated the Fourth Amendment. Id. The Supreme Court rejected this argument, concluding that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a non-resident alien and located in a foreign country. Id. at 274-275. Citing *Eisentrager* to support this proposition, the Court said that “we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.” Id. at 269.

In *Verdugo-Urquidez*, the respondent – like the Accused in the present case – argued that treating him differently from United States citizens and residents would

violate equal protection. The Court emphatically dismissed this contention. The Court said:

Respondent also contends that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution. . . . But the very cases previously cited with respect to the protection extended by the Constitution to aliens undermine this claim. They are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens. *Cf. Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

Id. at 273.

Finally, in Verdugo-Urquidez, the Court emphasized that applying the Constitution to aliens living abroad would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries." Id. The Court explained that the United States regularly employs Armed Forces outside this country, and that Armed Forces engage in many activities that might constitute searches and seizures. Id. at 273-274. The same reasoning applies to the Fifth Amendment. The United States unavoidably treats U.S. citizens differently from foreign citizens when it uses its military power abroad.

Saying that the Constitution does not afford rights to non-resident aliens does not mean that the United States can act unrestrained by any law. The United States must abide by the law of war. The law of war requires that the Accused receive a full and fair trial by military commission. But it does not require the United States to treat him exactly as it would treat a U.S. citizen.

The Accused in this case is not a resident of the United States, nor has he ever been, either legally or otherwise. He has no contacts whatsoever with the United States other than engaging in conspiracies to attack it and being detained at the U.S. Naval Station at Guantanamo Bay, Cuba. The fact that he is detained in Guantanamo does not help him because, "this sort of presence – lawful but involuntary – is not the sort to indicate any substantial connection with our country." Id. at 271. Therefore the Accused has no recourse at all to the Fifth or Fourteenth Amendments and his motion must, therefore, fail at its inception.¹

¹ The Supreme Court's recent decision in Rasul v. Bush, 124 S.Ct. 2686 (2004), in no way affects the validity of the Eisentrager and Verdugo-Urquidez holdings denying constitutional protections to non-resident aliens. Rasul merely interpreted 28 U.S.C. § 2241 to provide a vehicle for persons detained by the

b. The President's Military Order doesn't deny an Accused a fundamental right.

The conduct of Military Commissions pursuant to the President's Military Order does not discriminate in the allocation of fundamental rights. The Defense claims that Military Commissions discriminate in the allocation of fundamental rights. However, heightened scrutiny applies only to the differential allocation of *constitutionally guaranteed* rights. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 32-33 (1973). Because it has already been established by the Supreme Court that the Accused has no right to equal protection under the Fifth Amendment, indeed he has no constitutionally guaranteed rights, so there is no deprivation upon which heightened scrutiny may be applied. Thus, the Accused's claim must also fail in this regard.

c. The ICCPR is inapplicable to the Accused's case.

(1) Defense relies on the ICCPR to allege violations of Articles 2 and 14(1) of the treaty. However, such reliance is misplaced; the ICCPR does not apply to prosecutions for violations of law of war offenses and is, therefore, not relevant to Military Commission proceedings. By requesting relief under the ICCPR, the Accused is requesting that the Military Commission disregard United States law and decisions delivered since U.S. ratification of the ICCPR in 1992.

(2) The Coalition, including the United States, is engaged in an armed conflict with al Qaida and the Taliban. The Law of Armed Conflict applies to this war, not the ICCPR. The Laws of Armed Conflict regulate the interactions between belligerent states and the interactions between a state and individual members of enemy forces. The Law of Armed Conflict includes such treaties as the Hague and Geneva Conventions and was negotiated with the exigencies of war in mind. In contrast, the ICCPR is part of a body of law known as Human Rights Law, a distinctly separate body of law. Treaties under Human Rights Law were not negotiated with the requirements of wartime in mind² and therefore cannot apply to the ongoing armed conflict. By placing such emphasis on the ICCPR for relief, Defense is sidestepping the applicable body of law, the Law of Armed Conflict.

(3) The President and the United States Senate at the time of ratification made clear that the ICCPR did not expand protections beyond those already provided

United States to challenge the circumstances of their detentions. The Court's holding was based on statutory construction and did not rely on the existence of any constitutional right. The fact is the United States has always given its citizens more rights than non-citizens when it comes to constitutional rights. The Constitution is the social compact between the United States and its citizenry. To hold that it has unfettered and equal application to all persons, wherever situated and regardless of alienage, would provide the full penumbra of procedural and substantive protections guaranteed to citizens via the Constitution to all people of the world.

² See Jean Pictet, *Humanitarian Law and the Protection of War Victims*, 15 (1975) (Humanitarian law is valid only in the case of armed conflict, while human rights are essentially applicable in peacetime...The two systems are complementary, and indeed they complement one another admirably, but they must remain distinct).

under United States *domestic* law and in fact would not be applicable in any area that might conflict with the United States Constitution or laws. *See* Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) (“Nothing in this Covenant requires or authorizes legislation, or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”).³ Despite explicit reservations and mention on the effect ratification of the ICCPR would have on domestic law, no mention is made on the applicability of the ICCPR on the Law of Armed Conflict.⁴ This silence indicates that the United States did not contemplate application of the ICCPR to the Law of Armed Conflict and military commissions. To argue otherwise would be to conclude that the President entered into a treaty in which he agreed, without comment, to limit his ability as Commander and Chief to wage war and detain enemy combatants. Such an argument is not plausible.

d. International Covenant on Civil and Political Rights is not Self-Executing

The ICCPR has no legal impact on the military commissions. The Senate, in ratifying the ICCPR, specifically stated that “the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.” Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992). As Assistant Secretary of State Richard Schifter explained during the Foreign Relations Committee’s hearing on the ICCPR, the non self-executing provision means that “the Covenant provisions **when ratified, will not by themselves create private rights enforceable in U.S. courts;** that could be done by legislation adopted by Congress. **Since U.S. law generally complies with the Covenant, we do not contemplate proposing implementing legislation.”** ICCPR Hearing at 18 (emphasis added). Treaties are binding agreements between States; individuals are not parties to treaties. The ICCPR, therefore, does not provide individuals with rights enforceable in U.S. courts. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004); *Wesson v. Warden*, 305 F.3d 343, 348 (5th Cir. 2002) (relief denied because treaty is not self-executing and Congress has not enacted implementing legislation).

e. The Geneva Conventions do not apply to the Accused.

The Accused claims that the Geneva Conventions require that he be tried in the same courts as a U.S. citizen would. He is incorrect for two reasons. First, the Geneva Conventions are not self-executing. Second, they are inapplicable to the Accused.

³ See also Senator Clairborne Pell, Chairman, Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) (the ICCPR is rooted in Western democratic traditions and values and guarantees basic rights and freedoms consistent with our own constitution and Bill of Rights).

⁴ The Senate’s silence on the applicability of the law of armed conflict on the ICCPR is significant as the treaty was the subject of much debate in the Senate. The ICCPR was adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976. President Carter submitted the ICCPR to the Senate in 1979. The ICCPR was finally ratified by the Senate in 1992. *See* Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992)

Federal law distinguishes “self-executing” international agreements from “non-self-executing” international agreements. An international agreement is “non-self-executing” in any of the following circumstances:

- a. if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, or
- b. if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or
- c. if implementing legislation is constitutionally required.

Restatement (Third) of Foreign Relations Law § 111(4) (1987). If a treaty is “non-self-executing” then it does not give individuals rights that they may enforce in a judicial proceeding. “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.” *Id.* § 111 (3).

That the Geneva Conventions are not self-executing is demonstrated in the text of the conventions themselves, their legislative history, and case law. Indeed the Geneva Conventions contain many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means. As the Fourth Circuit recently explained:

What discussion there is [in the text of the Geneva Conventions] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inherent in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a “meeting of their representatives” with the aid of diplomats from other countries, “with a view to settling the disagreement.” Geneva Convention, at Article 11. Similarly, Article 132 states that “any alleged violation of the Convention” is to be resolved by a joint transnational effort “in a manner to be decided between the interested Parties.” *Id.* at art. 132; *cf. id.* at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for “persons committing . . . grave breaches of the present Convention”). We therefore agree with other courts of appeals that the language in the Geneva Convention is not “self-executing” and does not “create private rights of action in the domestic courts of the signatory countries.”

Hamdi v. Rumsfeld, 316 F.3d 450, 468-469 (4th cir. 2003), vacated on other grounds, 124 S.Ct. 2686 (2004). See also Al Odeh v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), overruled on other grounds, Rasul v. Bush, 124 S.Ct. 2686 (2004); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork J., concurring); Handel v. Artukovic, 601 F.Supp. 1421, 1424-1426 (C.D. Cal. 1985). The Fourth Circuit alluded to the fact that there was one area in which the

contracting parties sought to go beyond diplomacy to enforce violations of the treaty: “grave breaches,” which the parties pledged to punish themselves by enacting domestic criminal legislation. GPW Article 129. Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but does not create any privately enforceable rights. The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided individuals with private rights of action.

The legislative history of the conventions does not suggest otherwise. In fact, the Senate Report makes clear that the conventions are not self-executing. In the section titled “Provisions Relating To Execution Of The Conventions,” the Report states that “the parties agree, moreover, to enact legislation necessary to provide effective penal sanctions for persons committing violations of the contentions enumerated as grave breaches.” S. Exec. Rep. No. 84-9 (1955), at 7. The Report celebrates this provision as “an advance over the 1929 instruments which contained no corresponding provisions.” Id.

Significantly, the Supreme Court interpreted the 1929 Geneva Convention in Johnson v. Eisentrager, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled there that the German prisoners of war who were challenging the jurisdiction of the military commission which convicted them “could not” invoke the Geneva Convention because:

It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789. It should be noted that the Senate that ratified the 1949 conventions was operating post-Eisentrager, yet no mention was made of the new conventions or their implementing legislation creating an individually actionable right. Moreover, in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that “the weight of world opinion,” would “exercise a salutary restraint on otherwise unbridled actions.” S. Exec. Rep. at 32.

Given that it is apparent on the face of the treaty and from the legislative history that the parties contemplated the need for enacting legislation, the Fourth Circuit’s conclusion in Hamdi that the Geneva Conventions are not self-executing is undoubtedly correct. As such, Mr. Hicks’ motion should be denied on those grounds.⁵

⁵ United States v. Lindh, 212 F.Supp.2d 541 (E.D. Va. 2002), although permitting the assertion of the GPW “as a defense to criminal prosecution,” is not controlling in this instance because the Fourth Circuit, a

Even if the GPW were self-executing, the Accused's motion should be denied because the President has declared that the GPW does not apply to al Qaida. See Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1 (Feb. 7, 2002), available at www.library.law.pace.edu/government/detainee_memos.html. This determination is not reviewable, given the foreign policy and national security concerns implicated in the present context and the Presidential prerogatives in those domains. See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). But even if it were, it would at least be entitled to substantial deference, see Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). The President's memorandum should be given deference by the Commission and the Accused's request to dismiss should be denied.

f. Conclusion.

The Accused, as a non-resident alien, has no constitutional rights. Thus his motion must be dismissed in the first instance. Also, the Accused has no applicable rights under the ICCPR or the Geneva Conventions. For these reasons, the Defense Motion should be denied.

7. Attachments. None.

8. Oral Argument. If Defense is granted oral argument, Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. No witnesses will be needed to decide this motion.

//Original Signed//

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Lieutenant Colonel, U.S. Marine Corps
Prosecutor

superior court, in Hamdi subsequently held the GPW to be non-self-executing. Hamdi at 468. Moreover, the case of United States v. Noriega, 808 F.Supp. 791 (S.D. Fla. 1992), also offers nothing of substance to the issue. First, Noriega was an advisory opinion by a district court. Id. at 799. Second, Noriega's reasoning was that the non-grave-breach articles of the GPW were self-executing specifically because the GPW did not call for implementing legislation. Id. at 797. Thus, by the very reasoning in Noriega, Article 103 of the GPW, a grave breach, would not be self-executing as they require implementing legislation pursuant to the plain language of the treaty.