
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) DEFENSE REPLY TO
) PROSECUTION RESPONSE TO **D15**
) (ARTICLE 103 OF THE THIRD
) GENEVA CONVENTION AND
) UNITED STATES GOVERNMENT
) REGULATIONS)
)
) 27 October 2004
)
)

1. Timeliness. This reply is filed within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004, and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought. That the original Defense Motion, D15, be granted.

3. Facts:

a. The Chief Prosecutor in his Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, (attached) and cited by the Prosecution conditioned Defense Counsel access to Mr. Hamdan to "so long as we are engaged in pretrial negotiations. By so limiting Defense Counsel's access to Mr. Hamdan the Chief Prosecutor clearly envisioned representation for the limited purpose of negotiating a pre-trial agreement

b. The Prosecution states in b) that the February Legal Advisor Letter denying the applicability of Article 10 of the UCMJ gave a reason: Mr. Hamdan is being held as "an unlawful combatant (a basis unrelated to military commissions)". The claim that Mr. Hamdan's status is "unrelated" to commissions is flat out wrong, as the prosecutor's own memoranda make clear. See, e.g., Prosecution's Response to D20, Lack of Legislative Authority, at 4 (stating that commissions may punish "unlawful belligerents"); *id.* (quoting *Hamdi*'s language that punishment of "unlawful combatants" is appropriate); *id.* At 7 (discussing the "power to bring unlawful enemy combatants to justice"); and numerous other places in its Prosecution motions.

c. The Defense does not disagree that CDR XXXX indicated that the order of cases was not up to him. The Defense however, clearly remembers CDR XXXX stating that Mr. Hamdan was going to go to the back of the pack. CDR XXXX words proved prophetic, as although Mr. Hamdan received the second Target letter and was the only detainee to demand a speedy trial, he was in fact the last detainee charged.

d. Please refer to the initial motion for additional facts.

4. Law and Discussion.

The prosecution's response fails to refute the law as set forth in the Defendant's Motion To Dismiss for Violation of GPW Article 103 of the Geneva Conventions. Contrary to the prosecution's assertions, Article 103 binds the Commission and protects detained individuals from government overreaching. It is, moreover, clearly applicable to an individual confined in the circumstances Mr. Hamdan has suffered. Despite the Government's violation of Article 103 – a violation that notably the Prosecutor does not even deny – Mr. Hamdan is being brought before this commission ostensibly to vindicate the laws of war when the Prosecution itself has flouted them in a fundamental sense.

a. Article 103 of the GPW Binds this Commission

Contrary to the prosecution's assertions, Article 103 of the GPW binds this commission and provides a minimum level of protections to defendant, which cannot be abrogated by this commission. To deny this proposition, the prosecution must undermine the plain text of the United States Constitution. To deny this proposition, the prosecution must mischaracterize the overwhelming weight of centuries of learned precedent interpreting that plain text. To deny this proposition, the prosecution must rewrite the history of the United States Congress, the Geneva Convention, and the dominant interpretations of the Geneva Convention created by the Department of Defense. And finally, to deny this proposition, the prosecution discards invaluable protections for American soldiers in favor of abstract and ill-founded concerns over the prerogatives of the political branches of American government.

In any event, the entire presupposition of "self-execution" is irrelevant before this commission. It turns out that the Geneva Conventions are self-executing, as it happens, but that is not at all necessary to decide this motion. Self-execution has to do with whether an individual, if a treaty has been violated, can walk into a *federal civil* court and sue for money damages and the like. That has absolutely nothing to do with whether it may be asserted as a *defense* in a commission – particularly a commission that is evaluating whether he can be jailed for years on end. As to that question, the Prosecution offers absolutely no precedent, or even logic, whatsoever. And they cannot, for the entire premise of a military commission is that it is to vindicate the laws of war. One cannot vindicate those rules by conducting a commission that is at odds with the charter document of the laws of war – the Geneva Convention. If there is any doubt about this at all, the text of the Constitution makes it obvious. The Supremacy Clause of the United States Constitution is clear: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2.

While self-execution is therefore not at all relevant in this proceeding, it is worth pointing out that, for the record, the Prosecution's claims about the Geneva Convention are wrong. For centuries, the interpretation of such treaties has been recognized to be the "peculiar province of the judiciary." *Jones v. Meehan*, 175 U.S. 1, 3 (1899). The primacy of judicial interpretations of federal treaties under the Supremacy Clause, even against clearly contrary interpretations provided by Congress or the Executive Branch, has long been upheld. *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *Perkins v. Elg*, 307 U.S. 325 (1939); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809). A clearly contrary construction of a treaty provided by the Executive Branch may be given some weight, but it is "not conclusive" in the face of consistent judicial interpretation. *See Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).

The prosecution's response to the defense motion to dismiss entirely avoids the necessary dominance of judicial interpretation of federal treaties under the plain text of the Supremacy Clause and centuries of Supreme Court opinion.

The U.S. judiciary has provided a clear interpretation of the scope of the Geneva Conventions. That interpretation commits the United States and this tribunal to recognize that the Geneva Conventions represent "a self-executing treaty to which the United States is a signatory [They] are a part of American law" *United States v. Lindh*, 212 F. Supp.2d 541, 553-54 (E.D. Va. 2002) (footnotes omitted); *see also United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002), *remanded on other grounds*, 356 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004). The interpretation of the Geneva Conventions advanced by these courts is completely in keeping with longstanding Supreme Court precedent in interpreting and enforcing the rights guaranteed to individuals by federal treaties. Federal treaties "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 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); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924); *Chew Hong v. United States*, 112 U.S. 536 (1884); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833). Such a rule is provided by Article 103.

In contrast, the judicial interpretation of the Geneva Conventions advanced by the prosecution relies solely upon discredited, reversed, inapplicable, distorted, or minority judicial positions which lack the governing force of law.¹ They cannot justify the prosecution's strained

¹ The prosecution relies exclusively on the following cases in its response to the Defense Motion to Dismiss on Article 103 grounds. Prosecution Response at 3-4, *citing Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2003), *rev'd* 124 S.Ct. 2686 (2004); *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1424-26 (C.D. Cal. 1985).

The prosecution's main support is provided by a lengthy excerpt from the Fourth Circuit's ruling in *Hamdi*. This opinion was vacated by the Supreme Court, 124 S. Ct. 2686 (2004), in a plurality opinion written by Justice O'Connor. Justice O'Connor specifically avoided "address[ing] at this time whether any treaty guarantees [detainees] . . . access to a tribunal for a determination [of status]." However, Justice O'Connor is on record elsewhere expressing support for the preeminence of the Supremacy Clause in determining the legal force of foreign treaties, and for claiming further that "our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, "Federalism of Free Nations," in *International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox, eds., 1996). Whatever precedential value *Hamdi* may provide to this commission, it surely cuts against the prosecution's interpretation of Article 103 and in favor of dismissal.

The prosecution also cites Judge Randolph's concurrence in *Al Odah*. However, this citation is not representative of the D.C. Circuit's ruling in *Al Odah*; in any case, *Al Odah* was overruled by *Rasul*.

The prosecution also cites Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring). Again, this is not representative of the D.C. Circuit's ruling in *Tel-Oren*; in any case, Judge Bork's concurrence, considered in full, is best understood as **actually undermining** the prosecution's argument. *See Tel-Oren*, 726 F.2d at 808-09 (suggesting that treaties which "speak in terms of individual rights," as do the Geneva Conventions generally and Article 103 particularly, may be regarded as self-executing).

Finally, the prosecution cites *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). The prosecution's reliance on this case is completely misplaced, as it involves the predecessor to the 1949 GPW, the 1929 Geneva convention.

In short, the prosecution's claim that the Geneva Conventions are not self-executing is, if anything, undercut by the judicial opinions cited as support.

judicial interpretation of the Geneva Conventions, which runs counter to specific recent precedent and the overwhelming weight of Supreme Court authority. The correct judicial interpretation of the Geneva Conventions requires dismissal, even against a clearly contrary construction of the Geneva Conventions by the executive branch, which in any event is lacking in this case.² The plain text of the Constitution and the plain weight of U.S. judicial precedent are at stake before this commission. These authorities alone are sufficient and necessary for dismissal.

It is equally evident that the correct interpretation of the Geneva Conventions generally and Article 103 specifically provide privately enforceable rights. As was shown in the original Motion to Dismiss, American courts have historically understood treaty rights to be directly enforceable by private individuals. *See* Defendant's Motion To Dismiss at 7-8. In response, the prosecution ignores this overwhelming weight of judicial interpretation. Instead, the prosecution alludes to the 1929 Geneva Convention and *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *See* Prosecution Response at 4. The 1929 Geneva Convention is simply not at issue, and *Eisentrager* is irrelevant. However, it is relevant that the legislative history of the 1949 Geneva Conventions clearly demonstrates their intention to protect, "first and foremost . . . individuals, and not to serve state interests." Oscar M. Uhler et al., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958). It is also relevant that American courts have consistently held that the ultimate goal of the applicable Geneva Conventions "is to ensure humane treatment" for individuals, "not to create some amorphous, unenforceable code of honor among the signatory nations." *Noriega*, 808 F. Supp. at 799; *see also Lindh*, 212 F. Supp.2d at 553-54. The weight of relevant authority requires the rights guaranteed by Article 103 to be directly enforceable by private individuals such as Defendant.

As has been repeatedly demonstrated, the judicial interpretation of federal treaties, including the Geneva Conventions, must be paramount. The interpretation of the Geneva Conventions urged by the prosecution would require this court to ignore and reverse the settled and supreme judicial understanding of this treaty in favor of a radical vision justified by limited and controversial executive authority alone. Worse still, the prosecution's interpretation would require this commission to sacrifice invaluable protections afforded to American soldiers by the Geneva Conventions in favor of fictitious concerns for the power of the executive branch. The United States' commitment to broad adherence to the Geneva Conventions has created reciprocal protection for United States military personnel in conflicts across the world for over half a century. *See* Amicus Brief of General David M. Brahms, et al. at 2-7. These safeguards should

² The prosecution's response implies that the recent presidential memorandum expresses a consistent executive branch interpretation of the GPW. *See* Prosecution Response at 5, *citing Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees*, at 1 (Feb. 7, 2002). This implication is incorrect: the recent presidential memorandum is inconsistent with the previous weight of executive interpretation. *See* notes 46-47, *supra*. Even if the executive branch interpretation cited by the prosecution were a consistent and compelling alternative, the judicial interpretation of the GPW must be given ultimate precedence. *See Factor v. Laubenheimer*, 290 U.S. 276, 293-94, 295 (1933) (holding that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred," and ruling that although the construction of a treaty by the Executive Branch is "of weight," it is "not conclusive upon courts called upon to construe" the treaty). Moreover, American courts have specifically overturned the interpretations of treaties advanced by the executive branch in situations where individual rights are at stake, even in areas where deference is traditionally due. *See, e.g., Perkins v. Elg*, 307 U.S. 325; *United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979). In this case, where the executive interpretation provided by the prosecution is inconsistent even with past executive interpretations, the deference due to the correct judicial interpretation of the treaty must be even greater.

not be discarded on the basis of the prosecution's ill-founded structural concerns for the prerogatives of the political branches.

b. Article 103 is Applicable to Mr. Hamdan.

1) No Court Has Determined that Mr. Hamdan was Ever a Member of Al Qaeda.

The government cannot circumvent the protections of the Geneva Convention simply by assigning Mr. Hamdan membership in some "terrorist organization," particularly when, first, Mr. Hamdan was captured by XXXX, and, second, when evidence in the record includes Mr. Hamdan's adamant denial that he was ever a member of al Qaeda or engaged in any type of terrorist activity. The presumption of POW status under Geneva Convention Article 5 illuminates this issue; at a minimum, a "competent tribunal" must determine Mr. Hamdan to have been a member of al Qaeda before the government can dispute the applicability of the Article 103 of the Conventions on that same ground.³

2) The President's Opinion on the Applicability of the Geneva Convention to Al Qaeda Members Is Entitled to No Deference and Is, In Any Case, Wrong as a Matter of Law.

The prosecutor attempts to deprive this court of its constitutional mandate of judicial review by claiming that the legal conclusion set forth in a two-year-old memorandum from the President to the Vice President is "not reviewable."⁴ The very cases the prosecution cites reveal the fallacy behind this assertion, which seeks to conflate, on one hand, the individualized determinations a President will make on the explicit authority of law, with, on the other, a President's unsolicited opinion about a general legal matter.

In Chicago & S. Air Lines v. Waterman S.S. Corp.,⁵ cited by the prosecutor, the Supreme Court determined whether the courts could review a President's grant or denial of an application by a citizen carrier to engage in overseas and foreign air transportation.⁶ The relevant statute explicitly required Presidential approval before an application could be granted, and it was exceptionally expansive: "Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies."⁷ The Court understood the statute as "invert[ing] the usual administrative process" in this manner as a consequence of the foreign policy decisions implicit in the determination to grant these applications.⁸ Likewise, in Dep't of the Navy v. Egan,⁹ the Court found the decision by an executive agency to revoke a given Navy employee's security

³ See Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW) ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

⁴ Prosecution's Response to the Defendant's Motion To Dismiss for Violation of GPW Article 103 of the Geneva Conventions at 5.

⁵ 333 U.S. 103 (1948).

⁶ *Id.* at 104.

⁷ *Id.* at 109.

⁸ *Id.* at 109.

⁹ 484 U.S. 518 (1988).

clearance to be unreviewable where “the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is *committed by law* to the appropriate agency of the Executive Branch.”¹⁰

The decisions are, in short, wholly inapposite in the present context. No statute—and certainly, no provision of the Constitution—requires the President’s approval before the Geneva Conventions, signed by the United States over 50 years ago, will apply to a given group of people. It is, of course, the treaty itself that makes this determination. Indeed, any “executive decisions as to foreign policy” implicated by the *applicability* of these Conventions came in the former president’s decision to sign the Convention and in subsequent presidents’ decisions to approve or veto legislation expanding its scope. The current President is free to advocate for his interpretation of the Conventions, but that advocacy is by no means binding on the courts or this body.

In any case, the President’s interpretation of the applicability of the Conventions to members of al Qaeda is wrong as a matter of law. The amicus brief submitted in conjunction with the Defendant’s Motion To Dismiss for Violation of Common Article 3 explains the proper interpretation:

Secretary of State Powell was . . . correct when he stated, soon after the United States invaded Afghanistan, that the Geneva Conventions apply to both al Qaeda and Taliban fighters. Rowan Scarborough, *Powell Wants Detainees to the Declared POWs*, WASH. TIMES, Jan. 26, 2002. As his Legal Adviser stated (Taft Mem. at ¶ 3):

[The suggestion that there is a] . . . distinction between our conflict and al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in the conflict—al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.¹¹

Respondents’ interpretation of Common Article 2 bears a disturbing resemblance to the interpretation of predecessor conventions adopted by Nazi Germany in World War II. Exploiting “technicalities” and “ambiguities” in the 1929 Conventions, the Nazis refused to afford POW status to members of the armed forces of countries the Nazis occupied because those prisoners were no longer soldiers of any government or state in existence. See [Howard S.] Levie, *Prisoners of War in International Armed Conflict*, at 12 [(1977)]. Responding to this brazen evasion of the conventions, Common Article 2 was written as a catchall, in include every type of hostility which might occur without being ‘declared war,’” [Oscar M. Uhler et al.] *Commentary*

¹⁰ *Id.* at 527.

¹¹ See also Lawrence Azubuike, *Status of Taliban and Al Qaeda Soliders: Another Viewpoint*, 19 Conn. J. Int’l L. 127, 153-54 (2003) (arguing that the Third Convention should be applied to the conflict with al Qaeda because al Qaeda was an “enemy” of the U.S. in an armed conflict and its forces were so intertwined with the Taliban as to make them indistinguishable); Joan Fitzpatrick, *Agora: Military Commissions: Jurisdictions of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int’l L. 345, 349 (2002) (noting that the conflict in Afghanistan was an international armed conflict in which the Taliban and Al Qaeda joined forces against the U.S. and its Afghan allies).

IV: Geneva Conventions Relative to the Protection of Civilian Persons in Time of War (Jean S. Pictet ed., 1958)], at 14-15, thus ensuring that “nobody in enemy hands can be outside the law,” *id.* at 51.¹²

As one scholar has commented, [the government’s] position “repudiates the very concept of a ‘law’ of war,” substituting “a new form of international armed conflict that is subject to no identifiable norms of international humanitarian law” and “An international armed conflict in which all the ‘combatants’ as defined by the Third Geneva Convention are on one side—that of the United States and its allies.” Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 *Hastings Int’l & Comp. L. Rev.* 303, 317-18 (2002).¹³

It is, finally, critical for the court to recognize that any deference accorded to the President’s 2002 interpretation of the Conventions must be judged in the context of the last fifty years of executive interpretation of the Convention’s applicability. Again, the very same case that the prosecutor cites confirms the point, as the Court in *Kolovrat v. Oregon* found it determinative that there were before it “statements, in the form of diplomatic notes exchanged between the responsible agencies of the United States and of Yugoslavia, to the effect that the 1881 Treaty, *now and always*, has been construed as providing for inheritance by both countries’ nationals without regard to the location of the property to be passed or the domiciles of the nationals.”¹⁴ The *Kolovrat* Court also, tellingly, revealed that looking into the “*purpose* in entering into that series of treaties” is helpful when courts fulfill their constitutional duty of “interpreting treaties for themselves.”¹⁵ The purpose and history of the Convention both confirm that its provisions must be interpreted to encompass a broad scope. As its Commentary explicitly states: “Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. . . . There is no intermediate status; nobody in enemy hands can be outside the law.”¹⁶

In sum, the prosecution’s response fails to refute the law as set forth in the Defendant’s Motion To Dismiss for Violation. As the Defendant has contended throughout the process, Article 103 binds this commission. It is clearly applicable to an individual confined in the circumstances Mr. Hamdan has suffered. Due to the violations of the Conventions—which, tellingly, the Prosecution does not deny in its Response—the court should grant the Defendant’s Motion To Dismiss.

5. Files Attached. None.

6. Oral Argument. See D15, the Defense position remains the same.

¹² See also Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 *UCLA J. Int’l L. & For. Aff.* 331, 371 (2003) (arguing that “the U.S. treatment of individual al-Qaeda members must comport with the strictures of the conventions because the conventions apply in all instance of international conflict.”).

¹³ Amicus Brief of General David M. Brahms, et al. at 17-18 (footnote numbering altered).

¹⁴ 366 U.S. 187, 194-195 (1961) (emphasis added).

¹⁵ *Id.* at 195, 194.

¹⁶ See Int’l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958); see also Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; Dep’t of the Army, Field Manual no. 27-10, *Law of Land Warfare*, para. 73 (1956).

7. Legal Authority Cited.

- a. Article 103 of the GPW
- b. U.S. Const., Art. VI, cl. 2.
- c. *Jones v. Meehan*, 175 U.S. 1 (1899)
- d. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986)
- e. *Perkins v. Elg*, 307 U.S. 325 (1939)
- f. *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809)
- g. *Factor v. Laubenheimer*, 290 U.S. 276 (1933)
- h. *United States v. Lindh*, 212 F. Supp.2d 541 (E.D. Va. 2002)
- i. *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992)
- j. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)
- k. *The Head Money Cases*, 112 U.S. 580 (1884)
- l. *Jordan v. Tashiro*, 278 U.S. 123 (1928)
- m. *Asakura v. City of Seattle*, 265 U.S. 332 (1924)
- n. *Chew Hong v. United States*, 112 U.S. 536 (1884)
- o. *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)
- p. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)
- q. Oscar M. Uhler et al., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958)
- r. Levie, *Prisoners of War in International Armed Conflict* (1977)
- s. Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 *Hastings Int'l & Comp. L. Rev.* 303, 317-18 (2002)
- t. *Kolovrat v. Oregon* 366 U.S. 187 (1961)

8. Witnesses/Evidence Required. See D15, the Defense position remains the same. However, the Defense notes that the Prosecution's answer of 15 October 2004, indicates that the

Prosecution intends to call three witnesses but that the Prosecution has not filed a Notice of Witness in accordance with POM 10. The Defense does not read POM 10 to apply exclusively to the Defense. Accordingly, the Defense objects to the calling of any witness for which a notice has not been filed. The Defense understands that because of the novel issues presented that the failure to file may simply be an oversight on the Prosecutions part and the Defense is willing to withdraw its objection upon The Prosecution's submission of a Witness Notice on or before 1 November 2004 (5 working days before the hearing)

9. Additional Information. None.

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