
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
) DEFENSE REPLY TO
) PROSECUTION RESPONSE TO
) **D23** (COMMON ART 3 OF THE
) GENEVA CONVENTIONS)
)
)
) 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, D23, be granted.
3. Facts. Please see D23.
4. Law and Discussion.

The Prosecution's response to the Defendant's Motion To Dismiss for Violation of Common Article 3 of the Geneva Conventions is riddled with errors of law and logic. Whatever legal regime they happen to describe, it is certainly not one in the United States of America. Contrary to the government's four central contentions, (1) Article 2 of the Third Geneva Convention *does* apply to Mr. Hamdan, who therefore *is* entitled to POW protections; (2) Common Article 3 of the Third Geneva Conventions *does* apply to any and all armed conflicts, thereby entitling Mr. Hamdan to its protections; (3) the Geneva Conventions bind this body (and, what is more, have been implemented by binding army regulations) and provide Mr. Hamdan with a private right to require compliance with their provisions; and (4) both the military commission and the conditions of confinement imposed on Mr. Hamdan soundly fail to meet the minimum requirements imposed by either Article 2 or Common Article 3.

a. Article 2 of the Third Geneva Convention Does Apply to Mr. Hamdan, Who Is, As Such, Entitled to POW Protections.

- 1) Article 2 of the Third Geneva Convention Applies to Mr. Hamdan.

The Third Geneva Convention, which governs treatment of prisoners of war, relies upon its second article to dictate when its provisions will apply to the treatment of individuals detained pursuant to an armed conflict. Despite the prosecution's conflation of the Convention's Articles and their distinct mandates, Article 2 clearly indicates that Mr. Hamdan is entitled to the protections of the Third Convention.

The text of Article 2, in full, reads as follows:

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

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.¹

The prosecution responds to this text with two invalid conclusions. First, it asserts that because this Article indicates “three circumstances” in which the Third Convention applies, it provides the “*only* three circumstances in which the Conventions apply.”² This is flatly wrong. As made irrefutably clear in, for example, Article 3 of the same Convention, Article 2 indicates when *specific provisions* of the Convention *must* apply; it does not provide an exhaustive description of how and when all the Conventions’ various provisions adhere. The implications of the prosecution’s confusion in this regard are discussed in the discussion of Article 3, in Part II, *infra*.

The prosecution makes a second mistake when it denies that the circumstances outlined in Article 2 apply to the treatment of Mr. Hamdan. They do apply, and therefore do compel adherence to the Third Convention. Characterizing the United States’ war with Afghanistan as the “U.S.-al Qaeda armed conflict,”³ the prosecution proceeds to reject the conclusion that such a war would be within the purview of Article 2 under the theory that al Qaeda is not a High Contracting Party; al Qaeda has no territory to be occupied; and al Qaeda has not accepted and applied the Convention.

In making these claims, the prosecution mischaracterizes the conflict. As the Supreme Court has confirmed, the armed conflict provoking Mr. Hamdan’s capture ensued once “the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda *and the Taliban regime that had supported it.*”⁴ Indeed, it was during this conflict with the Afghan government of the Taliban—and, indeed, it was within the borders of Afghanistan—that the United States government first detained Mr. Hamdan. As the Legal Advisor to Secretary of State Powell explained,

[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

¹ Article 3 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).

² Prosecution’s Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 3 (emphasis added).

³ Prosecution’s Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 3.

⁴ *Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004).

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.⁵

In sum, therefore, it constitutes a factual dodge for the Prosecution to claim that Article 2 of the Geneva Conventions do not apply to an individual such as Mr. Hamdan, for Afghanistan is a High Contracting Party which has ratified the Conventions,⁶ and which therefore invokes its protections when in armed conflict with another High Contracting Party such as the United States.⁷ The Government cannot circumvent the protections of the Convention simply by assigning Mr. Hamdan membership in some “terrorist organization,” particularly 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, discussed in the Defendant’s Motion To Dismiss at 3 and in this Reply *infra*, illuminates this issue; at a minimum, a competent tribunal should have long ago determined Mr. Hamdan to be a member of al Qaeda and a combatant.

As the first paragraph of Article 2 therefore indicates that the Third Geneva Convention governs the treatment of Mr. Hamdan, the prosecution’s persistent attempts to dodge Article 2’s second and third paragraphs and its criticisms of al Qaeda become irrelevant. Paragraph 1 clearly states, “the present Convention shall apply” in these circumstances.⁸ This, in turn, renders the treatment of Mr. Hamdan subject to the provisions of the “present Convention,” including, *inter alia*, its Articles 4 and 5.

2) Mr. Hamdan Is Entitled to POW Protections.

As the preceding discussion confirmed, Mr. Hamdan is entitled to the protections of Articles 4 and 5 of the Third Geneva Convention. Given the government’s refusal to provide Mr. Hamdan with a hearing to determine his status under Article 4, these protections necessarily entitle Mr. Hamdan to presumptive prisoner of war status and the protections that affix accordingly. Article 4 is the provision that defines “prisoners of war.” Article 5, in full, reads as follows:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

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

⁵ See Amicus Brief of General David M. Brahm, et al., attached to the Defendant’s Motion To Dismiss, at 17. See also Rowan Scarborough, *Powell Wants Detainees To Be Declared POWs*, WASH. TIMES, Jan. 26, 2002.

⁶ See States Party to the Geneva Conventions (February 6, 2004), available at www.icrc.org/web/eng/siteeng0.nsf/htmlall/party_gc.

⁷ Article 2 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).

⁸ Article 2 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).

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.⁹

Dismissing the plain language of the second paragraph of Article 5, the prosecution attempts to dismiss its obligation to provide a “competent tribunal” to determine a detained individual’s status, and it does so through the flimsiest of means: by pointing to a declaration by the president that “the GPW does not apply to al Qaeda,”¹⁰ and its own assertions that “no doubt” exists to Mr. Hamdan’s status. This ridiculous substitution of conclusory assertions for substantive process reveals a clear misreading of the law. GPW Article 5 requires that those “having committed a belligerent act and having fallen into the hands of the enemy” receive full prisoner of war protection *until* “their status has been determined by a competent tribunal” to be that of a civilian rather than of a POW.¹¹ The clear language of this provision plainly creates a presumption of POW status,¹² which has been the undisputed interpretation adopted by the United States since its ratification of the Geneva Conventions in 1955.¹³ As the prosecution concedes, the Army has even incorporated the language of Article 5 directly into its regulations. It has done so in a manner that even more clearly reveals where the burden lies:

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 authority. . . . 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.¹⁴

See also Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2658 (2004) (Souter, J., concurring in the judgment) (acknowledging the “Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war ‘until such time as their status has been determined by a competent tribunal.’”).

What is more, even if this presumption of POW status did not apply, there exists significant doubt as to Mr. Hamdan’s status—far more than would be needed under Article 5’s “any doubt” standard. Mr. Hamdan was captured by bounty-hunting Afghan paramilitary forces with every incentive to distort and invent information to secure their rewards. Indeed, “Pakistani intelligence sources said Northern Alliance commanders could receive \$5,000 for each Taliban

⁹ 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).

¹⁰ Prosecution’s Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 2.

¹¹ 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).

¹² *Id.* See also Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 INT’L REV. RED CROSS 571, 574-75 (2002).

¹³ See Brief of Amici Curiae, Experts on the Law of War, in Support of Petitioners in *Hamdi v. Rumsfeld*, No. 03-6696 (U.S.S.C. 2004), at 6-7, available at

http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/184/AmiciCuriae_Experts_%20Law.pdf [hereinafter “*Hamdi Amici*”].

¹⁴ Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) & § 1-6(a) (1997), available at http://www.apd.army.mil/pdffiles/r190_8.pdf (emphasis added).

prisoner and \$20,000 for an al Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.”¹⁵ Mr. Hamdan has, moreover, claimed that he is entitled to POW status, which in itself is sufficient under Army regulations to confirm that his status is “in doubt.” Specifically, the regulations read,

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 of 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.¹⁶

A categorical refusal to provide POW protections to a class of detainees, even if made by a President, does not even approach the evidence that would be needed to eliminate the doubt emerging from these circumstances. Indeed, as the drafters of Article 5 made clear, the competent tribunal requirement is meant to counteract precisely what the government is here attempting to achieve, as it ensures that “decisions which might have the gravest consequences [would] not be left to a single person”—even to a president.¹⁷ Nor has the United States in the past allowed denial of privilege without an *individualized* assessment of status.¹⁸ In sum, Respondents’ willingness to dismiss Mr. Hamdan’s POW status, without first convening a competent tribunal to determine the same, both contravenes these military regulations implementing Article 5 and radically departs from the practices to which the U.S. military has faithfully adhered in every major conflict since World War II.¹⁹ See Amicus Brief of General David M. Brahms, et al., attached to the Defendant’s Motion To Dismiss, at 18-22 for further discussion.

3) Even If He Were Not Entitled to POW Protections, Mr. Hamdan Would Still Enjoy Protections Under the Geneva Conventions.

Given the nature of the prosecutor’s insinuations,²⁰ it would seem appropriate at this point to remind the Members that a rejection of Mr. Hamdan’s POW status, if eventually warranted, would not result in his person somehow existing beyond the reaches of the Geneva Conventions. On the contrary, as the Official Commentary to the Fourth Geneva Convention explains,

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

¹⁵ Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, Boston Globe, Nov. 17, 2002, at A30.

¹⁶ AR 190-8, § 1-6(b). See also FM 27-10, ch. 3, § I ¶ 71(b) (explaining that AR 190-8 is the military’s interpretation of Article 5).

¹⁷ Int’l Comm. of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* 77 (Jean S. Pictet ed., 1960).

¹⁸ Jennifer Elsea, Congressional Research Service, *Treatment of “Battlefield Detainees” in the War on Terrorism 29* (2002), available at <http://fpc.state.gov/documents/organization/9655.pdf>.

¹⁹ *Id.* See also *Hamdi Amici* at 9. See generally *id.* at 6-15.

²⁰ Namely, that the “Geneva Conventions do not apply to al Qaeda fighters such as Hamdan” if Article 2 does not apply, Prosecution’s Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 3, and similarly wholesale dismissals of the Conventions.

civilian covered by the Fourth Convention. . . . There is no intermediate status; nobody in enemy hands can be outside the law.²¹

Indeed, in this context, Mr. Hamdan's emphatic denials of any wrongdoing become even more salient, as our military history demonstrates that a detainee's claims of innocence are often adjudicated in his favor. The 1,196 tribunals convened during Operations Desert Storm, for example, resulted in 310 individuals being granted POW status. The remaining 886 detainees presenting claims in front of the tribunals "were determined to be displaced citizens and were treated as refugees."²²

In any case, the supposed "unlawful combatant" status that the government relies so heavily upon in its attempts to deny protections to Mr. Hamdan has but a single effect under the Geneva Convention: While civilians are generally not lawful targets for military action, "when a civilian . . . is actually found wielding arms in the zone of combat, he may be treated as a lawful target of attack—but only insofar and as long as he takes a 'direct part in hostilities.'"²³ Once the civilian's direct participation has ended, however, he must be treated in the same manner as any other civilian.²⁴ He, for example, may be prosecuted for engaging in combat, but only in accordance with the protections accorded by the Fourth Geneva Convention.²⁵

Such is the treatment owed to Mr. Hamdan if a competent tribunal determines that he does not warrant POW status under the Conventions. Until that time, the law requires the government to grant Mr. Hamdan the protections pursuant to POW status under GPW Article 5.

b. Common Article 3 Of The Third Geneva Conventions Does Apply To Any And All Armed Conflicts, Thereby Ensuring Mr. Hamdan A Baseline Level Of Protection.

²¹ 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).

²² Dep't of Defense, *Conduct of the Persian Gulf War: Final Result to Congress* 578 (1992).

²³ See also Brief of *Amici Curiae* Practitioners and Specialists in the International Law of War in Support of Respondents in *Rumsfeld v. Padilla*, No. 03-1027 (U.S.S.C. 2004), at 14-15, available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/224/AmiciCuriae_Practitioners_Specialists_InternationalLaw.pdf [hereinafter *Padilla Amici*]. See also *id.* ("'Illegal combatant' or 'unlawful combatant' is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges accorded to combatants, the most important of which are prisoner of war status and immunity from prosecution for engaging in combat. The phrase 'unlawful combatant' actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status), and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with). As persons in the latter category retain their civilian status, it is arguably improper to refer to them as combatants at all: they are more accurately described as 'unprivileged belligerents.' . . . The *Quirin* Court's use of the phrase 'unlawful combatants,' *Ex parte Quirin*, 317 U.S. 1, 31 (1942), rather than the categories and terminology of the Geneva Conventions, reflects the fact that *Quirin* predates the 1949 Conventions. Its analysis of [international humanitarian law] must therefore be read in conjunction with the subsequent, authoritative Geneva Conventions.") (emphasis added).

²⁴ *Padilla Amici* at 14 (citing Fourth Geneva Convention art. 4; *The Law of Land Warfare* para. 73).

²⁵ See *Padilla Amici* at 14 n.18 ("The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person based on his unlawful participation in hostilities, provided that procedural safeguards were observed.") (citing Fourth Geneva Convention arts. 42, 43, 78; Additional Protocol art. 75(4)).

The purpose and effect of Common Article 3 is to provide for a minimum standard of treatment of detained individuals in *all* armed conflicts. To this end, the defense can, certainly, agree with the fraction of the prosecution’s interpretation of Common Article 3 that is correct. The prosecutor states that

Common Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is not one between High Contracting Parties to the Conventions. Common Article 3 complements common article 2. . . . The United States has accepted the proposition that the basic standards of common Article 3 have become customary international law in state practice. Recent opinions by international courts have also taken the view that the protections of common article 3 have become customary international law. . . . In this conception, common article 3 is not just a complement to common article 2, it is a catch-all that establishes standards for any and all armed conflicts not included in common article 2. ²⁶

Despite such promising beginnings, the prosecution couples these excerpts with a conclusion about Common Article 3’s applicability in this case that run directly counter to the logic of the discussion. Distorting the language of the Article, the prosecution concludes that “by its own terms, Article 3 does not apply to the conflict pursuant to which Hamdan remains confined” ²⁷ This assertion is erroneous. Common Article 3 applies to *all* armed conflict, including this one, as the history and structure of the Conventions makes undeniably clear. The relevant paragraph of the Article reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions ²⁸

The prosecutor’s response reveals at least three errors of law. First, the prosecution distorts the phrase “armed conflict . . . occurring in the territory of one of the High Contracting Parties” to be equivalent to an “internal conflict.”²⁹ It then asserts that the “armed conflict in which the United State is currently engaged is not an internal conflict, because the United States is prosecuting it in both Afghanistan and around the globe.”³⁰ While, given the distortion, the relevance of this assertion remains unclear, it maybe appropriate to note at this juncture that it is undisputed that the conflict was, indeed, occurring in Afghanistan—and therefore “occurring in the territory of one of the High Contracting Parties.” The argument that the prosecution appears to be offering here (that Common Article 3 only applies to conflicts “occurring in the territory of” the United States) is cryptic, at best.

In any case, such fine distinctions, even if they existed, would not confine the reach of Common Article 3. Indeed, the prosecutor fails to recognize a distinctive feature of Common

²⁶ Prosecution’s Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 4-5.

²⁷ Prosecution’s Response at 4.

²⁸ Article 3 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).

²⁹ Prosecution’s Response at 4.

³⁰ *Id.*

Article 3—that its stated applicability, to non-international armed conflict occurring in given territories, does not *limit* its applicability to such conflicts. On the contrary, as the Official Commentary of the Convention emphatically asserts, the very purpose of the Article was to “ensur[e] respect for the few essential rules of humanity which all civilized nations consider as valid *everywhere* and under *all circumstances* and as being above and outside war itself.”³¹ The Commentary explicitly asserts that “[t]his minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts.”³² Indeed, the Commentary goes so far as to explain that Common Article 3 “proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.”³³ The prosecution does a noble job of compiling descriptions of conflicts governed by Common Article 3; yet it does nothing to suggest that this list is exhaustive. Indeed, it confirms, by implication, that it is not: If, as the prosecution asserts, “a conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . must *normally* mean a civil war[,]”³⁴ then it occasionally must mean something else. In short, the Article does apply to the various conflicts the prosecution describes—it also applies to every *other* armed conflict.

The prosecutor similarly misunderstands the meaning of the phrase “not of an international character” in the context of armed conflict. This descriptive term does not contemplate the borders of countries and the geographical range of a dispute, as the prosecutor’s filing suggests,³⁵ but rather depends on the number of High Contracting Parties participating in the conflict—if there is only one such nation, then the conflict is by definition “not of an international character.” The government’s contradictory interpretation is implausible, as it would necessarily result in “a gap in protection, which could not be explained by States’ concerns about their sovereignty.”³⁶ Given that one of the central aims of the Conventions was to close such gaps in humanitarian coverage, “this confirms that even a conflict spreading across borders remains a non-international armed conflict.”³⁷

Although the respondents nevertheless attempt to manufacture and then exploit such a gap, the structure of the Conventions confirms that such maneuvers are prohibited. In the context of international law, Common Article 3 is unusual insofar as it provides blanket protections across and within borders. Common Article 3 even pierces a High Contracting Party’s veil of sovereignty, for example, to apply to internal armed conflicts. As such, it is “both legally and morally untenable that the rules contained in Common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than

³¹ Int’l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 14 (Jean S. Pictet ed., 1958) (emphasis added).

³² Int’l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 14 (Jean S. Pictet ed., 1958).

³³ *Id.*

³⁴ See Prosecution’s Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 5 (emphasis added).

³⁵ See Prosecution’s Response to Defense Motion to Dismiss (Violation of Common Article 3 of the Geneva Conventions) at 5.

³⁶ Marco Sassòli, *Use and Abuse of the Laws of War in the ‘War on Terrorism’*, 22 LAW AND INEQUALITY 195, 201 (2004).

³⁷ *Id.*

in respect of international conflicts, would not be applicable to conflicts of an international character.”³⁸ The catalogue of jurisdictions explicitly endorsing this all-encompassing scope of the Article is extensive: The applicability of common Article 3 to all international armed conflicts is now recognized in the jurisprudence of the International Court of Justice,³⁹ the International Criminal Tribunal for the Former Yugoslavia,⁴⁰ the International Criminal Tribunal for Rwanda,⁴¹ and the Inter-American Commission for Human Rights.⁴² Likewise, the United States has, historically, applied Common Article 3 in *all* armed conflicts subject to its military policy, even in situations not rising to the level of an “armed conflict” (such as domestic disturbances).⁴³ Perhaps most tellingly, Protocol I to the Geneva Conventions, now ratified by over 160 countries, clarifies that the protections codified in Common Article 3 apply, as a matter of positive international law, to *all* armed conflicts.⁴⁴

In short, it is at this point “indisputable that [C]ommon Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based.”⁴⁵ There can be no doubt that this “minimum” core of “mandatory” rules applies to the government’s treatment of Mr. Hamdan. See also Amicus Brief of General David M. Brahm, et al., attached to the Defendant’s Motion To Dismiss, at 22-23, for further discussion.

c. The Geneva Conventions, Which Have Been Implemented By Binding Army Regulations, Are Self-Executing And Provide Mr. Hamdan With A Defense To Require Compliance With Their Provisions.

Contrary to the Prosecution’s wishful assertions, Common Article 3 of the GPW guarantees a minimum level of protections to a defendant which cannot be abrogated by this commission. To deny this proposition, the Prosecution must undermine the plain text of the

³⁸ Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, P 143 (Int’l Crim. Trib. for Former Yugoslavia App. Chamber Feb. 20, 2001).

³⁹ See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14 (June 27).

⁴⁰ See Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 87 (Int’l Crim. Trib. for Former Yugoslavia App. Chamber Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

⁴¹ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int’l Crim. Trib. for Rwanda Trial Chamber Sept. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998).

⁴² See *Abella v. Argentina*, Case 11,137, Inter-Am. C.H.R., PP 155-56, OEA/ser. L/V.97, doc. 38 (1997).

⁴³ See Dep’t of Defense, Directive 5100.77: DoD Law of War Program (Dec. 9, 1998). The directive states, in part: “The Heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.” *Id.* P 5.31, at 4; see also Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999).

⁴⁴ Protocol I, art. 75, 1125 U.N.T.S. at 37. Although the United States has not ratified the 1977 Additional Protocols I and II to the Geneva Conventions (which provide further rules for international and non-international armed conflicts, respectively), it recognizes that most of their provisions now constitute customary international law binding upon the United States. See, e.g., Dep’t of the Army, *Law of War Deskbook* 32 (Brian J. Bill ed., 2000); Dep’t of Army, *Operational Law Handbook* 11 (T. Johnson ed., 2003). See also *Padilla Amici* at 8.

⁴⁵ Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, P 143 (Int’l Crim. Trib. for Former Yugoslavia App. Chamber Feb. 20, 2001).

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); *see also Kolovrat v. Oregon*, 366 U.S. 187 (1961); *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 Common Article 3. 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.⁴⁶ They cannot justify the prosecution’s strained judicial interpretation of the Geneva Conventions, which runs counter to specific recent precedent and the overwhelming weight of Supreme Court authority.

The clear and unequivocal judicial interpretation of the Geneva Conventions must be given deference as the dominant construction of the Treaty. In response to the Defense Motion to Dismiss, the prosecution concedes, “the minimum protections of common article 3 have indeed become part of customary international law.” Prosecution Response at 5. This concession is correct, but it misses the main point: it is the clear and unequivocal interpretation of the Geneva Conventions by United States judicial authority that governs. The prosecution presents this issue as a false choice for this commission. However, contrary to the prosecution’s wishes, this commission is not called upon to arbitrate between an

⁴⁶ The prosecution relies exclusively on the following cases in its response to the Defense Motion to Dismiss on Common Article 3 grounds. Prosecution Response at 5-6, *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 Common Article 3 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 Common Article 3 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 federal courts “consistent holding [is] that the Geneva Conventions are not self-executing” is, if anything, undercut by the judicial opinions cited as support. *See* Prosecution Response at 7.

interpretation of the Geneva Conventions proffered by the executive branch and an interpretation of the Geneva Conventions derived from customary international law. Rather, this commission is compelled to dismiss because the U.S. judiciary has provided a clear interpretation of the Geneva Conventions. This interpretation must be preeminent, even against a clearly contrary construction of the Geneva Conventions by the executive branch, which in any event is lacking in this case.⁴⁷ The prosecution's concessions about the overwhelming weight of customary international law provide an informative but ultimately unnecessary sidebar. 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 Common Article 3 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. Defendant's Motion To Dismiss at 6. 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). Prosecution Response at 6-7. 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 Common Article 3 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 prosecution claims that dismissal "would create severe distortions in the structure of the Constitution." Prosecution Response at 7. This assertion is worse than incorrect. In fact the converse is true: the interpretation of the Geneva Conventions urged by the prosecution would require this court to ignore and reverse the

⁴⁷ The prosecution's response implies that the recent presidential memorandum expresses a consistent executive branch interpretation of the GPW. See Prosecution Response at 2-3, 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.

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

d. The Military Commission And The Conditions Of Confinement Imposed On Mr. Hamdan Both Soundly Fail To Meet The Minimum Requirements Imposed By Article 2 And Common Article 3.

1) The military commission falls far short of meeting the minimum standards imposed by the Geneva Conventions.

The list of the ways in which the military commissions fail to satisfy the Geneva Convention is long, and the prosecution has done nothing to remedy or explain these shortcomings through its Response's two-paragraph defense. The following summary of shortcomings includes references to the amicus briefs, attached to the Defendant's Motion To Dismiss, where each failing is discussed in more detail:

- a) **The commission system violates the detainees' right to a speedy investigation and trial.** *See* Amicus Brief of General David M. Brahms, et al. at 24-25; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 33-35.
- b) **The commission system violates the detainees' right to present an adequate defense.** This includes detainees' right to facilities for the defense, and right to equality of arms. *See* Amicus Brief of General David M. Brahms, et al. at 26-27; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 33-35.
- c) **The commission system violates the detainees' right to exclude coerced and unreliable confessions as evidence.** This includes an accused's right not to be compelled to testify against himself, or to confess guilt. *See* Amicus Brief of General David M. Brahms, et al. at 28; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 26-28.
- d) **The commission system violates the detainees' right to an independent and impartial tribunal.** *See* Amicus Brief of General David M. Brahms, et al. at 28-30; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 26-31; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 19-24.

- e) **The commission system violates the detainees' right to a civilian court.** *See* Amicus Brief of General David M. Brahms, et al. at 31.
- f) **The commission system violates the detainees' right to be free from retroactive punishments.** *See* Amicus Brief of General David M. Brahms, et al. at 31-32.
- g) **The commission system violates the detainees' right to an appeal to an independent judicial body.** *See* Unopposed Motion of 271 United Kingdom and European Parliamentarians at 31-33; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 34-35.
- h) **The commission system violates the detainees' right to fundamental fair trial requirements,** including that of prompt notice, appearance before a judge, judicial recourse, judicial investigation and trial, and to limited pretrial detention of prisoners of war. *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 24-26.
- i) **The commission system violates the detainees' right to counsel through restrictions on legal assistance,** including restrictions on the right to communicate with counsel in private. *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 29-30, 30-31, 32.
- j) **The commission system violates a detainee's right to be tried in his presence.** *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 32.
- k) **The commission system violates the detainees' right to exclude evidence obtained through torture.** *See* Unopposed Motion of 271 United Kingdom and European Parliamentarians at 35-38.
- l) **The commission system is unlawfully discriminatory insofar as it subjects foreign citizens to human rights violations that United States citizens do not suffer.** *See* Amicus Brief of General David M. Brahms, et al. at 32; Unopposed Motion of 271 United Kingdom and European Parliamentarians at 38-40; Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 35-37.
- m) **The commission system was never itself established by law.** *See* Brief of Amicus Curiae of Louise Doswald-Beck, et al. at 17-19.
- n) **The conditions of confinement likewise fail to satisfy the minimum requirements of the Geneva Convention.**

2) A similar list of shortcomings can be compiled in regards to the conditions of Mr. Hamdan's confinement:

- a. The government has subjected Mr. Hamdan to **prolonged arbitrary detention**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 33.
- b. The government has subjected Mr. Hamdan to **questioning under coercion**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 33.
- c. The government has subjected Mr. Hamdan to **solitary confinement without access to sunlight**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 34-35.
- d. The government has subjected Mr. Hamdan to **prolonged inadequate medical treatment**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 35.
- e. The government has subjected Mr. Hamdan to **restrictions on free exercise of religion**, in violation of the Conventions. *See* Amicus Brief of General David M. Brahms, et al. at 35.
- f. **The prosecutor's attempt to excuse these failings is unavailing.**

The prosecution addresses none of the failings listed above. It does, however, attempt to deny that it has violated Subpart (1)(d) of Common Article 3, which prohibits a Contracting Party from “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” In making this denial, the prosecutor points to reasons it may have confined Mr. Hamdan, often in solitary confinement, for *over three years*, beyond those reason implied by its desire to punish its detainees.

Intent is not, however, at issue here. The prosecutor cannot recharacterize a detention as something else, and he certainly cannot do so retroactively. The fact remains that the lengthy pretrial confinement of Mr. Hamdan in solitary confinement without charge amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process. The government cannot now undo this violation by charging Mr. Hamdan two years after it first detained him; nor can it stop its continued violation of this same provision by offering him the possibility of a trial which has no guarantee of ensuring his release even if he is found to be not guilty of the charges against him (which, as the Defendant has explained in its coinciding Motion To Dismiss, are in themselves invalid). The prosecution clings tightly to a distinction without a difference in its attempt to deny that the sentence it has imposed on Mr. Hamdan constitutes a “punishment.” Whether this dubious denial is persuasive, neither this word nor its equivalent can be found in Common Article 3, and for good reason—the primary purpose of the Third Geneva Convention is to protect the individual against harsh government treatment, not to ensure that governments are acting on the basis of certain motivations.

The Prosecution's Response fails to refute the law as set forth in the Defendant's Motion To Dismiss for Violation of Common Article 3 of the Geneva Conventions. The Defendant's argument as to the Prosecutor's violations of the Geneva Convention is correct as a matter of law. The Defendant therefore respectfully renews its request that the commission grant this Motion.

5. Files Attached. None.

6. Oral Argument Required. See D23, the Defense position remains the same.

7. Legal Authority Cited.

a. Articles 2,3, and 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)

b. *Rasul v. Bush*, 124 S. Ct. 2686 (2004)

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

d. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 INT'L REV. RED CROSS 571 (2002)

e. Brief of Amici Curiae, Experts on the Law of War, in Support of Petitioners in *Hamdi v. Rumsfeld*, No. 03-6696 (U.S.S.C. 2004), at 6-7, available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/184/AmiciCuriae_Experts_%20Law.pdf

f. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) & § 1-6(a) (1997), available at http://www.apd.army.mil/pdffiles/r190_8.pdf

g. Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, Boston Globe, Nov. 17. 2002

h. Int'l Comm. of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War: Commentary* 77 (Jean S. Pictet ed., 1960)

i. Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002), available at <http://fpc.state.gov/documents/organization/9655.pdf>

j. Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* 578 (1992)

k. Brief of Amici Curiae Practitioners and Specialists in the International Law of War in Support of Respondents in *Rumsfeld v. Padilla*, No. 03-1027 (U.S.S.C. 2004), at 14-15, available

at

http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/224/AmiciCuriae_Practitioners_Specialists_InternationalLaw.pdf

l. Marco Sassòli, *Use and Abuse of the Laws of War in the 'War on Terrorism'*, 22 LAW AND INEQUALITY 195, 201 (2004)

m. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, P 143 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Feb. 20, 2001).

n. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)

o. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 87 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996)

p. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Trial Chamber Sept. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998)

q. Abella v. Argentina, Case 11,137, Inter-Am. C.H.R., PP 155-56, OEA/ser. L/V.97, doc. 38 (1997)

r. Dep't of Defense, Directive 5100.77: DoD Law of War Program (Dec. 9, 1998)

s. U.S. Const., Art. VI, cl. 2.

t. Jones v. Meehan, 175 U.S. 1 (1899)

u. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986)

v. Perkins v. Elg, 307 U.S. 325 (1939)

w. Owings v. Norwood's Lessee, 9 U.S. 344 (1809)

x. Factor v. Laubenheimer, 290 U.S. 276 (1933)

y. United States v. Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002)

z. United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992)

aa. Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)

bb. The Head Money Cases, 112 U.S. 580 (1884)

cc. Kolovrat v. Oregon, 366 U.S. 187 (1961)

- dd. *Jordan v. Tashiro*, 278 U.S. 123 (1928)
 - ee. *Asakura v. City of Seattle*, 265 U.S. 332 (1924)
 - ff. *Chew Hong v. United States*, 112 U.S. 536 (1884)
 - gg. *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)
 - hh. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)
 - ii. 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)
 - jj. Amicus Brief of General David M. Brahms, et al.
 - kk. Unopposed Motion of 271 United Kingdom and European Parliamentarians
 - ll. Brief of Amicus Curiae of Louise Doswald-Beck
8. Witnesses/Evidence Required. The Defense position remains the same as in D23.
9. Additional Information. None.

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