

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH,
RAMZI BINALSHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM AL
HAWSAWI**

AE 214H

ORDER

**DEFENSE MOTION TO COMPEL
MR. HAWSAWI'S ACCESS TO THE
GOVERNMENT OF SAUDI ARABIA
IN COMPLIANCE WITH UNITED
STATES LAW / DEFENSE MOTION
TO COMPEL DISCOVERY**

9 APRIL 2015

1. Mr. Hawsawi filed a motion requesting this Commission issue an order compelling the Secretary of Defense to facilitate meetings and communications between the Accused and the Saudi Arabian Government.¹ Mr. Hawsawi argues that the Vienna Convention on Consular Relations [hereinafter Vienna Convention]² gives consular offices the right to visit a national of their state who is in custody. Similarly, the Defense also argued a 1933 bi-lateral agreement³ between the United States and Saudi Arabia granted Mr. Hawsawi the same right to contact his government. The Government responded by treating the Defense Motion as a writ of mandamus. They stated the Defense's arguments fail because: 1) Mr. Hawsawi has Learned Counsel who is performing his duties, 2) the inability to meet with his home country representatives does not affect the fairness of the proceedings, and 3) neither the Vienna Convention nor the 1933 Executive Agreement create a judicially enforceable right to consular access.⁴ The Defense reply

¹ Defense Motion to Compel Mr. Hawsawi's Access to the Government of Saudi Arabia in Compliance with United States Law, filed 28 August 2013 (AE 214(MAH)).

² Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

³ Provisional Agreement Between the United States of America and the Kingdom of Saudi Arabia in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce and Navigation [hereinafter 1933 Executive Agreement], 48 Stat. 1826 (Nov. 7, 1933).

⁴ Government Response to Compel Mr. Hawsawi's Access to the Government of Saudi Arabia in Compliance with United States Law, filed 11 September 2013 (AE 214B (GOV)).

argued this Commission has the authority to order compliance under the Rules for Military Commission (R.M.C.) 906.⁵

2. Mr. Hawsawi further requested this Commission to compel the Government to produce un-redacted copies of “all diplomatic letters, e-mails, and correspondence pertaining to requests made by the Saudi Arabian Government to meet with its citizens detained at Guantanamo Bay, Cuba.”⁶ The Government responded requesting this Commission delay ruling on the motion to allow it time to “complete its review of any potentially discoverable material responsive to the requested relief.”⁷ During a hearing on the motions, this Commission requested updated filings on the status of the request.⁸ The Defense supplement stated they had not received any of the requested documents.⁹ The Defense further argued that regardless of how this Commission rules on AE 214 (MAH), the documents remain “material to the preparation of Mr. Hawsawi’s case.”¹⁰ The Government’s response stated they had secured a number of classified documents. The Government will provide these documents to the Defense upon Defense signing a Memorandum of Understanding Regarding Receipt of Classified Information (MOU) in accordance with this Commission’s Second Amended Protective Order #1.¹¹

3. These motions were argued on 12 February 2015.¹²

4. Law.

a. Article 36 of the Vienna Convention provides, in relevant part:

⁵ Defense Reply to Government Response to Compel Mr. Hawsawi’s Access to the Government of Saudi Arabia in Compliance with United States Law, filed 27 September 2013 (AE 214D (GOV)) at page 3.

⁶ Defense Motion to Compel Discovery, filed 10 September 2013 (AE 214A (MAH)).

⁷ Government Response to Defense Motion to Compel Discovery, filed 25 September 2013 (AE 214C).

⁸ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad, et al. (2) Motions Hearing Dated 12 February 2015 from 1:28 P.M. to 2:26 P.M. at pp. 8471-72.

⁹ Mr. Hawsawi’s Supplement to AE 214A (MAH) Defense Motion To Compel Discovery, filed 13 March 2015 (AE 214E (MAH Sup)).

¹⁰ *Id.* at 2.

¹¹ Second Amended PROTECTIVE ORDER #1 To Protect Against Disclosure of National Security Information, dated 16 December 2015 (AE 013DDD).

¹² Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad, et al. (2) Motions Hearing Dated 12 February 2015 from 1:28 P.M. to 2:26 P.M.

Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.¹³

b. The 1933 Executive Agreement provides:

Subjects of his Majesty the King of the Kingdom of Saudi Arabia in the United States of America, its territories and possessions, and nationals of the United States of America, its territories and possessions, in the Kingdom of Saudi Arabia shall be received and treated in accordance with the requirements and practices of generally recognized international law. In respect of their persons, possessions, and rights, they shall enjoy the fullest protection of the laws and authorities of the country, and they shall not be treated in regard to their persons, property, right and interests, in any manner less favorable than the nations of any other foreign country.

c. A motion for appropriate relief may be filed to “cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.” R.M.C. 906. Mandamus is a “drastic and extraordinary remed[y].” *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). To obtain mandamus, a petitioner must show (1) he has “no other adequate means” of attaining the desired relief; (2) “the writ is appropriate under the circumstances”; and (3) he has a “clear and indisputable” right to issuance of the writ. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004); accord *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976).

d. The Military Commissions Act of 2009 (“MCA”) provides the accused a reasonable opportunity to obtain evidence as provided in regulations prescribed by the Secretary of Defense. *See* 10 U.S.C. § 949j. R.M.C. 701(c)(1) requires the Prosecution to produce evidence that is “material to the preparation of the defense.” “Each party is entitled to the production of evidence which is relevant, necessary and noncumulative,” and evidence is relevant under the MCA when it “contribute[s] to a party’s presentation of the case in some positive way on a matter in issue.”

¹³ Article 36.1.c.

R.M.C. 703(f)(1) and Discussion. The defense bears the burden on showing discovery is required to be compelled. R.M.C. 905(c)(2).

5. Analysis.

a. The Government has stated they are in possession of three pages of documents to answer the Defense's discovery request.¹⁴ The Government stipulated that the Saudi Arabian Government has requested contact with Mr. Hawsawi. The Government did not dispute the materiality of the documents and stated upon completion of the MOU they would provide the documents.

b. Because both a motion for appropriate relief under R.M.C. 906 and a writ of mandamus require a party to be entitled to a "right," this Commission must first determine whether Mr. Hawsawi has a justiciable right to contact with the Saudi Arabian consulate.

c. While the treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis. *See, e.g., Foster v. Neilson*, 2 Pet. 253, 314, 7 L.Ed. 415. The United States Supreme Court has found the Vienna Convention to not be self-executing. *Medellín v. Texas*, 552 U.S. 491 (2008). Further, the plain language of the Vienna Convention bestows the right onto the Consulate, not the individual. *United States v. Li*, 206 F.3d 56 (1st Cir. 2000) specifically held the Vienna Convention or even a bi-lateral agreement between countries does not create individual rights. *See also, Allaithi v. Rumsfeld*, 753 F.3d 1327, 1334 (D.C. Cir. 2014) (*citing United States v. Emuegbunam*, 268 F.3d 377, 392-94 (6th Cir. 2001)); and *United States v. Jimenez-Nava*, 243 F.3d 192, 197-98 (5th Cir. 2001). Given no authority confers a private right upon Mr. Hawsawi, Defense cannot show a "clear and indisputable" right to issuance of the writ. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81

¹⁴ AE 214G (GOV).

(2004). Further, because Defense cannot show any specific prejudice to his right he has at trial, relief under R.C.M. 906(a) is similarly un-cognizable. *See generally, United States v. Wood*, 36 M.J. 651, 653 (A.C.M.R. 1992).¹⁵

6. Ruling

a. Given the Government's lack of opposition, the Defense Motion to Compel Discovery (AE 214A (MAH)) is **GRANTED**, upon completion of MOU in accordance with this Commission's Second Amended Protective Order #1.

b. The Defense Motion for Appropriate Relief (AE 214 (MAH)) is **DENIED**.
So **ORDERED** this 9th day of April, 2015.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

¹⁵ *United States v. Wood* is a case involving the Rules for Courts Martial, which the R.M.C. were patterned from and has consistent language.