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 303D RULING DEFENSE MOTION FOR APPROPRIATE RELIEF TO REQUIRE CONFINEMENT CONDITIONS THAT COMPLY WITH INTERNATIONAL HUMANITARIAN LAW STANDARDS 22 June 2015

1. This ruling applies only in the case of the *United States v Mustafa Ahmend Adam Al Hawsawi*.[1]

2. Mr. al Hawsawi filed a motion requesting this Commission "order detention authorities to move Mr. al Hawsawi to a confinement location that complies with "International Humanitarian Law Standards."[2] The motion argues that detention at Joint Task Force Guantanamo (JTF-GTMO) "violate[s] accepted international humanitarian law standards, human rights law, and the 1933 Agreement between the United States and the Kingdom of Saudi Arabia."[3]

3. The Defense alleges the Accused has been subjected to inhumane treatment and "systemic violations," to include:

a. Periods of solitary confinement that included minimal contact with others for over 500 days.[4]
b. Denial of access to legal counsel.[5]

[1] *See* Joint Motion to Decline Joinder of AE 303(MAH) Defense Motion for Appropriate Relief to Require Confinement Conditions That Comply with International Humanitarian Law Standards, filed 5 June 2014 (AE 303(Mohammad, bin 'Attash, bin al Shibh, al Baluchi)). This position was clarified by Mr. Bin 'Attash's learned counsel that: "we don't believe we are prepared at this point with outstanding motions for discovery to be able to even draft it." Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 12 February 2015 from 10:49 A.M. to 11:43 A.M. at p. 8433.
[2] Defense Motion for Appropriate Relief to Require Confinement Conditions That Comply with International Humanitarian Law Standards, filed 29 May 2014 (AE 303(MAH)).
[3] *Id.* at 2.
[4] *Id.* at 12-13.

c. Denial of access to attorneys or representatives of his government, Saudi Arabia.[6]
d. Denial of "adequate" contact or communication with his family.[7] Mr. Hawsawi stated his only communication with family as of the time of the motion was two Red Cross Messages and four postcards for which delivery was delayed and portions were redacted.[8]
e. Denial of adequate premises and conditions to observe the basic tenets of his religious faith, to include not being allowed to engage in group prayer[9] and inability to pray in a "clean environment."[10]
f. Mr. Hawsawi, and other Camp 7 Detainees, are treated differently than all other JTF-GTMO detainees.[11]

4. The Government responded that the conditions of confinement at the detention facilities at JTF-GTMO "meet or exceed all U.S. obligations under international law."[12]

5. Oral argument on this motion was conducted on 12 February 2014.[13] In arguing that this Commission must grant relief the Defense said:

> [W]e know that these conditions are affecting the quality of life of Mr. al Hawsawi on a daily basis and that, therefore, also affects the quality of engagement that we have with the person that we represent and that we are asked to represent before this commission.[14]

Defense suggested this Commission had an independent obligation to ensure compliance with

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[5] *Id.* at 2, 12. This item is also subject of another motion by the Defense. *See* Emergency Defense Motion to Permit Attorney-Client Meetings 3 and 4 December 2013, filed 12 June 2014 (AE 254(WBA)). This motion only considers the facts alleged as it pertains to whether the Mr. Hawsawi has received inhumane treatment at JTF-GTMO, this motion does not address the AE 254 series on their merits.
[6] This item is also subject of another motion by the Defense. *See* 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)).
[7] AE 303(MAH) at 4.
[8] *Id.* at 5.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 7.
[12] Government Response to Defense Motion for Appropriate Relief to Require Confinement Conditions That Comply with International Humanitarian Law Standards, filed on 12 June 2014 (AE 303B(GOV)) (*citing* 2013 CAT Report ¶ 216).
[13] Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 12 February 2015 from 10:49 A.M. to 11:43 A.M. at pp. 8433 - 84.
[14] *Id.* at 8434.

these protections.[15] The Government argued Mr. Hawsawi was not detained as a pretrial confinee.[16]

6. This Commission has been established to try alien unprivileged enemy belligerents for violations of offenses triable by Military Commissions. 10 U.S.C. § 948b(a). The Military Commission Act also precludes alien unprivileged enemy belligerent, subject to trial by military commission under this chapter, from invoking the Geneva Conventions as a basis for a private right of action. 10 U.S.C. § 948b(e). The detainees are held "under the authority provided by the 2001 Authorization for the Use of Military Force (Public Law 107-40), as informed by the law of war." President Barack Obama, Letter to Congressional Leaders on the Global Deployments of United States Combat-Equipped Armed Forces, 2013 Daily Comp. Pres. Doc. 853 (Dec. 13, 2013).

7. During 2009, "[t]he Secretary of Defense tasked a special DoD team to review the conditions of confinement at Guantánamo Bay Naval Base, to ensure all detainees there are being held 'in conformity with all applicable laws governing the conditions of confinement, including Common Article 3 of the Geneva Conventions,' pursuant to the President's Executive Order on Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, dated January 22, 2009."[17] After "[t]he Review Team conducted 13 days of investigation . . ." they concluded "the conditions of confinement in Guantánamo are in conformity with Common Article 3 of the Geneva Conventions."[18]

8. Despite the Defense encouraging this Commission to "not shy away from studying The Hague model for how to comply with international norms for detention in war crimes cases" this

[15] *Id.* at 8455.
[16] *Id.* at 8450-53.
[17] AE 303B(GOV)(Attachment C).
[18] *Id.*

Commission has a limited role in addressing grievances a detainee has with JTF-GTMO. *See generally* 10 U.S.C. § 948d. Unless such requests involve a right or privilege within the criminal process, this Commission has limited jurisdiction to address a detainee's requests.[19]

9. Even if this Commission had authority to provide some of the remedies Defense has requested, such as ordering the movement of detainees from Camp 7 to another location, the specific claims fall short of cognizable violations requiring relief. In determining whether conditions at JTF-GTMO violate any theories postured by the Defense, this Commission evaluates current conditions at JTF-GTMO as they impact the Military Commission process. Detention at prior locations, at prior times for potentially other purposes, is not relevant as to whether Mr. Hawsawi's current confinement conditions are in violations on these norms.[20] Many of the specific "violations" stated do not rise to a level where-in action is required by this Commission:

a. This Commission finds that Mr. Hawsawi's argument that the Geneva Convention requires all detainees to be treated the same does not stand. Article 16 of the Geneva Convention clearly enables different treatment. The Article only prohibits adverse distinctions based on race, nationality, religious belief, political opinions, or any similar distinctions.[21]

b. This Commission also finds that Mr. Hawsawi's request's for group prayer and a "clean environment" to pray, similarly do not stand. Detainees do not have an unfettered right to obligate a detention facility to accommodate every religious request, to include group prayer.[22]

c. This Commission finds that there is no due process violation for the length of detention before trial. The proffer from Mr. Hawsawi that *Magluta v. Samples*[23] stands for any pretrial solitary confinement over 500 days is a violation of due process rights is incorrect. *Magluta* did not make the "excessive" finding as defense suggested, instead the court only allowed the

[19] *See* AE 294GG(enjoining JTF-GTMO from using female security personnel to escort detainees to/from attorney client meetings and hearings only); *see* AE 332C (denying defense request to intervene in detainees' medical care).
[20] This does not mean that such evidence is entirely irrelevant to this motion, and of course may be relevant to the trial as a whole whether for other motions, mitigation, or extenuation.
[21] Third Geneva Convention Article 16.
[22] *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351-2 (1987).
[23] 375 F.3d 1269, 1283 (11th Cir. 2004).

claim to go forward because the trial judge applied an incorrect standard. Defense also has not shown that Mr. Hawsawi is currently held as a pretrial confinee, as opposed to a detainee.

d. This Commission finds the denial of Detainee requests to expand recreational opportunities and increase detainee-to-detainee contact do not equate to inhumane treatment by Camp 7.

e. Attorney client access has been the subject of multiple motions and is still the subject of ongoing litigation. This Commission finds the relief sought and objections raised by the Defense for this motion do not rise to the level of "inhumane" treatment. Regardless of the outcome of other motions about representation rights, bureaucratic measures that may at times effect attorney client meetings, etc are not "inhumane." This Commission notes counsel has been representing Mr. Hawsawi, and though some instances of limitations to or even cancelations of contact have occurred, Mr. Hawsawi appears to have been represented and met with counsel on numerous occasions.

f. This Commission finds Mr. Hawsawi has had contact with his family. Defense has not cited any law that has stood for the position that the contact with family Mr. Hawsawi has received is legally "inadequate." Communications have been made, and though logistics appear to be an ongoing issue, the imperfections of these systems do not rise to the level of inhumane treatment.

g. The 1933 Agreement between the United States and the Kingdom of Saudi Arabia may constitute an international commitment; however, *United States v. Li*, 206 F.3d 56 (1st Cir. 2000) specifically held the even a bi-lateral agreement between counties 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). Therefore, even if lack of access to consular officials was a violation[24] it cannot be used as an individual right to adjudicate the requested relief.

10. The Defense has not presented any case law or other authority to this Commission that concludes any policy, procedure, or practice that differed from any practice at The Hague is "inhumane" or having significant impact to a right or privilege of the Accused before this Commission and thus requiring the relief the Defense requested.

[24] *See* 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, filed 9 April 2015

11. This Commission is further not persuaded by Defense's argument that quality of life effects of the detainees are also adversely affecting "the quality of engagement" of representation. As such, these and other of the Defense's requests are not cognizable for relief. Even if these desires were "inhumane," the Defense is prohibited from using the Geneva Conventions as a basis for a private right to request this Commission to take requested actions. The Defense, otherwise, has been unable to cite any specific law that gives this Commission the jurisdiction to make such an order, or even what law the Defense was relying on when they stated this Commission had an independent obligation to make such an order even if needed.

11. The Defense motion for appropriate relief is **DENIED.**

So ORDERED this 22nd day of June, 2015.

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JAMES L. POHL
COL, JA, USA
Military Judge