

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

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

AE 399 (WBA)

**Defense Motion
to Compel JTF-GTMO to Permit In-Person
Visitation between Mr. bin 'Atash and
Members of his Family**

Date Filed: 6 January 2016

1. Timeliness: This motion is timely filed.

2. Relief Sought:

Mr. bin 'Atash requests that the Commission compel Joint Task Force Guantanamo (JTF-GTMO) to permit him to visit with members of his family in person.

3. Overview:

Mr. bin 'Atash was seized on 29 April 2003 in Karachi, Pakistan. For the next 40 months, he was held *incommunicado* at a number of "black sites" outside the United States where he was brutally tortured by the Central Intelligence Agency and, possibly, other cooperating agencies and governments. During this period, Mr. bin 'Atash was not permitted to communicate with his family, nor was his family notified of his whereabouts. On 6 September 2006, Mr. bin 'Atash was rendered to Guantanamo Bay, Cuba and imprisoned in a secret facility where he has since been held. During all times from 2003 until the present, Mr. bin 'Atash has been denied virtually all contact with his family, whether in-person, by telephone or by videoconference. Such denial by the United States constitutes a violation of applicable international and domestic law.

In addition to his right to be free from unlawful pretrial punishment, Mr. bin 'Atash has a constitutional right to communicate with family members. Furthermore, and apart from the rights afforded Mr. bin 'Atash by United States law, both international humanitarian law (IHL) and international human rights law (IHRL) govern Mr. bin 'Atash's conditions of confinement and require JTF-GTMO to provide him reasonable access to his family.

The Commission should end the United States' 12-plus year violation of Mr. bin 'Atash's right to communicate with his family by ordering the Government to permit in-person family visitation. If the United States fails to provide for such visitation, the Commission should dismiss the charges pending against Mr. bin 'Atash for denial of Mr. bin 'Atash's right to due process.

4. Burden and Standard of Proof:

The defense bears the burden of persuasion. The standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

a. Unknown actors seized Mr. bin 'Atash in Karachi, Pakistan on 29 April 2003. The United States, if not involved in his arrest, took custody of Mr. bin 'Atash on an undisclosed date soon after. Once in the custody of the United States, Mr. bin 'Atash was rendered to a number of "black sites" where, over the course of more than three years, he was held *incommunicado*, brutally tortured, and subjected to all manner of cruel, inhuman, and degrading treatment.

b. On 6 September 2006, Mr. bin 'Atash resurfaced when the United States purportedly transferred his custody from the CIA to the Department of Defense and transferred him from a black site to a secret prison at Naval Station Guantanamo Bay, where he has been held since.

c. Since his arrest, the United States, despite having the capability, has denied Mr. bin 'Atash any simultaneous communication with his family. Mr. bin 'Atash, while in United States custody, has never been permitted to communicate with his family face-to-face, by telephone, or by video-teleconference.

d. The United States has permitted minimal written communication, facilitated by the International Committee of the Red Cross (ICRC), between Mr. bin 'Atash and his family; however, letters between Mr. bin 'Atash and his family are so limited in length and so delayed in their delivery as to be almost meaningless as a method of family communication for either a law of war detainee or a pre-trial defendant who stands innocent after almost 13 years of detention without trial.

e. The ICRC office located on Naval Station Guantanamo Bay has a system enabling detainees to regularly speak to their families by telephone and video-teleconference facilitated by the ICRC through its delegations around the world. Between 2008 and February 2014, the ICRC “made it possible for over 3,100 video and phone calls to take place” between prisoners at Guantanamo and their families.¹

f. The United States has never permitted Mr. bin 'Atash to utilize the telephone or video-teleconference facilities available to detainees through the ICRC.

g. In the Fall of 2014, the Department of Defense and the ICRC implemented a “video message” program for detainees housed in Camp 7, including Mr. bin 'Atash. Each detainee was to be permitted one short, non-contemporaneous, non-interactive video message every three months. Each detainee was to be permitted to designate up to five viewers. *See* AE321(WBA) at 4-5.

¹ Anna Nelson, *Guantanamo Bay: An Enduring ICRC Commitment* (Feb. 10, 2004), available at <http://intercrossblog.icrc.org/blog/guantanamo-bay-enduring-icrc-commitment>.

h. In the Fall of 2014, Mr. bin 'Atash was offered an initial opportunity to participate in the video message program. However, Mr. bin 'Atash withdrew his participation after being informed, approximately one hour prior to the taping of his video message, that both his father and his brother would be denied access to his video message. *See* AE321C(WBA) at 11-12.

i. In December 2014, Mr. bin 'Atash was again offered an opportunity to participate in the video message program. On or about 7 December 2014, Mr. bin 'Atash recorded a video message to be screened to his family by the ICRC. However, on or about 9 January 2015, Mr. bin 'Atash was informed by JTF-GTMO that his video message would not be released to his family. JTF-GTMO has offered no explanation for its refusal to release Mr. bin 'Atash's ICRC video message.

j. On 27 January 2015, Mr. bin 'Atash served the Prosecution with a discovery request pertaining to ICRC audio and video messages. AE360(WBA) at Attachment B. Mr. bin 'Atash requested that the Prosecution provide in discovery "a copy of all video or audio messages to Mr. bin 'Atash's family, in any format, recorded by Mr. bin 'Atash for the period 1 December 2014 to present." Mr. bin 'Atash additionally requested "any documentation and any communication...related to audio or video messages from Mr. bin 'Atash to his family, for the period 1 December 2014 to present," to include documentation concerning the U.S. Government's refusal to deliver Mr. bin 'Atash's 7 December 2014 recording.

k. On 28 January 2015, within twenty-four hours of Mr. bin 'Atash's discovery request, the Prosecution summarily denied the request in total. AE360(WBA) at Attachment C. The Prosecution stated that it had "no obligation to review, search for, or disclose self-serving ICRC recordings made by [Mr. bin 'Atash] to his family." The Prosecution further indicated that "[w]hatever decisions were made regarding whether or not to release the video message, and

who made those decisions and why, has absolutely nothing to do with this case.” The Prosecution indicated that it had conducted and would conduct no search for responsive materials in order to determine the materials’ discoverability. Due to the United States’ request for a delay to pretrial proceedings in Mr. bin ‘Atash’s case—which halted pre-trial proceedings in this case for more than 18 months—AE360 remains pending before the Commission.

1. In June 2015, Mr. bin ‘Atash was again offered an opportunity to participate in the video message program, and recorded a video message to be screened for his family by the ICRC. After being arrested at the age of 22, and experiencing almost 13 years of detention with no simultaneous communication with his family, Mr. bin ‘Atash, it appeared, would be able to speak on recorded video to his mother.

m. On 23 September 2015, before viewing Mr. bin ‘Atash’s video message, Mr. bin ‘Atash’s mother passed away.

n. In November 2015, Mr. bin ‘Atash was offered the opportunity to conduct an [REDACTED] videoconference on 5 December 2015 with family members who would participate from an ICRC affiliate office in Saudi Arabia. On 4 December 2015, Mr. bin ‘Atash was notified that the videoconference had been cancelled.

6. Law and Argument:

The United States’ Refusal to Permit Mr. bin ‘Atash Meaningful Communication with his Family Violates Domestic and International Law

Mr. bin ‘Atash enjoys a “nested set of protections” against unlawful conditions of confinement “based on his detention proper, his detention by the Department of Defense, his detention at Guantanamo Bay, his detention under the law of war, and – most narrowly – the war crimes charges pending against him.” AE254PPP(AAA) at 1-2. As a pretrial detainee under domestic law, Mr. bin ‘Atash has a constitutional and statutory right to be treated in a humane

manner, and he may not be “punished prior to an adjudication of guilt in accordance with due process of law.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (due process rights of pretrial detainees are “at least as great as the Eighth Amendment protections available to a convicted prisoner.”); *Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992) (“[w]hile a convicted prisoner is entitled to protection only against ‘cruel and unusual’ punishment, a pretrial detainee, not yet found guilty of any crime, may not be subjected to punishment of any description.”); *see also* 10 U.S.C. § 949s (prohibiting cruel or unusual punishment, either adjudged or “inflicted,” for any person subject to trial by military commissions). Where conditions or restrictions imposed incident to pretrial confinement are “arbitrary or purposeless,” a “court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” *Bell*, 441 U.S. at 538. “[I]nquiry into whether given conditions constitute ‘punishment’ must [] consider the totality of circumstances within an institution.” *Hubbard v. Taylor*, 399 F.3d 150, 160 (3d Cir. 2005).

In addition to his Fifth Amendment right to be free from unlawful pretrial punishment, Mr. bin ‘Atash also has additional constitutional right to communicate with family members. In particular, Mr. bin ‘Atash has a First Amendment right to communicate with friends and family. *See, e.g., Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (“persons incarcerated in penal institutions retain their First Amendment rights to communicate with family and friends...”); *Morgan v. LaVallee*, 526 F.2d 221, 225 (2d Cir. 1975) (noting that a “prison inmate’s rights to communicate with family and friends are essentially First Amendment rights” and that restrictions are impermissible where they “materially impede the inmate’s ability to communicate with the outside world...”).

Apart from the rights afforded Mr. bin 'Atash by United States law, both international humanitarian law (IHL) and international human rights law (IHRL) govern Mr. bin 'Atash conditions of confinement and require JTF-GTMO to provide Mr. bin 'Atash reasonable access to his family.

At minimum, Mr. bin 'Atash is guaranteed the protection of Common Article 3 of the Geneva Conventions, the various norms of customary international law applicable to non-international armed conflicts, as well as those protections that the United States has specifically agreed to apply in its treatment of Mr. bin 'Atash and his fellow detainees.² *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006); DoDD 2310.01E, DoD Detainee Program (19 August 2014) at ¶ 3(a) (incorporating by reference, *inter alia*, Articles 4-6 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II)). Each of these sources of international law vests Mr. bin 'Atash with various rights regarding communication with and meaningful access to members of his family. For example, it is a precept of customary international law that persons deprived of liberty in non-international armed conflict “be allowed to receive visits from family members to the degree practicable.” ICRC, Customary IHL Database, Rule 126, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule126. The United States has expanded upon this protection, defining “humane treatment” to include “appropriate contacts with the outside world,” including “exchange of letters, phone calls, and video teleconferences with immediate family or next of kin, as well as family visits.” DoDD 2310.01E at ¶ 3(b)(1)(b).

More specifically to the violation at issue, both IHL and IHRL, as adopted by the United

² Mr. bin 'Atash should properly be classified as a prisoner of war and protected by the Third Geneva Convention until otherwise classified by a competent tribunal, and a competent tribunal may ultimately classify Mr. bin 'Atash as a civilian internee subject to the protections of the Fourth Geneva Convention. *See generally* AE254VV(AAA) at 3 n.3; AE119(MAH); AE119(WBA). However, even absent an appropriate status determination by a competent tribunal, Common Article 3 provides baseline protections sufficient to trigger discovery of the material sought in the instant motion.

States, require JTF-GTMO to provide Mr. bin 'Atash reasonable access to his family through telephone/videoconferencing contact and family visits. The Fourth Geneva Convention, the minimum standard of humane treatment, and the requirement of rehabilitation from torture all mandate simultaneous family communication.

The protections of IHL, IHRL, and domestic law are not mutually exclusive but complementary, even during a non-international armed conflict.³ *See generally* Laura M. Olson, *Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-international Armed Conflict*, 40 CASE. W. RES. J. INT'L L. 437 (200). The relationship between IHL and IHRL is often referred to as complementary. *See, e.g.*, U.N. Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add 13 (Mar. 29, 2004). The International Court of Justice (ICJ) has confirmed the complementarity of IHL and IHRL, stating that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation. . . .” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9, 2004). *See also* *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

Neither the humane treatment requirement, nor the requirement for family visits, is new. AR 190-8, established in 1997, provides that, “All persons captured, detained, interned, or

³ *See, e.g.*, International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports, at 243 (Dec. 19, 2005), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports at 178 (July 9, 2004), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>; Inter American Court of Human Rights, *Bamaca-Velasquez v. Guatemala*, Judgment, at § 207 (Nov. 25, 2000), available at <http://www.corteidh.or.cr/mw-g-internal/de5fs23hu73ds/progress?id=9pDzF3WdiW>.

otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.” 15 AR 190-8 requires that, “Near relatives and other persons authorized by the theater commander will be permitted to visit the [civilian internee] as frequently as possible in accordance with theater regulations.”⁴

The United Nations Standard Minimum Rules for the Treatment of Prisoners explains that, “Prisoners shall be allowed to receive visits from their family and reputable friends.”⁵ Furthermore, “[a]n untried prisoner . . . shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.”⁶

The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment⁷ states, “communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”⁸ In particular, Principle 19 further emphasizes that, “A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”⁹

In addition to the IHL principles outlined above, the Convention Against Torture, as

⁴ AR190-8 § 6-7(b)(2)

⁵ Standard Minimum Rules ¶ 37.

⁶ Standard Minimum Rules ¶ 92.

⁷ U.N. General Assembly, A/RES/43/173 (Dec. 9, 1988) [hereinafter Body of Principles] ; see also U.N. General Assembly, Res. 60/148 (Dec. 16, 2005) (noting the stress of the Body of Principles on family visits as a means to prevent cruel, inhuman or degrading treatment); U.N. General Assembly, Res. 61/153 (Dec. 19, 2006) (same); U.N. General Assembly, Res. 62/148 (Dec. 18, 2007) (same).

⁸ Body of Principles, Principle 15.

⁹ 29 Body of Principles, Principle 19.

applied by Executive Order 13,491 and the Detainee Treatment Act, requires the United States to permit family visits and simultaneous communication to Mr. bin 'Atash. The President has ordered, and Congress has provided, that the provisions of the Convention Against Torture govern the treatment of Mr. bin 'Atash and others detained in connection with armed conflict.

The prohibition against torture is a paradigmatic example of customary international law,¹⁰ a *jus cogens* norm of binding international law separate from international agreements.¹¹ The prohibition is also enshrined in numerous international agreements¹² that define torture¹³ and describe the international regime effecting its prohibition. As part of its adherence to the universal norm prohibiting ill-treatment, the United States signed and ratified the U.N.

¹⁰ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J. concurring in part and concurring in the judgment); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1260 n.4 (11th Cir. 2012) (Barkett, J., specially concurring); *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

¹¹ See, e.g., Restatement (Third) § 102 (1) Sources of International Law (“A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; [or] (b) by international agreement...”); see also *The Nereide*, 13 U.S. 388, 423 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is part of the law of the land.”).

¹² See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113; American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev 2 (English ed., 1975); Inter-American Convention to Prevent and Punish Torture, Art. 1, OAS Treaty Series No. 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); International Covenant on Civil and Political Rights (ICCPR), Art. 7, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) [hereinafter Declaration on Torture]; see also *Filartiga*, 630 F.2d at 883.

¹³ “Torture” is defined in the CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” CAT Art. 1(1); see also, e.g., *Turkson v. Holder*, 667 F.3d 523, 526 (4th Cir. 2012); Declaration on Torture ¶ 1(1). The United States “understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm resulting caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 ¶ II(1)(a) (1990); see also MCRE 304(b)(3).

Convention Against Torture (CAT), the cornerstone of the international regime against torture and other forms of cruel, inhuman, and degrading treatment¹⁴ (collectively called “ill-treatment”).¹⁵ Ill-treatment includes the infliction of mental as well as physical suffering.¹⁶

Although the United States has declared that the individual rights provisions of CAT are not self-executing,¹⁷ the President of the United States has ordered that CAT governs conduct at Guantanamo Bay.¹⁸ In Executive Order 13491, the President ordered:

Consistent with the requirements of . . . the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely . . . whenever such individuals are . . . detained within a facility owned, operated, or controlled by a department or agency of the United States.¹⁹

The President has adopted CAT as a standard for gauging humane treatment, similar to the manner in which the Department of Defense adopted Additional Protocol I Article 75 and Additional Protocol II Articles 4-6 in its definition of humane treatment.

¹⁴ The United States ratified the Convention against Torture in October 1994, and the Convention entered into force for the United States on 20 November 1994. Initial Report of the United States to Committee Against Torture, CAT/C/28/Add.5 (9 February 2000), ¶ 3.

¹⁵ The United States considers “cruel, inhuman or degrading treatment or punishment” to mean the cruel and unusual punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments. See U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights ¶ I(3), 138 Cong. Rec. S4781-01 (1992); U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec. S17486-01 ¶ I(1) (1990); see also MCRE 304(b)(4). “In practice, the definitional threshold between ill-treatment and torture is often not clear.” CAT General Comment No. 2 ¶ 3. The difference between torture and CIDT is a matter of degree rather than kind. See, e.g., *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010).

¹⁶ See CCPR General Comment No. 20 ¶ 5 (1992); Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports), ¶ 12 (Aug. 12, 2013), available at <http://www.state.gov/j/drl/rls/213055.htm> [hereinafter US Third CAT Report] (“[T]he United States agrees that the intentional infliction of mental pain or suffering was appropriately included in the definition of torture to reflect the increasing and deplorable use by certain States of various psychological forms of torture and ill-treatment, such as mock executions, sensory deprivations, use of drugs, and confinement to mental hospitals.”).

¹⁷ See U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec. S17486-01 ¶ III(1) (1990) (declaring that Articles 1-16 of the CAT are not self-executing); *Response of the United States of America, List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America* ¶ 5, CAT/C/USA/Q/2 (2006) [hereinafter *U.S. Response*] (The declaration “is not a reservation intended to exclude or modify U.S. rights or obligations under the Convention.”); see also *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008) (explaining the meaning of “non-self-executing” in the context of the Vienna Convention).

¹⁸ Executive Order 13491 on Ensuring Lawful Interrogations, 74 Fed. Reg. 4894 (2009), available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

¹⁹ *Id.* at § 3(a).

Congress has also adopted CAT as a standard for gauging treatment of Mr. bin 'Atash and others at Guantanamo Bay. The Detainee Treatment Act (DTA) provides, "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."²⁰ The DTA goes on to define "the term 'cruel, unusual, or degrading treatment or punishment'" as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."²¹ The DTA specifically references CAT as a relevant standard for assessing treatment of U.S. prisoners.

Under Executive Order 13,491, the DTA, and IHRL, the United States has an obligation to provide "means for as full rehabilitation as possible" for victims of torture and ill-treatment.²² Article 14 of the CAT provides in relevant part, "Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."²³ In

²⁰ 42 U.S.C. § 2000dd(a).

²¹ 42 U.S.C. § 2000dd(d).

²² CAT General Comment No. 3 ¶ 11, CAT/C/GC/3 (2012). The Committee Against Torture has emphasized "that the obligation of States parties to provide the means for 'as full rehabilitation as possible' refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture. The obligation . . . may not be postponed." *Id.* at ¶ 12.

²³ CAT Art. 14(1). This right also extends to victims of cruel, inhuman and degrading treatment. CAT General Comment No. 3 ¶ 1 ("The Committee considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (hereinafter 'ill-treatment') without discrimination of any kind, in line with the Committee's general comment No. 2."); CAT General Comment No. 2 ¶ 3 ("Article 16, identifying the means of prevention of ill-treatment, emphasizes '*in particular*' the measures outlines in Articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14."). The United States understands "that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State

administration of these remedies, “the restoration of the dignity of the victim is the ultimate objective.”²⁴

Family involvement is critical in rehabilitation from the trauma of torture. As leading torture rehabilitation experts Freedom From Torture explain:

For torture survivors in particular, current clinical approaches are based on the understanding that rehabilitation needs to: (a) include multidisciplinary services to address the holistic and diverse needs of torture survivors and their families; (b) consider the importance of safety and stability in the current environment; and (c) to address the potentially long-term impact of torture, and its consequences for the victims’ social functioning, in terms of their social, familial and employment responsibilities.²⁵

“A prerequisite for a successful outcome is thought to be that great attention is paid to contextual components, in which facilitation of social integration and family relations are crucial.”²⁶

Family plays a critical role in rehabilitation: as participants in treatment, through creating a sense of security necessary for treatment, and by establishing a social structure in which Mr. bin ‘Atash can play a part, even while incarcerated at Guantanamo Bay.

Denial of meaningful family contact disrupts rehabilitation by severing the social support necessary for rehabilitation. “As an intimate social support system, family members promote recovery in at least four separate and related ways: (1) detecting traumatic stress; (2) confronting the trauma; (3) urging recapitulation of the catastrophe; and (4) facilitating resolution of the trauma-inducing conflicts.”²⁷ Under current policy, the United States allows Mr. bin ‘Atash to interact only with participants in his military commission, who are singularly unqualified to

Party.” U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec. S17486-01 ¶ II(3) (1990).

²⁴ CAT General Comment No. 3 ¶ 4.

²⁵ Ellie Smith *et al.*, *A Remedy for Torture Survivors in International Law: Interpreting Rehabilitation* 13 (Dec. 2010), available at

<http://www.freedomfromtorture.org/sites/default/files/documents/MF%20Rehabilitation%202010%20Final.pdf>.

²⁶ Bengt H. Sjölund *et al.*, *Rehabilitating Torture Survivors*, 41 J. Rehabilitation Med. 689, 695 (2009) (Att. L).

²⁷ Charles R. Figley, *Post-Traumatic Family Therapy*, in *Post-Traumatic Therapy and Victims of Violence* 86 (1988).

promote recovery from his torture. Mr. bin 'Atash needs meaningful family conduct as one element of the process of rehabilitation from torture.

United States criminal law provides what many consider to be the most robust set of rights afforded criminal defendants anywhere in the world. In reality, as Mr. al Baluchi noted in AE321(AAA Sup), Guantanamo Bay is the only detention center in the world where alleged war criminals are held pretrial with no ability to meet face-to-face with family,²⁸ and no ability to receive telephone calls from family members.²⁹ Even if JTF-GTMO were to permit Mr. bin 'Atash telephone or video communication with family members—a basic right he has been denied to date—only the opportunity for in-person communication with family members will remedy the government's violation of Mr. bin 'Atash's rights. *See Letter from Executive Director, National Association of Criminal Defense Lawyers* at Attachment B.

In the complete absence of any form of real-time communication or family visits, JTF-GTMO is in violation of United States and international law. This violation implicates Mr.

²⁸ Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Special Tribunal for Lebanon or Otherwise Detained on the Authority of the Special Tribunal for Lebanon [hereinafter "STL Rules of Detention"], Rule 59(A) (20 March 2009) ("Detainees shall be allowed to receive visits from their families and others at regular intervals under such restrictions and supervision as the Chief of Detention, in consultation with the Registrar, may deem necessary in the interests of the administration of justice or the security and good order of the Detention Facility.") (Att. F); Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal [hereinafter ICTR Rules of Detention], Rule 61(i) ("Detainees shall be allowed, subject to Rule 64, to receive visits from the family and friends at regular intervals under such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may deem necessary.") (Att. G); Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures [hereinafter Bosnian Detention Law], Art. 150(1) ("Prisoners shall be entitled to visits from members of their family and friends, and to visits by other persons on the approval of the Governor of the Establishment and in accordance with the House Rules.") (Att. H); *see also* STL Rules of Detention, Rule 60 (providing criteria under which the Detention Center may withhold permission for non-professional visits); ICTR Rules of Detention, Rule 64 (same).

²⁹ STL Rules of Detention, Rule 57(A) ("Detainees shall be entitled, under such conditions of supervision and time-restraints as the Chief of Detention deems necessary, to communicate with their families and others by receiving visits at the detention facility at regular intervals . . . and by letter or telephone . . ."); ICTR Rules of Detention, Rule 58 ("Subject to the provisions of Rule 64, detainees shall be entitled, under such conditions of supervision and time constraints as the Commanding Officer deems necessary, to communicate with their families and other persons with whom it is in their legitimate interest to correspond by letter and by telephone at their own expense."); Bosnian Detention Law, Art. 149(1) ("Prisoners shall be entitled to communicate freely, by correspondence and telephone, with their family and persons or representatives from organizations that can assist in their treatment."); *see also* STL Rules of Detention, Rule 57(C) (providing funding for communications by indigent defendants); ICTR Rules of Detention, Rule 58 (same).

bin 'Atash's preparation to defend his life against capital charges pending before this Commission insofar as he is unable to communicate with defense counsel or focus on basic aspects of litigation while being denied meaningful communication with his family. JTF-GTMO's illegal restriction on Mr. bin 'Atash's communication with family members may appear, in a vacuum, to be a "conditions of confinement" issue more suitable for collateral litigation. There exists an obvious "nexus," however, where an accused is punished incident to pretrial confinement which has been imposed, at least in part, [to] "ensure [his] presence for trial." (quoting *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005)). Indeed, where Mr. bin 'Atash is not permitted to have meaningful communication with his family, JTF-GTMO's actions engender a sense of hopelessness that causes Mr. bin 'Atash to withdraw from interaction with his counsel. Without personal contact with his family, Mr. bin 'Atash cannot recover from his torture in a manner that will enable to him to participate meaningfully in his trial.

The denial of Mr. bin 'Atash's right to communicate with family members denies him the due process of law, as he is left in a position where, given his torture by the CIA, and the conditions of detention he has endured in Guantanamo Bay, he is unable to assist in his defense. The Commission can remedy the government's unlawful restrictions by compelling JTF-GTMO to permit face-to-face visitation between Mr. bin 'Atash and his family. Alternatively, the Commission should dismiss the charges. bin 'Atash

7. Oral Argument: The Defense requests oral argument.

8. Witnesses: Mr. bin 'Atash reserves the right to request production of witnesses on this motion at a later date.

9. Conference with Opposing Counsel: The Prosecution opposes the relief requested herein.

10. Attachments:

- A. Certificate of Service
- B. Letter from Norman L. Reimer, Executive Director of the National Association of Criminal Defense Lawyers (2 pp., dated 4 Dec 15)

/s/
CHERYL T. BORMANN
Learned Counsel

/s/
MICHAEL A. SCHWARTZ
Major, U.S. Air Force
Detailed Defense Counsel

/s/
EDWIN A. PERRY
Detailed Defense Counsel

/s/
MATTHEW H. SEEGER
Major, U.S. Army
Detailed Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 6 January 2016, I electronically filed with the Trial Judiciary and served on all counsel of record by e-mail the attached **Defense Motion to Compel JTF-GTMO to Permit In-Person Visitation between Mr. bin 'Atash and Members of his Family.**

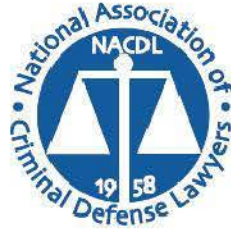
//s//

CHERYL T. BORMANN

Learned Counsel

Attachment B

National Association of Criminal Defense Lawyers



Norman L. Reimer
Executive Director

Colonel James L. Pohl
Military Judge
United States of America v. Khalid Shaikh Mohammad et al.
Military Commission Trial Judiciary
Guantanamo Bay, Cuba

December 4, 2015

Dear Colonel Pohl,

Family visitation has long been seen as a benefit to those in detention and those that manage detention centers. The National Association of Criminal Defense Lawyers (NACDL) brings collective experience of thousands of their members representing hundreds of thousands of incarcerated clients. Visits are known to sustain prisoners, improving their behavior as well as making them better able to assist in their defense. “Inmates like visitation because it keeps them grounded in a high-stress environment. Administrators like it because it’s an incentive for good behavior.”ⁱ The American Correctional Association (ACA) has consistently declared that “visitation is important” and “reaffirmed its promotion of family-friendly communication policies between offenders and their families.”ⁱⁱ

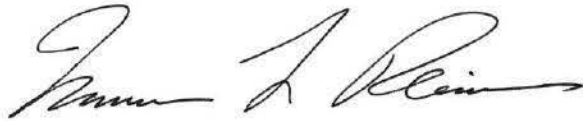
While the authorities at Guantanamo have facilitated video chats with some prisoners’ families, they have not been offered to all detainees and they do not have the same positive impact as in person visits. As a Washington Post editorial stated in response to the District of Columbia’s policy on video visitation, “there’s next to no evidence that video visitation provides the human encouragement and maintenance of family ties of in-person contact.”ⁱⁱⁱ

Families cite several reasons that video visits are not as satisfying as in person visits. “It is more difficult for families to ensure or evaluate the wellbeing of their incarcerated loved ones via video than in-person or through-the-glass.”^{iv} The quality of video and the lack of perspective make it difficult for family members to feel confident that their loved one is physically well. Family members also cite the lack of eye contact as a barrier to feeling connected during the visit. “[V]ideo visits can be disorienting because the companies set the systems up in a manner that is very different from in-person, human communication. Since the video visitation terminals were designed and set up with the camera a couple of inches above the monitor, the loved one on the outside will never be looking into the incarcerated person’s eyes. Families have repeatedly complained that the lack of eye contact makes visits feel impersonal.”^v Additionally, family visits improve the mental state of defendants, which can facilitate their participation in their defense.

“Liberty’s Last Champion”

NACDL strongly supports in-person family visits for all prisoners, at all stages of criminal proceedings. With reference to the Guantanamo defendants, who are facing capital charges and have been in US custody for over a decade, family visits are long overdue. For these reasons, NACDL unequivocally supports the request for in person family visits and supports efforts to procure funding to underwrite the necessary costs.

Sincerely,



Norman L. Reimer
Executive Director, National Association of Criminal Defense Lawyers

ⁱ Tim Murphy, *Prison Phone Companies Have Found Yet Another Way to Squeeze Families for Cash*, Mother Jones, Tue Feb. 24, 2015, <http://www.motherjones.com/politics/2015/01/jail-prison-video-visitation>.

ⁱⁱ 69.American Correctional Association Resolution, "Supporting Family-Friendly Communication and Visitation Policies," American Correctional Association Website, Reaffirmed January 24, 2012. Accessed on December 4, 2015 from:

http://www.aca.org/ACA_Prod_IMIS/aca_member/ACA_Member/Govt_Public_Affairs/PandR_FullText.aspx?PRCo de=R0015.

ⁱⁱⁱ Editorial, *D.C. prisoners deserve better than flawed video-only visitation policy*, Washington Post, August 12, 2013, https://www.washingtonpost.com/opinions/dc-prisoners-deserve-better-than-flawed-video-only-visitation-policy/2013/08/12/68834128-035e-11e3-88d6-d5795fab4637_story.html.

^{iv} Bernadette Rabuy and Peter Wagner, *Screening Out Family Time: The for-profit video visitation industry in prisons and jails*, Prison Policy Initiative, January 2015 at 7, accessed at http://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf.

^v Id at 8.