

**Submission to the Committee Against Torture in relation to its examination
of the United States of America's Third to Fifth State Party Report**

**Rendered Silent: Ongoing violations arising
from the denial of "High Value Detainees" right to
complain of torture and other ill-treatment**

Focussing on Articles 1, 2, 9, 13, 14, 15 and 16

LOIPR 6, 8, 10(c), 23, 27, 29, 30, 38

October 2014

SUBMISSION TO THE COMMITTEE AGAINST TORTURE

IN VIEW OF ITS EXAMINATION OF THE UNITED STATES OF AMERICA'S 5th STATE PARTY REPORT

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A. SUMMARY

1. This submission focuses on the silencing of a category of victims of torture and other ill-treatment through detention, isolation and classification of information as a result of United States counter-terrorism related policies – a deliberate system to ensure that no information about torture and other ill-treatment committed against these individuals will be released, to secure impunity for perpetrators and to ensure that no redress is achieved. This results in ongoing violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) that deserve serious attention in the upcoming review by the Committee against Torture of the implementation by the United States of its obligations under the Convention.
2. As the Committee is aware,¹ in the aftermath of the 9/11 attacks the United States implemented a system of rendition, secret detention and interrogation by the Central Intelligence Agency (“CIA”), which is now known to have involved grave violations of the Convention. The protocols applied in implementing the CIA’s “Rendition, Detention and Interrogation” (“RDI”) Program prescribed a specific program of capture, extraordinary rendition, secret detention and interrogation, each step involving deliberate practices amounting to torture and other prohibited ill-treatment.²
3. Among those subjected to this program were a number of individuals categorized as “High Value Detainees”, who were forcibly disappeared by US authorities – for a number of years – until their detention was acknowledged in September 2006.³ Those individuals are now held in a separate facility within Guantánamo Bay, and are almost completely cut off from the outside world.⁴ Six of the individuals held as so-called High Value Detainees are currently facing trial before a Military Commission, and the Prosecution is seeking the death penalty in each case.⁵
4. The United States has taken great measures to ensure that information about the serious human rights violations committed against the individuals classed as High Value Detainees during the time they were subjected to enforced disappearance in CIA “black sites” is not revealed to the public. Any information relating to the detainees’ time in secret detention, apart from the date and place of their capture, has been classified by United States authorities. The individuals’ thoughts and recollections about their time in secret detention can only be disclosed to those with very high level security clearance who are given access to them, that is, the International Committee of the Red Cross and the lawyers representing them before the Military Commission. Neither the detainees nor their Military Commission lawyers are permitted to pass the information to others. No others – consular officials, other lawyers working on the detainees’ behalf on issues beyond the scope of the ongoing criminal proceedings before the Military Commission, family, investigators from other states which have initiated or have been called upon to initiate investigations into the role of their governments in hosting “black sites” or facilitating capture or rendition – are allowed access to the men held as High Value Detainees

¹ CAT Concluding Observations: USA (2006), UN Doc. CAT/C/USA/CO/2, paragraphs 16-18.

² See further, paragraphs 13 to 19.

³ See CIA, ‘Background Paper on CIA’s Combined Use of Interrogation Techniques (undated) (redacted)’, Fax from [redacted], Central Intelligence Agency, to Dan Levin, Office of Legal Counsel, Department of Justice, 30 December 2004 (released 24 August 2009) , p. 2, <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf> (“**CIA Background Paper on Combined Techniques**”) (“Regardless of their previous environment and experiences, once an HVD is turned over to the CIA a predictable set of events occur”). See further, International Committee of the Red Cross (ICRC), ‘Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody’, February 2007, <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, (“**ICRC HVDs Report**”).

⁴ See further, paragraphs 20-27. Note that one of the High Value Detainees, Majid Khan, was moved to a different facility within Guantánamo Bay following the making of a guilty plea in his case: see further paragraph 22.

⁵ See further, paragraph 28.

except through limited security-cleared correspondence.⁶ Any such information disclosed in the Military Commission trial process itself is kept secret through closed or redacted pleadings and closed hearings or silenced parts of hearings.⁷

5. The legal regime in place operates to deny individuals detained by the US in Guantanamo Bay, including individuals facing capital charges in trials before the Military Commission, the rights guaranteed under the Convention to complain about and seek redress for torture and other ill-treatment, including the multiple violations arising in the course of enforced disappearance. It also frustrates investigations that could assist individuals facing charges before Military Commissions, including those punishable by death, with their defence, and prevents their legal representatives from providing an effective defence. It also enhances the risk that statements adduced as a result of torture or other ill-treatment will be introduced as evidence in proceedings in the United States and elsewhere. In addition, this legal regime obstructs investigations into torture and other ill-treatment in third countries.
6. This carefully constructed system of isolation of individuals and classification of information leads to multiple grave, ongoing, violations of the Convention. This submission focusses on how it:
 - violates the right to complain (Article 13) and the obligation to investigate (Article 12);
 - violates the right to redress (Article 14);
 - has resulted in repeated violations of the obligation to cooperate with criminal proceedings brought in other countries, including the supply of all evidence at the US Government's disposal necessary for the proceedings (Article 9);
 - violates the prohibition of the use of evidence obtained by torture or other ill-treatment in proceedings –including criminal proceedings before Military Commissions and in other jurisdictions, even those in which the death penalty is a possible sentence (Article 15);
 - in itself amounts to ongoing cruel, inhuman or degrading treatment (Article 16); and
 - results in multiple violations of the obligation under Article 2(1) to take effective legislative, administrative, judicial or other measures to prevent acts of torture or other ill-treatment.
7. As stark evidence of this, when defense lawyers in a case before the Military Commission sought to challenge the rules in place before the Military Commission contributing to this situation – on the grounds that they violated the Convention – the Prosecution took the explicit stance that, as a non-self executing treaty, **“there are no individual rights recognized by any domestic court under the Convention Against Torture”**, and the Court did not have jurisdiction to consider the

⁶ See paragraphs 23-27.

⁷ See further AE013DDD, ‘Military Judge Second Amended Protective Order #1 To Protect Against Disclosure of National Security Information’, 16 December 2013, [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013DDD\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013DDD(KSM%20et%20al)).pdf) (“**Second Amended Protective Order**”). This is attached as **Annex One** and discussed further below.

argument.⁸ This position was accepted by the Military Judge, who found that “**Articles 1-16 of the Convention Against Torture confer no rights to each Accused**”.⁹

8. **The organisations making this submission consider this to be an example of the deliberate and ongoing policies which violate the Convention and are designed to ensure that there is no accountability nor redress for torture committed against terrorist suspects in the “War on Terror”. These policies in themselves perpetuate the violation of the absolute prohibition of torture and lead to ongoing cruel, inhuman or degrading treatment or punishment, a high risk of the use of evidence obtained by torture or other ill-treatment, including in capital trials, and obstruction of investigations by other States of allegations of conduct prohibited by the Convention.**
9. These issues affect each of the individuals held as High Value Detainees currently detained in a special facility in Guantánamo Bay, including the six men currently on trial on capital charges before a Military Commission and – to a different but significant extent – other detainees at Guantánamo Bay. To illustrate their practical impact, in this submission we provide details on the case of Mustafa al-Hawsawi, a Saudi national who is one of those currently facing trial on capital charges before the Military Commission in relation to the 9/11 attacks. His treatment is illustrative of the systematic approach to a particular category of victims of torture. In addition to violating a range of Convention guarantees, it also undermines a core principle inherent in the absolute prohibition of torture and other ill-treatment: that there cannot be any distinction between ‘good’ or ‘bad’, ‘innocent’ or ‘non-innocent’ victims of torture or other ill-treatment. The abuse of national security and state secrecy arguments raises further issues of principle in the application and interpretation of the UN Convention against Torture. As the Committee has emphasized, the prohibition of torture and other ill-treatment is absolute and the right to access to justice and remedy including under Article 14 is obligatory, applies at all times and must be equally accessible to all victims of torture or other ill-treatment, without discrimination, including to those accused of involvement in terrorist acts or political crimes.¹⁰

B. THE ORGANISATIONS SUBMITTING THIS REPORT

10. **REDRESS** is an international human rights non-governmental organisation based in the United Kingdom with a mandate to assist torture survivors to seek justice and other forms of reparation. REDRESS has taken part as an intervener in litigation in the United States, Canada and Europe concerning violations committed in the CIA’s RDI Program. In addition, REDRESS has been working on a case illustrative of the concerns set out in this submission and highlighted in this report – that of Mustafa al-Hawsawi – since 2012, and has filed criminal complaints in Lithuania and Poland seeking investigations into allegations that he may have been detained and tortured in those countries in the course of the US RDI Program. As described further in this

⁸ USA v KSM et al, AE200F, ‘Government Response to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture’, 3 October 2013, p. 8, [http://www.redress.org/downloads/ksm-ii-\(ae200f\(ksm-et-al\)\).pdf](http://www.redress.org/downloads/ksm-ii-(ae200f(ksm-et-al)).pdf), (“**Government Response to Defense CAT Motion**”).

⁹ USA v KSM et al, AE200II, ‘Order To Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture’, 16 December 2013, p. 4, [http://www.redress.org/downloads/ksm-ii-\(ae200ii\)---order-on-motion-to-dismiss-re-cat.pdf](http://www.redress.org/downloads/ksm-ii-(ae200ii)---order-on-motion-to-dismiss-re-cat.pdf), (“**Order on CAT Motion**”).

¹⁰ Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 23 November 1997, CAT/C/GC/2/CRP. 1/Rev.4, paras. 5, 6 and 21 (“**CAT General Comment No. 2**”); CAT, General Comment No. 3: Implementation of Article 14 by States Parties, UN Doc., CAT/C/GC/3 (2012), paras. 27, 32, 38 (“**CAT General Comment No. 3**”). See also Principles VII and VIII of the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005; ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014, paras. 507, 494-499 and 546-551.

report, REDRESS has been severely hampered in its representation of Mr al-Hawsawi by the rules in place in the United States concerning access to detainees and classification of information.

11. Composed of some 60 eminent judges and lawyers from all regions of the world, the **International Commission of Jurists** (the ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession. Among other things the ICJ commissioned and published the report of an independent panel of eight distinguished jurists from different parts of the world on the global impact of counter-terrorism measures taken in response to the events on 11 September 2001 on human rights, *Assessing Damage and Urging Action*, and has submitted on its own and jointly a number of amicus briefs to courts on the duty of states to ensure the rights to redress and reparation for torture and other ill-treatment, including in relation to individuals who were subject to the RDI program.¹¹
12. Created in 1986, the **World Organisation against Torture** (OMCT) is a key coalition of international non-governmental organisations fighting against torture, summary executions, enforced disappearances and other cruel, inhuman or degrading treatment. OMCT has 297 affiliated organisations in its SOS-Torture Network and many tens of thousands correspondents in every country. Based in Geneva, OMCT's International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programmes allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. In the framework of its activities, OMCT also submits individual communications and alternative reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights.

C. BACKGROUND

A program of torture and other ill-treatment: The RDI Program and its application to High Value Detainees

13. Immediately following the 11 September 2001 attacks in New York City, Washington DC, and Pennsylvania, senior United States officials are known to have authorised a covert CIA Program of secret detention and interrogation of individuals suspected of involvement in terrorism.¹² The

¹¹ Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damage, Urging Action*, <http://www.icj.org/report-of-the-eminent-jurists-panel-on-terrorism-counter-terrorism-and-human-rights/>; *Al Nashiri v Poland*, submissions of 5 November 2012, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/ICJAI-AmicusBrief-AINashiri_v_Poland.pdf; and supplementary submissions of 15 February 2013, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJAI-SupplAmicusBrief-AINashiri_v_Poland_15022013.pdf; *Al Nashiri v Romania*, submissions of 13 March, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/03/AINashiri_v_Romania-ICJAIJointSubmission-ECtHR-final.pdf; *Abu Zubaydah v Lithuania*, submissions of 22 April 2013, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/04/ABU-ZUBAYDAH-v-LITHUANIA-AI-ICJ-AMICUS-220413-Final.pdf>; *Abu Zubaydah v Poland*, submissions of 17 October 2013, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/AbuZubaydah_v_Poland-AIICJThirdPartyIntervention-ECtHR-Final.pdf.

¹² UN, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives', A/HRC/22/52,

UN Special Rapporteur on the protection and promotion of human rights in the context of counterterrorism (the “Special Rapporteur on Counterterrorism”) has characterised this program as “a systematic campaign of internationally wrongful acts involving the secret detention, rendition and torture of terrorist suspects”.¹³ This Committee, other treaty bodies, regional courts, UN special procedures and other UN agencies and regional political bodies have on multiple occasions expressed grave concern at the violations of fundamental human rights, including the prohibition of torture and other ill-treatment, resulting from and central to the program.¹⁴

14. Under the program, the CIA was authorised to detain terrorist suspects and set up detention facilities known as “black sites” outside the United States.¹⁵ This program was used to detain, isolate and interrogate individuals who were considered to have a high intelligence value, known as High Value Detainees.¹⁶ At the beginning of August 2002 the United States Justice Department's Office of Legal Counsel authorised the CIA to use a range of “physical and mental abuse”¹⁷ of terrorist suspects in its custody under the secret detention program, known as “enhanced interrogation techniques”.¹⁸ Former United States President George Bush also authorised the CIA to carry out “extraordinary renditions”¹⁹ enabling detainees to be interrogated whilst in the formal custody of the public officials of other States, including States with a record of using torture.²⁰
15. The CIA subjected High Value Detainees to, in its words, a “very structured” and “rigorous” program of secret detention and interrogation at “black sites” or “exploitation facilities” in order

1 March 2013, para. 15, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf (“Emmerson 2013 Report”).

¹³ *Ibid.*, para. 14.

¹⁴ eg. CAT Concluding Observations: USA (2006), CAT/C/USA/CO/2 (25 July 2006) (“CAT 2006 Concluding Observations”); UN Human Rights Committee, Concluding Observations: USA (2014), CCPR/C/USA/CO/4, 23 April 2014, paras. 5 and 21; UN, “Joint Study on global practices in relation to secret detention in the context of countering terrorism Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the working group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin” A/HRC/13/42, 19 February 2010, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>, (“UN Joint Study on Secret Detention”); ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014; *Abu Zubaydah v Poland* (2014) App. No. 7511/13, 24 July 2014; European Parliament, Resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA (2013/2702(RSP), 10 October 2013.

¹⁵ Emmerson 2013 Report, above n.12, para. 14; UN Joint Study on Secret Detention, above n.14, para. 103.

¹⁶ Central Intelligence Agency Office of the Inspector General, ‘Special Review’, 7 May 2004, pp.3-4, [http://www.therenditionproject.org.uk/pdf/PDF%2020%20\[CIA%20IG%20Investigation%20EITs%202004\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%2020%20[CIA%20IG%20Investigation%20EITs%202004].pdf) (“CIA OIG Review”); CIA Background Paper on Combined Techniques, above n.3, p. 1; Stephen G. Bradbury, ‘Memorandum re: application of United States obligations under article 16 of the Convention against Torture to certain techniques that may be used in the interrogation of high value al-Qaida detainees’, 30 May 2005, p. 6, [http://www.therenditionproject.org.uk/pdf/PDF%2016%20\[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%20200\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%2016%20[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%20200].pdf).

¹⁷ Emmerson 2013 Report, above n.12, para. 15.

¹⁸ *Ibid.*; CIA OIG Review, above n.16, p. 15. See also Jay Bybee, Office of Legal Counsel, Department of Justice, “Memo for Alberto Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 USC §§2340-2340A”, 1 August 2002,

[http://www.therenditionproject.org.uk/pdf/PDF%2019%20\[Bybee%20Memo%20to%20Gonzales%20Standards%20Interrogation%201%20Aug.pdf](http://www.therenditionproject.org.uk/pdf/PDF%2019%20[Bybee%20Memo%20to%20Gonzales%20Standards%20Interrogation%201%20Aug.pdf); Jay Bybee, Office of Legal Counsel, Department of Justice, “Memo for John Rizzo, Acting General Counsel to the CIA: Interrogation of an Al Qaeda Operative”, 1 August 2002,

[http://www.therenditionproject.org.uk/pdf/PDF%2015%20\[Bybee%20Memo%20to%20CIA%201%20Aug%202002\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%2015%20[Bybee%20Memo%20to%20CIA%201%20Aug%202002].pdf).

¹⁹ “Extraordinary rendition” is defined here as the transfer without legal process of a detainee to the custody of a foreign government for purposes of detention and interrogation.

²⁰ Emmerson 2013 Report, above n.12, para. 15.

to elicit information.²¹ These were established as facilities “off limits to non-essential persons, press, ICRC [International Committee of the Red Cross], or foreign observers”.²² Both UN and European human rights mechanisms have recognised that this type of detention amounts to enforced disappearance, is in clear violation of the right to liberty and security and the right to a fair trial, facilitates the use of torture and other ill-treatment, and constitutes, in itself, a form of ill-treatment or torture.²³

16. The RDI Program as it applied to individuals held as High Value Detainees is described in detail in a December 2004 CIA memorandum addressed to the United States Department of Justice.²⁴ This program followed a set pattern: capture and handover of High Value Detainees to the CIA, rendition to a black site, reception at the black site, transitioning to interrogation, interrogation, debriefings and long-term detention.²⁵ The European Court of Human Rights has described that:

The CIA documents give a precise description of the treatment to which High Value Detainees were being subjected in custody as a matter of precisely applied and predictable routine, starting from their capture through rendition and reception at the black site, to their interrogations. As stated in the 2004 CIA Background Paper, “regardless of their previous environment and experiences, once a [High-Value Detainee] is turned over to the CIA a predictable set of events occur”. ... All the measures were applied in a premeditated and organised manner, on the basis of a formalised, clinical procedure, setting out a “wide range of legally sanctioned techniques” and specifically designed to elicit information or confessions or to obtain intelligence from captured terrorist suspects. Those – explicitly declared – aims were, most notably, “to psychologically ‘dislocate’ the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist ... efforts to obtain critical intelligence”; “to persuade High-Value Detainees to provide threat information and terrorist intelligence in a timely manner”; “to create a state of learned helplessness and dependence”; and their underlying concept was “using both physical and psychological pressures in a comprehensive, systematic and cumulative manner to influence [a High-Value Detainee’s] behaviour, to overcome a detainee’s resistance posture” ...²⁶

17. Each High Value Detainee was therefore subjected to this treatment as a matter of protocol.²⁷ The treatment amounted to enforced disappearance, which is in itself recognised as amounting to torture.²⁸ The European Court of Human Rights has found that a number of the procedures

²¹ Parliamentary Assembly Council of Europe (PACE), Committee on Legal Affairs and Human Rights (CLAH), ‘Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report’, 11 June 2007, para. 55, <http://assembly.coe.int/Documents/WorkingDocs/2007/edoc11302.htm> (“**Second Marty Report**”).

²² Committee on Armed Services, United States Senate, ‘Inquiry into the Treatment of Detainees in U.S. Custody’, 20 November 2008 (released 22 April 2009, redacted), p. 14, http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf, (“**SASC Detainee Report**”).

²³ See UN Joint Study on Secret Detention, above n.15, pp. 2-3; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, “Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 18 June 2010”, 19 May 2011, para 66, <http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.htm> (“**CPT Lithuania Report**”).

²⁴ CIA Background Paper on Combined Techniques, above n.3. Specific guidelines were issued on conditions of detention and interrogation under this program in January 2003: CIA OIG Review, above n.16, paras. 57-60 (heavily redacted).

²⁵ CIA Background Paper on Combined Techniques, above n.3; Stephen G. Bradbury, Office of Legal Counsel, US Department of Justice, ‘Re: Application of 18 USC §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value Al Qaeda Detainees’, Memo for John A Rizzo, Senior Deputy General Counsel, CIA, 10 May 2005, pp.5-6, [http://www.therenditionproject.org.uk/pdf/PDF%2017%20\[Bradbury%20Memo%20to%20Rizzo%20Combined%20Techniques%2010%20May%202020.pdf](http://www.therenditionproject.org.uk/pdf/PDF%2017%20[Bradbury%20Memo%20to%20Rizzo%20Combined%20Techniques%2010%20May%202020.pdf) (“**2005 OLC Combined Techniques Advice**”).

²⁶ ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014, paras. 512-515.

²⁷ See also ICRC HVDs Report, above n. 3.

²⁸ *Ibid.*, p. 22. See also, eg. CAT Concluding Observations: Spain (2009), CAT/C/ESP/CO/5, 9 December 2009, para. 21.

standardly used, in themselves and in combination, also amount to torture.²⁹ Recent statements made by unidentified CIA officials to the press suggest that the methods used may have been even more brutal than those outlined in the protocols.³⁰

18. Following the public release of United States government documents in 2009 it is now known that around one hundred individuals were held under this program between September 2001 and May 2005, although by May 2005 there were less than twenty remaining in the CIA's custody.³¹ On 6 September 2006 former United States President Bush confirmed that a number of so-called High Value Detainees had been moved to Guantánamo Bay, Cuba, having spent years being held in sites outside the United States, and subject to "an alternative set of procedures".³² Mustafa al-Hawsawi is one of the 14 so-called High Value Detainees who was taken at that time to Guantánamo Bay.³³
19. Information about the whereabouts of individuals held as High Value Detainees during their period of enforced disappearance has been the subject of extreme secrecy, with the United States and other involved States making "strenuous efforts to keep their involvement in the CIA program hidden from public scrutiny".³⁴

Detention at Guantánamo Bay

20. The so called High Value Detainees remaining at Guantánamo Bay, including Mustafa al-Hawsawi, are – apart from one individual who has pleaded guilty to charges brought against him – held in a separate, purpose-built section of the prison: Camp 7.³⁵ The location, as well as much of the operation and conditions of confinement of Camp 7, remain classified, and only a strictly limited number of government agents are allowed access. Even the lawyers of the detainees held there, all of whom have received "TOP SECRET//SECURE COMPARTMENTED INFORMATION" security clearance from the government, have been barred from entering, except for a 12 hour daytime visit granted to three members of each defense team by order of the Military Commission Judge in 2013.³⁶ The secrecy surrounding the conditions of confinement only adds to their oppressiveness.
21. It is known, however, that the conditions are far more oppressive than those in other sections of Guantánamo Bay. Each High Value Detainee is held in segregated cells which limit their ability to

²⁹ ECtHR, *El Masri v Macedonia* (2012), App. No. 39630/09, 13 December 2012, para. 211. See also *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014; *Abu Zubaydah v Poland* (2014), App. No. 7511/13, 24 July 2014.

³⁰ See, eg. Peter Foster, 'CIA 'tortured al-Qaeda suspects close to the point of death by drowning them in water-filled baths'', *Telegraph*, 7 September 2014, <http://www.telegraph.co.uk/news/worldnews/al-qaeda/11080450/CIA-tortured-al-Qaeda-suspects-close-to-the-point-of-death-by-drowning-them-in-water-filled-baths.html>.

³¹ UN Joint Study on Secret Detention, above n.15, para. 103, citing Stephen G. Bradbury, Office of Legal Counsel, Department of Justice, "Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency Re: application of United States obligations under article 16 of the Convention against Torture to certain techniques that may be used in the interrogation of high value al-Qaida detainees", 30 May 2005, p. 5, [http://www.therenditionproject.org.uk/pdf/PDF%2018%20\[Bradbury%20Memo%20to%20Rizzo%2030%20May%202005\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%2018%20[Bradbury%20Memo%20to%20Rizzo%2030%20May%202005].pdf).

³² The White House (2006), 'President Discusses Creation of Military Commissions to Try Suspected Terrorist', The White House Archive website, 6 September 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

³³ ICRC HVDs Report, above n.3, p. 5.

³⁴ Emmerson 2013 Report, above n.12, para. 19.

³⁵ See *USA v KSM et al*, AE303 (MAH), 'Defense Motion for Appropriate Relief to Require Confinement Conditions that Comply with International Humanitarian Law standards', 29 May 2014, p. 3, www.mc.mil ("Defense Motion on Confinement Conditions").

³⁶ *Ibid.*, p. 13; Dina Temple-Raston (2013), 'Sept. 11 Trial Judge Gives Defense Attorneys Access To 'Camp 7'', 21 February 2013, <http://www.npr.org/blogs/thetwo-way/2013/02/21/172639164/sept-11-trial-judge-gives-defense-attorneys-access-to-camp-7>.

communicate with each other.³⁷ Under this regime the detainees are confined to their cells for 20 to 24 hours per day.³⁸ They are only allowed access to one other detainee during their maximum two hours of outdoor activity per day.³⁹ The conditions of Camp 7 have been described in an Army report cited by one member of the US House of Representatives as “deteriorating rapidly”, and in danger of putting staff and detainees at risk.⁴⁰ Detainees are also not able to maintain their religious practices, including *salat* (group prayer), and have been forced to pray beside the toilet in their cell, which is considered particularly degrading.⁴¹

22. Notably, an individual classified as a High Value Detainee who pleaded guilty was “rewarded” by being moved to a different camp within Guantánamo Bay that has much less restrictive conditions.⁴² His plea agreement specifically stated that “as long as I am fully and truthfully cooperating with the Government as required by this agreement, I should not be detained at Camp 7 and should be detained at a facility consistent with the detention conditions appropriate for Law of War detainees...”⁴³ The few individuals who have been convicted of terrorist offences following trials by Military Commission and who remain at Guantánamo Bay are also held in less restrictive conditions of confinement.⁴⁴

Restrictions on access

23. The so-called High Value Detainees now held in Camp 7 were completely cut off from the outside world during their time in secret detention. It was not until October 2006, almost four years after Mustafa al-Hawsawi’s capture, that they were permitted to see representatives from the ICRC for the first time. In 2008, the individuals held as High Value Detainees were first allowed “controlled and limited” access to defense counsel with very high level security clearance at a facility outside Camp 7.⁴⁵ With the exception of ICRC officials, limited contact with security-cleared defense lawyers, and very restricted security-cleared correspondence, the High Value Detainees held in Camp 7 remain largely isolated from the outside world today. Mr al-Hawsawi’s lawyers have described this as a “near total blackout on all outside contacts”.⁴⁶
24. Phone calls are not allowed between High Value Detainees and their defense counsel, so any contact must be in person at Guantánamo Bay, or through mail. In relation to mail, attorney-client communications are controlled by a communications order, which in theory limits the review of documents by a ‘privilege review team’ to contraband and proper markings. However, lawyers in the 9/11 trial have alleged that authorities at Guantánamo Bay have gone beyond inspecting for contraband and have instead systematically engaged in impermissible content review of attorney-client communications.⁴⁷

³⁷ *Ibid.*, p. 11.

³⁸ *Ibid.*, p. 2.

³⁹ *Ibid.*, p. 11.

⁴⁰ *Ibid.*, p. 4.

⁴¹ *Ibid.*, p. 5.

⁴² *Ibid.*, pp. 9-10.

⁴³ *Ibid.*, p. 10.

⁴⁴ *Ibid.*, p. 8.

⁴⁵ *Ibid.*, p. 13.

⁴⁶ *Ibid.*, p. 11.

⁴⁷ Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Joint Urgent Appeal: United States of America, UA G/SO 218/2 G/SO 214 (3-3-16) Terrorism (2005-4) G/SO 214 (53-24) USA 31/2012, p. 3, https://spdb.ohchr.org/hrdb/22nd/public-UA_USA_30.11.12_31.2012.pdf; Tom Ramstack (2013), ‘Guantanamo guards accused of improper document seizures’, *Reuters*, 24 October 2013, <http://www.reuters.com/article/2013/10/24/us-usa-guantanamo-idUSBRE99N11D20131024>; Al Jazeera (2013), ‘Q & A: Defending Guantanamo Prisoners’, 14 May 2013, <http://m.aljazeera.com/story/201351311028244726>; Wells Bennett,

25. In relation to visits, there is only one facility available for visits and authorities allow a maximum of six HVD visits at a time, creating scheduling conflicts and denials of access when a number of lawyers requests to meet their client at the same time. In addition, the Guantanamo Joint Detention Group, which controls detentions operations, has refused to schedule attorney client visits when other court hearings (unrelated to the defendants in the 9/11 trial) are ongoing, and meetings on the weekends are routinely denied if there are no upcoming hearings immediately following the weekend.⁴⁸ Like with mail, serious violations of attorney-client privilege have also been shown to have occurred during visits: it was revealed in hearings in the Military Commission pre-trial proceedings in February 2013 that listening devices disguised as smoke detectors had been installed in attorney-client meeting rooms.⁴⁹
26. Despite requests, no access has been given to consular officials of the so-called High Value Detainees' home countries. For example, despite a number of requests made by Mr al-Hawsawi and his lawyers, requests to speak to consular officials from his home state of Saudi Arabia have been completely denied.⁵⁰
27. Contact with family members is also virtually non-existent. Since October 2006, High Value Detainees have been permitted to send two ICRC messages and four postcards during each quarterly ICRC visit. These are believed to be subject to intelligence and security review, and are generally delivered with a six to twelve month delay, with many having been heavily redacted by US authorities.⁵¹ Unlike other Guantánamo Bay detainees, High Value Detainees are not (and have never been) allowed telephone calls with their families.

The Military Commission Proceedings

28. Six of the High Value Detainees at Guantánamo Bay, including Mr al-Hawsawi, are currently on trial before Military Commissions in two sets of proceedings. The first is the trial of five men (Khalid Shaikh Mohammad, Walid Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa al-Hawsawi) for their alleged involvement in the 9/11 attacks (the "9/11 trial"). The second is the trial of Abd al-Rahim Al-Nashiri for attacks and an attempted attack on United States Navy ships in 2000 and 2002. Each case is currently at pre-trial stage, and each of the accused faces charges which could lead to the imposition of the death penalty.⁵²
29. The Military Commissions before which individuals at Guantánamo Bay are being tried are designed specifically to ensure that information about the CIA's RDI program and the torture carried out through it is not made public. As President Bush explained on the passage of the first Military Commissions Act: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? The bill meets that

'10/24 Motions Session #1: Those Best Situated to Testify About a Search of Al-Hawsawi's Cell', 24 October 2014, <http://www.lawfareblog.com/2013/10/1024-motions-session-1-those-best-situated-to-testify-about-a-search-of-al-hawsawis-cell/>.

⁴⁸ On oral argument in relation to a motion on this issue see further Wells Bennett (2013), '12/18 Motions Session #1: Meetings', *Lawfare*, 18 December 2013, <http://www.lawfareblog.com/2013/12/1218-motions-session-1-meetings/>; '12/18 Motions Session #2: More on Meetings', *Lawfare*, 18 December 2013, <http://www.lawfareblog.com/2013/12/1218-motions-session-2-more-on-meetings/>; '12/18 Motions Session #3: More Meetings, More of the Time', *Lawfare*, 18 December 2013, <http://www.lawfareblog.com/2013/12/1218-motions-hearing-3-more-meetings-more-of-the-time/>.

⁴⁹ *Ibid.*; Laura Pitter (2013), 'Listening In: New revelations at Guantánamo show the walls have ears, and justice is being made a mockery', 21 February 2013, <http://www.hrw.org/news/2013/02/21/listening>.

⁵⁰ *Defense Motion on Confinement Conditions*, above n.35, p. 4. See further USA v KSM et al, AE 214(MAH), 'Defense Motion to Compel Mr. Hawsawi's Access to the Government of Saudi Arabia in Compliance with United States Law', www.mc.mil.

⁵¹ *Ibid.*, pp. 4 and 12.

⁵² For further information on each of the cases see www.mc.mil.

test". He went on to stress that as a result of the Act, "our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs".⁵³

30. The legislation in place for all intents and purposes excludes the jurisdiction of US courts over any claims raised by the accused, aside from limited *habeas corpus* review (required after a successful constitutional challenge), which has recently been interpreted to include some oversight of current detention conditions,⁵⁴ and final appeals on any criminal conviction.⁵⁵ This Committee has already expressed concern about this withdrawal of jurisdiction, and its compatibility with Article 13 of the Convention.⁵⁶
31. Numerous previous reports have raised serious concerns about the compatibility of Military Commission trials with the United States' human rights obligations,⁵⁷ and the organisations making this submission echo those concerns. The aspect of those trials that this submission focusses on, however, is the way that proceedings have been designed to ensure that no allegations of torture and ill-treatment committed during the detainees' enforced disappearance can be publicly disclosed by counsel, in any forum, nor made public during the trial.

Second Amended Protective Order No. 1

32. A recent Congressional Research paper summarises the protection of classified information under the Military Commissions Act of 2009 (MCA) as follows:

At military commissions convened pursuant to the MCA, classified information is to be protected during all stages of proceedings and is privileged from disclosure for national security purposes. Whenever the United States seeks to protect certain information from disclosure in any military commission case, the prosecution is to submit a declaration, signed by a knowledgeable official with classification authority, invoking the privilege and setting forth the damage to national security that would be expected to occur without protective measures. The military judge may not authorize the discovery of or access to such information unless he determines that it would be relevant and useful to any part of the defense's case. The military judge may authorize the United States to delete or withhold specified items of classified information from documents made available to the accused; substitute a summary of the information; or substitute a statement admitting relevant facts that the classified information would tend to prove.⁵⁸

33. In the case related to 9/11, the silencing of detainees, their defense counsel, and the proceedings themselves is achieved through what is known as Second Amended Protective Order No. 1 (the "Protective Order") (copy attached as Annex One).⁵⁹ This order establishes procedures applicable to all those who come into possession of classified information in

⁵³ President George W. Bush, remarks on signing the Military Commissions Act of 2006, 17 October 2006. Public Papers of the Presidents of the United States, 2006, book 2, p. 1858, <http://www.gpo.gov/fdsys/pkg/PPP-2006-book2/pdf/PPP-2006-book2-doc-pg1857.pdf>.

⁵⁴ Military Commissions Act 2006; *Aamer & Ors. v Obama & Ors*, US Court of Appeals for the District of Columbia, 11 February 2014, <http://www.lawfareblog.com/wp-content/uploads/2014/02/Aamer-Opinion.pdf>.

⁵⁵ 10 U.S.C. §950g. See further Jennifer K Elsea (2014), 'The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues', Congressional Research Service, 4 August 2014, pp. 33-35, <http://fas.org/srg/crs/natsec/R41163.pdf>

⁵⁶ CAT 2006 Concluding Observations, above n. 14, para. 27.

⁵⁷ See, eg. Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Inter-American Commission on Human Rights, Washington DC, 3 October 2013, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=> ("The Special Rapporteur finds that the military commissions – even after legislative amendments were introduced in the Military Commissions Act of 2009 – simply maintain a substandard system of justice and do not meet international fair trial standards"); Human Rights Committee, Concluding Observations: USA, CCPR/C/USA/CO/4, 23 April 2014, para. 21.

⁵⁸ Jennifer K Elsea (2014), above n.55, pp. 30-31 (citations omitted).

⁵⁹ A similar protective order is in place in Al-Nashiri's trial.

connection with the case, including defense counsel. It makes it clear that classified information includes not just documents, but also information acquired orally.⁶⁰

34. The definition of classified information explicitly includes almost all information about the High Value Detainees' period of enforced disappearance, including:

(4) ...

- (a) Information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date;
 - (b) Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin 'Attash and Ali Abdul Aziz were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Bin al Shibh was detained from the time of his capture on or around 11 September 2002 through 6 September 2006.
 - (c) The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006;
 - (d) The enhanced interrogation techniques that were applied to an Accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing and limitations of those techniques; and
 - (e) Descriptions of the conditions of confinement of any of the Accused from on or around the aforementioned capture dates through 6 September 2006;
- (5) any document or information obtained from or related to a foreign government or dealing with matters of US foreign policy, intelligence, or military operations, which is known to be closely held and potentially damaging to the national security of the United States or its allies.⁶¹

35. The Protective Order is therefore all-encompassing, covering all elements in relation to any claim of torture or other ill-treatment committed during the accused's period of enforced disappearance, and/or any information that may allow the identification of possible perpetrators or third state responsibility. It goes on to provide that "[n]o participant in any proceeding, including the Government, Defense, *Accused*, witnesses, and courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case".⁶²

36. It further specifies that "[n]o member of the Defense, including any defense witness, is authorized to disclose any classified information obtained during the case, outside the immediate parameters of these Military Commission proceedings".⁶³ It also explicitly prohibits members of the Defense and Defense witnesses from disclosing classified information in

⁶⁰ Second Amended Protective Order, above n. 7, Section 2(f)(4).

⁶¹ *Ibid.*, Article 2(f)(5).

⁶² *Ibid.*, Article 8(b) (emphasis added).

⁶³ *Ibid.*, Article 5(f).

response to any summons, subpoena, or court order from any United States or foreign court.⁶⁴ Article 9 of the Protective Order outlines the consequences of unauthorised disclosure of classified information, which may include disciplinary action or other sanctions including a charge of contempt of the Commission and possible referral for criminal prosecution.⁶⁵

37. The government's rationale for the restrictions is telling: because the defendants were "detained and interrogated in the CIA program" of secret detention, torture and other ill-treatment, they were "exposed to classified sources, methods, and activities" and therefore cannot be permitted to disclose what the government did to them.⁶⁶
38. All defense counsel are required to sign a Memorandum of Understanding ("MOU") agreeing to the terms of the Protective Order before evidence containing classified information will be disclosed to them.⁶⁷ To date, defense counsel for all but one of the accused have reportedly refused to sign this document, meaning that they have been refused access to much of the discovery requested from the Prosecution.⁶⁸
39. The United States government has made clear its position on the effect of this Protective Order as it relates to information held by the defendants. According to the government, anything the defendants can say about their extraordinary rendition and time in secret detention is classified:

the categories of information contained in subparagraphs (a)-(e) are still considered classified regardless of how that information is or was conveyed to the Accused and counsel. For purposes of prohibiting the unauthorized disclosure of classified information, it makes no difference whether the Accused observed the information, experienced aspects of the information, or learned about it from another source. The Accused are still in possession of the classified information and the Commission possesses the authority and responsibility to prohibit its unauthorized disclosure.⁶⁹

40. Classified information about the treatment so-called High Value Detainees were subjected to can be disclosed in Military Commission proceedings, however the Protective Order sets out strict and cumbersome restrictions on the handling of classified evidence, and the disclosure of it in pleadings and in hearings to ensure that it will not be made public. Although the Military Commission proceedings are generally public (by closed circuit video link), where counsel intends to refer to any information covered by the Protective Order, or knows that an accused intends to make any statement, they must provide advance notice, and this will result in a closed hearing on those matters. Any classified information contained in pleadings must be filed in a separate, sealed attachment. In addition, all other pleadings are reviewed before publication on the Military Commission website, and any information covered by the Protective Order is redacted (or the pleading is made entirely sealed). The Protective Order also imposes a time delay on broadcasting of open hearings to ensure that if classified information is disclosed

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, Article 9(a).

⁶⁶ USA v KSM et al, AE-013D, 'Government's Response to the American Civil Liberties Union Motion for Public Access to Proceedings and Records, 16 May 2012, pp. 6 and 13, http://www.aclu.org/files/assets/govt_resp_to_mot_for_public_access_2012.05.16_0.pdf.

⁶⁷ AE013BB, Amended Memorandum of Understanding Regarding the Receipt of Classified Information, [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013BB\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013BB).pdf). This is still in place following the adoption of Second Amended Protective Order No. 1, above n.7.

⁶⁸ See further AE 260(MAH) Mr Hawsawi's Motion to Compel a Response to its Discovery Request of 25 September 2013, 23 December 2013, pp. 1-2, www.mc.mil.

⁶⁹ See USA v KSM et al, AE013HHH, Government Response to Defense CAT Motion, above n.8, p. 9.

during an open hearing, the broadcast will be suspended and it will not be transmitted to the public.⁷⁰

D. EFFECT OF RESTRICTIONS ON THE RIGHT TO COMPLAIN AND DEFENCE OF CHARGES

41. The effect of the restrictions on access, the classification of information, and the rules of the Military Commission proceedings – including the Protective Order – is to comprehensively prevent the disclosure, outside a very small circle of persons, of any information from the detainees themselves about the way they were treated during the period of their enforced disappearance. Given that only a very small number of persons with very high security clearance are given access to these detainees, this regime has a number of specific implications.
42. **First**, it denies detainees (and their defense lawyers) the opportunity to complain about torture and other human rights violations they were subjected to in any forum, including before the authorities of the United States⁷¹ and the authorities of any other country alleged to be complicit. Defense lawyers cannot, for example, bring a complaint on behalf of their client in a country where it is alleged that a detainee was held in secret detention. Nor can they instruct any other lawyers or other individuals to pursue such claims on their client's behalf, as to do so would risk breaching the protective order by suggesting that violations occurred.⁷² They have also been barred from providing information covered by the Protective Order to members of Congress, including in relation to Congressional investigations, and to a review team established by the President examining conditions of confinement at Guantanamo Bay.⁷³ Instead, in the words of one of the defense teams, the protective order and associated memorandum of understanding "imposes an affirmative obligation on defense counsel to police the accused and prevent them from exercising rights they have under international law to seek investigation and recourse as victims of torture".⁷⁴ This is in direct violation of the US authorities' obligations under Article 13 of the Convention.
43. **Second**, it means that defense lawyers are highly restricted in the extent to which they can conduct their own inquiries into how the defendants were treated in detention. Such inquiries are not only relevant for mitigation of sentence if the defendants are found guilty,⁷⁵ but are also relevant to the defence of the charges themselves, including testing of evidence which may have been obtained by torture.⁷⁶ It also means that they cannot authorise others to carry out such inquiries on their behalf.

⁷⁰ Second Amended Protective Order, above n. 7, Sections 6-8.

⁷¹ Although as discussed elsewhere, there are no available remedies in the United States: see further Amnesty International (2013), 'USA: Human Rights Betrayed: 20 years after ratification of ICCPR, human rights principles sidelined by 'global war' theory', pp. 6-9, http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14509_E.pdf.

⁷² See further USA v KSM et al, AE-013EEE(MAH), 'Motion to Make Conforming Amendments to AE-013DDD, the Commission's Second Amended Protective Order #1', 6 January 2014, p.2, [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013EEE\(MAH\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013EEE(MAH)).pdf).

⁷³ USA v KSM et al, AE-200(AAA), 'Mr. al Baluchi's Notice of Joinder, Factual Supplement & Argument to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture', 17 September 2013, pp.17-19, [http://www.redress.org/downloads/ksm-ii-\(ae200\(aaa\)\).pdf](http://www.redress.org/downloads/ksm-ii-(ae200(aaa)).pdf) ("Al-Baluchi CAT Motion Joinder Notice"). See further interview with James Connell, 'Gitmo Attorney Blasts Torture, Classification & Zero Dark Thirty Lies', published 4 September 2014, <https://www.youtube.com/watch?v=aCjDVoFuP5U>.

⁷⁴ Ibid, p. 2.

⁷⁵ See USA v KSM et al, AE200 (MAH, RBS, WBA), 'Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture', 12 August 2013, p. 8, [http://www.redress.org/downloads/ksm-ii-\(ae200\(mahrbswba\)\).pdf](http://www.redress.org/downloads/ksm-ii-(ae200(mahrbswba)).pdf), ("Defense CAT Motion").

⁷⁶ Ibid., p. 3.

44. **Third**, it has operated to prevent third parties from obtaining information from the defendants to pursue complaints on their behalf in third States, including information on which States to complain to. Each of the defendants undoubtedly holds information that could give indications as to where they were held and how they were treated, which could be tied to other data available in the public domain to give factual credence to any allegations. However, because of the secrecy of the RDI Program, the restrictions on access to information from the detainees have substantially impeded the ability to meet the initial burden of proof in a particular country to satisfy authorities that the relevant State was involved and has an obligation to investigate allegations made.
45. **Fourth**, it has made it very difficult for defendants to provide even general powers of attorney to lawyers or third party organisations who wish to pursue proceedings in third countries based on information in the public domain. This is the situation facing REDRESS, which has been representing Mustafa al-Hawsawi on the basis of an understanding that Mr al-Hawsawi has a general interest in proceedings being pursued on his behalf, as discussed further in the next section. This creates significant difficulties in filing complaints and appeals, and may block or impede access to remedies and review mechanisms including before treaty bodies and regional courts.
46. **Fifth**, it means that detainees or their military defense counsel cannot provide information to assist investigations in other States into rendition and secret detention, severely hampering those States in fulfilling their own obligations under the Convention. Such investigations have ostensibly been undertaken in a number of countries, including Poland and Lithuania.⁷⁷ In the Polish investigation to date, prosecutors reportedly have made four requests to United States authorities for information to assist their investigation; one has been denied and the other three have not received a response.⁷⁸ In Lithuania, a Judge of the Vilnius Court has recently overturned a decision by prosecutors not to investigate allegations of secret detention in the country, finding that in order to make any decision the prosecutor “must” (among other things) attempt to obtain information from the accused, his lawyer and United States authorities.⁷⁹
47. **Sixth**, it has been argued by the defense for Ammar al-Baluchi, one of the accused in the 9/11 trial, that the operation of the Protective Order seriously damages the quality of his medical care, and prevents meaningful rehabilitation from torture.⁸⁰ Counsel’s pleading on this matter however remains classified.

E. THWARTING COMPLAINTS: ILLUSTRATIVE EXAMPLE, THE CASE OF MUSTAFA AL-HAWSAWI

48. The case of Mustafa al-Hawsawi is an illustrative example of the effect these restrictions have had in blocking access to lawyers and to remedies for torture and other ill-treatment, and the violations of the Convention that this leads to.
49. Mustafa al-Hawsawi is a Saudi national who was captured by United States authorities in March 2003 and was held in secret detention until officials acknowledged his detention at Guantánamo

⁷⁷ For further information about these investigations see Human Rights Watch (2013), ‘Globalizing Torture: CIA Secret Detention and Extraordinary Rendition’, at pp. 91-93 and 101-102, <http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>.

⁷⁸ Associated Press (2014), Prosecutors in CIA prison probe may visit US, 6 February 2014, http://www.washingtonpost.com/world/europe/prosecutors-in-cia-prison-probe-may-visit-us/2014/02/06/08f1b614-8f30-11e3-878e-d76656564a01_story.html.

⁷⁹ Vilnius Regional Court, Appeal No 1S-5-312/2014, Ruling of 28 January 2014, unofficial English translation available at: <http://www.redress.org/downloads/lithuaniregional-court-al-hawsawi6-feb-14-2.pdf>.

⁸⁰ Al-Baluchi CAT Motion Joinder Notice, above n.73, p.24.

Bay, Cuba in September 2006. He currently faces capital charges in a trial before a Military Commission in Guantánamo Bay, relating to his alleged involvement as media organiser and financier in the September 11, 2001 attacks in the United States.⁸¹

50. REDRESS has been involved in the case of Mr al-Hawsawi since July 2012, and has carried out its own investigations into his case. However, Mr al-Hawsawi and his defense counsel are completely prohibited, under the Protective Order, from pursuing any proceedings themselves, and from assisting in any investigations or proceedings brought by others. Although his Military Commission defense counsel have access to Mr al-Hawsawi, they cannot disclose any information obtained from Mr al-Hawsawi, or which might tend to confirm or deny classified information, or give any instructions or indications of whether or what type of action should be taken. Nevertheless, on the understanding that Mr al-Hawsawi did have a general interest in proceedings being taken on his behalf, and on the basis of REDRESS's own investigations as described below, REDRESS moved ahead on the case.
51. There is very little information in the public domain about where Mr al-Hawsawi was held from March 2003 to September 2006, although a newspaper report suggests that he was at the very least transferred through a number of European States.⁸² Despite these severe limitations REDRESS has carried out a detailed analysis of publicly available sources which indicates that Mr al-Hawsawi was subjected to serious violations of international law including enforced disappearance, torture and other prohibited ill-treatment. REDRESS' analysis indicates that a number of States, including Poland and Lithuania, are likely to be implicated in these violations and have the responsibility to investigate them under their domestic law and international law. REDRESS has therefore sought to compel investigations into these allegations in these third States by bringing formal criminal complaints.⁸³

Challenge to the Protective Order by defense counsel

52. Mr al-Hawsawi's Military Commission defense counsel challenged the operation of the Protective Order, arguing that his inability to complain about torture and other ill-treatment undermines the fairness of the trial and is in violation of the US obligations under the Convention against Torture and customary international law.⁸⁴ In their submissions, it is argued that not only were the defense lawyers prohibited from undertaking any litigation on his behalf, they were hampered in investigations for his defense and could not cooperate with any efforts undertaken by others on his behalf.
53. In its response, the Prosecution argued that the rights guaranteed under the Convention against Torture had not been incorporated into domestic US law, and could not be relied on by Mr al-Hawsawi in the Military Commission proceedings.⁸⁵
54. On 16 December 2013 the Military Judge denied the Defense Motion, finding that "Articles 1-16 of the Convention Against Torture confer no rights to each Accused", and that "Customary

⁸¹ See Department of Defense, 'JTF-GTMO Detainee Assessment: Mustafa al-Hawsawi', 8 December, [http://www.therenditionproject.org.uk/pdf/PDF%20444%20\[JTF-GTMO%20Detainee%20Assessment.%20Mustafa%20Ahmad%20al-Hawsawi%20\(8%20Dec%202006\)\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%20444%20[JTF-GTMO%20Detainee%20Assessment.%20Mustafa%20Ahmad%20al-Hawsawi%20(8%20Dec%202006)].pdf); USA Department of Defense (2011), 'DOD Announces Charges Sworn Against Five Detainees Allegedly Responsible for 9/11 Attacks', 31 May 2011, <http://www.defense.gov/releases/release.aspx?releaseid=14532>.

⁸² Matt Apuzzo & Adam Goldman (2010), 'CIA flight carried secret from Gitmo', Associated Press, 7 August 2010, http://www.boston.com/news/nation/washington/articles/2010/08/07/ap_exclusive_cia_flight_carried_secret_from_gitmo/.

⁸³ See further <http://www.redress.org/case-docket/al-hawsawi-case-1>.

⁸⁴ Defense CAT Motion, above n.75.

⁸⁵ Government Response to Defense CAT Motion, above n.8, pp. 8-10.

international law norms, like non-self-executing treaties, are not part of domestic U.S. law”.⁸⁶ The Judge did make some changes to the Protective Order (resulting in Second Amended Protective Order No. 1, as described above), however he stressed that these changes would have no practical impact on the information that can be publicly disclosed, which has indeed proved to be the case.⁸⁷

Inability of third parties to obtain written authorisation to act

55. Since September 2012 REDRESS has attempted to obtain a written authority to act (Power of Attorney) from Mr al-Hawsawi pertaining to his enforced disappearance, however the restrictions on access to him have made this very difficult. For a start, the Protective Order means that any authority must be worded in extremely general terms, and cannot refer to any specifics of the proceedings which REDRESS is pursuing, as this may point to information which is classified, such as the countries in which he was held.
56. On 17 October 2013 REDRESS filed a motion before the Military Commission seeking leave to intervene in proceedings brought by the accuseds’ counsel challenging the Protective Order on the ground that it is contrary to the Convention against Torture.⁸⁸ In addition REDRESS sought an order from the military judge allowing it to provide two powers of attorney worded in general language to Mr al-Hawsawi to enable REDRESS to represent him in proceedings outside the United States. On 27 November 2013 the military judge denied REDRESS’s motion, ruling that it had “no authority to grant the requested relief” and that it “will not intervene in the daily operations of the detention facility absent a showing [that] some aspect of those operations adversely impacts these proceedings”.⁸⁹
57. Thereafter, in January 2014 REDRESS approached Joint Task Force Guantánamo Bay (JTF-GTM), which is part of the US Department of Defense responsible for the running of the detention facility. REDRESS requested that it provide the powers of attorney to Mr al-Hawsawi, and – if he signs them – to return them to REDRESS. When JTF-GTM responded that no staff at the camp would be authorised to witness the signature of the document, REDRESS requested access for this purpose but received no response to its request. It then wrote further to suggest that Mr al-Hawsawi be advised that he could sign the power of attorney without a witness, and return it to REDRESS, but has not received any further correspondence in this regard. REDRESS understands that even if Mr al-Hawsawi has signed the power of attorney, it is likely to be blocked from being sent to REDRESS as a result of security review.

Effect on actions in other jurisdictions

58. The inability to obtain information from Mr al-Hawsawi directly or even a Power of Attorney from him has the potential to block access to information and remedies in jurisdictions outside the US.

⁸⁶ Order on CAT Motion, above n.9, pp. 4-5.

⁸⁷ AE013CCC, Second Supplemental Ruling on Government Motion to Protect Against Disclosure of National Security Information, 16 December 2013, [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013CCC\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013CCC(KSM%20et%20al)).pdf).

⁸⁸ USA v KSM et al, AE200J, ‘Motion of the Redress Trust for leave to intervene in support of the Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture (AE-200) and for Order Granting Permission to Obtain Written Authority from Mr. al-Hawsawi’, 17 October 2013, [http://www.redress.org/downloads/ksm-ii-\(ae200j\(ksm-et-al\)\).pdf](http://www.redress.org/downloads/ksm-ii-(ae200j(ksm-et-al)).pdf).

⁸⁹ USA v KSM et al, AE200EE, ‘Order on Motion of the Redress Trust for leave to intervene in support of the Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture (AE-200) and for Order Granting Permission to Obtain Written Authority from Mr. al-Hawsawi’, 27 November 2013, p. 2.

59. The difficulties encountered in **Lithuania** are illustrative of these problems. On 13 September 2013, REDRESS and the Lithuanian organisation Human Rights Monitoring Institute (“HRMI”) filed a criminal complaint with the Lithuanian Prosecutor-General, requesting him to open an investigation into allegations that Mr al-Hawsawi had been secretly detained on Lithuanian territory and subjected to torture and other ill-treatment.⁹⁰
60. This complaint relied on a synthesis and analysis of publicly available materials, but, for the reasons outlined above, REDRESS does not have any information obtained from Mr al-Hawsawi himself, and is unable to obtain such information. It was therefore only possible to allege that it was “highly likely” that Mr al-Hawsawi had been held in secret detention on Lithuanian territory.
61. On 27 September 2013, the Prosecutor’s office issued a decision refusing to open an investigation into the allegations raised.⁹¹ The reasons given for refusing to open an investigation included that there was insufficient evidence to raise the obligation to investigate, and that the complaint was not based on information obtained from Mr al-Hawsawi or known “directly” to HRMI or REDRESS, but was instead based on “assumptions” made after “analyzing ‘accessible information’”.⁹²
62. REDRESS and HRMI appealed the decision of the Lithuanian Prosecutor in the Lithuanian courts. At first instance the appeal was dismissed. However, on 28 January 2014, the Vilnius Regional Court upheld the appeal in part.⁹³ It found that the Prosecutor had not taken any steps to determine whether an investigation should be opened, and therefore annulled the decision on the basis that it was groundless. The Court held that it could not order the Prosecutor to open an investigation, but stressed that a certain number of minimum steps needed to be taken before any decision on the complaint could be made, including requesting information from United States authorities, and from Mr al-Hawsawi himself.⁹⁴
63. The complaint was returned to the Prosecutor for reconsideration, and an investigation was opened in February 2014. Nevertheless, the investigation is severely hindered by Mr al-Hawsawi’s inability to provide information to the Lithuanian authorities about what he experienced.
64. Difficulties also have been encountered in **Poland**, where REDRESS brought a complaint on Mr al-Hawsawi’s behalf in December 2013 alleging that it was highly likely that Mr al-Hawsawi was held in, or at least transferred through, Poland in 2003, and subjected to numerous violations including torture and ill-treatment, and *refoulement*, on its territory. In March 2014 the Prosecutor refused to include Mr al-Hawsawi as a person with victim status in its ongoing investigation (this is a wider investigation covering a range of allegations concerning the use of Polish territory to facilitate the goals of the CIA RDI Program). Although REDRESS has appealed this decision, without information from Mr al-Hawsawi himself, or information specifically declassified by the US or any leaks of information about his whereabouts (as have existed in other cases), and in the face of the determined efforts of United States authorities to block any information about his movements or treatment, the case must be built on circumstantial evidence only. In these circumstances it is much more difficult to convince national authorities that sufficient evidence exists to raise the obligation to investigate.

⁹⁰ A copy of the complaint is available at: <http://www.redress.org/downloads/casework/final-lithuania---investigation-request.pdf>.

⁹¹ A copy (in Lithuanian) of the Prosecutor’s decision is available at: <http://www.redress.org/downloads/decision-of-prosecutor-27.09.13.pdf>.

⁹² *Ibid.*

⁹³ See judgment of the Vilnius Regional Court, 28 January 2014, available at: <http://www.redress.org/downloads/al-hawsawi---vilnius-regional-court---decision-20140129.pdf>.

⁹⁴ *Ibid.*

F. KEY VIOLATIONS OF THE CONVENTION AGAINST TORTURE

65. The RDI Program and subsequent detention of individuals at Guantánamo Bay, including as described above, involves clear and serious violations of the Convention, many of which are ongoing. Ongoing violations include: violations of Articles 1, 2 and 16 through the conditions of detention at Guantánamo Bay; violations of Articles 5-7 arising from the policy of not prosecuting those responsible for torture and ill-treatment committed as part of the RDI Program and since; violations of Article 12 for the failure to undertake prompt, effective independent and impartial and transparent investigations into the enforced disappearances and other torture and ill-treatment committed against detainees, and blocking lawyers from providing information to United States government reviews that have been undertaken; violations of Articles 13 and 14 by the blocking of complaints in the United States and complete failure to provide redress to victims; and violations of Article 9 by impeding, not cooperating with, and failing to provide all evidence to investigations being conducted in other jurisdictions into their own involvement in the RDI Program. The rules in place in the Military Commission, including the restrictions on information about High Value Detainees' treatment in secret detention, also raise the risk of use of evidence obtained by torture and other ill-treatment in those and other proceedings, in violation of Article 15 of the Convention, to an unacceptable level. In addition, the silencing of the detainees in itself amounts to a violation of Article 16 and Article 2 of the Convention.

Article 13 – the right to complain of torture and to have complaints independently, impartially and thoroughly examined

66. The US has: classified all information about the detainees' treatment during their time in secret detention; placed extreme restrictions on detainees and their lawyers; removed the jurisdiction of US courts except for limited *habeas corpus* review and final appeals on conviction; and ensured that any information about their treatment that has been deemed to be classified and is disclosed in Military Proceedings will not be made public (see paras. 20-40). Among other things, this violates the right of the individuals who were classified and held as High Value Detainees to complain about their enforced disappearance, and treatment in black sites, and to have their cases promptly, independently, impartially and thoroughly examined by competent US authorities.

67. The Committee has made it clear that the concept of "territory" in the Convention, includes "any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the *de jure* or *de facto* control of a State party".⁹⁵ It therefore clearly applies to treatment endured by the detainees during their time in custody in black sites as well as their treatment in transit and up to the present as detainees at the Guantánamo Bay detention facility.

68. The Protective Order (paras. 32-40) prohibits the individuals and their counsel from disclosing information about the torture they were subjected to, and the detention system (paras. 20-27) makes it in any event impossible in practice for the accused to do so. For example, in Mr al-Hawsawi's case, through the combination of classifying all information about the treatment he endured in secret detention, removing the jurisdiction of domestic courts except in very limited circumstances, severely limiting his access to the outside world (and redacting communications made), and imposing criminal sanctions on any person who divulges information about his treatment, the US has made it impossible for Mr al-Hawsawi to complain to competent independent and impartial US authorities about the treatment to which he was subjected.

⁹⁵ Committee Against Torture, General Comment No. 2, above n.10, para. 7.

69. The sole forum in which any information about alleged torture or other ill-treatment that has been deemed to be classified can be disclosed is, as outlined above at paragraph 40, in Military Commission proceedings which are closed to the public (reinforced by delayed broadcast of public hearings to ensure that any classified information inadvertently or otherwise referred to in such hearings is also not disclosed). Given that the expressly described purpose of setting up the Military Commissions was to allow the CIA program to continue, and to shield CIA officials from scrutiny of the ordinary Courts (para. 29), it is clear that any allegations raised in these proceedings are extremely unlikely to result in any – let alone any impartial – investigations. This Committee has already established that they cannot fulfil the requirements under Article 13.⁹⁶ In any event, on-going and future investigations, though important and necessary, more than ten years after the events, do not meet the requirement of “prompt”.
70. In addition, and connected to the following section on Article 14, the US authorities have made it impossible for the individuals who were held as “High Value Detainees” to themselves lodge complaints directly of their treatment to other States involved in their enforced disappearance and torture, and by blocking access to the information they have about their treatment, it has severely hindered any person or organisation from doing so on their behalf (see paras. 44-45 and 55-64).

Article 14 – the right to redress for torture and ill-treatment

71. The classification of information, restrictions on Military Commission defense counsel and denial of contact with outside lawyers (see paras. 20-40) also continues to violate the rights of the individuals held as High Value Detainees to redress, i.e. the right to an effective remedy and reparation, including compensation and rehabilitation, as guaranteed by Article 14 of the Convention.
72. The Committee made clear in its General Comment No. 3:
- the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. ...Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.
73. Article 14 therefore requires that the United States allow the individuals who were held as “High Value Detainees” to seek redress both in the United States, and in other States implicated in their enforced disappearance and torture. As shown by the example of Mustafa al-Hawsawi (paras. 48-64), the rules in place are designed precisely to prevent this from happening as they seek to frustrate any access to suitable legal avenues from the outset. They do this by ensuring that detainees cannot make a complaint themselves, that the lawyers acting as their defense counsel in the proceedings before the Military Commissions cannot do so on their behalf, that it is extremely difficult to authorise others to do so, and even if this is possible they cannot give specific instructions to such individuals or organizations, and any evidence they hold about what happened is blocked from disclosure.
74. Despite all the obstacles of the current system, some isolated information has been leaked or declassified about the specific treatment and whereabouts of some of the individuals held as High Value Detainees, including a report issued by the ICRC after it first interviewed the High Value Detainees in 2006, which was leaked,⁹⁷ and a heavily redacted report summarizing the

⁹⁶ CAT 2006 Concluding Observations, above n.14, para. 27.

⁹⁷ ICRC HVDs Report, above n.3. See further, for example, the now declassified information available about Mr Mohammad as explained at pp. 5-10 of the motion of defense lawyers for detainee Khalid Shaikh Mohammad in Military

results of an investigation by the CIA's own Office of the Inspector General into CIA abuses of detainees under the RDI Program, which was declassified.⁹⁸ This information has been used to instigate investigations in some States, and has been sufficient to allow the European Court of Human Rights to conclude that two of the individuals who were held as High Value Detainees were tortured on Polish territory and to order that, Poland, which was held to have violated *inter alia*, the prohibition of torture and other ill-treatment, the right to liberty, the right to a fair trial, the right to private life and the right an effective remedy, pay compensation to them.⁹⁹ Significantly – Poland has also been ordered to seek assurances from the US authorities that Mr al-Nashiri will not be subjected to the death penalty.¹⁰⁰

75. For other individuals, including Mr al-Hawsawi, there is little or nothing (yet) in the public domain (for Mr al-Hawsawi, in part because he elected to remain anonymous when interviewed by the ICRC, which is a key source on the specific treatment individual High Value Detainees were subjected to). Persons and organizations attempting to act on behalf of individuals about whom there is little or no information in the public domain (as in the case of Mustafa al-Hawsawi) are therefore likely to face greater hurdles to convince authorities to open an investigation into a State's potential involvement in their torture and other ill-treatment, and are also likely to face more significant hurdles to prove state responsibility for such treatment.
76. As discussed in paragraph 47 above, it has also been argued (in closed proceedings) by the defense for at least one of the accused in the 9/11 trial that the restrictions on disclosure seriously damages the quality of the accused's medical care, and prevents meaningful rehabilitation from torture.¹⁰¹

Article 9 – Failure to cooperate with criminal investigations in other jurisdictions

77. As outlined above (paras. 46 and 58-63), the detention and classification regimes in place also hinder investigations by other States, including those which are likely to have been involved in the violations, for example through hosting secret detention sites, or allowing rendition planes to land. Many of such States are Parties to the Convention and are legally obliged to conduct such investigations under the Convention; and the United States has an explicit obligation under Article 9 to cooperate with their criminal investigations.¹⁰²
78. The United States has demonstrated on a number of occasions that it does not intend to cooperate. It is known, for example, that Polish prosecutors have to date made four requests to United States authorities for information to assist their investigation; one has been denied and the other three have not received a response.¹⁰³ The United States has also refused to supply information requested by prosecutors in Spain, Germany and Italy, in relation to extraordinary

Commission proceedings USA v KSM et al, AE 200 (KSM), 'Defense Notice of Joinder, Factual Supplement & Argument', 2 September 2013, p. 5, [http://www.redress.org/downloads/ksm-ii-\(ae200\(ksm\)\)part1.pdf](http://www.redress.org/downloads/ksm-ii-(ae200(ksm))part1.pdf) ("KSM Motion").

⁹⁸ CIA OIG Review, above n.16.

⁹⁹ ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014; *Abu Zubaydah v Poland* (2014) App. No. 7511/13, 24 July 2014 (both of these judgments will become final three months after the date of the judgment, unless they are referred to the Court's Grand Chamber).

¹⁰⁰ ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014, para. 589.

¹⁰¹ Al-Baluchi CAT Motion Joinder Notice, above n.73, p.24.

¹⁰² See, eg. *Goiburú v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, para. 93 (22 September 2006) (where serious violations have a cross-border character, States implicated in one part of those violations have an obligation to investigate that involvement). See also *Rantsev v. Cyprus & Russia* (2010) 51 EHRR 1, Eur. Ct. H.R., para. 289 (for serious cross-border human rights violations States must not only conduct a domestic investigation into events occurring on their own territories, but must "cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories").

¹⁰³ Associated Press (2014), 'Prosecutors in CIA prison probe may visit US', 6 February 2014, <http://news.yahoo.com/prosecutors-cia-prison-probe-may-visit-us-130908177.html>.

rendition operations,¹⁰⁴ and documents released by Wikileaks suggest that its diplomats in fact went to great lengths to derail those investigations.¹⁰⁵

79. At the most basic level, by blocking access to the individuals held as High Value Detainees, and any release of information from them, the United States is denying other State Parties access to some of the most vital evidence in their investigations. This is reinforced by Protective Orders, such as that in the proceedings brought against those being tried before the Military Commission in relation to the attacks on 9/11, which specifically disallows those covered by it to respond to “any summon, subpoena, or court order, or the equivalent thereof, from any United States or foreign court or on behalf of any criminal or civil investigative entity within the United States or from any foreign entity”, without explicit permission from the Commission or government.¹⁰⁶
80. The regime in place therefore operates not only to deny individuals their rights under the Convention, and access to information that may be very important for their defence (including on capital charges), and to breach Article 9, but also hinders third States in their own efforts to comply with the Convention.

National security considerations cannot be used to block investigations and to extinguish the right to complain about torture and obtain redress

81. The absolute prohibition of torture and the absolute prohibition of enforced disappearance entail a number of positive obligations which are also firmly established to be of an absolute nature. States must both (i) guarantee victims the right to complain and the right to redress/an effective remedy, and (ii) carry out a prompt, impartial and effective investigation into allegations of such treatment. These obligations are part of, and integral to, the prohibitions themselves.¹⁰⁷ Because these positive obligations are integral to the absolute prohibitions, it is also firmly established that they are non-derogable.¹⁰⁸
82. The Protective Order has been adopted ostensibly to protect “the sources, methods, and activities by which the United States defends against international terrorism and terrorist organisations”.¹⁰⁹ However, by its extremely broad reach the Protective Order impermissibly extinguishes fundamental and non-derogable rights of the accused to complain and to redress. It is even more crucial to uphold these rights in a capital case where the right to life of accused is at stake (and as argued further below, such circumstances themselves amount to a violation of the prohibition of torture and other ill-treatment).

¹⁰⁴ Scott Horton (2010) ‘Justice Department Refuses Cooperation with Polish Prosecutors Investigating Torture at CIA Black Site’, 30 December 2010, <http://harpers.org/blog/2010/12/justice-department-refuses-cooperation-with-polish-prosecutors-investigating-torture-at-cia-black-site/>.

¹⁰⁵ Giles Tremlett (2010) ‘Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture’, *Guardian*, 1 December 2010, <http://www.theguardian.com/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>.

¹⁰⁶ Second Amended Protective Order, above n.7, Section 5(3)(f).

¹⁰⁷ See, eg. *Assenov v. Bulgaria*, 1998-VIII, Eur. Ct. H.R., para. 102; *Aslakhanova v. Russia*, Eur. Ct. H.R. App. No. 2944/06, 18 December 2012, para. 144; *The “Street Children” Case. (Villagrán Morales et al.)*, Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 63, para. 225 (19 November 1999); *Velasquez Rodriguez Case*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 para.166 (July 29, 1988), and *Loayza Tamayo Case*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42 para.170 (November 27, 1998); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, (International Criminal Tribunal for the Former Yugoslavia 10 December 1998) 38 I.L.M. 317, paras.144 and 148.

¹⁰⁸ CAT General Comment No. 3, above n.10, para. 42. See also, Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Add.11 (2001), para. 15 (“under no circumstances may arguments of national security be used to deny redress for victims”).

¹⁰⁹ *USA v KSM et al*, AE-0130, ‘Ruling on Government Motion to Protect Against Disclosure of National Security Information’, 6 December 2012, www.mc.mil.

83. The Committee has made it clear that, because of their non-derogable nature, national security considerations *cannot* be used to extinguish the right to complain about torture, and other ill-treatment, and to block investigations into allegations of such conduct or to redress.¹¹⁰

84. Any effort to *limit* the right to a remedy must be based on legitimate grounds and be proportionate. National security interests may only constitute a legitimate aim when they are genuinely tailored to protecting such interests rather than protecting States from embarrassment or preventing the exposure of illegal activity.¹¹¹ The Special Rapporteur on Counterterrorism specifically identified paragraphs 2 (g) (4)-(5) of the previous, but very similar, Protective Order¹¹² as offending this principle.¹¹³ He said:

A particularly egregious illustration ... is the practice of the Military Commissions in Guantanamo Bay to treat evidence confirming the torture of “high-value detainees” by the CIA as “classified information” on the spurious ground that the accused, having been subjected to waterboarding and other forms of torture, are thereby privy to information about classified CIA interrogation techniques which they cannot be permitted to reveal, in any proceeding open to the public, even to the extent of preventing their attorneys from providing the accused with government classified materials about the ill-treatment to which they were subjected.

85. The organisations invite the Committee to consider that the system imposed on detainees, such as Mr al-Hawsawi, is not a neutral application of principles of classification but part of a systematic approach to prevent any information about the torture and ill-treatment suffered, its circumstances and details, and information about personnel, agencies or countries implicated, to become known or used in any court proceedings. It extinguishes the right to any effective remedy and does so for reasons that are not confined to a legitimate purpose.

86. Even if certain restrictions on access to evidence could in principle be deemed consistent with a legitimate aim, these restrictions must be proportionate and strictly necessary to achieve that aim in a democratic society. In *Al-Nashiri v Poland*, a case concerning allegations of torture and enforced disappearance of another High Value Detainee, the European Court of Human Rights stressed that:

...even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as

¹¹⁰ CAT General Comment No. 3, above n.10, para. 42; *Cordova v. Italy (No. 1)*, 2003-I Eur. Ct. H.R. 53 (any limitations on judicial review “must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”); See also *Waite & Kennedy v. Germany*, 1999-I Eur. Ct. H.R.; *Chahal v U.K.*, 1996-V, Eur. Ct. H.R. 456-457; *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. (2008), at paras. 138 and 141; “*Five Pensioners*” v. *Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, at para. 136 (28 February 2003). See also *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)*, Interpretation of the Judgment on the Merits, Inter-Am. Ct. H.R. (ser. C) No. 75, at para. 41 (14 May 2001).

¹¹¹ See The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, at Principle 2(b), cited in Report of the Special Rapporteur on Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1996/39 (1996), p. 30: “[a] restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest”, http://ap.ohchr.org/documents/alldocs.aspx?doc_id=700. See also UN Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions on the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4 (1984), <http://www.refworld.org/docid/4672bc122.html>. See further Emmerson 2013 Report, above n.12, para. 39.

¹¹² *USA v KSM et al*, AE013AA, ‘Amended Protective Order No. 1’, 9 February 2013, [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013AA\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013AA).pdf).

¹¹³ Emmerson 2013 Report, above n.12, p. 15.

much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests (see, *mutatis mutandis*, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 216-218, ECHR 2009).

Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.

An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory (see *Anguelova v. Bulgaria*, no.38361/97, § 140, ECHR 2002-IV; *Al-Skeini and Others*, cited above, § 167 and *El-Masri*, cited above, §§191-192).¹¹⁴

87. The UN Special Rapporteur on Counterterrorism has stressed that where claims are advanced for classification of material in proceedings “there should be a strong presumption in favour of disclosure, and any procedure adopted must, as a minimum, ensure that the essential gist of the classified information is disclosed to the victim or his family, and made public”.¹¹⁵

Article 15 – the prohibition on the use of evidence obtained by torture

88. The prohibition on using evidence obtained by torture or other ill-treatment as evidence in any proceedings, (other than those against the alleged perpetrator of the torture), is clear and non-derogable, irrespective of any national security considerations.¹¹⁶ However, the rules in place at the Military Commission, including the restrictions on information about High Value Detainees’ treatment in secret detention, raise the risk of use of such evidence in violation of Article 15 of the Convention to an unacceptable level.
89. The current Military Commission Rules of Evidence ostensibly prohibit the introduction of evidence obtained through the use of torture, or by cruel, inhuman or degrading treatment,¹¹⁷ and require that any statement made by the accused can only be admitted if the statement was voluntarily given or was made “incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence”.¹¹⁸ However the rules still allow “coerced statements” made by others to be used as evidence if the judge determines they are “reliable” and “probative”, that their use is “in the best interest of justice” and that they

¹¹⁴ ECtHR, *Al Nashiri v Poland* (2014), App. No. 28761/11, 24 July 2014, paras. 494-495.

¹¹⁵ Emmerson 2013 Report, above n.12, p. 16, citing the UN Basic Principles, paras. 22(a) to (d); UN Office of the High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”), para. 82, UN Doc. HR/P/PT/8/Rev.1 (2001), www.refworld.org/docid/4638aca62.html; *A. v. U.K.* App. No. 3455/05, Eur. Ct. H.R., (2009) paras. 218 to 220; *Yassin Abdullah Kadi v. European Commission*, Case T-85/09, General Court (Seventh Chamber), 30 September 2010 [2011] CMLR 24, paras. 173 to 174.

¹¹⁶ CAT General Comment No. 2, above n.10, para. 6.

¹¹⁷ Rule 304 of the Military Commission Rules of Evidence, contained in the Manual For Military Commissions (2012) provides that: “No statement, obtained by the use of torture, or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a trial by military commission...”.

¹¹⁸ *Ibid.*, Rule 304(a)(2).

were not obtained by torture or other ill-treatment.¹¹⁹ Evidence derived from statements obtained under torture or other cruel, inhuman or degrading treatment can also be admitted if the military judge rules that it is reliable, and that its use is in the interests of justice.¹²⁰

90. This situation is worsened by the operation of the Protective Order (see paras. 32-40). As Defense counsel are not permitted to disclose any information about the whereabouts or treatment of the accused during their time in secret detention, they are severely hampered in undertaking investigations into the evidence used against the accused at trial. These difficulties are made more acute by the very rigorous restrictions the Protective Order sets on handling classified information (using secured facilities and systems), which poses particular challenges if classified information is uncovered during investigations in other countries. As set out in the Defense motion challenging the Protective Order:

the Defense is completely cut off from exploring critical avenues for obtaining evidence, refuting or corroborating evidence, and otherwise pursuing the defense through collateral investigations or proceedings.¹²¹

91. This not only means that individuals who were held as High Value Detainees such as Mr al-Hawsawi do not have “full and effective assistance of counsel”, it also means that counsel are likely to be unable to adequately identify and refute evidence obtained by torture.
92. This violation is even more grave in a capital trial such as that underway for the 9/11 attacks. The Human Rights Committee has made it clear that the death penalty should not be imposed if the procedural guarantees to a fair trial are not upheld.¹²² The imposition of a capital sentence in these circumstances would amount not only to a violation of the rights to life and to a fair trial under the International Covenant on Civil and Political Rights, but – it is submitted – would also amount to treatment in violation of the Convention.
93. In addition, the determined secrecy around the torture and other ill-treatment that individuals were subjected to under the RDI Program also increases the risk that evidence obtained by such treatment may be used against individuals in other jurisdictions.

Article 16 – this denial of rights in itself amounts to cruel and inhuman treatment

94. The pre-trial conditions in which the High Value Detainees are held in Camp 7 at Guantánamo Bay (paras. 20-27) are extremely harsh and in themselves amount to cruel, inhuman and degrading treatment.¹²³ These conditions include essentially solitary confinement, being restricted to cells for at least 20 hours per day, the deliberate denial of the ability to carry out religious practices and extremely limited contact with lawyers and families.
95. Furthermore, the deliberate silencing of individuals who were held as High Value Detainees about complaints of torture through essentially incommunicado detention, classification rules, and restrictions on handling and disclosure of information within their trial, in and of itself amounts to cruel, inhuman and degrading treatment. In order to keep torture practices secret and in order to prevent complaints of torture, the government perpetuates the original violation

¹¹⁹ *Ibid.*, Rule 304(a)(3). See further Jennifer K Elsea (2014), above n.55, pp. 27-29.

¹²⁰ *Ibid.*, Rule 304(a)(5).

¹²¹ See CAT Defense Motion, above n.75, p. 8.

¹²² Human Rights Committee, General Comment No. 6: Article 6 (1982), UN Doc. HRI/GEN/1/Rev.6 at 127 (2003), para. 7.

¹²³ For a recent statement that the conditions in Guantanamo Bay generally amount to torture and other ill-treatment see: Statement of the United Nations Special Rapporteur on torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantanamo Bay, Inter-American Commission on Human Rights, Washington DC, 3 October 2013, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=>.

and by this continues the severe suffering inflicted on the High Value Detainees. This is made worse if – as has been alleged – the claim of classification results in the inability of victims to seek meaningful medical or psychological support and rehabilitation. In effect, the rules in place carry out a legally sanctioned policy of disablement. The person who has been subjected to torture at the hands of the same State that is now trying them is rendered completely unable to defend the rights they are guaranteed under the Convention, and their lawyers are rendered unable to effectively assist them. By deliberately depriving them of their rights – *because* they have been subjected to torture in the “War on Terror” – these policies deny the very humanity of the detainees. Here – as with protracted indefinite detention of detainees without information or procedural rights – the detainees are treated as objects, not rights holders, within the complete power of the authorities and in denial of the principle of human dignity which the prohibition is intended to protect.¹²⁴

96. The effect of this treatment is heightened when it is implemented in the context of Military Commission proceedings in which the prosecution is seeking the death penalty. When a person has been forcibly disappeared and tortured by the State now trying them, the mere prospect of being sentenced to death by a Military Commission that is authorised to rely on coerced evidence can reasonably be seen to lead to intense psychological distress and suffering.¹²⁵ This is particularly the case when considering the significant impediments faced by the individuals who were held as High Value Detainees and their lawyers in defending their rights.

Article 2 – the policies adopted directly violate the obligation to take effective legislative, administrative, judicial and other measures to prevent torture

97. In addition to the effect on the individuals concerned, the policies adopted to silence detainees and classify information about their treatment run counter to the United States’ obligation under Article 2 of the Convention. Instead, the United States has instituted a carefully designed policy, carried out through legislative, executive and judicial powers, to enshrine impunity for torture committed under its jurisdiction and to prevent victims from exercising their rights guaranteed by the Convention, including to redress, in relation to it. This is antithetical to the obligation to prevent torture, particularly: “to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented”.¹²⁶

G. CONCLUSION

98. From the RDI Program right through to the Military Commission proceedings, the United States has constructed a system described as “calculated to evade the operation of human rights law”.¹²⁷ The classification regime preventing detainees and their lawyers from complaining about torture is an integral part and egregious example of this. In the words of one of the defense counsel in the 9/11 trial, the United States has “tortur[ed] our victims and then construct[ed] an elaborate scheme of incommunicado detention and ‘classification’ designed to

¹²⁴ See further Report of the Special Rapporteur on Torture, Manfred Nowak, A/HRC/10/44, 14 January 2009, para. 41, citing ECtHR, *Tyrer v United Kingdom* (1978) Series A.26, Judgment of 25 April 1978 and Human Rights Committee, FKAG v Australia (2014), CCPR/C/108/D/2094/2011, 26 July 2013, para. 9.8.

¹²⁵ As to the psychological suffering arising from apprehension of being subjected to the death penalty see (in the European context) see ECtHR, *Al-Saadoon & Mufdhi v UK* (2010) App. No. 61498/08, 2 March 2010, para. 144. See further analogous circumstances apparent in the “death row phenomenon”, as discussed by the Special Rapporteur on Torture, Juan Mendez, in his interim report to the General Assembly, A/67/279, 9 August 2012, paras. 42-51.

¹²⁶ CAT, General Comment No. 2, above n.10, para. 4.

¹²⁷ Emmerson 2013 Report, above n.12, p. 15.

silence them forever...".¹²⁸ This not only perpetuates the original torture and other ill-treatment, but leads to impunity as it ensures that perpetrators cannot be investigated or prosecuted.

99. The Protective Order, as well as the extremely limited access to the accused, operates to deny the defendants in the 9/11 trial the rights guaranteed under the Convention to complain about and seek redress for the torture and other prohibited ill-treatment to which they have been subjected. It also frustrates investigations which could assist the defendants' defence, puts some accused at an even greater disadvantage than others, and frustrates remedies in other jurisdictions.
100. The determined secrecy around such serious violations of human rights affects not only the defendants, but also violates principles of oversight and public scrutiny essential for the effective eradication of torture throughout the world.
101. In doing so, it both denies the individuals who have been subjected to torture and other ill-treatment their rights and perpetuates a legally sanctioned security regime that is fundamentally incompatible with the universal prohibition of torture and enforced disappearance. Rendering individuals deprived of their liberty "rightless" is anathema to the rule of law and sets a highly problematic precedent capable of further undermining the rights of those subject to security legislation in other States parties.¹²⁹ It runs entirely counter to the rationale of the Convention to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world".¹³⁰
102. The organisations consider:
- that the United States policy depriving victims of their right to complain of torture and other ill-treatment violates the Convention, including articles 1, 2, 9, 13, 14, 16, as it either intends or has the effect of extinguishing the right to a remedy and redress for one category of victims of torture;
 - that any national security, secrecy invocation or classification must pursue a legitimate aim, that it cannot have the effect or intend to prevent disclosure of wrong-doing or illegal activity, and the US policies described in this submission that have the effect or intend to prevent disclosure of torture and other ill-treatment and information which could lead to the identification and punishment of those responsible violate the Convention, and are unjustified and disproportionate;
 - that such practices perpetuate the initial violation of torture and constitute an additional and new form of cruel, inhuman or degrading treatment;
 - that victims of torture are entitled to pursue and contribute to legal remedies or legal proceedings in third countries or before universal or regional human rights bodies. The US must facilitate rather than block such efforts.
103. **In order to meet its obligations under the Convention in relation to the issues highlighted in this submission, REDRESS, the OMCT and the ICJ consider that the United States must:**
- ensure that any category of victim of torture and other ill-treatment, including those detained in the name of counter-terrorism, has an enforceable right to remedy and redress;

¹²⁸ KSM Motion, above n.97, p. 17.

¹²⁹ See REDRESS (2012) 'Extraordinary Measures, Predictable Consequences: Security legislation and the prohibition of torture', September 2012, http://www.redress.org/downloads/publications/1209security_report.pdf.

¹³⁰ Convention Against Torture, preamble.

- declassify information concerning the capture, extraordinary rendition, detention and interrogation of terrorist suspects, including those currently on trial before Military Commissions at Guantánamo Bay;
- transfer proceedings of all criminal charges to independent and impartial United States civilian courts and ensure that such proceedings meet international standards of fairness and do not result in the imposition of the death penalty;
- ensure that no evidence obtained as a result of torture or other ill-treatment is used in any proceedings;
- review the combined operation of Military Commission, military detention, classification rules and jurisdictional laws, and repeal or amend them to allow detainees to describe their experiences of torture and ill-treatment, and to seek redress within and outside the United States;
- immediately close the detention facility at Guantánamo Bay, and pending such closure allow detainees the right to contact any lawyers of their choice to pursue legal proceedings on their behalf in the United States and third countries, and allow those lawyers physical access to the detainees;
- pending the closure of Guantánamo Bay detention facility, and following the transfer of individuals lawfully detained or serving a sentence to other facilities, ensure that the detention regime applied to them is consistent with international standards including the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- ensure that national security or state secrecy doctrines can never have the effect of extinguishing the right to complain of torture or other ill-treatment, or to limit the right and ability of torture victims to seek medical or psychological support for rehabilitation, and provide access to an effective judicial remedy within the United States before civilian courts for anyone alleging a violation of his or her rights under the Convention in the course of counter-terrorism operations or measures;
- investigate allegations of enforced disappearance, torture and other ill-treatment and prosecute and punish all those responsible (with the full chain of responsibility as set out in Article 4 of the Convention); and
- fully cooperate with criminal investigations and other legal proceedings in third States into allegations of involvement in the CIA's program of extraordinary rendition and secret detention, including by responding timely and fully to requests for assistance concerning access to detainees and evidence.

ANNEX ONE: Second Amended Protective Order No. 1

**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 013DDD*****Second Amended*
PROTECTIVE ORDER #1****To Protect Against Disclosure of
National Security Information**

16 December 2013

Upon consideration of the submissions regarding the Government's motion for a protective order to protect classified information in this case, the Commission finds this case involves classified national security information, including TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (SCI), the disclosure of which would be detrimental to national security, the storage, handling, and control of which requires special security precautions, and the access to which requires a security clearance and a need-to-know. Accordingly, pursuant to authority granted under 10 U.S.C. § 949 p-1 to p-7, Rules for Military Commissions (R.M.C.) 701 and 806, Military Commissions Rule of Evidence (M.C.R.E.) 505, Department of Defense Regulation for Trial by Military Commissions (2011) ¶ 17-3, and the general judicial authority of the Commission, in order to protect the national security, and for good cause shown, the following Protective Order is entered.

1. SCOPE

a. This Protective Order establishes procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case,

regardless of the means by which the persons obtained the classified information. These procedures apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals, subject to modification by further order of the Commission or orders issued by a court of competent jurisdiction.

b. This Protective Order applies to all information, documents, testimony, and material associated with this case that contain classified information, including but not limited to any classified pleadings, written discovery, expert reports, transcripts, notes, summaries, or any other material that contains, describes, or reflects classified information.

c. Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the defense or prosecution of this case, respectively, of the contents of this Protective Order.

2. DEFINITIONS

a. As used in this Protective Order, the term "Court Security Officer (CSO)" and "Assistant Court Security Officer (ACSO)" refer to security officers, appointed by the Military Judge, to serve as the security advisor to the judge, to oversee security provisions pertaining to the filing of motions, responses, replies, and other documents with the Commission, and to manage security during sessions of the Commission. The CSO and ACSO will be administered an oath IAW Rule 10, Military Commissions Rules of Court.

b. The term "Chief Security Officer, Office of Special Security" refers to the official within the Washington Headquarters Service responsible for all security requirements and missions of the Office of Military Commissions and to any assistants.

c. The term "Defense" includes any counsel for an accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff, Defense

Security Officer, or other persons working on the behalf of an Accused or his counsel in this case.

d. The term "Defense Security Officer" (DSO) refers to a security officer, serving as security advisor to the Defense, who oversees security provisions pertaining to the filing of motions, response, replies, and other documents with the Commission.

e. The term "Government" includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the United States or its counsel in this case.

f. The words "documents" and "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming and non-conforming copies, whether different from the original by reason of notation made on such copies or otherwise, and further include, but are not limited to:

(1) papers, correspondence, memoranda, notes, letters, cables, reports, summaries, photographs, maps, charts, graphs, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, facsimiles, invoices, worksheets, and drafts, alterations, modifications, changes, and amendments of any kind to the foregoing;

(2) graphic or oral records or representations of any kind, including, but not limited to: photographs, maps, charts, graphs, microfiche, microfilm, videotapes, and sound or motion picture recordings of any kind;

(3) electronic, mechanical, or electric records of any kind, including, but not limited to: tapes, cassettes, disks, recordings, electronic mail, instant messages, films, typewriter

ribbons, word processing or other computer tapes, disks or portable storage devices, and all manner of electronic data processing storage; and

(4) information acquired orally.

g. The terms “classified national security information and/or documents,” “classified information,” and “classified documents” include:

(1) any classified document or information that was classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as “CONFIDENTIAL,” “SECRET,” “TOP SECRET,” or additionally controlled as “SENSITIVE COMPARTMENTED INFORMATION (SCI);”

(2) any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that was derived from United States Government information that was classified, regardless of whether such document or information has subsequently been classified by the Government pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as “CONFIDENTIAL,” “SECRET,” “TOP SECRET,” or additionally controlled as “SENSITIVE COMPARTMENTED INFORMATION (SCI);”

(3) verbal or non-documentary classified information known to an accused or the Defense;

(4) any document or information as to which the Defense has been notified orally or in writing that such document or information contains classified information, including, but not limited to the following:

(a) Information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date;

(b) Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin "Attash and Ali Abdul Aziz Ali were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Bin al Shibh was detained from the time of his capture on or around 11 September 2002 through 6 September 2006.

(c) The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006;

(d) The enhanced interrogation techniques that were applied to an Accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and

(e) Descriptions of the conditions of confinement of any of the Accused from on or around the aforementioned capture dates through 6 September 2006;

(5) any document or information obtained from or related to a foreign government or dealing with matters of U.S. foreign policy, intelligence, or military operations, which is known to be closely held and potentially damaging to the national security of the United States or its allies.

(6) The terms “classified national security information and/or documents,” “classified information,” and “classified documents” do not include documents or information officially declassified by the United States by the appropriate OCA.

h. “National Security” means the national defense and foreign relations of the United States.

i. “Access to classified information” means having authorized access to review, read, learn, or otherwise come to know classified information.

j. “Secure area” means a physical facility accredited or approved for the storage, handling, and control of classified information.

k. “Unauthorized disclosure of classified information” means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, including its very existence, constitutes disclosing that information.

3. COURT SECURITY OFFICER

a. A Court Security Officer (CSO) and Assistant Court Security Officer(s) (ACSO) for this case have been designated by the Military Judge.

b. The CSO and any ACSO are officers of the court. *Ex parte* communication by a party in a case, to include the Office of Military Commissions, DoD General Counsel, or any intelligence or law enforcement agency, with the CSO/ASCO is prohibited except as authorized by the M.C.A. or the Manual for Military Commissions (M.M.C.). This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10 U.S.C. § 949b. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Trial Judiciary.

c. The CSO/ACSO shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times during Commission proceedings and that only personnel with the appropriate clearances and authorizations are present when classified or protected evidence is presented before Military Commissions.

d. The CSO shall consult with the Original Classification Authority (OCA) of classified documents or information, as necessary, to address classification decisions or other related issues.

4. DEFENSE SECURITY OFFICER

a. Upon request of Defense Counsel for an accused, the Convening Authority shall provide a Defense Security Officer for the defendant.

b. The Defense Security Officer is, for limited purposes associated with this case, a member of the Defense Team, and therefore shall not disclose to any person any information provided by the Defense, other than information provided in a filing with the Military Commission. In accordance with M.C.R.E. 502, the Defense Security Officer shall not reveal to any person the content of any conversations he hears by or among the defense, nor reveal the nature of documents being reviewed by them or the work generated by them, except as necessary to report violations of classified handling or dissemination regulations or any Protective Order issued in this case, to the Chief Security Officer, Office of Special Security. Additionally, the presence of the Defense Security Officer, who has been appointed as a member of the Defense Team, shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

c. The Defense Security Officer shall perform the following duties:

(1) Assist the Defense with applying classification guides, including reviewing pleadings and other papers prepared by the defense to ensure they are unclassified or properly marked as classified.

(2) Assist the Defense in performing their duty to apply derivative classification markings pursuant to E.O. 13526 § 2.1(b).

(3) Ensure compliance with the provisions of any Protective Order.

d. To the fullest extent possible, the classification review procedure must preserve the lawyer-client and other related legally-recognized privileges.

(1) The Defense may submit documents to the Chief Security Officer, Office of Special Security with a request for classification review. If the Defense claims privilege for a document submitted for classification review, the defense shall banner-mark the document "PRIVILEGED."

(2) The Chief Security Officer, Office of Special Security, shall consult with the appropriate OCA to obtain classification review of documents submitted for that purpose. The Chief Security Officer, Office of Special Security, shall not disclose to any other entity any information provided by a Defense Security Officer, including any component of the Office of Military Commissions, except that the entity may inform the military judge of any information that presents a current threat to loss of life or presents an immediate safety issue in the detention facility. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Military Commissions.

(3) Submission of documents for classification review shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

5. ACCESS TO CLASSIFIED INFORMATION

a. Without authorization from the Government, no member of the Defense, including defense witnesses, shall have access to classified information in connection with this case unless that person has:

(1) received the necessary security clearance from the appropriate DoD authorities and signed an appropriate non-disclosure agreement, as verified by the Chief Security Officer, Office of Special Security,

(2) signed the Memorandum of Understanding Regarding Receipt of Classified Information (MOU), attached to this Protective Order, and

(3) a need-to-know for the classified information at issue, as determined by the Original Classification Authority (OCA) for that information.

b. In order to be provided access to classified information in connection with this case, each member of the Defense shall execute the attached MOU, file the executed originals of the MOU with the Chief Security Officer, Office of Special Security, and submit copies to the CSO. The execution and submission of the MOU is a condition precedent to the Defense having access to classified information for the purposes of these proceedings. The Chief Security Officer, Office of Special Security and CSO shall not provide copies of the MOUs to the Prosecution except upon further order of the Military Commission. The Chief Security Officer can provide the Prosecution the names of the Defense team members, identified on the record, who have executed the MOU. The MOUs for Defense Team members who have been provided *ex parte* may be provided, under seal, to the Chief Security Officer, Office of Special Security, and the CSO under seal and will not be further released without authority of the Commission.

c. The substitution, departure, or removal of any member of the Defense, including defense witnesses, from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Protective Order.

d. Once the Chief Security Officer, Office of Special Security verifies that counsel for the Accused have executed and submitted the MOU, and are otherwise authorized to receive classified information in connection with this case, the Government may provide classified discovery to the Defense.

e. All classified documents or information provided or obtained in connection with this case remain classified at the level designated by the OCA, unless the documents bear a clear indication that they have been declassified. The person receiving the classified documents or information, together with all other members of the Defense or the Government, respectively, shall be responsible for protecting the classified information from disclosure and shall ensure that access to and storage of the classified information is in accordance with applicable laws and regulations and the terms of this Protective Order.

f. No member of the Defense, including any defense witness, is authorized to disclose any classified information obtained during this case, outside the immediate parameters of these military commission proceedings. If any member of the Defense or any defense witness receives any summons, subpoena, or court order, or the equivalent thereof, from any United States or foreign court or on behalf of any criminal or civil investigative entity within the United States or from any foreign entity, the Defense, including defense witnesses, shall immediately notify the military judge, the Chief Security Officer, Office of Special Security, and the Government so that appropriate consideration can be given to the matter by the Commission and the OCA of the materials concerned. Absent authority from the Commission or the Government, the Defense and

defense witnesses are not authorized to disseminate or disclose classified materials in response to such requests. The Defense, an Accused, and defense witnesses and experts are not authorized to use or refer to any classified information obtained as a result of their participation in commission proceedings in any other forum, or in a military commission proceeding involving another detainee.

6. USE, STORAGE, AND HANDLING PROCEDURES

a. The Office of the Chief Defense Counsel, Office of Military Commissions, has approved secure areas in which the Defense may use, store, handle, and otherwise work with classified information. The Chief Security Officer, Office of Special Security, shall ensure that such secure areas are maintained and operated in a manner consistent with this Protective Order and as otherwise reasonably necessary to protect against the disclosure of classified information.

b. All classified information provided to the Defense, and otherwise possessed or maintained by the Defense, shall be stored, maintained, and used only in secure areas. Classified information may only be removed from secure areas in accordance with this Protective Order and applicable laws and regulations governing the handling and use of classified information.

c. Nothing in this Protective Order shall be construed to interfere with the right of the Defense to interview witnesses, regardless of their location. If the Defense receives a document containing information described in ¶ 2(g) or memorializes information described in ¶ 2(g), while in a non-secure environment, the Defense shall:

(1) Maintain positive custody and control of the material at all times;

(2) Unless under duress, relinquish control of the material only to other personnel with the appropriate security clearance and a need-to-know;

(3) Transport the material in a manner not visible to casual observation;

(4) Not add information (including markings) corroborating the material as classified until returning to a secure area;

(5) Not electronically transmit the information via unclassified networks;

(6) Transport the material to a secure area as soon as circumstances permit; and,

(7) After returning to a secure area, mark and handle the material as classified.

d. Consistent with other provisions of this Protective Order, the Defense shall have access to the classified information made available to them and shall be allowed to take notes and prepare documents with respect to such classified information in secure areas.

e. The Defense shall not copy or reproduce any classified information in any form, except in secure areas and in accordance with this Protective Order and applicable laws and regulations governing the reproduction of classified information.

f. Defense counsel can conduct open source searches from a computer not identifiable with the U.S. government. The raw search material can be stored in an unclassified format or on an unclassified system. However, if an individual has access to classified information, any as information described in ¶¶ 2(g)(2) and 2(g)(4) will be marked or treated as classified in a Military Commissions pleading if the information is specifically referenced to information available in the public domain.

g. All documents prepared by the Defense that are known or believed to contain classified information, including, without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Commission, shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons possessing an appropriate approval for access to such classified information. Such activities

shall take place in secure areas, on approved word processing equipment, and in accordance with procedures approved by the Chief Security Officer, Office of Special Security

h. The Defense may submit work product for classification review using the procedures outlined in ¶ 4(d). Except as provided in ¶ 6, all such documents and any associated materials containing classified information or information treated as classified under ¶ 6f and g such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits shall be maintained in secure areas unless and until the OCA or Chief Security Officer, Office of Special Security advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to the Government unless authorized by the Commission, by counsel for an Accused, or as otherwise provided in this Protective Order.

i. The Defense may discuss classified information only within secure areas and shall not discuss, disclose, or disseminate classified information over any non-secure communication system, such as standard commercial telephones, office intercommunication systems, or non-secure electronic mail.

j. The Defense shall not disclose any classified documents or information to any person, including counsel in related cases of Guantanamo Bay detainees in Military Commissions or other courts (including, but not limited to, habeas proceedings), except those persons authorized by this Protective Order, the Commission, and counsel for the Government with the appropriate clearances and the need-to-know that information. The Commission recognizes the presentation of a joint defense may necessitate disclosure on a need-to-know basis to counsel for co-accused.

k. To the extent the Defense is not certain of the classification of information it wishes to disclose, the Defense shall follow procedures established by the Office of Military Commissions for a determination as to its classification. In any instance in where there is any doubt as to

whether information is classified, the Defense must consider the information classified unless and until it receives notice from the Chief Security Officer, Office of Special Security, this information is not classified.

l. Until further order of this Commission, the Defense shall not disclose to an Accused any classified information not previously provided by an Accused to the Defense, except where such information has been approved for release to an Accused and marked accordingly.

m. Except as otherwise stated in this paragraph, and to ensure the national security of the United States, at no time, including any period subsequent to the conclusion of these proceedings, shall the Defense make any public or private statements disclosing any classified information accessed pursuant to this Protective Order, or otherwise obtained in connection with this case, including the fact that any such information or documents are classified. In the event classified information enters the public domain without first being properly declassified by the United States Government, counsel are reminded they may not make public or private statements about the information if the information is classified. (*See* paragraph 2g of this Protective Order for specific examples of information which remains classified even if it is in the public domain). In an abundance of caution and to help ensure clarity on this matter, the Commission emphasizes that counsel shall not be the source of any classified information entering the public domain, nor should counsel comment on information which has entered the public domain but which remains classified.

7. PROCEDURES FOR FILING DOCUMENTS

- a. See Rule 3, Motion Practice, Military Commissions Trial Judiciary Rules of Court.
- b. For all filings, other than those filed pursuant to M.C.R E. 505, in which counsel know, reasonably should know, or are uncertain as to whether the filing contains classified information

or other information covered by Chapter 19-3(b), DoD Regulation for Trial By Military Commission, counsel shall submit the filing by secure means under seal with the Chief Clerk of the Trial Judiciary.

c. Documents containing classified information or information the Defense Counsel believes to be classified shall be filed pursuant to the procedures specified for classified information.

d. Classified filings must be marked with the appropriate classification markings on each page, including classification markings for each paragraph. If a party is uncertain as to the appropriate classification markings for a document, the party shall seek guidance from the Chief Security Officer, Office of Special Security, who will consult with the OCA of the information or other appropriate agency, as necessary, regarding the appropriate classification.

e. All original filings will be maintained by the Director, Office of Court Administration, as part of the Record of Trial. The Office of Court Administration shall ensure any classified information contained in such filings is maintained under seal and stored in an appropriate secure area consistent with the highest level of classified information contained in the filing.

f. Under no circumstances may classified information be filed in an otherwise unclassified filing except as a separate classified attachment. In the event a party believes an unsealed filing contains classified information, the party shall immediately notify the Chief Security Officer, Office of Special Security, and CSO/ACSO, who shall take appropriate action to retrieve the documents or information at issue. The filing will then be treated as containing classified information unless and until determined otherwise. Nothing herein limits the Government's authority to take other remedial action as necessary to ensure the protection of the classified information.

g. Nothing herein requires the Government to disclose classified information.

Additionally, nothing herein prevents the Government or Defense from submitting classified information to the Commission *in camera* or *ex parte* in these proceedings or accessing such submissions or information filed by the other party. Except as otherwise authorized by the Military Judge, the filing party shall provide the other party with notice on the date of the filing.

8. PROCEDURES FOR MILITARY COMMISSION PROCEEDINGS

a. Except as provided herein, and in accordance with M.C.R.E. 505, no party shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in this case.

(1) Notice Requirements

(a) The parties must comply with all notice requirements under M.C.R.E. 505 prior to disclosing or introducing any classified information in this case.

(b) Because statements of an Accused may contain information classified as TOP SECRET/SCI, the Defense must provide notice in accordance with this Protective Order and M.C.R.E. 505(g) if an Accused intends to make statements or offer testimony at any proceeding.

(2) Closed Proceedings

(a) While proceedings shall generally be publicly held, the Commission may exclude the public from any proceeding, *sua sponte* or upon motion by either party, in order to protect information, the disclosure of which could reasonably be expected to damage national security. If the Commission closes the courtroom during any proceeding in order to protect classified information from disclosure, no person may remain who is not authorized to access

classified information in accordance with this Protective Order, which the CSO shall verify prior to the proceeding.

(b) No participant in any proceeding, including the Government, Defense, Accused, witnesses, and courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case.

(3) Delayed Broadcast of Open Proceedings

(a) Due to the nature and classification level of the classified information in this case, the Commission finds that to protect against the unauthorized disclosure of classified information during proceedings open to the public, it will be necessary to employ a forty-second delay in the broadcast of the proceedings from the courtroom to the public gallery. This is the least disruptive method of both insuring the continued protection of classified information while providing the maximum in public transparency.

(b) Should classified information be disclosed during any open proceeding, this delay will allow the Military Judge or CSO to take action to suspend the broadcast—including any broadcast of the proceedings to locations other than the public gallery of the courtroom (e.g., any closed-circuit broadcast of the proceedings to a remote location)—so that the classified information will not be disclosed to members of the public.

(c) The broadcast may be suspended by the Military Judge or CSO whenever it is reasonably believed that any person in the courtroom has made or is about to make a statement or offer testimony disclosing classified information.

(d) The Commission shall be notified immediately if the broadcast is suspended. In that event, and otherwise if necessary, the Commission may stop the proceedings

to evaluate whether the information disclosed, or about to be disclosed, is classified information as defined in this Protective Order. The Commission may also conduct an *in camera* hearing to address any such disclosure of classified information.

(4) Other Protections

(a) During the examination of any witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not found previously to be admissible by the Commission. Following such an objection, the Commission will determine whether the witness's response is admissible and, if so, may take steps as necessary to protect against the public disclosure of any classified information contained therein.

(b) Classified information offered or admitted into evidence will remain classified at the level designated by the OCA and will be handled accordingly. All classified evidence offered or accepted during trial will be kept under seal, even if such evidence was inadvertently disclosed during a proceeding. Exhibits containing classified information may also be sealed after trial as necessary to prevent disclosure of such classified information.

(5) Record of Trial

(a) It is the responsibility of the Government, IAW 10 U.S.C § 948l(c) to control and prepare the Record of Trial. What is included in the Record of Trial is set out by R.M.C. 1103. The Director, Office of Court Administration, shall ensure that the Record of Trial is reviewed and redacted as necessary to protect any classified information from public disclosure.

(b) The Director, Office of Court Administration, shall ensure portions of the Record of Trial containing classified information remain under seal and are properly

segregated from the unclassified portion of the transcripts, properly marked with the appropriate security markings, stored in a secure area, and handled in accordance with this Protective Order.

9. UNAUTHORIZED DISCLOSURE

a. Any unauthorized disclosure of classified information may constitute a violation of United States criminal laws. Additionally, any violation of the terms of this Protective Order shall immediately be brought to the attention of the Commission and may result in disciplinary action or other sanctions, including a charge of contempt of the Commission and possible referral for criminal prosecution. Any breach of this Protective Order may also result in the termination of access to classified information. Persons subject to this Protective Order are advised that unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. The purpose of this Protective Order is to ensure those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the OCA and in conformity with this Order.

b. The any party shall promptly notify the Chief Security Officer, Office of Special Security, upon becoming aware of any unauthorized access to or loss, theft, or other disclosure of classified information, and shall take all reasonably necessary steps to retrieve such classified information and protect it from further unauthorized disclosure or dissemination.

10. SURVIVAL OF ORDER

a. The terms of this Protective Order and any signed MOU shall survive and remain in effect after the termination of this case unless otherwise determined by a court of competent jurisdiction.

b. This Protective Order is entered without prejudice to the right of the parties to seek such additional protections or exceptions to those stated herein as they deem necessary.

So ORDERED this 16th day of December 2013.

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