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Ending Torture. Seeking Justice for Survivors

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RENDERED SILENT

Denying defendants in military commission trials the right to complain of torture and enforced disappearance

Articles 2(3), 6, 7, 9, 10, 14 and 16

List of Issues 1, 8, 11, 17

Submission to the Human Rights Committee
for consideration of the United States of America's
5th State Party Report

February 2014

SUBMISSION TO THE HUMAN RIGHTS COMMITTEE

FOR CONSIDERATION OF THE UNITED STATES OF AMERICA'S 5th STATE PARTY REPORT

12 February 2014

A. INTRODUCTION

1. 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.

2. As part of its work, REDRESS has taken part as an intervener in litigation in the United States, Canada and Europe concerning violations committed in the United States Central Intelligence Agency's programme of "extraordinary rendition" of what it termed "High Value Detainees" suspected of terrorism (the "'High Value Detainee' Programme"). REDRESS is also advocating for investigations to be opened in relation to Mustafa al-Hawsawi – an individual "High Value Detainee" subjected to this programme, who is currently facing capital trial before a military commission in Guantánamo Bay, Cuba.

3. The Committee has already received a large amount of information concerning the United States' implementation of the International Covenant on Civil and Political Rights (the "Covenant"). This includes information about the United States' failure to investigate and prosecute individuals responsible for the "High Value Detainee" Programme and to provide redress to victims,[1] the arbitrary detention of individuals at Guantánamo Bay,[2] restrictions on detainees' access to lawyers,[3] and fair trial concerns in relation to military commission proceedings of those charged with terrorist offences.[4]

4. This report therefore focuses on a single, specific issue: **the classification of information which has the result of denying military commission defendants the right to complain of torture and ill-treatment and enforced disappearance.**[5] This issue impacts on the United States' compliance with its obligations under the Covenant. It also adversely affects the ability of other States to uphold their obligation to effectively investigate allegations of their own involvement in extraordinary rendition, secret detention and torture.

B. SUMMARY

5. The United States has implemented a system of detention and trial designed to ensure that information about the serious human rights violations alleged to have been committed against "High Value Detainees" during their time in Central Intelligence Agency ("CIA") black sites is not revealed to the public, and cannot be disclosed in any forum outside the secretive military commission trials.

6. This is because any information relating to the detainees' time in secret detention has been classified by United States authorities.[6] Detainees' thoughts and recollections about their time in secret detention can only be disclosed to those with the necessary security clearance who are given access to the detainees, that is particularly the detainees' military commission lawyers.[7]

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[1] See. eg. Center for Constitutional Rights (Accounting for a Decade of War), pp. 13-16; ACLU (Shadow Report), pp. 39-42; Amnesty International (Human Rights Betrayed), pp. 6-9; Amnesty International (Submission to the Human Rights Committee), pp. 7-11, 26-27; Human Rights Watch (Submission to the Human Rights Committee), pp. 9-11.

[2] See, eg. Amnesty International (Submission to the Human Rights Committee), pp. 29-33; Birnberg Peirce (Preliminary Submission); Center for Constitutional Rights (Arbitrary Detention at Guantanamo); Human Rights Watch (Submission to the Human Rights Committee), pp. 7-8.

[3] See, eg. Amnesty International (Submission to the Human Rights Committee), p. 14.

[4] See, eg. Amnesty International (Submission on the Death Penalty), pp. 2, 4, 26, 34; Amnesty International (Submission to the Human Rights Committee), pp. 35- 37; Human Rights Watch (Submission to the Human Rights Committee), pp. 8-9.

[5] On this issue see also Amnesty International (Submission to the Human Rights Committee), pp. 27-28 and 37.

[6] See *ibid.*, pp.27-28.

[7] See the government's position on this issue in AE013HHH, Government Response To Defense Motion to Make Conforming Amendments to AE 013DDD, the Commission's Second Amended Protective Order #1 and Mr. al Baluchi's

Neither the detainees or their military commission lawyers are permitted to pass the information to others.[8] Any such information is also kept secret in the Guantánamo Bay military commission trial process itself through closed or redacted pleadings and closed or silenced hearings.[9]

7. The regime in place operates to deny the defendants who face capital charges in trials before the military commission the rights guaranteed under the Covenant to complain about and seek redress for the multiple violations characteristic of enforced disappearance, torture and other prohibited ill-treatment. It also frustrates investigations that could assist the defence, prevents their legal representatives from providing an effective defence, and puts the defendants at a distinct disadvantage to others facing capital trials. As such it leads to serious violations of Articles 2(3), 6, 7, 9, 10, 14 and 16 of the Covenant.

8. REDRESS urges the Committee to ask the United States delegation:

> **Can the delegation confirm whether detainees at Guantánamo Bay, including "High Value Detainees", can have access to lawyers without security clearance to pursue proceedings on their behalf in third States, given that their own defence lawyers are currently prohibited from doing so?**
>
> **How many requests for mutual legal assistance has the United States received from other States concerning investigations into allegations of rendition, secret detention and torture? How many requests has the United States allowed, how many has it denied, and how many are still pending?**

C. BACKGROUND

9. 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 programme of secret detention and interrogation of individuals suspected of involvement in terrorism.[10] The United Nations Special Rapporteur on the protection and promotion of human rights in the context of counterterrorism has characterised this programme as "a systematic campaign of internationally wrongful acts involving the secret detention, rendition and torture of terrorist suspects".[11]

Notice of Joinder, Factual Supplement and Argument, stating the Prosecution's position on this point, 27 January 2014, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013HHH(KSM%20et%20al)).pdf. There the government makes it clear that "uncleared, foreign individuals" will not be given access to the defendants (at p. 2).

[8] See the motion of defence lawyers for detainee Khalid Shaikh Mohammad in military commission proceedings AE 200 (KSM), Defense Notice of Joinder, Factual Supplement & Argument ("**KSM Motion**"), p. 5 ("Every lawyer authorized to meet with Mr Mohammad is instructed that Mr Mohammad's statements, observations, and experiences during his period of mistreatment by the CIA remain classified.") Available at: http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200(KSM))_Part1.pdf.

[9] See further AE013DDD, Military Judge Second Amended Protective Order #1To 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. This is attached as **Annex Two** and discussed further below.

[10] United Nations, "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, 1 March 2013, para. 15, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf ("**Emmerson 2013 Report**").

[11] *Ibid* para. 14.

10. Under the programme, the CIA was authorised to detain terrorist suspects and set up detention facilities known as "black sites" outside the United States.[12] This programme was used to isolate and interrogate detainees who were considered to have a high intelligence value, known as "High Value Detainees".[13] At the beginning of August 2002 the United States Justice Department's Office of Legal Counsel purported to authorise the CIA to use a range of "physical and mental abuse"[14] of terrorist suspects in its custody under the secret detention programme, known as "enhanced interrogation techniques".[15] Former United States President George Bush also authorised the CIA to carry out "extraordinary renditions"[16] 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.[17]

11. The CIA subjected "High Value Detainees" to a "very structured" and "rigorous" programme of secret detention and interrogation at "black sites" or "exploitation facilities" in order to elicit information.[18] These were established as facilities "off limits to non-essential persons, press, ICRC [International Committee of the Red Cross], or foreign observers".[19] Both UN and European human rights mechanisms have recognised that this type of detention is in clear violation of the right to liberty and security and the right to a fair trial, facilitates the use of torture and ill-treatment, and constitutes, in itself, a form of ill-treatment or torture.[20]

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[12] *Ibid.*, para. 14; United Nations, "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" ("**UN Joint Study on Secret Detention**"), A/HRC/13/42, 19 February 2010, para. 103, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf.

[13] 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 ("**CIA OIG Review**"); 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. 1, http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf ("**CIA Background Paper on Combined Techniques**"); 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.

[14] Emmerson 2013 Report, above n.10, para. 15.

[15] *Ibid.*; CIA OIG Review, above n.13, 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; 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.

[16] "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.

[17] Emmerson 2013 Report, above n.10, para. 15.

[18] Parliamentary Assembly Council of Europe (PACE), Committee on Legal Affairs and Human Rights (CLAHR), "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**").

[19] 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**").

[20] See UN Joint Study on Secret Detention, above n.12, 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**").

12. The "High Value Detainee" Programme followed a carefully defined process which incorporated purposefully violent and disorientating physical and psychological "pressure which is described in detail in a December 2004 CIA memorandum for the United States Department of Justice.[21] This programme 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.[22] The CIA's programme was designed as an integrated experience that incorporated purposefully violent and disorientating physical and psychological "pressures" to influence "High Value Detainees"' behaviour during these stages.[23]

13. Following the public release of United States government documents in 2009 it is now known that around one hundred individuals were held under this programme between September 2001 and May 2005, although by May 2005 there were less than twenty remaining in the CIA's custody.[24] On 6 September 2006 former United States President Bush confirmed that a number of "High Value Detainees" had been returned to Guantánamo Bay, Cuba, having spent years being held in sites outside the United States, and subject to "an alternative set of procedures".[25]

14. Information about the whereabouts of "High Value Detainees" 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 programme hidden from public scrutiny".[26]

D. SILENCE ON TORTURE AND ENFORCED DISAPPEARANCE: MILITARY COMMISSION TRIALS OF 'HIGH VALUE DETAINEES' AT GUANTÁNAMO BAY

15. Many of those subjected to the "High Value Detainee" Programme remain in custody at Guantánamo Bay. At least six of those individuals 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 of 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 defendant faces charges which could lead to the imposition of the death penalty.[27]

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[21] CIA Background Paper on Combined Techniques, above n.13. Specific guidelines were issued on conditions of detention and interrogation under this programme in January 2003: CIA OIG Review, above n.13, paras. 57-60 (heavily redacted).

[22] CIA Background Paper on Combined Techniques, above n.13; 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%2020.pdf ("**2005 OLC Combined Techniques Advice**").

[23] CIA Background Paper on Combined Techniques, above n.13, p. 1. See also CIA OIG Review, above n.13, p. 15.

[24] UN Joint Study on Secret Detention, above n.12, 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.

[25] The White House, "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.

[26] Emmerson 2013 Report, above n.10, para. 19.

[27] For further information on each of the cases see www.mc.mil.

16. A number of shadow reports have raised serious concerns about the compatibility of these trials with the State Party's obligations under the Covenant,[28] and REDRESS echoes those concerns.

17. This report focuses on one troubling aspect of these trials: the way that the system of detention and trial has been designed to ensure that information about the serious human rights violations allegedly committed against "High Value Detainees" during their time in CIA black sites is not revealed to the public, and cannot be disclosed in any forum outside the secretive military commission trials.

18. This report focuses on the proceedings in the 9/11 trial, however similar issues arise in relation to the trial of al-Nashiri.

Second Amended Protective Order No. 1

19. The operation of the restrictions described above is seen in an order of the Military Commission Judge in the 9/11 trial known as Second Amended Protective Order No. 1 (the "Protective Order") (copy attached as Annex Two). This order establishes procedures applicable to all those who come into possession of classified information in connection with the case, including defence counsel. It makes it clear that classified information includes not just documents, but also information acquired orally.[29] The definition of classified information explicitly includes:

> (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 U.S. foreign policy, intelligence, or military operations, which is

[28] See references above, n.4.
[29] *Ibid.*, Section 2(f)(4).

known to be closely held and potentially damaging to the national security of the United States or its allies.[30]

20. The Protective Order 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".[31]

21. 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".[32] It also explicitly prohibits members of the defence and defence witnesses from disclosing classified information in response to any summons, subpoena, or court order from any United States or foreign court.[33] 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.[34]

22. All defence 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.[35] To date defence counsel for all but one of the accused have refused to sign this document, meaning that they have been refused access to much of the discovery requested from the Prosecution.[36]

23. The government has recently 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.[37]

24. The government also made it clear that – even if the military commission was to take a different view of the obligations on the accused – it intends to continue restricting access to the defendants to those with security clearance.[38] In its view there is no way in which this information can be released.

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[30] *Ibid.*, Article 2(f)(5).
[31] *Ibid.,* Article 8(b) (emphasis added).
[32] *Ibid.,* Article 5(f).
[33] *Ibid.*
[34] *Ibid.*, Article 9(a).
[35] AE013BB, Amended Memorandum of Understanding Regarding the Receipt of Classified Information, available at 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.9.
[36] 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.
[37] See AE013HHH, Government Response To Defense Motion, above n.7, p. 9.
[38] *Ibid.*, p. 2. ("the Defense is seeking tacit support from this Commission for the Accused to disclose classified information to uncleared, foreign individuals. Although such disclosures will be limited based on practical safeguards within JTF-GTMO and prior Commission orders, the statutory rules prohibiting the unauthorized disclosure of classified information govern the actions of all participants in this proceeding, and this Commission need not make a change" (emphasis added)).

Effect of restrictions on the right to complain and defence of charges

25. The effect of this classification regime 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 or are treated. Given that only a very small number of persons with security clearance are given access to these detainees, this regime has a number of specific implications.

26. **First**, it denies detainees (and their defence lawyers) the opportunity to complain about torture and other human rights violations they were subjected to either in the United States[39] or in any other jurisdiction. Defence lawyers cannot, for example, bring a complaint on behalf of their client in a country where it is known that a detainee was held in secret detention. Nor can they instruct any other individuals in general terms to pursue such claims on their client's behalf, as to do so would risk breaching the protective order by suggesting that violations occurred.[40] Instead, in the words of one of the defence 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".[41]

27. **Second**, it means that defence lawyers are very restricted in the extent to which they can conduct their own inquiries into how the defendants were treated in detention. Such investigations are particularly relevant for mitigation of sentence if the defendants are found guilty,[42] but may also be relevant to the defence of the charges themselves. It also means that they cannot authorise others to carry out such investigations on their behalf.

28. **Third**, it has operated to prevent third party organisations from obtaining information from the defendants to pursue complaints on their behalf in third States, including information about 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 "High Value Detainee" Programme, it is difficult even 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.

29. **Fourth**, it has even operated to prevent defendants from providing general powers of attorney to 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. However, REDRESS has not been able to obtain a power of attorney through his lawyers (for fear of breaching the Protective Order[43]), the military commission (after a motion to the military commission requesting

[39] Although as discussed elsewhere, there are no available remedies in the United States: see further references cited in n.1.

[40] See further 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.

[41] Ibid, p. 2.

[42] See AE200 (MAH, RBS, WBA) Defense Motion to Dismiss, 12 August 2013, p. 8, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200(MAHRBSWBA)).pdf.

[43] As to this point, see the discussion in the hearing on the above motion held on 22 October 2013, where In Mr al-Hawsawi's Military Defense Counsel stressed the importance of litigation in forums outside the Military Commission for Mr al-Hawsawi's defense, and how Military Defense Counsel is precluded from undertaking such litigation himself (at 6414-6416). He explained that, given these restrictions, the "best worst option" is for a third party to undertake litigation in other jurisdictions while "we sit on the sideline and watch while somebody else does it" (6416): Unofficial/Unauthenticated

permission to provide the power of attorney to Mr al-Hawsawi was denied[44]) or (to date) through the United States Department of Defense, which is responsible for the operation of the detention facilities at Guantánamo Bay.[45] This creates significant difficulties in filing complaints and appeals, and may completely block access to review mechanisms including the European Court of Human Rights, which requires a formal power of attorney from the individual being represented, or a delegated power of attorney from a lawyer with direct access to the defendant. Further detail of the case is provided in Annex One.

30. **Fifth**, it means that detainees or their representatives cannot provide information to assist enquiries in other States into rendition and secret detention, severely hampering those States in fulfilling their own obligations under the Covenant. Such inquiries have ostensibly been undertaken in a number of countries, including Poland and Lithuania.[46] In the Polish investigation 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.[47] 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 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.[48]

E. VIOLATIONS OF THE ICCPR

Articles 7 and 9, 10 and 16 in conjunction with Article 2(3)

31. The "High Value Detainee" Programme constitutes a form of enforced disappearance in violation of several Covenant rights, involving in particular serious violations of Articles 7 (prohibition of torture and other ill-treatment) and 9 (liberty and security of the person), 10 (humane treatment in detention) and 16 (recognition as a person before the law).[49] These violations, and the State Party's failure to investigate and prosecute those responsible, are examined in greater detail in other reports submitted to the Committee.[50] In addition (and aside from the barriers to justice existing within the United States court system for all victims of torture committed in the "war on terror", and those applicable to individuals in Guantánamo Bay in particular[51]), by blocking the defendants' ability to complain and to obtain a remedy including redress, the State Party is in clear violation of its obligation under Article 2(3) of the Covenant.

Transcript of the KSM et al. (2) Motions Hearing Dated 10/22/2013 from 10:45 AM to 12:23 PM, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Oct2013-AM2).pdf.

[44] REDRESS brought a motion before the Military Commission seeking an order for a power of attorney to be provided to Mr al-Hawsawi for signature, but this was denied. See further: AE200J (KSM et al), Motion of the Redress Trust, 17 October 2013, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200J(KSM%20et%20al)).pdf, and AE200EE, Military Judge Order, 27 November 2013, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200EE(KSM%20et%20al)).pdf.

[45] On 29 January 2014 REDRESS wrote to Joint Task Force Guantanamo enclosing the powers of attorney asking that they be provided to Mr al-Hawsawi, but it has not yet received a resopnse.

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

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

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

[49] See, eg. the Human Rights Committee's decision in Khaled Il Khwildy v Libya, Comm. No. 1804/2008, 1 November 2012, UN Doc. CCPR/C/106/D/1804/2008. See also ECtHR, *El Masri v Former Yugoslav Republic of Macedonia* (2012) App. No. 39630/09, Judgment of 13 December 2012.

[50] See in particular the references cited in n.1.

[51] *Ibid.*, and references in n.4.

32. The Committee has stressed that Article 2 (3) requires that "in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights".[52] An essential part of the right to a remedy is the right to complain about violations,[53] the very essence of which has been negated by the system in place.

National security considerations cannot be used to extinguish the right to complain about torture and related violations, and to obtain redress

33. 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.[54] States must both (i) guarantee victims the right to complain and the right to redress/an effective remedy, and (ii) carry out an effective investigation into allegations of such treatment. These obligations are part of, and integral to, the prohibitions themselves.[55]

34. Because these positive obligations are integral to the absolute prohibitions, it is also firmly established that they are non-derogable. As explained by the Committee:

> It is inherent in the protection of rights explicitly recognized as non-derogable... that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights [...].[56]

35. 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".[57] However, by its extremely broad reach the Protective Order impermissibly extinguishes fundamental and non-derogable rights of the accused. It is even more crucial to uphold these rights in a capital case where the right to life of defendants is at stake.

36. International law is clear that, because of their non-derogable nature, national security considerations *cannot* be used to completely extinguish the right to complain about torture and to obtain redress, or to block investigations into allegations of torture.[58]

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[52] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 15.
[53] Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7) (1992), Forty-Fourth Session, para. 14.
[54] *Ibid.*, para. 3.
[55] *Ibid.*, paras. 10-15. See also, 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 1988) 38 I.L.M. 317, paras.144 and 148, http://www.refworld.org/docid/40276a8a4.html.
[56] Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 15.
[57] AE-013O, Ruling on Government Motion to Protect Against Disclosure of National Security Information, 6 December 2012, www.mc.mil.
[58] See Committee Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3 (13 December 2012), para. 42, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f3&Lang=en; *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).

37. 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.[59] The United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism ("UN Special Rapporteur on Counterterrorism") has specifically identified paragraphs 2 (g) (4)-(5) of the previous, but very similar, Protective Order[60] as offending this principle.[61]

38. Even if certain restrictions on access to evidence were deemed consistent with a legitimate aim, these restrictions must be proportionate and strictly necessary to achieve that aim in a democratic society. In *Chahal v. United Kingdom*, for example, the European Court of Human Rights noted that courts have the ability to fashion procedures that can address national security considerations:

> [T]he use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved . . . there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence and yet accord the individual a substantial measure of procedural justice.[62]

39. 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."[63]

Failure to cooperate with investigations by other States

40. As outlined above, the classification in place also hinders investigations by other States which are likely to have been involved in the violations, for example through hosting secret detention sites, or allowing rendition planes to land. Such States are legally obliged to conduct such

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[59] *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.10, para. 39.

[60] AE013AA, Amended Protective Order No. 1, 9 February 2013, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013AA).pdf.

[61] Emmerson 2013 Report, above n.10, p. 15.

[62] *Chahal v U.K.*, 1996-V, Eur. Ct. H.R. *See further Tinnelly & Sons v. U.K.*, App. No. 20390/92, 27 Eur. H. R. Rep. 249, 291 (1998); *Devenny v. U.K.*, App. No. 24265/94, 35 Eur. H.R. Rep. 643, 647-648 (2002); *Al-Nashif v. Bulgaria*, App. No. 50963/99, 36 Eur. H.R. Rep. 655 (2002).

[63] Emmerson 2013 Report, above n.10, 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.

investigations under the Covenant and other treaties applicable to them, and States party to Covenant, including the United States, have an obligation to cooperate with such investigations.[64] The Protective Order therefore operates not only to deny the defendants their rights, and information that may be very important for their defence, but also hinders third States in their efforts to comply with international law.

41. As such it undermines the prohibition of torture and the rule of law in those countries, and in the international legal system as a whole. This policy sends a strong negative signal to other States in relation to the duty to hold perpetrators of human rights violations amounting to international crimes accountable, and has provided a damaging example for other States to follow. This point was put succinctly by Lord Steyn of the English Court of Appeal:

> [W]hat must authoritarian regimes, or countries with dubious human rights records, make of the example set by the most powerful of all democracies?... [M]any foreign governments, who want to free themselves of the restraints of human rights, have already directly invoked the United States policy in regard to the Guantánamo Bay prisoners as justification for their actions.[65]

Article 6 (right to life), Article 7 (torture and other ill-treatment) and Article 14 (fair trial)

42. The military commission proceedings suffer from a number of flagrant violations of the right to a fair trial, as set out in other organisations' shadow reports.[66] In addition, the classification restrictions, by negating the right of the defence, render trials patently unfair, leading to violations of Article 14 and (because it is a capital trial) potential violations of Article 6.

43. In addition, there is growing recognition that the imposition of the death penalty is in itself a violation of Article 7.[67]

Negative impact on ability to provide an effective defence

44. In a motion challenging the Protective Order filed by defence lawyers before the military commission in 2013, the lawyers explained how the Protective Order fatally impacts on their ability to provide an effective defence to the accused.

45. In this motion, three of the defence lawyers explained the impact of the Protective Order as follows:

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[64] *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").

[65] Speech by Lord Steyn, Twenty-Seventh FA Mann Lecture, British Institute of International and Comparative Law and Herbert Smith, 25 November 2003, 'Guantanamo Bay: The Legal Black Hole' (Reprinted at (2004) 53 International and Comparative Law Quarterly 1). See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Addendum – Mission to the United States of America, 25 October 2007, UN Doc. A/HRC/6/17/Add.3, para. 3.

[66] See above, n.4.

[67] See UN Special Rapporteur on Torture (2012), 'Interim Report: Death penalty and the prohibition of torture and cruel, inhuman and degrading treatment or punishment', 9 August 2012, UN Doc. A/67/279. Although the Human Rights Committee is yet to find the death penalty in itself a violation of Article 7, in the case Ng v. Canada (1993) dissenting opinions held that the death penalty as such constitutes cruel, inhuman and degrading treatment, regardless of how it is carried out: Charles Chitat Ng v Canada, Communication No. 469/1991, Decision of 5 November 1993, UN Doc. CCPR/C/49/D/469/1991

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> [c]ounsel is confronted with a situation where they are prohibited from assisting or advising their client as to how to pursue a potentially viable avenue for development of mitigation evidence or other relief. Counsel are also cut off completely from pursuing reasonable and critical avenues of investigation due to the classification restrictions in place.
>
> Defense Counsel cannot effectively represent the accused in this capital case under these restrictions, and therefore, without the full and effective assistance of counsel, the case must be dismissed.[68]

46. Counsel for Khaled Shaikh Mohammad expressed their significant concerns about the process in their Notice of Joinder to the Motion:

> the Commission must understand what it is asking of Defense Counsel - requiring counsel to either (a) sign the MOU [agreeing to abide by the Protective Order], participate in a violation of the Convention against Torture, and curtail a known avenue of mitigation to pursue claims in the U.S., claims before the Committee against Torture, and claims in potentially-complicit States Party to the Convention, (b) sign the MOU over their legal and ethical objections and potentially be deemed ineffective by an appellate court, or (c) not sign the MOU and bear the potential of Commission-directed removal.[69]

47. On 16 December 2013 the Military Judge denied the Defense Motion.[70] He did make some changes to the Protective Order (resulting in Second Amended Protective Order No. 1, as described above). One of these changes was to remove words which deemed the "observations and experiences of an accused" with respect to their capture, rendition and secret detention to be classified information.[71] However, he stressed that this was because the wording was "superfluous" and defense counsel were still subject to the conditions of their security clearance, meaning that the removal of this language did not affect the information that defense lawyers can disclose.[72] As set out above at paragraph 23 to 24, the government maintains that the accused is still prevented from disclosing this information. Nor does it intend to change its policy on access to detainees at Guantanamo Bay to allow individuals without security clearance to speak to the defendants. As it stands, therefore, this change will not have practical impact on the issues raised in this report.

48. The Committee has consistently held that, under Article 14(3) of the Covenant, lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference.[73] This situation described by the Defence Counsel in this case shows a clear violation of Article 14(3) of the Covenant, by which the defendants must have adequate facilities for the preparation of their defence.

49. This violation is even more grave in a capital trial such as that underway for the 9/11 attacks. The Committee has made it clear that the death penalty cannot be imposed if the procedural guarantees under the Covenant to a fair trial are not upheld.[74] The imposition of a capital

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[68] See AE200 (MAH, RBS, WBA) Defense Motion to Dismiss, above n.42, p. 8.
[69] See KSM Motion, above n.8, p. 19.
[70] AE200II, Military Judge Order to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, 16 December 2013, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE200II).pdf.
[71] 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.
[72] *Ibid.*, p.8.
[73] Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial (2007) UN Doc. CCPR/C/GC/32.
[74] Human Rights Committee, General Comment No. 6: Article 6 (1982), UN Doc. HRI/GEN/1/Rev.6 at 127 (2003), para. 7.

sentence in these circumstances would amount to a violation of the right to life under Article 6 and, it is submitted, Article 7.[75]

Creating inequalities between the defendants

50. By denying the defendants the right to complain outside the military commission process about treatment they have been subjected to, the Protective Order also operates to create inequalities between the defendants in the 9/11 trial, and between those subject to proceedings before military commissions and those tried in the regular courts. In this way, the United States Government is effectively disadvantaging some defendants in the proceedings, in violation of Article 14 of the Covenant.

51. For some accused in the two military commission trials concerning "High Value Detainees", information is now in the public domain from declassified documents and other sources indicating the treatment they were subjected to and/or giving clues about the States in which they were held.[76] This information could be relied on in proceedings in those States, and has in some cases been sufficient to lead to the opening of an official investigation.[77]

52. However, for other accused, including Mr al-Hawsawi who REDRESS has been attempting to represent, such information is not available. Any person attempting to act on his behalf is therefore much less likely to be able to convince domestic authorities to open an investigation into a State's potential involvement, investigations which may uncover information which could assist in Mr al-Hawsawi's defence.

53. To afford a fair trial the State "must administer its capital sentencing procedures with even hand".[78] In its differential effect, the Protective Order results in a judicially created distinction between the various defendants subject to military commission proceedings and to others facing capital charges, in violation of the equal protection guarantee in Article 14(1) of the Covenant, and, potentially, the right to life under Article 6.

F. CONCLUSION

54. From the "High Value Detainee" Programme right through to the military commission trials, the United States has constructed a system "calculated to evade the operation of human rights law".[79] 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 defence counsel in the 9/11 trial: "[b]y torturing our victims and then constructing an elaborate scheme of incommunicado detention and 'classification' designed to silence them forever, the United States has joined the world's worst human rights abusers".[80]

55. The Protective Order, in conjunction with extremely limited access to defendants in Guantánamo Bay, operates to deny the defendants in the 9/11 trial the rights guaranteed under the Covenant to complain about and seek redress for torture and other prohibited ill-treatment.

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[75] See above n. 0.
[76] *See*, for example, the now declassified information available about Mr Mohammad as explained at pp. 5-10 of the KSM Motion, above n.8.
[77] E.g., "On September 21, 2010, Polish lawyers for [Abd al Rahim] al Nashiri filed an application with Polish prosecutors in Warsaw requesting an investigation into his detention and treatment in Poland. In October 2010, the prosecutor granted victim status to al Nashiri, thereby recognizing that his claims against the Polish government may have merit": Human Rights Watch, Globalizing Torture: CIA Secret Detention and Extraordinary Rendition (2013) at 100, http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition.
[78] *Gardner v. Florida*, 430 U.S. 349, 361 (1977).
[79] Emmerson 2013 Report, above n.10 , p. 15.
[80] KSM Motion, above n.8, p. 17.

It also frustrates investigations which could assist the defendants' defence, and puts some accused at an even greater disadvantage than others.

56. The determined secrecy around such serious violations of human rights affects not just the defendants, but also violates principles of oversight and public scrutiny essential for the effective protection of human rights.

57. In doing so, it denies the individual defendants their rights and undermines the fairness of this trial in violation of the Covenant. It also perpetuates a legally sanctioned security regime that is fundamentally incompatible with the universal prohibition of torture and enforced disappearance. Rendering detainees "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 States parties around the world.[81]

G. SUGGESTED QUESTIONS AND RECOMMENDATIONS

58. REDRESS urges the Committee to ask the United States delegation:

> **Can the delegation confirm whether detainees at Guantánamo Bay, including "High Value Detainees", can have access to lawyers without security clearance to pursue proceedings on their behalf in third States, given that their own defence lawyers are currently prohibited from doing so?**
>
> **How many requests for mutual legal assistance has the United States received from other States concerning investigations into allegations of rendition, secret detention and torture? How many requests has the United States allowed, how many has it denied, and how many are still pending?**

59. REDRESS suggests that the Committee recommend that the United States:

- abandon military commission trials and drop pursuit of the death penalty against any detainee currently held at Guantánamo Bay;
- declassify information concerning the capture, extraordinary rendition and detention of terrorist suspects, including those currently on trial before military commissions at Guantánamo Bay;
- 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;
- provide to victims an effective judicial remedy within the United States for human rights violations committed as part of the "War on Terror";
- investigate allegations of torture and enforced disappearance, and prosecute and punish those responsible; and
- cooperate with investigations in other States into allegations of involvement in the CIA's programme of extraordinary rendition and secret detention, including by responding fully to requests for assistance concerning access to detainees and evidence.

[81] 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; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, above n.65, para. 3.

ANNEX ONE: An illustration: the case of Mustafa al-Hawsawi

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 Bay, Cuba in September 2006. He currently faces capital charges in a trial before a military commission in Guantánamo Bay,[82] relating to his alleged involvement as media organiser and financer in the September 11, 2001 attacks in the United States.

REDRESS has been involved in the case of Mr al-Hawsawi since July 2012. Given its mandate, REDRESS was interested in supporting Mr al-Hawsawi's case. In July 2012 REDRESS was put in touch with Mr al-Hawsawi's Defense Counsel, who said that Mr al-Hawsawi has a general interest in legal proceedings being pursued on his behalf.

However, Defence Counsel are restricted by the way information was classified and are therefore unable to cooperate in any proceedings. Counsel further explained that he could not 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 action should be taken.

There is very little information in the public domain about where Mr al-Hawsawi was held from March 2003 to September 2006. 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. The analysis indicates that a number of States are implicated in these violations and have the responsibility to investigate them under their own domestic law and international law. REDRESS has therefore sought to compel investigations into these allegations in third States that are potentially implicated in the alleged violations.

Inability to obtain written authorisation to act

Since September 2012 REDRESS has attempted to obtain a formal written authority from Mr al-Hawsawi. However, to date it has not been able to obtain this authority. It is REDRESS's understanding that an authority, even expressed in general terms and not referring to any individual country, cannot be provided through his Defence Counsel as to do so may risk breaching the Protective Order.

On 17 October 2013 REDRESS filed a motion before the military commission seeking to intervene in proceedings brought by the defendants' counsel challenging the protective order as contrary to the Convention Against Torture. REDRESS sought leave to intervene in support of that motion, and 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.

On 29 January 2014 REDRESS approached the Joint Task Force Guantánamo Bay, which is part of the Department of Defense, to request that it provide the powers of attorney to Mr al-Hawsawi, and – if he signs them – to return them to REDRESS. At the date of submitting this report it had not received a response.

[82] See Department of Defence, JTF-GTMO Detainee Assessment: Mustafa al-Hawsawi, 8 December 2006 ("JTF-GTMO Detainee Assessment"), 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, "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.

Effect on actions in other jurisdictions

The inability to obtain information, or even a written authority, from Mr al-Hawsawi has the potential to completely block access to remedies and information in other jurisdictions.

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 was secretly detained on Lithuanian territory and subjected to torture and other prohibited ill-treatment.[83]

This complaint relied on a synthesis and analysis of publicly available materials, but could not include information obtained from Mr al-Hawsawi himself. It was therefore only possible to allege it was "highly likely" that Mr al-Hawsawi was held in secret detention on Lithuanian territory.

On 27 September 2013, the Prosecutor's office issued a decision refusing to open an investigation into the allegations raised.[84] 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'".[85]

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 Vilnius Regional Court upheld the appeal in part.[86] 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.[87]

The complaint has now been returned to the Prosecutor for reconsideration. Nevertheless – if the United States continues to deny access to Mr al-Hawsawi – any investigation will be severely hindered by Mr al-Hawsawi's inability to provide information to the authorities about what he experienced. In addition, the lack of a written authority to act will mean that REDRESS and HRMI will not have the express right to challenge any decision to terminate an investigation.

Furthermore, the classification regime and Protective Order as currently interpreted may block access to the European Court of Human Rights if REDRESS and HRMI wish to challenge any final decision of the Lithuanian authorities, as the Rules of Procedure set down that only a victim can bring a complaint, and any person or organisation representing the victim must provide a written authority.[88]

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[83] A copy of the complaint is available at: http://www.redress.org/downloads/casework/final-lithuania---investigation-request.pdf.

[84] A copy (in Lithuanian) of the Prosecutor's decision is available at: http://www.redress.org/downloads/decision-of-prosecutor-27.09.13.pdf.

[85] *Ibid.*

[86] 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.

[87] *Ibid.*

[88] *See* Rules of Court of the European Court of Human Rights, Rule 45(3) ("[w]here applicants are represented in accordance with Rule 36, a power of attorney or written authority to act shall be supplied by their representative or representatives"), http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf. Following extensive research, REDRESS is not aware of any exceptions having been made to this rule.

ANNEX TWO: 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