MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL-HAWSAWI	**AE-200J (KSM et al)** **Motion of the Redress Trust** for leave to intervene in support of the Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture (AE-200) and for Order Granting Permission to Obtain Written Authority from Mr. al-Hawsawi October 17, 2013

1. Timeliness: There is no established timeframe for the filing of this motion.

2. Relief sought: The Redress Trust ("REDRESS") moves for leave to intervene in support of the Defense motion to dismiss because the Amended Protective Order #1 violates the Convention Against Torture (AE-200). REDRESS further moves for an order granting it permission to obtain written authority from Mr. Mustafa Ahmed Adam al Hawsawi to act on his behalf in legal proceedings outside the United States of America.

3. Overview: As an organization attempting to represent the interests of one of the accused outside the Military Commission process, REDRESS has a direct interest in how Amended Protective Order #1 (the "Protective Order") operates, and the extent to which its operation denies the accused rights guaranteed by international law and hinders other States' compliance with their obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").[1]

This Motion will first describe REDRESS's involvement in the case of Mr. al-Hawsawi and the significant difficulties that the Protective Order has put in the way of seeking remedies in

[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 29 UN GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); U.N.T.S. 85 ("CAT").

third states on his behalf for alleged torture and other cruel, inhuman and degrading treatment or punishment ("other prohibited ill-treatment"). This will show that the Protective Order operates to block complaints in two ways: first, it prevents Mr. al-Hawsawi from requesting assistance in or authorizing others to bring claims regarding his treatment and detention. Second, and crucially, it extinguishes his ability to provide evidence to support these claims.

The motion will then address the following issues:

A. The right to complain about torture, the right to obtain an effective remedy, and the obligation to investigate torture are each interconnected and integral to upholding the prohibition of torture itself. These rights are non-derogable, and cannot be extinguished by the assertion of national security considerations.

B. REDRESS's experience shows how the Protective Order operates to deny these rights to the accused in this case, and to frustrate investigations that other States are legally required to carry out. REDRESS has attempted to represent Mr. al-Hawsawi in proceedings in third States to complain about alleged torture and other prohibited ill-treatment while in secret detention and to compel investigations into these claims. However, the Protective Order has shut Mr. al-Hawsawi off from such proceedings and has hamstrung REDRESS's ability to pursue them.

C. The Protective Order operates to create inequalities between the various defendants now subject to proceedings before military commissions, in violation of the Fifth Amendment of the U.S. Constitution. The Protective Order means that the accused cannot disclose information about what happened to them. For some of the defendants, there is evidence in the public domain from declassified and other sources which can support an investigation into allegations of human rights

violations committed against them, while for others there is not. The Protective Order therefore operates to put some defendants at an even greater disadvantage to others in this case, and to those being tried before the Military Commissions more generally.

These issues could not be more important. Not only do they fatally undermine the due process rights of the accused in this capital trial, they significantly undermine the rule of law in the United States and third countries and the fundamental prohibition of torture.

4. Burden of proof: As the moving party REDRESS bears the burden of proof.[2]

5. Statement of Facts:

(i) Relevant procedural history

a) On August 12, 2013, Defense Counsel for Messrs. al-Hawsawi, Bin al Shibh and Bin 'Attash filed a motion to dismiss (the "Motion to Dismiss") based on the difficulties raised for the Defense by Amended Protective Order #1 (the "Protective Order").[3]

b) On September 3 and 17, 2013, Defense Counsel for Mr. Mohammad and Mr. al-Baluchi filed joinder motions, and these were later granted by the Commission.[4] Together, these motions are referred to as the "Defense Motions." These motions have been cleared by security review and published on the Military Commission's website.

[2] Rules for Military Commissions ("R.M.C.") 905(c)(2)(A).
[3] AE-200 (MAH, RBS, WBA), Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture.
[4] AE-200 (KSM) Defense Notice of Joinder Supplement Facts & Law to AE200 (MAH, RBS, WBA) Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, September 3, 2013 (hereinafter "KSM Motion") and AE-200 (AAA), Mr. al Baluchi's Notice of Joinder, Factual Supplement & Argument to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, September 17, 2013 (hereinafter "AAA Motion").

c) A number of other filings have been made in relation to the Defense Motions, notably the Government's Response to the Motion, filed on October 3, 2013,[5] and the Reply of Defense filed on October 10, 2013.[6] These two files are listed on the Military Commission's website, but as of the date of this filing are not yet publicly available and therefore have not been reviewed by REDRESS.

(ii) REDRESS

d) REDRESS is an international human rights non-governmental organization with a mandate to assist torture survivors to seek justice and other forms of reparation. It is registered under United Kingdom charity law and is also recognized in the United States of America with 501(c)(3) status under the federal code.[7]

e) REDRESS fulfils its mandate through a variety of means, including casework, law reform, research and advocacy.[8]

f) REDRESS has accumulated a wide expertise on the various facets of the right to reparation for victims of torture under international law and regularly takes up cases on behalf of victims of torture before national, regional and international human rights mechanisms and courts.[9]

(iii) REDRESS's role in the case of Mr. al-Hawsawi

g) REDRESS has been involved in the case of Mr. al-Hawsawi since July 2012.[10]

[5] AE-200F, Government Response To Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, October 3, 2013.
[6] AE-200I (MAH), Defense Reply to Government Response to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, October 10, 2013.
[7] Ex. C (Declaration of Carla Ferstman, ¶2, October 17, 2013).
[8] Id., ¶3.
[9] Id., ¶3.
[10] Id., ¶¶4-5.

h) Given its mandate, REDRESS was interested in supporting Mr. al-Hawsawi's case. In July 2012 REDRESS was put in touch with Defense Counsel.[11] He expressed that Mr. al-Hawsawi has a general interest in legal proceedings being pursued on his behalf, but that Counsel was very restricted by the way information was classified and was therefore unable to cooperate. Counsel further explained that he could not disclose any information obtained from Mr. al-Hawsawi, or which might tend to indicate classified information, or give any instructions or indications of whether action should be taken.[12]

i) There is very little information in the public domain about where Mr. al-Hawsawi was held from March 2003 to September 2006.[13]

j) 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.[14]

k) 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. [15]

l) REDRESS has therefore sought to compel investigations into these allegations in third States which are potentially implicated in the alleged violations.[16]

(iv) Inability to obtain written authorization to act

m) Since September 2012 REDRESS has attempted to obtain a formal written authority from Mr. al-Hawsawi, through his Defense Counsel. However, to date it has not been able to obtain this.[17]

[11] Id., ¶5.
[12] Id.
[13] Id., ¶9.
[14] Id., ¶10.
[15] Id., ¶11.
[16] Id., ¶12.

n) It is REDRESS's understanding that an authority, even expressed in general terms and not referring to any individual country, cannot be provided as to do so may risk breaching the Protective Order.[18]

o) As further described below, the inability to obtain a written authority is likely to block access to certain remedies and information.[19]

(v) Action in Lithuania

p) The difficulties encountered in Lithuania are illustrative of these problems. On September 13, 2013 REDRESS and the Lithuanian organization 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.[20]

q) 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.[21]

r) On September 27, 2013, the Prosecutor's office issued a decision refusing to open an investigation into the allegations raised.[22]

s) 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

[17] Id., ¶7.
[18] Id., ¶8.
[19] Id., ¶¶12, 17, 20. Ex. D (Declaration of Natalija Bitiukova, ¶¶7-8, October 16, 2013).
[20] Ex. C (Declaration of Carla Ferstman, ¶13, October 17, 2013) and Ex. D (Declaration of Natalija Bitiukova, ¶2, October 16, 2013).
[21] Ex. C (Declaration of Carla Ferstman, ¶14, October 17, 2013).
[22] Ex. E (Decision of Lithuanian Prosecutor, September 27, 2013).

information obtained from Mr. al-Hawsawi or known "directly" to HRMI or REDRESS, but was instead based on "assumptions" made after "analyzing 'accessible information.'"[23]

t) REDRESS and HRMI have appealed the decision of the Lithuanian Prosecutor in the Lithuanian courts.[24]

u) Even if the Courts order the prosecutor to open an investigation, any such investigation will be severely hindered by Mr. al-Hawsawi's inability to provide information to the authorities about what he experienced.[25]

v) 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.[26]

(vi) Action in Poland

w) REDRESS is also in the process of filing a request for victim status on behalf of Mr. al-Hawsawi in Poland. [27]

x) Again, the Protective Order raises the dual issues of having sufficient evidence to compel the opening of an investigation, and having standing to participate in any investigation. [28]

y) Without a written power of attorney from Mr. al-Hawsawi, REDRESS will not be allowed access to the investigation file or information about the status of the investigation.[29]

z) Similarly, any such investigation will be severely hindered by Mr. al-Hawsawi's inability to provide information to the authorities about what he experienced.[30]

[23] Id.
[24] Ex. C (Declaration of Carla Ferstman, ¶15, October 17, 2013). Ex. D (Declaration of Natalija Bitiukova, ¶4, October 17, 2013).
[25] Ex. C (Declaration of Carla Ferstman, ¶16, October 17, 2013).
[26] Ex. D (Declaration of Natalija Bitiukova, ¶¶7-8, October 16, 2013).
[27] Ex. C (Declaration of Carla Ferstman, ¶18, October 17, 2013).
[28] Id., ¶19.
[29] Id., ¶20.
[30] Id., ¶21.

(vii) Impact on Appeals

aa) REDRESS anticipates that in relation to the proceedings in Lithuania and other third States it will need to file appeals to domestic mechanisms to compel further investigations. However, as set out above, these will be significantly hampered, if not made impossible, by the inability to obtain a formal authorization to act from Mr. al-Hawsawi.[31]

bb) Furthermore, the Protective Order as currently drafted and interpreted will block access to the European Court of Human Rights as the Rules of Procedure set down that only a victim can bring a complaint, and any person or organization representing the victim must provide a written authority.[32]

6. Law and Argument

A. Legal basis for the relief requested.

Mr. al-Hawsawi's right to due process and equal protection is guaranteed by the Fifth Amendment of the U.S. Constitution. His right to present evidence in his defense and to examine and respond to all evidence admitted against him on the issue of guilt or innocence and for sentencing are also expressly granted by the Military Commissions Act of 2009 ("M.C.A").[33] These rights are violated by the operation of the Protective Order as further described in the

[31] *See* Ex. D (Declaration of Natalija Bitiukova, ¶¶7-8, October 16, 2013); Ex. C (Declaration of Carla Ferstman, ¶19, October 17, 2013).

[32] Ex. C (Declaration of Carla Ferstman, ¶23, October 17, 2013). *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.

[33] National Defense Authorization Act for Fiscal Year 2010, § 1802, Pub.L. 111–84, H.R. 2647, 123 Stat. 2190 (Codified at 47A U.S.C. §§949(a)(2)(A) (2009)).

Motion to Dismiss.[34]

REDRESS has a demonstrated direct and genuine interest in the outcome of this case and additionally has standing to seek access to these court proceedings under Regulations 19-3(c) and (d) of the Regulation for Trial By Military Commission, 2011. Those provisions specifically permit a third party, including an international organization,[35] to challenge whether information presented in these proceedings "may be released to the public or is not appropriately designated as 'protected.'"[36]

In the event of any ambiguity on this point, the M.C.A., the Regulation for Trial by Military Commission and the Military Commissions Trial Judiciary Rules of Court should be "construed in a manner so as not to violate international law, as [it is presumed] that Congress ordinarily seeks to comply with international law when legislating."[37] As set out in detail below, international law requires that victims of torture be given the right to an effective remedy. Where judicial remedies are required, as they are in relation to torture, an effective remedy requires access to counsel.[38] As the Protective Order operates to silence Mr. al-Hawsawi, and there is no

[34] *See* AE-200 (MAH, RBS, WBA), Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture, pp. 7-8. *See also* AE-200 (KSM) Defense Notice of Joinder Supplement Facts & Law to AE200(MAH, RBS, WBA) Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, September 3, 2013, 16, 19 and AE-200 (AAA), Mr. al Baluchi's Notice of Joinder, Factual Supplement & Argument to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, 19-20 (on the effect on mitigation).

[35] M.C.R. 806 defines "public" to include national and international organisations, in the context of providing that trials should be publicly held.

[36] Department of Defense Regulation for Trial by Military Commissions (2011) ¶¶19-3(c) and (d).

[37] *United States v. Khadr*, 717 F. Supp. 2d 1215, 1238 (C.M.C.R. 2007) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

[38] *See* Committee Against Torture, General Comment No. 3, para. 30, U.N. Doc. CAT/C/GC/3 ("Judicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation. States parties should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints

other way for REDRESS to access him except through this Commission, the effect of denying leave to intervene would be to shut off the only potential remedy for a continuing violation of international law.

B. The right to complain about torture, the right to obtain an effective remedy, and the obligation to investigate torture are integral to the prohibition itself.

(i) The rights and obligations concerned: Customary international law recognizes the prohibition of torture as a peremptory norm (*jus cogens*).[39] Such a norm is accepted by the international community as one from which no derogation is permitted.[40] This is reinforced by the fact that the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ('CAT') has at present 154 States party, including all 47 member states of the Council of Europe, and States from every region of the world.[41] Torture is widely recognised as a crime under international law[42] and a grave breach of international humanitarian law,[43] for which individuals, as well as states, have responsibility on the international level.

and to make claims for redress"), available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11.

[39] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, [2012] General List No 144. I.C.J, para. 99.

[40] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986). cmt. k ("Peremptory norms of international law (jus cogens). Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.").

[41] A list of all parties to the CAT is available at: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en.

[42] *See*, e.g. CAT, Arts. 4-9; Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9; 37 I.L.M. 1002 (1998); 2187 U.N.T.S. 90, ('ICC Statute'), Arts. 7(1)(f) and 8(2)(a)(ii).

[43] First Geneva Convention, Art. 50; Second Geneva Convention, Art. 51; Third Geneva Convention, Art. 130; Fourth Geneva Convention, Art. 147; ICC Statute, Arts. 8(2)(a)(ii) and (iii) and (c)(i).

The absolute prohibition of torture entails certain positive obligations which are also firmly established to be of an absolute nature.[44] The Defense Motions provide a thorough exposition of the positive obligations which (i) guarantee victims the right to complain and the right to redress/an effective remedy for torture and other prohibited ill-treatment,[45] and (ii) require states to carry out an effective investigation into allegations of such treatment.[46] REDRESS refers to and adopts those submissions. It draws particular attention to:

(a) CAT Article 12 (obligation to investigate wherever there is reasonable ground to believe that an act of torture has been committed), Article 13 (right to complain to and to have case promptly and impartially examined by competent authorities) and Article 14 (right to redress); and

(b) the prohibition of torture and guarantee of the right to an effective remedy for torture and other prohibited ill-treatment provided for under other international treaties, including the International Covenant on Civil and Political Rights ("ICCPR")[47] and the European Convention on Human Rights.[48] Both of these treaties have individual complaints mechanisms, many of which would, but for the Protective Order, be available to the accused in relation to the allegations raised.[49]

[44] As to which, see section (ii), below.
[45] Motion to Dismiss at 3-5, KSM Motion at 14-15, AAA Motion at 2, 10-14.
[46] AAA Motion at 13, 24-25.
[47] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).
[48] European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221.
[49] For example, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism ("UN Special Rapporteur on Counterterrorism") has stated that "there is now credible evidence to show that CIA 'black sites' were located on the territory of Lithuania, Morocco, Poland, Romania and Thailand": Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, U.N. Doc. A/HRC/22/52, para. 19 (1

The United States has signed and ratified CAT and the ICCPR, making them part of "the supreme Law of the Land" pursuant to the Supremacy Clause of the U.S. Constitution.[50] Although the CAT is a non-self-executing treaty, the U.S. government has made it clear that it believes that its obligations under the CAT, and therefore the rights guaranteed to individuals, are part of U.S. law and are binding on the United States government.[51] In addition, customary international law is itself a part of federal common law in both criminal and civil cases.[52]

(ii) These rights and obligations are interconnected and integral to the prohibition of torture itself: The positive obligations guaranteeing individuals the right to complain and to obtain an effective remedy and redress, and requiring states to carry out investigations into allegations of torture and other prohibited ill-treatment are part of, and integral to, the prohibition itself. The European Court of Human Rights has expressed this connection clearly in relation to the obligation to investigate allegations of torture:

> Where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under

March 2013), available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf. For complaints concerning Poland and Lithuania a victim would ultimately have access to the European Court of Human Rights. Morocco and Poland have also accepted the individual complaints procedure under Article 22 of the CAT: *see* http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en. Lithuania and Poland have also accepted the individual complaints procedure of the ICCPR, under its First Optional Protocol: *see* http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-5&chapter=4&lang=en.

[50] U.S. Const. art. VI.

[51] *See*, Committee Against Torture, Initial Report of the United States of America, para. 60, U.N. Doc. CA T/C/28/Add.5 (1995) ("More generally, however, the United States considered existing law to be adequate to its obligations under the Convention"), available at: www.state.gov/documents/organization/100296.pdf.

[52] *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). In addition, the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1986) cmt. D states that "[c]ustomary international law is considered to be like common law in the United States, but it is federal law."

> Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance …, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[53]

Similarly, the Inter-American Court of Human Rights consistently stresses that States are "obliged to investigate and punish any violation of the rights embodied in the Convention in order to guarantee such rights; and … this obligation is related to the rights to be heard by the courts and to a prompt and effective recourse".[54]

This interpretation is consistent with international law. The prohibition of torture is universally recognised and encompasses the obligation not to commit torture as well as the obligation to forestall and preempt any such acts.[55]

Because these positive obligations are integral to the absolute prohibition, it is also firmly established that they are non-derogable. As explained by the UN Human Rights 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]

[53] *Assenov v. Bulgaria*, 1998-VIII, Eur. Ct. H.R., para. 102. *See also Aslakhanova v. Russia*, Eur. Ct. H.R. App. No. 2944/06, 18 Dec. 2012, para. 144.
[54] *The "Street Children" Case. (Villagrán Morales et al.),* Merits, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 63, ¶225 (Nov. 19, 1999). *See also Velasquez Rodriguez Case*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶166 (July 29, 1988), and *Loayza Tamayo Case*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42 ¶170 (November 27, 1998).
[55] *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, (Int'l Crim. Trib. For the Former Yugoslavia 10 Dec. 1988) 38 I.L.M. 317, paras.144 and 148, available at: http://www.refworld.org/docid/40276a8a4.html.
[56] Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), available at: http://www.refworld.org/docid/453883fd1f.html.

The Committee Against Torture is the supervisory mechanism established under the CAT to provide authoritative interpretations regarding the interpretation and application of the treaty.[57] It has stressed that Articles 12 to 14 cannot be derogated from in any circumstances.[58] The leading commentary on the CAT also stresses that the "right of complaint afforded to victims of torture or ill treatment is a fundamental guarantee that must be upheld in all circumstances."[59]

Similarly, the Inter-American Court of Human Rights has held that "judicial guarantees" including the obligation to investigate violations and victims' access to a court are of a non-derogable nature where these are linked to ensuring the protection of non-derogable rights.[60] The European Court of Human Rights has also affirmed this position.[61]

The importance of upholding these positive obligations is reflected across international norms and practice.[62] For example, in 2005, the UN General Assembly adopted basic principles on the right to a remedy and reparation for human rights violations, including torture. Significantly, this General Assembly resolution was adopted by consensus, including by the

[57] CAT, Article 17. That the views of such Committees should be accorded great weight was recognised by the International Court of Justice in *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J. Rep. 2010 639, para. 66 (concerning the equivalent body under the International Covenant on Civil and Political Rights, the Human Rights Committee).

[58] Committee Against Torture, General Comment No. 2: Implementation of article 2 by States parties, para. 6, U.N. Doc. CAT/C/GC/2 (24 January 2008) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en.

[59] MANFRED NOWAK & ELIZABETH MACARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 442 (2009) (included as Ex. F).

[60] *See*, e.g. *Barrios Altos* case (*Chumbipuma Aguirre et al*. v. *Peru*), Judgment, Merits, Inter-Am.Ct.H.R. (ser. C) No. 75, ¶¶ 41–44 (Mar. 14, 2001).

[61] *See*, eg. *Chahal v UK*, 1996-V, Eur. Ct. H.R, para. 80.

[62] *See,* Human Rights Committee, General Comment No. 20: Article 7, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1992), available at: http://www1.umn.edu/humanrts/gencomm/hrcom20.htm.

United States. It reaffirms that victims' rights of access to justice and redress mechanisms for such violations should be "fully respected."[63] As such, the resolution affirms that States "shall" provide "equal access to an effective judicial remedy as provided for under international law," that States have the duty to investigate such violations, and that States should "cooperate with one another and assist international judicial organs competent in the investigation and prosecution of such violations."[64]

(iii) National security considerations cannot be used to extinguish the right to complain about torture and to obtain redress: The Protective Order in the instant case has been adopted ostensibly to protect "the sources, methods, and activities by which the United States defends against international terrorism and terrorist organisations."[65] Because of its extremely broad reach, however, 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.

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 it.

This was stressed by the Committee Against Torture in its General Comment No. 3 on Article 14: "under no circumstances may arguments of national security be used to deny redress

[63] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN G.A. Res 60/147 (2005), Principle II(3)(c), available at: http://www.refworld.org/docid/4721cb942.html ("UN Basic Principles").
[64] Id., paras. 12 and 4 respectively.
[65] AE-013O, Ruling on Government Motion to Protect Against Disclosure of National Security Information, 6 December 2012.

for victims."[66] By logical extension, this also applies to the ability to complain. Both the European Court of Human Rights,[67] and the Inter-American Court of Human Rights[68] have consistently adopted the same position. The Inter-American Court of Human Rights has also made it clear that States cannot refuse to provide classified information for the investigation of serious human rights violations solely because of national security considerations.[69]

Any effort to *limit* the right to a remedy must be based on legitimate grounds and be proportionate. While national security interests may constitute a legitimate aim, they will only be considered so when they are genuinely tailored to protecting such interests rather than protecting states from embarrassment or preventing the exposure of illegal activity.[70] The

[66] Committee Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, para. 42, U.N. Doc. CAT/C/GC/3 (13 December 2012), available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f3&Lang=en.

[67] In *Cordova v. Italy (No. 1)*, for example, the European Court of Human Rights held that 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." *Cordova v. Italy (No. 1)*, 2003-I Eur. Ct. H.R. 53. To do so would violate the right to a remedy. *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.

[68] *"Five Pensioners" v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, at para. 136 (Feb. 28, 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 (May 14, 2001).

[69] *See, e.g.*, *Myrna Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, at para. 180 (Nov. 25, 2003) ("The Court deems that in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.").

[70] *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, U.N. Doc. E/CN.4/1996/39 (1996) at 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

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 2g(4)-(5) of the Protective Order as offending this principle. According to the Special Rapporteur, the provisions are part of a policy that is "precisely calculated to evade the operation of human rights law."[71]

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.[72]

particular ideology, or to suppress industrial unrest."), available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=700. *See also* U.N. Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions on the International Covenant on Civil and Political Rights, U.N. Doc E/CN.4/1985/4 (1984), available at: http://www.refworld.org/docid/4672bc122.html. *See further* Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, para. 39, U.N. Doc. A/HRC/22/52 (2013), available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf.

[71] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, U.N. Doc. A/HRC/22/52 (2013), at 15, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf.

[72] *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).

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."[73]

Particular attention must be paid to these principles in this, a capital criminal case. As the U.S. Supreme Court has reaffirmed on a number of occasions, death is a different kind of punishment from any other that may be imposed:

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.[74]

For this reason, the Supreme Court has attached even greater importance to fair procedure in the criminal capital trial context. It has held that the defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence.[75]

In the case of *Gardner v. Florida*, relying partly on the Due Process Clause of the Fourteenth Amendment and partly on the Eighth Amendment's prohibition against cruel and

[73] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, U.N. Doc. A/HRC/22/52 (2013), 16, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf, 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, U.N. Doc. HR/P/PT/8/Rev.1 (2001), available at: 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.

[74] *Gardner v. Florida,* 430 U.S. 349, 357–358 (1977).

[75] Id. at 358. *See also Witherspoon v. Illinois*, 391 U.S. 510, 521-523.

unusual punishment, the Court held that a procedure for selecting people for the death penalty that permitted consideration of secret information about the defendant was unacceptable.[76] In that case, the information was kept secret on the basis that an assurance of confidentiality to potential sources of information is essential to enable investigators to obtain relevant but sensitive disclosures. However, the Court held that rationale was not sufficient to override the importance of due process in the sentencing phase of a capital trial.[77]

In this case, the reality and appearance of fairness is crucial for the legitimacy of this process before the United States public, and the international community. National security considerations cannot operate to extinguish the accused's rights under international law in relation to torture, particularly where that undermines their due process rights in a capital trial.

C. The Protective Order operates to deny Mr. al-Hawsawi's right to complain about his treatment and to seek redress, and frustrates investigations by authorities in third States.

REDRESS's experience, outlined in Part 5, above, shows how the Protective Order has operated to completely deny Mr. al-Hawsawi the rights referred to in the previous section and to frustrate investigations that international law requires States to undertake. The Protective Order does this in two ways: first, it prevents Mr. al-Hawsawi from making a claim himself or requesting assistance from others to bring claims outside the United States regarding his treatment and detention. Second, and crucially, it extinguishes his ability to provide evidence to support these claims.

[76] *Gardner v. Florida*, 430 U.S. 349, 362-364 (1977).
[77] Id., at 358-359. *See also, e.g. Lockett v. Ohio*, 438 U.S. 586 (1978) (sentencing authorities, whether a judge or a jury, must be able to consider every possible mitigating factor, rather than being limited to a specific list); *Eddings v. Oklahoma*, 455 U.S. 104 (1982)*:* (the sentencing court had violated the defendant's rights when it refused to consider the defendant's turbulent family history as a mitigating factor).

(i) Effect of preventing Mr. al-Hawsawi from requesting assistance: The Protective Order has the clear consequence that the natural route for vindicating the rights referred to above, submission of a complaint by Mr. al-Hawsawi, is blocked. As such Articles 13 and 14 of the CAT, and the right to an effective remedy, are necessarily violated.

In addition, the interpretation of the Protective Order to disallow provision of written authorisation for others to act on his behalf negates the ability of organisations such as REDRESS to bring a complaint on his behalf. As described in the statement of facts, this limits the ability of organizations to initiate proceedings that compel authorities to carry out investigations and it blocks access to human rights bodies tasked with reviewing compliance with international law such as the European Court of Human Rights. As a consequence, States are not held accountable before judicial mechanisms when they fail to fulfil their international law obligations to investigate their potential involvement in Mr. al-Hawsawi's secret detention and alleged torture and other prohibited ill-treatment.

(ii) Effect of denying ability to provide evidence: Preventing Mr. al-Hawsawi from providing evidence to support any complaint about violations of human rights and humanitarian law further negates his rights guaranteed by international law and frustrates investigations that other States are legally required to carry out. As such, even if Mr. al-Hawsawi was allowed to make a complaint, or to authorise others to do so, the practical effect of the Protective Order would still operate to deny him an effective remedy because the investigations carried out would be limited.

Mr. al-Hawsawi undoubtedly holds information that could give indications as to where he was held and how he was treated, which could be tied to other data available in the public domain to make a case. However, because of the secrecy of the CIA high value detainee

program, it is difficult even to meet the initial burden of proof in a particular country to satisfy authorities that they were involved and have an obligation to investigate. This has been demonstrated by the complaint filed in Lithuania, where the Prosecutor refused to open an investigation.

Furthermore, even where countries such as Lithuania and Poland *have* opened investigations into their involvement in the secret detention and alleged torture and other prohibited ill-treatment of high value detainees, as they have in relation to other individuals, those investigations have been severely hampered by the fact that the US government prevents detainees from providing information that would be relevant to the inquiries.[78]

These third States are legally obliged to conduct such investigations under the CAT and other treaties applicable to them, and States party to CAT, including the United States, have an obligation to cooperate with such investigations.[79] The Protective Order therefore operates not only to deny Mr. al-Hawsawi his rights, and information that may be very important for his defense, but also hinders third States in their efforts to comply with international law. 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.

Unless both of these restrictions – on the ability to pursue or authorise others to pursue

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

[79] *See*, eg. *Goiburú v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶93 (Sep. 22, 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").

complaints, and on the ability to provide evidence based on their thoughts and recollections – are removed, there will be a continuing violation of the absolute prohibition of torture and other ill-treatment, and a violation of Mr. al-Hawsawi's rights to complain and to have an effective remedy and redress guaranteed under international law.

D. The Protective Order operates to create inequalities between the different accused.

By denying these rights under international law, the Protective Order also operates to create inequalities between the various defendants now subject to proceedings before military commissions. In this way, the Government is effectively disadvantaging some accused in the proceedings, in violation of the due process clause of the Fifth Amendment as well as international law.[80]

For some accused detainees, information is now in the public domain (from declassified documents and other sources) indicating the treatment they were subjected to or providing information about the States in which they were held.[81] This information could be relied on in foreign proceedings. Indeed, this information has been sufficient in some cases to lead to the opening of an official investigation.[82]

[80] *See Bolling v. Sharpe*, 347 U.S. 497 (1954), at 499–500 (the liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws).

[81] *See*, for example, the now declassified information available about Mr Mohammad as explained at pp. 5-10 of AE-200(KSM), Defense Notice of Joinder Supplement Facts & Law to AE200(MAH, RBS, WBA) Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, September 3, 2013.

[82] 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,

For other accused detainees, including Mr. al-Hawsawi, such information is not available. For example, there is a brief reference to Mr. al-Hawsawi in the declassified documents referred to in Mr. Mohammad's Defense Motion of Joinder,[83] referring to the fact that he was allegedly responsible for a piece of intelligence which was then used to obtain further information from Mr. Mohammad.[84] There are no references to his treatment or movements after capture in those or any other declassified documents. 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 also assist in Mr. al-Hawsawi's defense.

To afford due process, the State "must administer its capital sentencing procedures with even hand."[85] In its differential effect, the Protective Order results in a judicially created distinction between the various defendants subject to Military Commission proceedings, in violation of the due process clause of the Fifth Amendment as well as international law.[86]

E. Conclusion

The Protective Order operates to deny the accused in this case his rights guaranteed under treaty law and customary international law to complain about and seek redress for torture and

available at: http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition.

[83] AE-200(KSM), Defense Notice of Joinder Supplement Facts & Law to AE200(MAH, RBS, WBA) Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, September 3, 2013.

[84] *See* CIA Office of the Inspector General, Special Review: Counterterrosim, detention and interrogation activities (September 2001 – October 2003) (2003-7123-IG), para. 214 (May 7, 2004) available at: http://www.therenditionproject.org.uk/pdf/PDF%2020%20[CIA%20IG%20Investigation%20EITs%202004].pdf.

[85] *Gardner v. Florida*, 430 U.S. 349, 361 (1977).

[86] The Supreme Court's approach to Fifth Amendment equal protection claims is the same as to equal protection claims brought under the Fourteenth Amendment: *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

other prohibited ill-treatment. It also frustrates investigations which could assist the accused's defense, and puts some accused at an even greater disadvantage than others. This not only fatally undermines the fairness of this trial in violation of the U.S. Constitution, but it also strikes a significant blow to the prohibition of torture and the rule of law.

7. Oral argument: REDRESS requests oral argument on this motion. If leave is granted, Counsel requests permission to present argument by video teleconference, under the Judge's discretion provided for in Military Commissions Trial Judiciary Rule of Court 7(2)(d).

8. Request for Witnesses and Evidence: None.

9. Conference: REDRESS conferred via electronic mail with the Prosecution and Defense. The Defense for each of the accused indicated that it supports REDRESS's motion for leave to intervene and its request for relief. The Prosecution indicated that it opposes REDRESS's motion for leave to intervene and its request for relief.

10. Attachments

- **A.** Certificate of service
- **B.** Certificate of conference
- **C.** Declaration of Carla Ferstman of 17 October 2013
- **D.** Declaration of Natalija Bitiukova of 16 October 2013
- **E.** Copy of Lithuanian Prosecutor's decision not to open investigation dated 27 September 2013 with unofficial translation
- **F.** Extract from Manfred Nowak & Elizabeth Macarthur, The United Nations Convention against Torture: A Commentary 442-3 (2009)

Respectfully submitted, October 17, 2013

/S/_____
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Counsel of Record

A

CERTIFICATE OF SERVICE

I certify that on October 17th, 2013, I caused to be electronically filed AE-200J (KSM et al) **Motion of the Redress Trust** to intervene in support of the Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture (AE-200) and for Order Granting Permission to Obtain Written Authority from Mr. al-Hawsawi with the Clerk of Court and served the foregoing on all counsel of record by email.

/S/_____
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(619) 525-1413

Counsel of Record

B

CERTIFICATE OF CONFERENCE

I certify that REDRESS conferred via electronic mail with the Prosecution and Defense in relation to its intention to move to intervene in support of the Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture (AE-200) and for Order Granting Permission to Obtain Written Authority from Mr. al-Hawsawi. The Defense for each of the accused indicated that it supports REDRESS's motion for leave to intervene and its request for relief. The Prosecution indicated that it opposes REDRESS's motion for leave to intervene and its request for relief.

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C

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.

14. 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.

15. On September 27, 2013, the Prosecutor's office issued a decision refusing to open an investigation into the allegations raised. On 8 October 2013, REDRESS and HRMI appealed the decision of the Lithuanian Prosecutor in the Lithuanian courts.

16. If the Courts do order the prosecutor to open an investigation, any such investigation will be severely hindered by Mr. al-Hawsawi's inability to provide information to the authorities about what he experienced.

17. I am further informed by HRMI and believe that 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.

18. REDRESS is also in the process of filing a request for victim status on behalf of Mr. al-Hawsawi in Poland, and has instructed a Polish lawyer in the case.

19. Again, the Protective Order raises the dual issues of having sufficient evidence to compel the opening of an investigation, and having standing to participate in any investigation.

20. I am informed by REDRESS' Polish lawyer that without a written power of attorney from Mr. al-Hawsawi, REDRESS will not be allowed access to the investigation file or information about the status of the investigation.

D

DECLARATION OF NATALIJA BITIUKOVA

Pursuant to 28 U.S.C. § 1746, I, Natalija Bitiukova, do declare as follows:

1. I am the Deputy Director of the Human Rights Monitoring Institute ("HRMI), a non-governmental organisation based in Lithuania. I hold Bachelor in Laws degree from the Mykolas Romeris Unviersity (Lithuania) and LL.M. in Human Rights and the European Union Law from the Central European University (Hungary). Central European University is organized as an American graduate institution and accredited in both the United States of America, the State of New York and Hungary. I have been working for the Human Rights Monitoring Institue since 2009. In 2012, I spent one year as a Legal Interm with the Open Society Justice Initiative/Open Society Foundations.

2. On 13 September 2013 HRMI and the Redress Trust ("REDRESS") filed a complaint with the Lithuanian Prosecutor-General concerning the case of Mustafa al-Hawsawi.

3. On 27 September 2013 the Prosecutor issued a decision refusing to open an investigation into the case.

4. On 8 October 2013 HRMI and REDRESS filed an appeal to a pre-trial investigation Judge against the Prosecutor's decision.

5. I am informed and believe that REDRESS does not have a written authority from Mr al-Hawsawi to pursue proceedings on his behalf.

6. The fact that REDRESS does not have a written authority from Mr al-Hawsawi has not precluded HRMI and REDRESS from appealing the decision of the Prosecutor dated 27 September 2013.

7. However, if a pre-trial investigation judge orders the prosecutor to open the investigation, the prosecutor opens it and later adopts a decision to terminate it, Lithuanian law does not expressly provide for HRMI and REDRESS to challenge that decision, because they do not have formal authority to represent Mr al-Hawsawi.

8. According to Articles 212 and 214 of the Lithuanian Code of Criminal Procedure (Official Gazette 2002, Nr. 37-1341, Nr. 46), if the prosecutor terminates an investigation on the ground that "no evidence was collected to substantiate the suspect's guilt", he or she must inform "a suspect, his representative, his lawyer, a victim, a plaintiff, a respondent and their representatives" about such decision and those individuals have a right to appeal.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 16th day of October, 2013.

Natalija Bitiukova

E

LIETUVOS RESPUBLIKOS
GENERALINĖ PROKURATŪRA

NUTARIMAS
2013 m. rugsėjo 27 d.
Vilnius

Generalinės prokuratūros Organizuotų nusikaltimų ir korupcijos tyrimo departamento prokuroras Antanas Stepučinskas, susipažinęs su tarptautinės nevyriausybinės organizacijos REDRES direktorės C. Ferstman ir Žmogaus teisių stebėjimo instituto (toliau – ŽTSI) įgaliotos atstovės N. Bitiukovos (toliau ir – pareiškėjos) 2013-09-13 pareiškimu ir jam nagrinėti reikalinga medžiaga,

n u s t a t ė :

Pareiškime prašoma pradėti ikiteisminį tyrimą dėl Lietuvos pareigūnų ir valstybės institucijų dalyvavimo perduodant, slapta kalinant, kankinant ir nežmoniškai bei žeminančiai elgiantis su Mustafa al-Hawsawi, kuris, pareiškėjų teigimu, Gvantanamo (Kuba) Jungtinės Amerikos Valstijų (toliau – JAV) karinės komisijos teisiamas dėl 2001-09-11 JAV-se įvykdytų teroristinių išpuolių.

Pareiškime teigiama, „<...> yra labai didelė tikimybė, jog al-Hawsawi buvo vienas iš 2004 m. kovo – 2006 m. rugsėjo 4 d. laikotarpiu Lietuvoje kalintų suimtųjų, kuomet buvo pripažinta, jog jis kalinamas Gvantanamo įlankos bazėje esančiame kalėjime <...>“. (Pareiškimo 2 lapas)

Pareiškėjų teigimu, „šiuos įtarimus sustiprino ir neseniai atrasta informacija apie skrydžių maršrutus, sudaranti pagrindą rimtoms prielaidoms apie suimtųjų gabenimą į ir iš Lietuvos <...>“. (Pareiškimo 1 lapas)

Pareiškėjų vertinimu, tai, kad al-Hawsawi „buvo iš Maroko nuskraidintas į Europą ir laikomas Lietuvoje pagrindžia informacija apie kitų „aukštos vertės suimtųjų“ (toliau – AVS) pervežimus, atitikimas AVS programos metodologijos, kuri suimtiesiems numatė vieną po kito sekusius tardymų ir apklausų ciklus, o tam tikrais etapais jie galėjo būti laikomi vieni su kitais. Tai taip pat derinasi su AVS skirtų vienučių skaičiumi tuo pačiu laikotarpiu veikusiuose slaptuose kalinimo centruose Rumunijoje. Informacija apie skrydžius suteikia svarių įrodymų, kad AVS buvo laikomi Lietuvoje, o įtariamų perdavimo skrydžių datos suteikia leidžia daryti išvadą, kad al-Hawsawi buvo vienas iš šiais skrydžiais gabentų suimtųjų <...>“. (Pareiškimo 2 lapas)

Pareiškime nurodyti šie su JAV CŽV siejami skrydžiai: 2003-02-04 Nr. N8213G, 2004 m. rugsėjis, Nr. nežinomas, 2005-01-02 Nr. N961BW, 2005-02-17 Nr. N724CL, 2005-02-18 Nr. N787WH, 2005-10-06 Nr. N380AB N787WH, 2006-03-25 Nr. N733MA N740EH, kurių metu nurodytus skrydžius vykdę lėktuvai naudojosi Vilniaus ir Palangos oro uostais. (Pareiškimo 47 punktas, 19-20 lapai)

Pareiškėjos pripažįsta, kad „atskleisti skrydžiai jokiu būdu nepateikia išsamaus su CŽV slaptais sulaikymo centrais ir ypatingųjų perdavimo programa susijusių skrydžių sąrašo. Lietuvos valdžios institucijos turi kur kas geresnę galimybę bei pareigą vykdyti tyrimus, nes informacija apie skrydžius ir elgesį su suimtaisiais turi būti žinoma atitinkamiems pareigūnams Lietuvoje“. (Pareiškimo 48 punktas, 20-21 lapai)

Pareiškime taip pat teigiama, kad:

- „Buvę CŽV pareigūnai, tiesiogiai susiję su programa, teigė „ABC News“, jog „aštuoni įtariamieji buvo laikomi [Lietuvoje] ilgiau, nei metus, iki 2005 m. pabaigos, kuomet jie buvo perkelti, nes pasklido žinia apie programą“;

- „Kitą dieną (2009 m. rugpjūčio 21 d.) Dick Marty savo pareiškime pranešė, jog jo šaltiniai patvirtino „ABC News" paskelbtą informaciją, kad AVS buvo kalinami Lietuvoje. Jis kreipėsi į valdžios institucijas, kad šios įvykdytų išbaigtą, nepriklausomą ir patikimą tyrimą";

- „Du tuometiniai aukšto rango JAV pareigūnai, pacituoti „ABC News" pranešime, tvirtino, jog AVS buvo laikomi Lietuvoje iki 2005 m. pabaigos, kuomet buvo paviešinta informacija apie programą. Vėliau atskleisti skrydžių duomenys rodo, jog suimtieji galėjo būti laikomi Lietuvoje iki 2006 m. Įtariama, jog tuomet suimtieji buvo perkelti iš Rytų Europos į vieną ar kelias nežinomas vietas, apibūdintas kaip „bazės karinėse zonose". (Pareiškimo 26-28 punktai, 14 lapas)

- „Kol Generalinio prokuroro ikiteisminis tyrimas buvo vykdomas, Jungtinės Karalystės nevyriausybinė organizacija Reprieve Zain al-Abidin Muhammad Husayn (žinomo kaip Abu Zubaydah) vardu pareiškė, jog nenustatytu laikotarpiu tarp 2004 ir 2006 m. jis buvo laikomas Lietuvoje CŽV slapto kalinimo programos tikslais. Reprieve teigė kad „neseniai juos pasiekė informacija iš neskelbiamo ir ypač patikimo šaltinio, kuri patvirtina, jog p. Huscinas buvo kalinamas slaptame CŽV kalėjime Lietuvoje". 2011 m. gegužės mėn. išplatintas pranešimas spaudai, kuriame teigiama, jog du buvę JAV žvalgybos pareigūnai įvardino Abu Zubaydah kaip vieną iš aukštos vertės suimtųjų, kalintų Lietuvoje". (Pareiškimo 42 punktas, 17 lapas)

Prašymas pradėti ikiteisminį tyrimą dėl Lietuvos pareigūnų ir valstybės institucijų dalyvavimo perduodant, slapta kalinant, kankinant ir nežmoniškai bei žeminančiai elgiantis su M. al-Hawsawi netenkintinas.

Baudžiamojo proceso kodekso (toliau – BPK) 166 straipsnio 1 dalies 1 punkte nustatyta, kad ikiteisminis tyrimas pradedamas gavus fizinio ar juridinio asmens skundą, pareiškimą ar pranešimą apie nusikalstamą veiką, t. y. duomenis apie jos padarymo laiką, vietą, būdą, padarinius. Iš pareiškimo ir jo priedo akivaizdu, kad išvadą apie tai, jog „didelė *tikimybė*, kad M. al-Hawsawi buvo vienas iš 2004 m. kovo – 2006 m. rugsėjo 4 d. laikotarpiu Lietuvoje kalintų suimtųjų <...>" (pareiškimo 2 lapas) pareiškėjos grindžia ne jų pačių betarpiškai žinomomis ar šio asmens joms pateiktomis faktinėmis aplinkybėmis, o prielaidomis, padarytomis išanalizavus „prieinamus duomenis".

Pareiškime nurodyta informacija apie su JAV CŽV siejamus lėktuvų skrydžius, t. y. skrydžių datos, numeriai ir maršrutai vertintina kaip patvirtinanti tik tai, kad konkrečiu laiku, konkretus lėktuvas skrido konkrečiu maršrutu, o ne objektyviais duomenimis, kad juo (lėktuvu) M. al-Hawsawi ar kitas konkretus JAV CŽV galimai sulaikytas asmuo (ar asmenys) buvo neteisėtai įgabentas ir išlaipintas Vilniaus ar Palangos oro uoste, Lietuvos pareigūnų betarpiškai ir savarankiškai ar dalyvaujant su kitos šalies (JAV CŽV) pareigūnais neteisėtai kalinamas ir kankinamas, o vėliau išgabentas iš Lietuvos Respublikos.

Generalinėje prokuratūroje 2010-01-22 buvo pradėtas ikiteisminis tyrimas Nr. 01-2-00016-10 dėl galimo JAV CŽV sulaikytų asmenų pervežimo (skraidinimo) ir kalinimo Lietuvos Respublikos teritorijoje. Šio tyrimo metu negauta jokių duomenų apie tai, jog su JAV CŽV siejamais orlaiviais į Lietuvos Respubliką būtų neteisėtai atgabenti ar išgabenti kokie nors asmenys. Galimai neteisėtam asmenų laikymui skirtų patalpų apžiūros metu ir kitais proceso veiksmais nustatyta kita jų paskirtis ir tai, kad jokie asmenys jose nebuvo neteisėtai laikomi.

Ikiteisminio tyrimo Nr. 01-2-00016-10 metu tirtos aplinkybės buvo vertinamos ne tik BK 228 straipsnyje (piktnaudžiavimas), bet ir BK 100 straipsnyje (Tarptautinės teisės draudžiamas elgesys su žmonėmis) ir 146 straipsnyje (Neteisėtas laisvės atėmimas) numatytų nusikalstamų veikų aspektu. 2011-01-14 ikiteisminis tyrimas Nr. 01-2-00016-10 buvo nutrauktas prokuroro nutarime konstatavus, kad negauta jokių duomenų apie neteisėtą asmenų gabenimą, jų sulaikymą ar kitokį neteisėtą laisvės apribojimą ar atėmimą. Prokuroro nutarimą nutraukti ikiteisminį tyrimą Nr. 01-2-00016-10 BPK nustatyta tvarka patikrinęs aukštesnysis prokuroras paliko galioti kaip teisėtą ir pagrįstą. Kadangi, sprendžiant iš pareiškimo (17-18 lapai), pareiškėjoms prokuroro 2011-01-14

nutarime nutraukti ikiteisminį tyrimą Nr. 01-2-00016-10 tyrimo metu konstatuotos aplinkybės ir jų teisinis įvertinimas žinomi, todėl šiame nutarime detaliau neaptariami.

Atsižvelgiant į tai, kad 2013-09-13 pareiškime pateiktą informaciją nėra pagrindo vertinti faktinėmis aplinkybėmis, turinčiomis požymių nusikalstamų veikų, prieš M. al-Hawsawi galimai padarytų Lietuvos Respublikos pareigūnų, o teiginiai apie JAV CŽV sulaikytų asmenų (tame tarpe ir M. al-Hawsawi) kalinimą Lietuvoje yra paneigti atliktu ikiteisminiu tyrimu Nr. 01-2-00016-13, konstatuotina, jog yra aiški viena iš BPK 3 straipsnio 1 dalyje nurodytų aplinkybių, t. y. nepadaryta veika, turinti nusikaltimo ar baudžiamojo nusižengimo požymių (1 punktas), kuriai (aplinkybei) esant yra pagrindas atsisakyti pradėti ikiteisminį tyrimą.

Todėl vadovaudamasis BPK 168 straipsnio 1 dalimi ir 3 straipsnio 1 dalies 1 punktu,

n u t a r ė:

1. Atsisakyti pradėti ikiteisminį tyrimą dėl tarptautinės nevyriausybinės organizacijos REDRES direktorės C. Ferstman ir ŽTSI įgaliotos atstovės N. Bitiukovos 2013-09-13 pareiškime nurodytų aplinkybių.

2. Šis nutarimas per 7 dienas nuo jo nuorašo gavimo dienos gali būti pareiškėjų skundžiamas Vilniaus miesto apylinkės teismo ikiteisminio tyrimo teisėjui.

Organizuotų nusikaltimų ir korupcijos tyrimo departamento prokuroras Antanas Stepučinskas

UNOFFICIAL TRANSLATION

REPUBLIC OF LITHUANIA
OFFICE OF THE PROSECUTOR GENERAL

To: Deputy Director of the Human Rights Monitoring Institute
Natalija Bitiukova

ref 17 2 – 17918 of 27 09 2013

Didzioji str. 5 LT-01228 Vilnius

Re: application of September 13th, 2013

In response to the September 13th, 2013 application of yours and the director's of the non-governmental organization REDRESS C. Ferstman I hereby send you September 27, 2013 resolution which can be appealed to the Vilnius city district court pre-trial investigation judge in 7 days after the copy of the resolution has been received.

APPENDIX: copy of the resolution of 13 09 2013, 3 pages

Prosecutor of the Department of Organized Crime and Corruption [signed]
Antanas Stepučinskas

State Budget Funded Enterprise, Rinktines g. 5A, LT-01515 Vilnius. Tel (8 5) 266 2305. Fax (8 5) 266 2317
Email: generaline.prokuratura@prokuraturos.lt – The data is collected and held at the Registry of Legal Persons, code 288603320

REPUBLIC OF LITHUANIA
OFFICE OF THE PROSECUTOR GENERAL

RESOLUTION
27 September 2013
Vilnius

Antanas Stepucinskas, the Prosecutor of the Department of Organized Crime and Corruption of the Office of the Prosecutor General of the Republic of Lithuania, having familiarized himself with the application of the director of the international non-governmental organization REDRESS C. Ferstman and representative of Human Rights Monitoring Institute (hereinafter– HRMI) N. Bitiukova (hereinafter – the applicants) and the material needed to analyse it,

has established as follows:

In the application it is requested to open a pre-trial investigation into the participation of Lithuanian public officials and state institutions in rendition, secret detention, torture, inhumane and degrading treatment of Mustafa al-Hawsawi, who as claimed by the applicants, is being tried in Guantanamo, Cuba, by the United States of America (hereinafter – USA) Military Commission with charges of September 11th, 2011, terrorist attacks in USA.

It is stated in the application that "it is highly likely that Mr al-Hawsawi was one of the detainees held in Lithuania for a period between March 2004 and 4 September 2006, when his detention at Guantánamo Bay was acknowledged. " (page 2 of the application)

According to the applicants, "[this suspicion] has been strengthened by recently uncovered flight data which shows flight circuits highly suggestive of detainee transfers into and out of Lithuania." (page 1 of the application)

The applicants are considering that al-Hawsawi "was moved to Europe from Morocco, and that it was Lithuania where he was held.", therefore "this conclusion is consistent with the methodology of the HVD programme, by which detainees were subjected to successive cycles of interrogation and debriefing, and were likely to be held with others at a similar stage in the process. It is also consistent with the number of cells available for HVDs to be held in other known secret detention sites operating during this period in Romania. Flight data provides strong evidence that HVDs were held in Lithuania, and the dates of suspected rendition flights provide a further indication that Mr al-Hawsawi was one of the detainees transferred on those flights." (page 2 of the application)

The following flights, related to CIA of USA are indicated: 04 02 2003 No. N8213G, September of 2004 No. unknown, 02 01 2005 No. N961BW, 17 02 2005 N724CL, 18 02 1005 No. N787WH, 05 10 2005 No. N280AB N787WH, 25 03 2006 No. N733MA N740EH, during which the planes used Vilnius and Palanga airports. (Article 47 of the application, pages 19-20)

The applicants acknowledge, that "the flights uncovered by no means provide an exhaustive complete list of flights connected to the CIA secret detention and extraordinary rendition programmes. The Lithuanian authorities are far better placed to undertake investigations, as information about the flights and any treatment of detainees must be known to relevant public officials within Lithuania, and Lithuanian authorities have an obligation to do so." (Article 48 of the application, pages 20-21)

In the application it is also claimed, that:

- "Former CIA officials directly involved in the programme told ABC News that "as many as eight suspects were held [in Lithuania] for more than a year, until late 2005 when they were moved because of public disclosures about the programme"
- "The following day (21 August 2009), Dick Marty issued a statement that his own sources confirmed ABC News' report that "HVDs" were held in Lithuania. He called for authorities to carry out a full, independent and credible investigation"
- Two senior USA government officials at the time, cited in the ABC News report, claimed that "HVDs" were held in Lithuania until late 2005, when information on the programme became public. Flight records uncovered later have suggested that detainees may have been held in Lithuania until 2006. Detainees were then allegedly transferred out of Eastern Europe, to one or more undisclosed locations described simply as "war zone facilities"." (Articles 26-28 of the application, page 14)
- "While the Prosecutor General's pre-trial investigation was still underway, specific allegations were raised by UK NGO Reprieve, on behalf of "HVD" Zain al-Abidin Muhammad Husayn (otherwise known as Abu Zubaydah), that he was held in Lithuania as part of the CIA's programme of secret detention at some time between 2004 and 2006. Reprieve stated that "recent information ha[d] come to it from a confidential and extremely reliable unclassified source, confirming that Mr Husayn was held in a secret CIA prison in Lithuania".96 A later news report, published in May 2011, stated that two former USA intelligence officials had specifically named Abu Zubaydah as one of the "HVDs" held in Lithuania." (Article 42 of the application, page 17)

The request to open a pre-trial investigation into the participation of the Lithuanian public officials and state institutions in the rendition, secret detention, torture, inhumane and degrading treatment of Mustafa al-Hawsawi is dismissed.

Article 166 part 1 paragraph 1 of the Criminal Procedure Code of the Republic of Lithuania provides that the pre-trial investigation is opened when an appeal, application or report of a criminal act is received by a natural or legal person, i.e. information about its time, place, nature and results. After reviewing the application and its appendix it is clear, that the applicant's conclusion that "it is highly *likely* that Mr al-Hawsawi was one of the detainees held in Lithuania for a period between March 2004 and 4 September 2006 <…>" is based not on the factual circumstances known directly by them or given by this individual but on the assumptions which had been made after analysing "accessible information".

Information about the flights related to the CIA of the USA provided in the application, i.e. dates, numbers and routes of the flights, should be considered as proving only [the fact] that on a specific time, a specific aircraft took a specific route, but not as objective data that by it (aircraft)
M. al-Hawsawi or other specific individual (or individuals) possibly arrested by the CIA of USA were illegally were transported to Vilnius or Palanga airport, illegally detained and tortured directly by the Lithuanian public officials alone or with the participation of the other country's (the CIA of USA) officers and after that moved out of the Republic of Lithuania.

A pre-trial investigation No. 01-2-00016-10 of alleged rendition and detention of the USA CIA detainees in the Republic of Lithuania was opened by the Prosecutor General's Office on January 01, 2010. In the course of this investigation, no data proving that aircrafts linked to the USA CIA illegally transported individuals to and from the territory of the Republic of Lithuania was obtained. During the inspection on-site and other procedures carried out to examine the facilities allegedly outfitted for detaining individuals unlawfully, it was established that no individuals were kept there unlawfully and that facilities were set up for a different purpose.

The legal appraisal of the circumstances investigated in the course of the pre-trial investigation No. 01-2-00016-10 was not limited to Article 228 of the Criminal Code of the Republic of Lithuania (abuse of office) but also [included] Article 100 (treatment of persons prohibited under the international law) and Article 146 (illegal restriction of liberty). In January 14, 2011 the pre-trial investigation No. 01-2-00016-10 was terminated due to the fact that no information was obtained on the illegal rendition of persons, on the detention thereof or other illegal restriction of their liberty or removal if their liberty, as stated in Prosecutor General's report. The superior prosecutor has examined the prosecutor's resolution on the termination of the pre-trial investigation No. 01-2-00016-10 in light of the Criminal Procedure Code and found it to be lawful and substantiated. It transpires from the application (pages 17-18), that the applicants are aware of the facts and their legal appraisal as provided for in the prosecutors report to terminate pre-trial investigation No. 01-2-00016-10, therefore these circumstances are not discussed further in this report.

Taking into account [the fact] that the information, presented in application of September 13, 2013, cannot be considered as factual evidence indicating that a criminal offences has been committed by the by the public officials of the Republic of Lithuania against M. al-Hawsawi and that the allegations about the detention of the USA CIA held individuals (including M. al-Hawsawi) in Lithuania are denied by the pre-trial investigation No. 01-2-00016-13, it should be concluded the Criminal Procedure Code Article 3 Part 1 [is applicable] here, namely that no deed has been done which has indications of a criminal offence or a criminal misdemeanour (paragraph 1), therefore there is no ground to open a pre-trial investigation.

Acting on the basis of the Code of Criminal Procedure of the Republic of Lithuania, Article 168 Part 1 and Article 3 Part 1 Paragraph 1,

it has been decided:

1. To refuse to open a pre-trial investigation into the information provided in September 13, 2013 application of C.Ferstman, director of international non-governmental organisation REDRESS and HRMI authorised representative N.Bitiukova.
2. The applicant can be appeal this resolution to the Vilnius city district court pre-trial investigation judge in 7 days after the copy of the resolution has been received.

Prosecutor of the Department of Organized Crime and Corruption [signed]
Antanas Stepučinskas

F

Extract from Manfred Nowak & Elizabeth Macarthur, The United Nations Convention against Torture: A Commentary 442-3 (2009).

2.2 Analysis of Working Group Discussions

10 In written comments on Article 9 of the original Swedish draft, *Austria* suggested that 'the right to an effective remedy before a national authority' replace the words 'the right to complain to'. It was further suggested by Austria, together with *Denmark*, that the words 'without threat of further torture or other cruel, inhuman or degrading treatment or punishment' be deleted, since, in the opinion of Denmark, they gave a false impression that forms of threat other than torture might be used. The *United States* proposed a new Article which would incorporate the concepts contained in Articles 9 and 10 (the right to complain).[9] The *United Kingdom* proposed that the word 'jurisdiction' be deleted and replaced by 'territory' and further that the words 'without threat of further torture or cruel, inhuman or degrading treatment or punishment' in line 5 be omitted.[10]

11 Article 9 was renumbered Article 12 in the revised Swedish draft. During the discussion in the 1980 Working Group it was suggested that *Articles 12 and 13 be reversed*. The rationale of the representative who made this proposal was that the prevention and punishment of acts of torture were primarily the responsibility of the governments of States parties and not that of the victim, who may not be in a position to make complaints. The Working Group agreed to this proposal. It was pointed out by the same representative that it was necessary to ensure the protection not only of the complainant but also of any witnesses against ill-treatment in retaliation for the complaint made or testimony given. Several representatives suggested that this was necessary in order to encourage witnesses to put themselves at the disposal of the competent authorities. In this connection, one representative proposed that the words 'or intimidation', 'and witnesses' and 'or any evidence given' should be inserted in the last sentence of Article 12.[11]

12 In response to the question on the scope of the phrase '*territory under its jurisdiction*', it was said that it was intended to cover, inter alia, territories still under colonial rule and occupied territories.

3. Practice of the Committee

3.1 State Reporting Procedure

13 The right of complaint afforded to victims of torture or ill-treatment is a fundamental guarantee that must be upheld in all circumstances. For instance,

[9] E/CN.4/1314.
[10] E/CN.4/1314/Add.1.
[11] E/CN.4/1367.

concern was expressed regarding the limited right of complaint afforded under the National Commission on Security Ethics in *France*. The Committee was concerned that the Commission could not accept cases referred to it directly by a person who has been subjected to torture or cruel, inhuman or degrading treatment, but only cases referred to it by a Member of Parliament, the Prime Minister or the Children's Ombudsman. While welcoming the establishment of such a body, the Committee noted that in order to comply with Article 13, the National Commission on Security Ethics must be enabled to accept cases referred to it directly by any person who claims to have been subjected to torture, or cruel, inhuman or degrading treatment in any territory under its jurisdiction.[12]

14 In *Nepal*, the Torture Act of 1996 imposed a statute of limitation of 35 days for complaining about acts of torture and instituting proceedings for compensation. The Committee found such a restriction to be inconsistent with the guarantees provided for in Article 13. This provision requires firstly that the conclusions of any independent inquiry should be made available to victims of torture in order to assist them in pursuing compensation claims. Further, the Committee recommended that the Act should be amended so that there is no statute of limitation for registering complaints and that actions for compensation can be brought within two years from the date that the conclusions of inquiries become available.[13]

15 In addressing *Qatar's* failure to provide compensation, the Committee stated that this provision required that all persons who have been victims of acts of torture should be provided with fair and adequate compensation, and affirmed that this includes the means for a full rehabilitation.[14] Consequently, Article 13 requires that States, in addition to providing adequate avenues of complaint for victims must also establish programmes for the physical and psychological rehabilitation of victims.[15]

16 The Committee has set out the explicit *requirements of Article 13*. Under this provision, States are required to take the requisite measures to ensure that all persons deprived of their liberty or arrested by law-enforcement officials:

- are informed promptly of their rights, including the right to complain to authorities about ill-treatment and the right to be informed promptly of the charges against them;

[12] CAT/C/FRA/CO/3, § 22.
[13] CAT/C/NPL/CO/2, § 28.
[14] CAT/C/QAT/CO/2, § 18.
[15] CAT/C/CR/31/4, § 7(j).

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL-HAWSAWI	**AE-200J (KSM et al)** **Motion of the Redress Trust** for leave to intervene in support of the Defense Motion to Dismiss Because the Amended Protective Order #1 Violates the Convention Against Torture (AE-200) and for Order Granting Permission to Obtain Written Authority from Mr. al-Hawsawi October 17, 2013

DRAFT ORDER

I hereby order that the Redress Trust is granted permission to seek and obtain written authority from Mr. Mustafa al-Hawsawi to act on his behalf in legal proceedings as set forth pursuant to the terms of Forms 1 and 2 attached to this Order.

_____ _____

James L. Pohl
Col. JA, USA
Military Judge

Date

FORM OF AUTHORITY NO. 1 ATTACHED TO ORDER

REDRESS AUTHORITY FORM

I, MUSTAFA ADAM AHMED AL-HAWSAWI, currently of Guantánamo Bay, Cuba

hereby authorise The Redress Trust of 87 Vauxhall Walk, London, United Kingdom to represent me in proceedings outside the United States of America, which excludes proceedings in any court or tribunal convened in territory under U.S. jurisdiction or control, in relation to allegations concerning human rights violations committed against me since 2003 and related matters.

I also specifically authorise the following individuals to act on my behalf in this matter: Carla Ferstman, Director; Lutz Oette, Counsel; Sarah Fulton, International Legal Officer; Harpreet K. Paul, Caseworker.

Signed: _____

Print name: _____

Date: _____

Witnessed: _____

Print name: _____

Date: _____

FORM OF AUTHORITY NO. 2 ATTACHED TO ORDER

EUROPEAN COURT OF HUMAN RIGHTS
A U T H O R I T Y

(Rule 36 of the Rules of Court)

I, MUSTAFA AHMED ADAM AL-HAWSAWI, currently of Guantánamo Bay, Cuba

hereby separately authorise each of Carla Ferstman, Lutz Oette, Sarah Fulton, and Harpreet K. Paul of the Redress Trust, *and* the Redress Trust, of 87 Vauxhall Walk, London SE11 5HJ, United Kingdom to represent me in the proceedings before the European Court of Human Rights, and in any subsequent proceedings under the European Convention on Human Rights, concerning any application by me introduced under Article 34 of the Convention against any member state of the European Convention of Human Rights, at any date after the signature of this authority.

.....
(place and date)

.....
(signature of applicant)

I hereby accept the above appointment

.....

.....

.....

.....