

UNITED STATES OF AMERICA

v.

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

AE200(AAA)

**Mr. al Baluchi’s Notice of Joinder, Factual
 Supplement & Argument to
 Defense Motion to Dismiss**
 Because Amended Protective Order #1 Violates
 the Convention Against Torture

17 September 2013

1. **Timeliness:** This pleading is timely filed.

2. **Relief Requested:**

a. If an OCA has actually classified the observations and experiences of Mr. al Baluchi about his torture, the military commission should dismiss the charges for violation of international law guaranteeing the right to speak about and seek redress for torture and other forms of cruel, inhuman, or degrading treatment.

b. In the alternative, if an OCA has not actually classified the observations and experiences of Mr. al Baluchi about his torture, the military commission should amend AE013AA Amended Protective Order #1 as follows:

Paragraph	Current language	Proposed revision
2(g)(5)	In addition, the term “information” shall include, without limitation, observations and experiences of an accused with respect to the matters set forth in subparagraphs 2g(4)(a)-(e), above.	In addition, † The term “information” shall not include, without limitation, observations and experiences statements of an accused with respect to the matters set forth in subparagraphs 2g(4)(a)-(e), above.

3. **Overview:**

International law, including the Convention Against Torture and the international legal norms it reflects, establishes a legal regime which prohibits nations from committing torture or

silencing those who have been tortured, and requires nations to provide redress to victims of torture. Amended Protective Order #1 attempts to silence Mr. al Baluchi's complaints about his torture by defining his "observations and experiences" as classified. This provision prohibits Mr. al Baluchi from advocating for redress in U.S. venues and international fora, a right guaranteed to him by international law. The purported classification of Mr. al Baluchi's torture also interferes with his ability to investigate and prove his claims, as well as subjecting him to harsher conditions of confinement. Perhaps most fundamentally, this provision prevents Mr. al Baluchi from obtaining rehabilitation from his experience of torture.

4. **Burden of Proof:** The defense bears the burden of proof.

5. **Facts:**

a. Mr. al Baluchi adopts paragraphs 5.A-C of AE 200(MAH,RBS,WBA) Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture.

b. Mr. al Baluchi adopts and paragraphs 3(b)(ii)-(vi) of AE 200 (Mohammad) Mr. Mohammad's Notice of Joinder, Factual Supplement & Argument to AE 200(MAH,RBS,WBA) Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, subject to the proviso that the facts pertaining specifically to Mr. Mohammad's experiences are adopted herein on information and belief only.

6. **Argument:**

A. International law, including the Convention Against Torture, guarantees the right to speak about and seek redress for torture and other forms of cruel, inhuman, or degrading treatment.¹

¹ This motion is limited to international law regarding torture or other cruel, inhuman, and degrading treatment or punishment. Customary international law also prohibits enforced disappearance, prolonged arbitrary detention, and a consistent pattern of gross violations of internationally recognized rights. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) [hereinafter Restatement (Third)]. Other motions may address these elements of customary international law.

The ability to tell someone about torture, and to ask them to do something about it, is integral to the freedom from torture. The definition of the experience of abuse as “classified information” in Amended Protective Order #1 robs the international regime against torture of all meaning: torture is prohibited, but so is attempting to describe the torture and stop it from happening again. The “observations and experiences” provision of Amended Protective Order #1 damages not only the defense but also the fabric of the international norm against torture.

1. International law prohibits torture and other forms of CIDT.

Freedom from torture is a universally acknowledged right. All nation States are obligated to prevent and punish torture as a preemptory rule of international law: the prohibition of torture is a *jus cogens* norm, permitting no derogation.² As such, no countervailing interest,³ including

² See, e.g., Restatement (Third) § 102 Comment k (“Peremptory norms of international law (jus cogens). Some rules of international law are recognized by the international community of states as preemptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a preemptory norm is subject to modification only by a subsequent norm of international law having the same character.”).

³ See General Assembly resolution 39/46 of 10 December 1984 (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) (hereinafter “CAT”), Art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture.”); CAT General Comment No. 2 ¶ 5; CCPR General Comment No. 20 ¶ 3 (1992).

fighting terrorism,⁴ justifies violating the universal prohibition against torture.⁵ The United States has repeatedly proclaimed its recognition of this principle to its citizens and to the world.⁶

The prohibition against torture is a paradigmatic example of customary international law,⁷ a source of international law separate from international agreements.⁸ The United States is bound to protect and defend the individual right to be free of torture as a *jus cogens* rule of customary international law, which binds judicial bodies of the United States, including the military commissions.⁹

The prohibition is also enshrined in numerous international agreements¹⁰ that define torture¹¹ and describe the international regime effecting its prohibition. As part of its adherence

⁴ See, e.g., CAT General Comment No. 2 ¶ 5; CCPR Human Rights Committee, *Concluding Observations: Sweden*, CCPR/CO/74/SWE ¶ 12(a) (2002); Report of the Committee Against Torture, A/57/44 ¶ 17 (2002); CCPR Human Rights Committee, *Concluding Observations: Peru*, CCPR/C/79/Add.67 ¶ 355 (1996).

⁵ See, e.g., Restatement (Third) § 702 (“A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (d) torture or other cruel, inhuman, or degrading treatment or punishment”); CAT General Comment No. 2 ¶ 1, CAT/C/GC/2 (2008) (“Since the adoption of the Convention Against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law.”).

⁶ See, e.g., Initial Report of the United States to Committee Against Torture, CAT/C/28/Add.5 (9 February 2000) (2000) ¶ 100 (“Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.”); Second Periodic Report of the United States to the Committee Against Torture, CAT/C/48/Add.3 (29 June 2005), ¶ 59 (“[O]n June 26, 2004, honoring the U.N. International Day in Support of Victims of Torture, President [George W.] Bush reaffirmed the U.S. commitment to ending torture and stated that the U.S. ‘stands against and will not tolerate torture.’”)

⁷ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J. concurring in part and concurring in the judgment); *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1260 n.4 (11th Cir. 2012) (Barkett, J., specially concurring); *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

⁸ See, e.g., Restatement (Third) § 102 (1) Sources of International Law (“A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; [or] (b) by international agreement...”).

⁹ *The Nereide*, 13 U.S. 388, 423 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is part of the law of the land.”).

¹⁰ See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

to the universal norm prohibiting ill-treatment, the United States signed and ratified the U.N. Convention Against Torture (CAT), the cornerstone of the international regime against torture and other forms of cruel, inhuman, and degrading treatment¹² (collectively called “ill-treatment”).¹³ Ill-treatment includes the infliction of mental as well as physical suffering.¹⁴

Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113; American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev 2 (English ed., 1975); Inter-American Convention to Prevent and Punish Torture, Art. 1, OAS Treaty Series No. 67; reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); International Covenant on Civil and Political Rights (ICCPR), Art. 7, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) [hereinafter Declaration on Torture]; *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

¹¹ “Torture” is defined in the CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” CAT Art. 1(1); *see also, e.g., Turkson v. Holder*, 667 F.3d 523, 526 (4th Cir. 2012); Declaration on Torture ¶ 1(1). The United States “understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm resulting caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec. S17486-01 ¶ II(1)(a) (1990); *see also* MCRE 304(b)(3).

¹² The United States ratified the Convention against Torture in October 1994, and the Convention entered into force for the United States on 20 November 1994. Initial Report of the United States to Committee Against Torture, CAT/C/28/Add.5 (9 February 2000), ¶ 3.

¹³ The United States considers “cruel, inhuman or degrading treatment or punishment” to mean the cruel and unusual punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments. *See* U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights ¶ I(3), 138 Cong. Rec. S4781-01 (1992); U.S. Reservations, Declarations, and

The United States was instrumental in the development and wide adoption of CAT,¹⁵ and has repeatedly expressed a national commitment to “the full and effective implementation of its obligations under the Convention [Against Torture] throughout its territory.”¹⁶ The United States has widely proclaimed that “[t]he absolute prohibition of torture is of fundamental importance to the United States.”¹⁷ In the Torture Victims Relief Act, Congress found that, “The American people abhor torture by any government or person.”¹⁸

The law of war—also known as international humanitarian law—also clearly prohibits torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating

Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec. S17486-01 ¶ I(1) (1990); *see also* MCRE 304(b)(4). “In practice, the definitional threshold between ill-treatment and torture is often not clear.” CAT General Comment No. 2 ¶ 3. The difference between torture and CIDT is a matter of degree rather than kind. *See, e.g., Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010).

¹⁴ *See* CCPR General Comment No. 20 ¶ 5 (1992); Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports), ¶ 12 (Aug. 12, 2013) (<http://www.state.gov/j/drl/rls/213055.htm>; last visited on 17 September 2013) [hereinafter US Third CAT Report] (“[T]he United States agrees that the intentional infliction of mental pain or suffering was appropriately included in the definition of torture to reflect the increasing and deplorable use by certain States of various psychological forms of torture and ill-treatment, such as mock executions, sensory deprivations, use of drugs, and confinement to mental hospitals.”)

¹⁵ Initial Report of the United States to Committee Against Torture, CAT/C/28/Add.5 (9 February 2000) (2000) ¶ 5 (“The United States has long been a vigorous supporter of the international fight against torture. United States representatives participated actively in the formulation of the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1975, and in the negotiation of the Convention against Torture.”).

¹⁶ United States of America, Initial Report of States Parties Due in 1995, Committee Against Torture, CAT/C/28/Add.5 ¶ 6 (Feb. 9, 2000) [hereinafter US Initial CAT Report]; *see also* United States of America, Second Periodic Report of States Parties Due in 1999, Committee Against Torture, CAT/C/48/Add.3 ¶ 5-7 (June 29, 2005) [hereinafter US Second CAT Report]; Statement by President of the United States, Torture Victims Relief Act of 1998, 34 Weekly Comp. of Pres. Doc. 2203 (Nov. 9, 1998).

¹⁷ US Third CAT Report ¶ 2.

¹⁸ Torture Victims Relief Act of 1998, Pub. L. 105-320, 105th Cong., 2d Sess. § 2(1) (1998).

and degrading treatment.¹⁹ “State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.”²⁰ Common Article 3 of the Geneva Conventions prohibits “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment” of civilians and persons *hors de combat*.²¹ In *Hamdan v. Rumsfeld*, the Supreme Court ruled that Common Article 3 of the Geneva Conventions was applicable to all armed conflicts not of an international character, including conflicts between a state and a non-state actor.²² Under the War Crimes Act, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are themselves war crimes.²³

The United States has declared that the individual rights provisions of CAT are not self-executing.²⁴ This declaration, however, “is not a reservation intended to exclude or modify U.S. rights or obligations under the Convention.”²⁵ Even though it is non-self-executing,²⁶ the

¹⁹ International Committee of the Red Cross, *Customary International Humanitarian Law* 315 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (“Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.”).

²⁰ *Id.*

²¹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Art. 3; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Art. 3; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art. 3; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Art. 3 (hereinafter “Common Article 3”).

²² *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006).

²³ 18 U.S.C. § 2441.

²⁴ See U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec. S17486-01 ¶ III(1) (1990) (declaring that Articles 1-16 of the CAT are not self-executing).

²⁵ See *Response of the United States of America, List of Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America* ¶ 5, CAT/C/USA/Q/2 (2006) [hereinafter *U.S. Response*].

²⁶ See *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008) (explaining the meaning of “non-self-executing” in the context of the Vienna Convention).

principles expressed in CAT are part of the domestic law of the United States as a reflection of the *jus cogens* norm against torture.²⁷ In fact, the President of the United States has ordered that CAT governs conduct at Guantanamo Bay.²⁸

Even before the United States signed and ratified CAT, torture and other forms of ill-treatment were proscribed by the Eighth Amendment to the United States Constitution, which prohibits “cruel and unusual punishments.”²⁹ “Protection against torture and cruel, inhuman or degrading punishment or treatment is provided by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution and through U.S. federal and state laws, both criminal and civil.”³⁰

²⁷ See *Sosa*, 542 U.S. at 729 (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“... United States courts apply international law as part of our own in appropriate circumstances.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”); *The Nereide*, 13 U.S. 388, 423 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is part of the law of the land.”); see also *Sarei v. Rio Tinto*, PLC, 671 F.3d 736, 758 (9th Cir. 2011) (holding that Genocide Convention reflected a *jus cogens* norm even if not self-executing), *vacated on other grounds*, 133 S. Ct. 1995 (2013), *on remand*, 2013 U.S. App. LEXIS 13312 (9th Cir. June 28, 2013); *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) (per curiam), *cert. denied*, 2013 U.S. LEXIS 349 (Jan. 7, 2013) (referring to CAT as binding domestic law in the context of a FARR claim). In 2005, the United States told the Committee Against Torture that “the U.S. federal court cases that have referenced the Torture Convention in some way since October, 1999, numbering well over 1000, illustrate the real impact of U.S. Convention undertakings on the U.S. legal system.” U.S. Second CAT Report ¶ 8.

²⁸ Executive Order 13491 on Ensuring Lawful Interrogations, 74 Fed. Reg. 4894 (2009), available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

²⁹ *Baze v. Rees*, 553 U.S. 35, 94-101 (2008) (Thomas, J., concurring) (reviewing the support for the Eighth Amendment as a bar on torturous punishments); Restatement (Third) § 702 Reporters’ Notes 5 (“In the United States, torture as punishment is barred by the Eighth Amendment to the Constitution, and confessions of crime obtained by torture are excluded pursuant to the Fifth Amendment”); U.S. Initial CAT Report (“Torture has always been proscribed by the Eighth Amendment to the United States Constitution, which prohibits ‘cruel and unusual punishments.’”).

³⁰ Common Core Document of the United States of America: Submitted With the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights (December 30, 2011), available at <http://www.state.gov/j/drl/rls/179780.htm>, at 16.

Federal, state and local statutes and law also prohibit ill-treatment, and “it is clear that any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States”.³¹ Since the United States signed and ratified CAT, it has enacted several statutes to extend federal civil and criminal jurisdiction to torture committed extraterritorially.³²

Moreover, the *Charming Betsy* doctrine limits the authority of the military commission to define the observations and experiences of the defendants as classified information.³³ This venerable rule provides that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”³⁴ As argued extensively elsewhere,³⁵ the Military Commission Act definition of “classified information”³⁶ limits the military commission’s authority to define information as classified.³⁷ The military commission cannot define information as classified unless the United States has classified it “pursuant to statute, Executive Order, or regulation.”³⁸ The United States cannot classify the observations and experiences of the defendants because the information is not “owned by, produced by or for, or . . . under the control of the United States Government.”³⁹ Even if CAT were not a part of the domestic law of the United States, the *Charming Betsy* doctrine would require the military commission to interpret 10 U.S.C. § 948a(2) to be consistent with CAT.

³¹ U.S. Initial CAT Report ¶ 101.

³² See 18 U.S.C. §§ 2340-2340A; 18 U.S.C. § 2441; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“[A] clear mandate appears in the Torture Victim Protection Act of 1991, providing authority that ‘establish[es] an unambiguous and modern basis for’ federal claims of torture and extrajudicial killing.” (citations omitted)).

³³ See *Annachamy v. Holder*, 686 F.3d 729, 739 (9th Cir. 2012) (applying *Charming Betsy* doctrine to CAT).

³⁴ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

³⁵ See AE 013G Joint Defense Response to Government Motion to Protect Against Disclosure of National Security Information at 16-18, incorporated herein by reference.

³⁶ 10 U.S.C. § 948a(2); see also MCRE 505(b)(1).

³⁷ 10 U.S.C. § 949p-1(a); 10 U.S.C. § 949p-3; see also MCRE 505(a)(1).

³⁸ 10 U.S.C. § 948a(2)(A).

³⁹ Executive Order 13526 § 1.1(a)(2).

2. International human rights law establishes the right of individuals to speak out about allegations of torture or CIDT.

The right to speak out against ill-treatment is a necessary corollary to the prohibition against torture. States engaged in torture or CIDT always seek to suppress information regarding their actions, often citing national security as their basis for doing so.

Article 13 of the CAT provides in relevant part, “Each State party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.”⁴⁰ This right also extends to cruel, inhuman or degrading treatment.⁴¹ Other international human rights organs have adopted the same position under other instruments.⁴²

The right to complain is at the heart of the protection against torture: “If the individual cannot complain, then there is nothing to prevent and nothing to punish.”⁴³ The ability to complain guaranteed by “Article 13 must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.”⁴⁴ The United States has proclaimed its recognition of this principle to its citizens and to the world: “In all situations, all victims of torture in the United States

⁴⁰ CAT Art. 13.

⁴¹ CAT Art. 16(1); U.S. Initial CAT Report ¶ 301.

⁴² United Nations Human Rights Council, *Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: Rehabilitation of Torture Victims*, at 2, A/HRC/22/L.11 (2013) (“[N]ational legal systems must ensure that victims obtain redress without suffering any reprisals for bringing complaints or giving evidence;”); CCPR General Comment No. 20 ¶ 14 (“The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law.”).

⁴³ Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 Harvard Hum. Rts. J. 87, 101 (2001).

⁴⁴ *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber No. 39630/09 ¶ 255 (E.C.H.R. 2012).

have the right to bring a complaint and to have their case promptly and impartially examined by competent authorities.”⁴⁵

The right to complain is interrelated with the right to free expression. “[F]reedom of expression should be regarded, like the right to a remedy, as a pivotal right in international law. That is because, quite simply, international attention and action against human rights abuses cannot be aroused without it.”⁴⁶ The right to free expression is codified in the major human rights international instruments.⁴⁷ The United States prizes freedom of expression, enshrining it in several clauses of the First Amendment.⁴⁸ The United States may limit freedom of expression in the interest of national security only under narrowly-defined circumstances.⁴⁹ Even

⁴⁵ U.S. Initial CAT Report ¶ 239.

⁴⁶ Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* 104 (1999).

⁴⁷ Universal Declaration of Human Rights, Art. 19 (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”); ICCPR Art. 19(2) (“Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”); American Declaration of the Rights and Duties of Man Art. 4 (“Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”).

⁴⁸ The United States considers the First Amendment to provide even greater protection for freedom of expression than ICCPR ¶ 19. See U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights ¶ III(2), 138 Cong. Rec. S4781-01 (Apr. 2, 1992).

⁴⁹ *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (“McGehee therefore has a strong first amendment interest in ensuring that CIA censorship of his article results from a *proper* classification of the censored portions.”; emphasis original); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972) (“We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.”); ICCPR Art 19(3); CCPR General Comment No. 34 ¶ 35 (“When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”).

considerations of national security can never limit freedom of thought, “which remains the one natural right—or at least capacity—that can never be shackled.”⁵⁰

The right to free expression includes the right to the truth, especially in the context of human rights violations.⁵¹ In an investigation of alleged human rights violations, “the decision to qualify the information as secretive . . . cannot stem solely from a State organ whose members are charged with committing the wrongful acts.”⁵² The right to truth is part of both the right to complain and the right to redress, as the international human rights remedy of satisfaction specifically includes “[v]erification of the facts and full and public disclosure of the truth.”⁵³

3. International human rights law establishes the right to a remedy for torture or CIDT, including the right to rehabilitation.

“[T]he pivotal technical right, which must be implemented as a precondition of the enjoyment of basic liberties, is the right to an effective remedy.”⁵⁴ The right to an effective remedy is recognized in numerous international instruments.⁵⁵

Article 14 of the CAT provides in relevant part, “Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”⁵⁶ This right

⁵⁰ Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* 105 (1999); see also CCPR General Comment No. 34 ¶ 9 (2011) (The “‘right to hold opinions without interference’ . . . is a right to which the Covenant permits no exception or restriction.”).

⁵¹ *Gomes Lund v. Brazil*, at ¶¶ 196-202 (I.A.C.H.R. 2010).

⁵² *Gomes Lund*, at ¶ 202.

⁵³ Basic Principles at ¶ 22(b); see also CAT General Comment No. 3 ¶ 16.

⁵⁴ Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* 92 (1999).

⁵⁵ Universal Declaration of Human Rights, Art. 8, A/RES/3/217 A (10 December 1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); ICCPR Art. 2(3)(a) (“Each State party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”).

⁵⁶ CAT Art. 14(1). The United States understands “that Article 14 requires a State Party to

also extends to victims of cruel, inhuman and degrading treatment.⁵⁷ “Where an individual has an arguable claim that he has been ill-treated by agents of the State, the notion of an ‘effective remedy’ entails . . . a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”⁵⁸ The “term ‘redress’ in article 14 encompasses the concepts of ‘effective remedy’ and ‘reparation,’” including “rehabilitation, satisfaction and guarantees of non-repetition.”⁵⁹ In administration of these remedies, “the restoration of the dignity of the victim is the ultimate objective.”⁶⁰

Under international human rights law, the United States has an obligation to provide “means for as full rehabilitation as possible” for victims of torture and ill-treatment.⁶¹ The Committee Against Torture has specifically directed the United States to ensure “that mechanisms

provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.” U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong Rec. S17486-01 ¶ II(3) (1990).

⁵⁷ CAT General Comment No. 3 ¶ 1, CAT/C/GC/3 (2012) (“The Committee considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (hereinafter ‘ill-treatment’) without discrimination of any kind, in line with the Committee’s general comment No. 2.”); CAT General Comment No. 2 ¶ 3 (“Article 16, identifying the means of prevention of ill-treatment, emphasizes ‘*in particular*’ the measures outlines in Articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14.”).

⁵⁸ *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber No. 39630/09 ¶ 255 (E.C.H.R. 2012).

⁵⁹ CAT General Comment No. 3 ¶ 2. International human rights law recognizes five remedies: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. *See* 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, G.A. Res. 60/147 ¶¶ 18-20 (2005) [hereinafter Basic Principles].

⁶⁰ CAT General Comment No. 3 ¶ 4.

⁶¹ CAT General Comment No. 3 ¶ 11. The Committee Against Torture has emphasized “that the obligation of States parties to provide the means for ‘as full rehabilitation as possible’ refers to the need to restore and repair the harm suffered by a victim whose life situation, including dignity, health and self-sufficiency may never be fully recovered as a result of the pervasive effect of torture. The obligation . . . may not be postponed.” *Id.* at ¶ 12.

to obtain full redress, compensation and rehabilitation are accessible to all victims of acts or torture or abuse . . . perpetrated by its officials.”⁶² In this sense, rehabilitation means “the restoration of function or the acquisition of new skills required as a result of the changes circumstances of a victim in the aftermath of torture or ill-treatment.”⁶³ Efforts at rehabilitation “should be holistic and include medical and psychological care as well as legal and social services.”⁶⁴

The United States has publicly proclaimed the right to rehabilitation from torture. The United States has formally advised the Committee Against Torture, “In addition to monetary compensation, states should of course take steps to make available other forms of remedial benefits to victims of torture, including medical and psychiatric treatment.”⁶⁵ The United States funds domestic and foreign services and rehabilitation for victims of torture, and in 2000, lead the world in its support of the United Nations Voluntary Fund for Victims of Torture.⁶⁶

The Committee Against Torture has specifically identified “State secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress” as obstacles to effective implementation of Article 14.⁶⁷ “[U]nder no circumstances may arguments of national security be used to deny redress for victims.”⁶⁸ “States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment”⁶⁹

⁶² *CAT Conclusions and Recommendations: United States* ¶ 28, CAT/C/USA/CO/2 (2006)

⁶³ CAT General Comment No. 3 ¶ 11.

⁶⁴ CAT General Comment No. 3 ¶ 11.

⁶⁵ U.S. First CAT Report ¶ 284; *see also* ¶ 267 (“Medical and psychiatric treatment and rehabilitation are also available to victims of torture.”).

⁶⁶ Initial Report of the United States to Committee Against Torture, CAT/C/28/Add.5 (9 February 2000) ¶ 249.

⁶⁷ CAT General Comment No. 3 ¶ 38.

⁶⁸ CAT General Comment No. 3 ¶ 42.

⁶⁹ CAT General Comment No. 2 ¶ 4.

B. Defining Mr. al Baluchi's observations and experiences in CIA custody as "classified information" damages him in many ways.

Amended Protective Order #1⁷⁰ defines the defendants' observations and experiences of ill-treatment as "classified information." Paragraph 2(g)(5) states that "the term 'information' shall include, without limitation, observations and experiences of an accused with respect to matters set forth in subparagraphs 2g(4)(a)-(e), above." The subparagraphs in ¶ 2(g)(4) describe information about the defendants' capture, foreign detention, interrogation, conditions of confinement, and the persons involved. Paragraph 2(g) defines all of this information as "classified information" for the purposes of Protective Order #1, and goes on to impose numerous restrictions on the handling of "classified information."

The observations and experiences of the defendants are not actually classified, but only defined as "classified information" by Amended Protective Order #1. The observations and experiences of the defendants cannot be classified because they are not "owned by, produced by or for, or . . . under the control of the United States government."⁷¹ The military commission, not any Original Classification Authority, imposed the restrictions on handling the observations and experiences of the defendants, in direct violation of 10 U.S.C. § 948a(2) and MCRE 505(b)(1).

The military commission's restrictions on the handling of the defendants' observation and experiences of ill-treatment severely prejudices their rights to complain and to redress. In fact, the Committee Against Torture specifically expressed its concern about "the limitations on detainees' effective right to complain" in the military commissions convened under Military

⁷⁰ AE013AA Amended Protective Order #1 to Protect Against Disclosure of National Security Information.

⁷¹ Executive Order 13526 Classified National Security Information § 1.1(a)(2) (Dec. 29, 2009). This argument was developed at length in AE013G Joint Defense Response to Government Motion to Protect Against Disclosure of National Security Information at 16-20, incorporated herein by reference.

Commissions Order No. 1.⁷² Military Commissions Order No. 1 established procedures for national security protective orders,⁷³ but did not specifically purport to classify statements of the defendants. The Committee instructed the United States to “ensure that its obligations under articles 13 and 15 are fulfilled in all circumstances, including in the context of military commissions.”⁷⁴ Protection of these rights is especially important in the military commissions context, because the United States has stripped Mr. al Baluchi protections provided by an independent judiciary.⁷⁵

Even if Mr. al Baluchi’s experiences were in fact classified by an OCA, that element would only exacerbate the problem. The OCAs are no less bound to apply the law than the military commission. Were the military commission to find that it was powerless to override an OCA’s classification decision, the only remedy for the illegality would be dismissal of the charges.

1. Defining Mr. al Baluchi’s observations and experiences as classified prevents advocacy on his behalf in the United States.

The classification of Mr. al Baluchi’s observations and experiences prevents advocacy on his behalf through the many fora available in the United States. The definition of Mr. al Baluchi’s experience of torture as classified prohibits him from seeking redress through legislative, judicial, and executive processes, as well as in the public arena.

First, because Amended Protective Order #1 defines Mr. al Baluchi’s experiences as classified, his attorneys cannot advocate for his interests in the legislative arena. Thus far, “The

⁷² *CAT Conclusions and Recommendations: United States* ¶ 30.

⁷³ Military Commissions Order No. 1 ¶ 6(D)(5)(a) (March 21, 2002).

⁷⁴ *Id.*

⁷⁵ See US Initial CAT Report ¶ 46 (“At all levels, an independent judiciary exists to guarantee fundamental rights, including freedom from torture”); *id.* ¶ 71 (“Among the elements that promote compliance with the standards of the Convention are . . . the availability of effective administrative and judicial remedies for those who believe they have been the victims of abuse or excess.”).

political branches have not been indifferent to detainees' interests. To the contrary, the treatment of military detainees has occasioned extended debate and led to a series of statutes."⁷⁶ Congress has spoken at least three times on issues of detainee ill-treatment,⁷⁷ and could certainly pass further legislation.⁷⁸ Unfortunately, "Classification forced the nation to rely on leaked information to debate these questions [regarding torture], and to do so well after torture . . . programs were in place."⁷⁹ Protective Order #1 prohibits defense counsel from petitioning Congress and contributing Mr. al Baluchi's perspective to the ongoing national debate about the treatment of former CIA detainees.

One critical decision pending in the legislative arena is the release of the Senate Select Committee on Intelligence Report. This classified report, more than 6,000 pages long, includes "details of each detainee in CIA custody, the conditions under which they were detained, the intelligence they actually provided and the accuracy—or inaccuracy—of CIA descriptions about the program to the White House, Department of Justice, Congress and others."⁸⁰ Mr. al Baluchi has requested both the SSCI Report⁸¹ and the CIA response,⁸² but the prosecution has not

⁷⁶ *Vance v. Rumsfeld*, 701 F.3d 193, 200 (7th Cir. 2012) (en banc), *cert. denied*, 2013 U.S. LEXIS 4438 (June 10, 2013).

⁷⁷ See Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190; Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739.

⁷⁸ See *Lebron v. Rumsfeld*, 670 F.3d 540, 551 (4th Cir. 2012) ("Of course Congress may decide that providing a damages remedy to enemy combatants would serve to promote a desirable accountability on the part of officials involved in decisions [relating to detention and interrogation.]"), *cert. denied*, 2012 U.S. LEXIS 4422 (June 11, 2012); *Arar v. Ashcroft*, 585 F.3d 599, 580 (2d Cir 2009) (en banc), (explaining that Congress is the appropriate branch of government to determine the scope of redress for extraordinary rendition).

⁷⁹ Elizabeth Goitein & David M. Shapiro, *Reducing Overclassification Through Accountability* 1 (2011).

⁸⁰ Press Release: Feinstein Statement on CIA Detention, Interrogation Report (December 13, 2012).

⁸¹ Attachment F (DR-051-AAA).

⁸² Attachment G (DR-078-AAA).

responded to either of these requests. If Protective Order #1 did not purport to classify his experiences, Mr. al Baluchi could add important information to the debate over the SSCI Report.

Protective Order #1 also restricts Mr. al Baluchi from seeking redress in the civilian courts. The United States has explained that the reason it has not recognized the competence of the Committee Against Torture to hear individual complaints is that it fully addresses allegations of torture through its domestic legal system.⁸³ The United States has represented that its law “provides various avenues for seeking redress in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. A wide range of civil remedies includes injunctions, compensatory and/or punitive damages and equitable relief.”⁸⁴ The United States has also explained that, “A writ of habeas corpus may also be used to complain of unconstitutional conditions of confinement, including torture or ill-treatment.”⁸⁵

All of those remedies, however, require pleading with sufficient specificity to withstand a motion to dismiss by the government. In *Ashcroft v. Iqbal*,⁸⁶ for example, the plaintiff, a Pakistani Muslim, was arrested on criminal charges and detained by federal officials under restrictive conditions. He subsequently sued under *Bivens v. Six Unknown Named Agents*, claiming that the detention violated his right against discrimination on the basis of religion. The Supreme Court affirmed the dismissal of his complaint on its face. To survive a motion to dismiss, it held, required that the factual allegations be “plausible,” which, it explained, more than the mere possibility that the allegations were true: “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and

⁸³ U.S. Second CAT Report ¶ 163.

⁸⁴ U.S. Third CAT Report ¶ 147; *see, e.g.*, 22 U.S.C. § 2671; 28 U.S.C. § 1350; 42 U.S.C. § 1985; *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

⁸⁵ U.S. Initial CAT Report ¶ 241.

⁸⁶ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

plausibility of entitlement to relief.”⁸⁷ The *Iqbal* standard has been applied to, among other potential remedies for torture, cases brought under the Alien Torts Statute.⁸⁸ Without the ability to relate their experience and perceptions of their treatment at the hands of their interrogators, it is impossible to meet this standard – they can allege nothing at all about the acts that violated their rights, much less allege sufficient facts to make their claims “plausible.”⁸⁹ Thus, in effect, classifying the defendants’ experience removes their right to pursue any civil remedies, including those that have provided an avenue redress for other torture victims.⁹⁰

Indeed, the classification of the defendants’ observations and experiences limits the possibility of advocacy even within the Executive Branch. On information and belief, after the President ordered a review of conditions of confinement at Guantanamo Bay,⁹¹ some military commissions defense counsel attempted to provide information about their clients’ observations and experiences to the review team. The Department of Defense rebuffed this effort on the basis that the information was classified.

Similarly, when then-Convening Authority VADM Bruce McDonald provided the defendants with an opportunity to submit matters in mitigation prior to referral, he thought “counsel would have wanted to submit” information about detainees’ experience because “[h]ow

⁸⁷ *Id.* at 678.

⁸⁸ 28 U.S.C. § 1350; *see Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 14 (2010).

⁸⁹ Indeed, given the absolute bar on their ability to relate their experiences in any manner, attempting to file a civil action would require a complaint so devoid of actionable facts that it would expose the defendants to a significant risk of sanctions under Federal Rule of Civil Procedure 11(c)

⁹⁰ *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2nd Cir. 1995) (holding that torture is actionable under the Alien Tort Statute).

⁹¹ Executive Order 13492, Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities § 6, 74 Fed. Reg. 4897, 4899 (Jan. 27, 2009); *see also* Memorandum for Vice Chief of Naval Operations Regarding Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement (Feb. 2, 2009), *available at* <http://www.defense.gov/pubs/pdfs/App3.pdf>.

they were treated during the detention in my mind does go to mitigation.”⁹² VADM McDonald expected “at a minimum [he] would receive some information that had been already out in the public domain concerning the treatment of the detainees.”⁹³ Of course, because Mr. al Baluchi’s observations and experiences of his detention were classified,⁹⁴ no such information existed.

Finally, the Amended Protective Order prevents presentation of information about Mr. al Baluchi’s abuse to the public, which is both an end in itself and a mechanism to obtain relief through the political process. The United States has explained to the Committee Against Torture that, “the large and active community of non-governmental organizations in the United States works constantly to ensure that abuses that occur are brought to light and the government is responsive to the will of the people. A strong and independent press (including print and electronic media) serves an important role in this regard.”⁹⁵ In sharp contrast to this ideal, the United States has strictly prohibited Mr. al Baluchi and his counsel from bringing his abuse to light.

2. Treating Mr. al Baluchi’s observations and experiences as classified prohibits advocacy on his behalf in international and foreign fora.

The definition of Mr. al Baluchi’s observations and experience as classified completely prevents him from complaining of his ill-treatment to any international body. Although a number of international bodies can help victims of torture and other forms of ill-treatment, Amended Protective Order #1 prevents Mr. al Baluchi from establishing his right to their assistance.

⁹² Unofficial Transcript at 2877.

⁹³ Unofficial Transcript at 2876.

⁹⁴ In early 2012, when the mitigation submissions were due, the United States required counsel to treat every statement Mr. Al Baluchi made as classified. *See* AE009F Joint Motion to Reconsider AE009E Order Regarding Presumptive Classification Att. B.

⁹⁵ US Initial CAT Report ¶ 46; *see also id.* ¶ 71 (“Among the elements that promote compliance with the standards of the Convention are . . . independent promotional and investigative activities by knowledgeable non-governmental groups and organizations . . .”).

The “observations and experiences” restriction prevents Mr. al Baluchi from seeking relief for his ill-treatment in the same manner as other CIA detainees have. In the international human rights context, as in U.S. domestic law, the party charging the State with a violation of human rights, such as torture or ill-treatment, has the initial burden of proof.⁹⁶ Unlike Mr. el-Masri, who obtained relief in the European Court of Human Rights, Mr. al Baluchi cannot prepare a declaration describing his experience in CIA detention.⁹⁷ Release of any declaration from Mr. al Baluchi would require years of declassification review and litigation, if indeed the United States ever released such a declaration.⁹⁸ Given these difficulties, other detainees alleging torture have mainly based their complaints to international human rights bodies on publicly-available information.⁹⁹ Mr al Baluchi cannot do the same, as almost no open-source information about his treatment exists.

⁹⁶ See, e.g., European Court of Human Rights Rules of Court (1 July 2013), *available at* http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf, at Rule 44C § 1 (“Failure to participate effectively”); *id.* at Rule 47 (“Contents of an individual application”). The burden to disprove the allegations shifts to the state once a victim has presented a prima facie case. However, in certain circumstances, the Court will draw ‘inferences’ or ‘presumptions’ of fact, and shift the burden of proof to the state even in the absence of a prima facie case. The specific circumstances of the case and the unequal position of the parties regarding access to evidence inform decisions to shift the burden of proof from the person alleging torture to the state. See, e.g., *Salman v Turkey*, European Court of Human Rights, 21986/93 Judgment (Merits and Just Satisfaction) (2000) at para. 100, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58735;Varnava and Others v Turkey>, European Court of Human Rights, 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment (Merits and Just Satisfaction) (2009) at para. 184, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94162>.

⁹⁷ See *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber No. 39630/09 ¶ 16 (E.C.H.R. 2012) (referencing Mr. el-Masri’s declaration).

⁹⁸ “A request for release of an affidavit from Abu Zubaydah has been pending before the US authorities for more than two years but, as is routinely the case, this request will involve the need for litigation in a US court. In addition, if the document is released, it is likely to be heavily redacted. Attempts to declassify drawings and writings by the applicant during his detention have been unsuccessful.” *Husayn (Abu Zubaydah) v. Poland*, Fourth Section No. 7511/13 ¶ 30 (E.C.H.R. 2013).

⁹⁹ See, e.g., *Husayn (Abu Zubaydah) v. Poland*, Fourth Section No. 7511/13 ¶ 30 (E.C.H.R. 2013).

There are multiple human rights monitoring mechanisms in the United Nations system, including independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.¹⁰⁰ There are regional avenues for redress as well. The Inter-American Commission on Human Rights (IACHR) is one example of a regional monitoring forum to which Mr. al Baluchi could turn for relief if not prohibited by the Amended Protective Order. The United States recognizes the authority of the IACHR to receive and evaluate individual complaints, make general recommendations, request information, prepare reports, and engage in similar investigatory and disseminating activities regarding the human rights compliance of the United States.¹⁰¹ Of course, the IACHR will not act without a factual basis, which Mr. al Baluchi cannot provide because his factual basis is defined as classified.

In addition, if Protective Order #1 did not require defense counsel to treat Mr. al Baluchi's experiences and observations of ill-treatment as classified, defense counsel could advocate directly with the Committee or other entities who provide information to the Committee.¹⁰² Although the United States does not recognize the competence of the Committee Against Torture to hear individual complaints under Article 22, the Committee can hear Article 21 (state-to-state) complaints, query the United States on treaty compliance, and draw attention to U.S.

¹⁰⁰ See, e.g., Commission on Human Rights, Situation of detainees at Guantanamo Bay E/CN.4/2006/120 (27 February 2006) *available at* <http://www2.ohchr.org/english/issues/terrorism/docs/E.CN.4.2006.120.pdf> (joint report submitted by five holders of mandates of special procedures of the Commission on Human Rights).

¹⁰¹ Common Core Document of the United States of America: Submitted With the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights (December 30, 2011), available at <http://www.state.gov/j/drl/rls/179780.htm>, at 125; *id.* at 126 (“The United States recognizes the Commission as an important mechanism for the promotion and protection of human rights in the Americas, in other States as well as our own.”).

¹⁰² See Participation of non-governmental organizations (NGOs) and National Human Rights Institutions (NHRIs) to the reporting process to the Committee Against Torture, *available at* http://www2.ohchr.org/english/bodies/cat/follow_up_ngo.htm.

non-compliance through general comments and statements.

Finally, foreign countries have provided domestic means for their nationals to seek redress for their torture, including torture by other countries in which their own nation has been implicated.¹⁰³ Pakistan has a system of civil justice and an active human rights community;¹⁰⁴ Mr. al Baluchi's access to that system is blocked by the Protective Order for the same reasons that he has no ability to pursue his United States domestic civil remedies.

3. Treating Mr. al Baluchi's observations and experiences as classified leads to harsher conditions of confinement than most other Guantanamo Bay prisoners.

The effort to prevent Mr. al Baluchi from sharing his observations and experiences of ill-treatment, of which ¶ 2(g)(5) is a part, results in much harsher conditions of confinement than Mr. al Baluchi's circumstances warrant. Mr. al Baluchi is housed where he is not because he presents any risk to the general population of prisoners,¹⁰⁵ but rather because he possesses information the United States wishes to suppress.

Although most prisoners at Guantanamo Bay live communally, Mr. al Baluchi lives under conditions equivalent to or more restrictive than a super-max prison. JTF-GTMO does not keep

¹⁰³ See, e.g., Justice Dennis O'Connor, Report of the Events Relating to Maher Arar (September 2006) available at http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf (hereinafter "Arar Commission") at 9 (finding Mr. Arar was interrogated, tortured, and held in degrading and inhumane conditions); *id.*, at 60, 61 ("At the beginning of the Inquiry, many people within government and likely some members of the public believed that Mr. Arar had not been tortured while in Syria and that he had voluntarily admitted links to terrorist activities ... The disturbing part of all this is that it took a public inquiry to set the record straight"); CBC News, Harper's apology 'means the world': Arar (January 26, 2007) available at www.cbc.ca/news/canada/story/2007/01/26/harper-apology.html; CBC News: RCMP's embattled chief quits over Arar testimony (December 6, 2002), available at www.cbc.ca/news/canada/story/2006/12/06/zaccardelli.html.

¹⁰⁴ See, e.g., Justice Project Pakistan, "Justice Project Pakistan Launches the Bagram Campaign" (September 4, 2013) available at <http://www.jpp.org.pk/newsdetail.php?id=3>.

¹⁰⁵ On information and belief, Mr. al Baluchi has presented no serious disciplinary issues while at Guantanamo Bay.

Mr. al Baluchi under these oppressive conditions because he is a danger to himself or others—he is not—but rather to prevent him from conveying his experiences and observations of torture.

“DoD, with the assistance of the ICRC, has established a video-teleconference program through which many detainees are able to see and speak with their family members.”¹⁰⁶ The policy of treating Mr. al Baluchi’s experiences and observations as classified, however, drives the refusal of JTF-GTMO to permit him ICRC-facilitated phone calls with his family. JTF-GTMO has refused humanitarian phone calls even upon the death of Mr. al Baluchi’s father.¹⁰⁷ Mr. al Baluchi is not even allowed to call his attorneys, despite their geographical distance.

4. The definition of Mr. al Baluchi’s observations and experiences as classified seriously damages the quality of his medical care, and prevents meaningful rehabilitation from torture.

See classified addendum.

5. The purported classification of Mr. al Baluchi’s observations and experiences interferes with Mr. al Baluchi’s attempt to investigate and prove his ill-treatment.

International standards require a thorough investigation of a torture victim’s claims, including extensive forensic interviews and medical evaluations regarding the victim’s experience, in order to establish the veracity of torture allegations. In particular, the Istanbul Protocol¹⁰⁸ is recognized by the United States¹⁰⁹ and the international community,¹¹⁰ as the

¹⁰⁶ U.S. Third CAT Report ¶ 223.

¹⁰⁷ See AE093(AAA) Motion to Request One-Time Audiovisual Communication Through the ICRC with Mr. al Baluchi’s Family.

¹⁰⁸ Office of the UN High Commissioner for Human Rights, Professional Training Series No. 8/Rev.1, *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Ill Treatment* (2004) HR/P/PT/8/Rev.1, available at <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf> (last accessed 16 September 2013) (hereinafter “*Istanbul Protocol (2004)*”).

¹⁰⁹ U.S. Third CAT Report ¶ 101 (“The United States recognizes the important role the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) can play in international efforts to promote the effective

definitive statement of standards for the investigation of claims of torture. It contains international guidelines on the assessment of individuals who allege torture and ill treatment, the investigation of cases of alleged torture, and on reporting the findings of such investigations to the judiciary and any other bodies. The Istanbul Protocol became a United Nations official document in 1999 and is published by the Office of the UN High Commissioner for Human Rights in its Professional Training Series.

Forensic medical evaluations of torture and ill-treatment are conducted for purposes that are material and relevant to questions that will come before the military commission: to clarify the facts concerning the detainee's ill-treatment, to establish who is responsible, and to demonstrate any need for medical care and rehabilitation.¹¹¹ "The absence of qualified, independent forensic medical experts to review and render opinions on medical evidence of alleged torture and ill-treatment may preclude the proper discovery of material medical evidence and undermine the legitimacy of judicial decisions."¹¹²

The Government seeks to restrict precisely the type of information a forensic investigator is asked to assess: individual allegations of torture and other ill-treatment. A forensic investigator

investigation and documentation of torture and other ill-treatment.").

¹¹⁰ "The Istanbul Protocol standards are widely recognized by the UN, regional and national human rights bodies and are routinely applied in courts of law as part of the investigative procedures or scientific evidence." International Forensic Expert Group, Statement on access to relevant medical and other health records and relevant legal records for forensic medical evaluations of alleged torture and other cruel, inhuman or degrading treatment or punishment, TORTURE Journal, Volume 22, Supplementum 1 "Forensic Evidence Against Torture", 2012, at 39-48, *available at* <http://www.irct.org/media-and-resources/library/torture-journal/archive/volume-22--supplementum-1--2012.aspx> (hereinafter "*IFEG Statement (2013)*") at 39.

¹¹¹ *Istanbul Protocol (2004)*, at para. 78 (Purposes of effective investigation and documentation of torture and other CIDT include "clarification of the facts and establishment and acknowledgment of individual and State responsibility..." and "demonstration of the need for [*inter alia*] provision of the means for medical care and rehabilitation.")

¹¹² *IFEG Statement (2013)* at 41.

is called upon to render an opinion the degree of consistency between individual allegations of torture and other ill-treatment and specific physical and/or psychological findings. A full and impartial medical and legal assessment of an allegation of torture or other ill-treatment of a living victim requires the investigator to develop a forensic medical opinion about this relationship.¹¹³

To do so, a forensic investigator is required to attempt to obtain as much personal testimony as possible about the place and conditions of detention and the alleged methods of torture and ill-treatment, in a coherent narrative account. Investigators are to seek information that includes observations and experiences uniquely intimate to the victim's personal experience of pain and suffering.¹¹⁴ Other important information includes, *inter alia*, circumstances leading up to the torture, including arrest or abduction and detention; approximate dates and times of the torture, including when the last instance of torture occurred; a detailed description of the persons involved in the arrest, detention and torture; contents of what the person was told or asked; physical injuries sustained in the course of the torture; a description of the usual routine in the place of detention and the pattern of ill-treatment; a description of the facts of the torture, including the methods of torture used.¹¹⁵ Forensic investigators are to consider the following lines of questioning:

- Encourage the person to use all his/her senses in describing what has happened to him or her. Ask what he or she saw, smelled, heard and felt. This is important, for

¹¹³ *Istanbul Protocol (2004)*, at para. 83(d); *id.*, at para. 187 (“For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient.”); *IFEG Statement (2013)* at 41 (“Comprehensive forensic medical evaluations of torture and ill-treatment ... evaluations require an opportunity to interview the alleged victim and to conduct both physical and psychological examinations...”).

¹¹⁴ *IFEG Statement (2013)* at 42 “[T]he nature and extent of psychological reactions to torture and ill-treatment depend on the meaning individuals assign to traumatic experiences.”

¹¹⁵ *Istanbul Protocol (2004)*, at para 99.

instance, in situations where the person may have been blindfolded or experienced the assault in the dark.”).¹¹⁶

- Describe the conditions of the cell or room (note size, others present, light, ventilation, temperature, presence of insects, rodents, bedding and access to food, water and toilet). What did you hear, see and smell? Did you have any contact with people outside or access to medical care? What was the physical layout of the place where you were detained?¹¹⁷
- Describe the room or place. Which objects did you observe? If possible, describe each instrument of torture in detail; for electrical torture, the current, device, number and shape of electrodes. Ask about clothing, disrobing and change of clothing. Record quotations of what was said during interrogation, insults hurled at the victim, etc. What was said among the perpetrators?¹¹⁸
- For each form of abuse, note: body position, restraint, nature of contact, including duration, frequency, anatomical location and the area of the body affected. Was there any bleeding, head trauma or loss of consciousness? Was the loss of consciousness due to head trauma, asphyxiation or pain?¹¹⁹

As currently defined in Amended Protective Order #1, Mr. al Baluchi cannot answer a single one of these questions. Classifying their experience thus takes away their possibility of employing the authoritative professional norms of investigation to refute prosecution efforts to deny or minimize the physical and psychological effects of their treatment.

The freedom from torture is meaningless without the ability to speak out about one’s torture in the hopes of redress. The United States has chosen the classic strategy of democracies which commit torture: claim that the torture victim’s experience is classified in the interest of national security. True national security lies in observing the United States’ international obligations, and allowing Mr. al Baluchi to speak out about and seek redress for his torture.

6. Conference: The moving party conferred with the opposing party. The opposing party objects.

¹¹⁶ *Istanbul Protocol (2004)*, at para 100.

¹¹⁷ *Istanbul Protocol (2004)*, at para 139.

¹¹⁸ *Istanbul Protocol (2004)*, at para 140.

¹¹⁹ *Istanbul Protocol (2004)*, at para 141.

7. **Request for Oral Argument:** The defense requests oral argument.
8. **Request for Witnesses and Evidence:** The following witnesses are relevant and necessary to the resolution of the issues presented in this motion:

Dr. Manfred Nowak

Dr. I

HM#6

The defense reserves the right to identify additional witnesses.

9. **Additional Information:** None.

10. **Attachments:**

- A. Certificate of Service
- B. Classified Addendum
- C. Medical Records
- D. DR-017A-AAA
- E. DR-017C-AAA
- F. DR-051-AAA
- G. DR-078-AAA

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

Counsel for Mr. al Baluchi

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 17th day of September, 2013, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B

Filed on SIPR

United States v. KSM et al.

APPELLATE EXHIBIT 200 (AAA)

(Pages 32-42)

SECRET

Attachment B

**APPELLATE EXHIBIT 200 (AAA) is located in
original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. KSM et al.

APPELLATE EXHIBIT 200 (AAA)

Attachment C

Filed on SIPR

United States v. KSM et al.

APPELLATE EXHIBIT 200 (AAA)

(Pages 44-53)

SECRET

Attachment C

**APPELLATE EXHIBIT 200 (AAA) is located in
original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. KSM et al.

APPELLATE EXHIBIT 200 (AAA)

Attachment D



**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620**

14 November 2012

MEMORANDUM FOR Trial Counsel

FROM: James G. Connell, III, Counsel for Mr. al Baluchi

SUBJECT: SUPPLEMENT TO DEFENSE REQUEST FOR DISCOVERY

Earlier today, the defense requested a copy of all records (electronic or otherwise) in the possession of the United States containing information relating to the physical and mental health and/or treatment of Mr. al Baluchi.

Please note that the defense does not authorize the prosecution to review or examine any such records as they may be covered by M.C.R.E. 513, the HIPAA Privacy Rule, and by common-law privileges and privacy interests with respect to medical treatment. Rather, the defense requests that the prosecution arrange for custodians to provide responsive information directly to the defense and provide contact information for any such custodian.

Thank you for your attention in this matter. If you have any questions about this request or would like to discuss further, please feel free to contact me.

Respectfully Submitted,

//s//

James G. Connell, III
Counsel for Mr. al Baluchi

DR017A

Attachment E

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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

26 August 2013

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, and Military Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY
(Supplemental Request re Defendant's Medical Records)

Defendant, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the following discovery:

Discovery Request

This discovery request supplements the earlier request for medical records dated 14 November 2012 (DR-017-AAA), its supplement of the same date (DR-017A-AAA), and its second supplement (DR-017B-AAA) dated 16 July 2013. On 22 April 2013, the prosecution made a partial production of Mr. al Baluchi's Department of Defense medical records. I appreciate the efforts of the prosecution to expedite this production.

The 22 April 2013 production of medical records is incomplete in several respects. I write to reiterate our request for a complete copy of Mr. al Baluchi's medical records in the possession of the United States. This request includes but is not limited to the following:

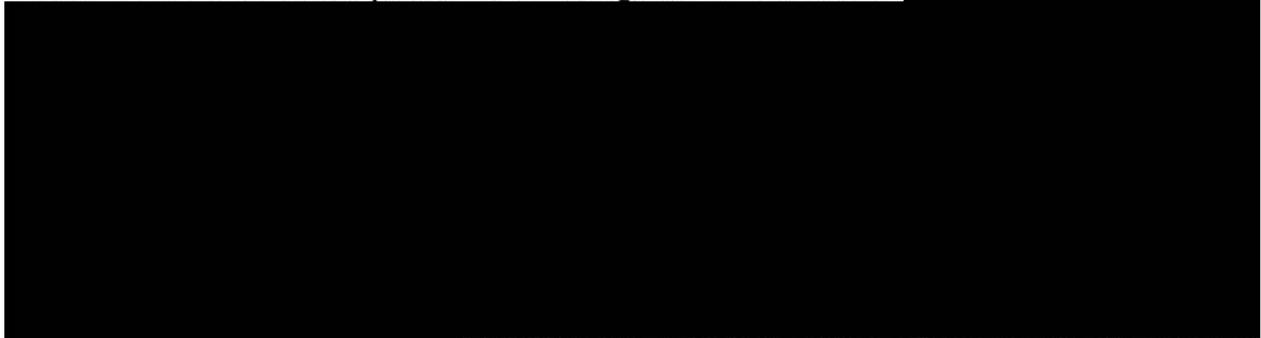
- (1) *Omitted time periods.* The earliest non-redacted date in the produced records is 8 September 2006; the United States had custody of Mr. al Baluchi prior to that date. For example, a medical notation on 28 June 2007 (MEA-10018-00000159) refers to stool samples taken in August 2004 as well as additional follow-up testing. Please provide the complete records for the entire duration that Mr. al Baluchi has been in the custody of the United States. Furthermore, your memorandum of 30 April 2013 indicates that the production omits medical records between June 2012 and February 2013 and stops at 26 March 2013. We have found additional gaps: in the medical records from 13 May 2007 to 10 July 2007; 17 July 2007 to 11 September 2007; 2 August 2007 to 19 March 2008; 6 February 2012 to 6 February 2013; 7 May 2008 to 21 August 2008; 30 January 2009 to 10 May 2009; and everything after 12 November 2010.
- (2) *Medical imaging.* The medical records refer to a CT scan, conducted on 19 October 2006, and also suggest the existence of dental and spinal X-ray imaging.
- (3) *Dental records.* The produced records refer to dental treatments on numerous occasions,

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but do not include the dental records themselves.

(4) *Detainee Socialization Management Program.* The DSMP records produced contain attendance forms regarding intermittent dates during the years 2008-2010. Please provide the complete set of narrative notes taken by the social workers regarding each specific visit from the inception of the program through the current date.

(5) *Un-redacted, un-obscured, and un-changed copies of the already-produced records.* The produced medical records contain redactions of important witness information, including the full names of all the treatment providers, including, but not limited to:



Additionally, important portions of the records are redacted or obscured by artifacts of the copying process. I understand that un-redacted copies may be classified.

(6) *Mr. al Baluchi's handwritten notes.* Please provide the complete and un-redacted versions of all of Mr. al Baluchi's handwritten notes; for example, there is one dated 23 February 2007 that is missing at least the first of what appears to be at least two pages.

Please note that the defense does not authorize the prosecution to review or examine any such records as they may be covered by M.C.R.E. 513, the HIPAA Privacy Rule, and common-law privileges and privacy interests with respect to medical treatment. Instead, the defense requests that the prosecution arrange for custodians to provide responsive information directly to the defense and provide contact information for any such custodian.

Thank you for your attention to this matter. If you have any questions about this request or would like to discuss further, please feel free to contact me.

Respectfully Submitted,

//s//

Sterling R. Thomas
Lt Col, USAF
Counsel for Mr. al Baluchi

Attachment F



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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

21 May 2013

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Military Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY (**DR-051-AAA**)

Defendant, by and through undersigned counsel pursuant to RMC 701, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby submits the following discovery requests.

(1) Please produce the Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program in full without abridgment, abbreviation, expurgation, and/or redaction of any kind.

(2) Please produce all documents and communications of any kind referring or relating to Ali Abdul Aziz Ali, Ammar al Baluchi, or any other names or aliases for the same individual, that are referred to in or provide source material for the Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program, in full without abridgment, abbreviation, expurgation, and/or redaction of any kind.

Please do not hesitate to contact me with any questions or concerns.

Very respectfully,

//s//

Sterling R. Thomas,

Lieutenant Colonel, USAF

Military Defense Counsel for Mr. al Baluchi

Attachment G



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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

15 July 2013

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Military Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY (**DR-078-AAA**)

Defendant, by and through undersigned counsel pursuant to RMC 701, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby submits the following discovery requests.

(1) Please produce all documents mentioning or responding to the Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program in full without abridgment, abbreviation, expurgation, and/or redaction of any kind.

(2) Please produce all documents and communications of any kind referring or relating to Ali Abdul Aziz Ali, Ammar al Baluchi, or any other names or aliases for the same individual, that are referred to in or provide source material for all documents mentioning or responding to the Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program, in full without abridgment, abbreviation, expurgation, and/or redaction of any kind.

Please do not hesitate to contact me with any questions or concerns.

Very respectfully,

//s//

Sterling R. Thomas,
Lieutenant Colonel, USAF
Military Defense Counsel for Mr. al Baluchi