

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH,
RAMZI BIN AL SHAIBAH,
AMAR AL BALUCHI
("ALI ABDUL AZIZ ALI"),
MUSTAFA AHMED ADAM AL HAWSAWI

AE 200(MAH,RBS,WBA)

Defense Motion to Dismiss
Because Amended Protective Order #1 Violates
the Convention Against Torture

12 August 2013

1. **Timeliness:** This motion is timely filed in accordance with the Military Commissions Trial Judiciary Rules of Court.¹
2. **Burden:** The Defense bears the burden of persuasion as the moving party on this motion.²
3. **Relief Sought:** The Defense requests that this Commission dismiss this case.³
4. **Overview:** "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."⁴ This is the law of our land because the United States has ratified the Convention Against Torture (CAT).⁵

¹ See Trial Jud. R. Ct., Rule 3-7.

² See R.M.C. 905(c).

³ Should this Commission enter findings that the interests of justice preclude dismissal of the charges, and there remains legal authority to support the ongoing pursuit of the charges, the accused would assert that the death penalty must be removed as a possible sentence, based on the violations set out herein.

⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85 (hereinafter "CAT" or "the Convention"), Art. 2 (2).

⁵ The CAT, having been ratified by the US Senate at Section 2242 (b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21 1998), and incorporated into federal law through an accumulation of various statutes, *see, e.g.*, Torture Victims Protection Act (TVPA) of 1991, 106 Stat. 73, March 12 1992, is classified within "the Supreme Law of the Land." U.S. Const., Art. VI, cl. 2

Denying the accused the ability to independently seek investigation and relief under the Convention violates our law by precluding the exercise of the non-derogable⁶ rights it assures. At its core, the Convention Against Torture is a treaty that answered the call to an international outcry to prohibit the torture of human beings. The crucial corollary of the non-derogable fundamental right against torture in the CAT is its empowerment of an individual to come forward, claim his right, and have his case investigated. This treaty binds all States Parties, requiring them to enact domestic laws to protect against torture, and granting jurisdiction over States Parties and over individual actors who violate it.⁷ The Convention also forbids States Parties from transporting anyone to a country where there is reason to believe that person will be tortured.⁸ States Parties to the CAT, such as the United States, therefore embrace profound obligations to ensure both the protection and exercise of the rights contained therein.

Amended Protective Order #1 operates to extinguish the accused's individual rights to assert claims under the CAT. The terms of Amended Protective Order #1 bar the accused and Defense Counsel from asserting or pursuing critical avenues of redress and investigation vital to the accused's defense, and that would otherwise be developed if the accused or Defense Counsel could effectively assert his legal rights under the CAT. Under Amended Protective Order #1, Defense Counsel also can do nothing to assist the accused towards this end. Moreover, in order to protect classified information, counsel must completely forgo viable avenues of investigation of the type ethically and legally mandated in a constitutionally sufficient capital mitigation investigation, in violation of Equal Protection, Due Process, the Sixth Amendment right to counsel, and the Eighth Amendment. Because it irremediably infringes on the accused's constitutional rights in a capital prosecution, precluding learned counsel from the reasonable performance of their duties in defending against the death penalty, this case must be dismissed.

Amended Protective Order #1 binds and silences the accused by extending to them a duty to safeguard classified information where no such duty properly lies with them. In effect, the protective order precludes them from exercising their personal rights under the CAT to file a

⁶ Non-derogable rights are treaty rights, widely considered 'absolute' rights, which cannot be suspended or curtailed even in situations of national emergency. Such rights include "the right to life, the prohibition of slavery, prohibition of torture or to cruel, inhuman or degrading treatment or punishment and prohibition of retroactive penal measures." *See* http://www.genevaacademy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php

⁷ CAT, Articles 4 and 5.

⁸ CAT, Article 3

claim, a prohibition that violates the terms of the Convention we ratified. Our Government cannot under any circumstances facilitate a violation of not only our most imperative international treaty obligations, but even more so, our own laws. The ends do not justify the means, a lesson we should have learned by now. Here therefore, the Government simply cannot legally or realistically sustain a capital prosecution that remains faithful to our death penalty jurisprudence, in order to safeguard classified information. The case against the accused cannot stand where the Defense is completely cut off from exploring critical avenues for obtaining evidence, refuting or corroborating existing evidence, and otherwise pursuing the defense through collateral investigations or proceedings.⁹

5. **Facts:**

- A. On April 4, 2012, the Government referred capital charges against the Accused under the Military Commissions Act of 2009 (MCA of 2009).
- B. On February 9, 2013, the Military Judge signed a protective order to govern the handling of classified information in this case. *See* AE 013AA, Amended Protective Order #1.
- C. On that same date, the commission filed a Memorandum of Understanding that defense counsel were to sign, acknowledging the requirements of Amended Protective Order #1. *See* AE 013BB, Amended Memorandum of Understanding Regarding the Receipt of Classified Information.
- D. Classified facts are contained in an *Ex-Parte/Under Seal*, Top Secret/SCI document filed as Attachment C.

6. **Law and Argument:**

A. States Parties to the Convention Against Torture are Bound to Refrain from Torturing and to Preserve the Rights of Torture Survivors

The Convention Against Torture is an international treaty that unequivocally prohibits under any circumstances acts of torture. It commits States Parties to enacting laws that prohibit the

⁹ The rules governing the Military Commission allow for the dismissal of charges against an accused when the Government invokes national security concerns or a privilege to prevent the accused access to, or use of, classified or other government information. *See* RMC 407(b), MCRE 505(h)(6)(A), and MCRE 506 (f).

torture of human beings within their borders.¹⁰ The Convention also forbids States Parties from transporting anyone to a country where there is reason to believe that person will be tortured.¹¹

Article 13 of the CAT creates a non-derogable¹² right of a victim to come forward and have his case investigated, and establishes obligations of State parties to assure those rights.

Specifically, Article 13 provides:

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. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

The United States ratified the CAT in 1998,¹³ thereby accepting as U.S. law the central tenet of the treaty: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁴ The prohibition on torture in the CAT is further enshrined as a “jus cogens” norm throughout the entirety of international law. States Parties to the CAT shoulder profound international obligations to ensure both the protection and exercise of the rights contained therein. In ratifying the CAT, therefore, the United States and the 77 other States Parties¹⁵ have committed to protecting one of the most fundamental rights, which cannot be diminished by any particular circumstances or perceived emergencies. Additionally, this right to be free from torture is equally available to all persons under the CAT and under the Equal Protection Clause.

¹⁰ CAT, Article 4

¹¹ CAT, Articles 2-4.

¹² Non-derogable rights are treaty rights, widely considered ‘absolute’ rights, which cannot be suspended or curtailed even in situations of national emergency. Such rights include “the right to life, the prohibition of slavery, prohibition of torture or to cruel, inhuman or degrading treatment or punishment and prohibition of retroactive penal measures.” *See* http://www.genevaacademy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php

¹³ Implementing legislation for the CAT is Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Division G, Oct. 21, 1998).

¹⁴ CAT, Art. 2 (2).

¹⁵ Status of signatories as of July 17, 2013. *See* http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en

To implement the protections under the CAT, the terms of the Convention establish the Committee Against Torture.¹⁶ This Committee has the authority to investigate an individual's complaints against States Parties to the Convention, and who have recognized the competence of the Committee to investigate these individual claims.¹⁷ A torture survivor should first seek relief in the domestic legal system of the country against which he is complaining.¹⁸ Regardless of the mechanism employed to file an initial complaint, the torture survivor ultimately must be able to impart substantive information sufficient to allow the State Party or the Committee Against Torture to find the claim warrants investigation.¹⁹

A complaint (also called a "petition" or "communication") must establish "reasonable ground to believe that an act of torture has been committed."²⁰ Among other details, the communication should contain the following information:

1. [T]he name of the State Party against which the individual is making a complaint for a violation under the CAT;
2. [T]he specific articles of the CAT that the complainant alleges were violated;
3. [D]etailed facts and circumstances, in chronological order, setting out how the alleged violations occurred;
4. [S]upporting documentation, including any authorization to act on the complainant's behalf, decisions of domestic courts, complaints to and decisions by other international investigatory bodies, and corroborating evidence of the violation.²¹

B. In Violation of U.S. and International Law, Amended Protective Order #1 Prohibits the Accused from Seeking Relief Available under the Convention Against Torture

¹⁶ The Committee is comprised of 10 independent human rights experts, who serve in their individual capacity. *See* CAT, Art. 17.

¹⁷ *See* CAT, Art. 17. The United States has not recognized the competence of the Committee, so it would not entertain individual claims filed to the Committee. Its other commitments under the CAT, however, remain, and other signatories, who have recognized the Committee, may entertain individual claims.

¹⁸ CAT, Art. 22, Section 5 (2). This Article further provides that a complainant may forego this step if seeking a domestic remedy is "unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention."

¹⁹ The accused in this case cannot proceed to file a complaint in any States Parties domestic legal system, nor directly with the Committee Against Torture, due to logistical and legal prohibitions, to include Amended Protective Order #1

²⁰ CAT, Art. 12 ("Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed [sic] in any territory under its jurisdiction.")

²¹ This information is found in the sample Complaint Form to the Committee Against Torture http://www.bayefsky.com/complain/20_form_cat.php

Amended Protective Order #1 violates United States obligations under the CAT by imposing a duty on the accused to protect classified information where no such obligation lies with them, thereby extinguishing their individual abilities to apply for relief. The protective order prevents disclosure of “observations and experiences of an accused.” Under these terms, the accused cannot share their individual experiences and knowledge, or even avail themselves of the assistance of their counsel to do so, to communicate information that they must impart in order to exercise their individual rights to file a claim under the CAT. By precluding their abilities to independently initiate an investigation where the CAT gives them a right to do so; the protective order violates both United States and international law. The protective order carves an unlawful, unethical, and unconscionable exception to our obligations under the CAT, despite the CAT’s terms which allow no exception.²²

The particular breadth of the protective order’s restrictions is noteworthy: It treats as classified not just documents the Defense receives in discovery from the Government, but also information known to or received from the accused. The following information, which is within the specific knowledge of the accused, is deemed classified and prohibited from release under Amended Protective Order #1:

- i. Information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date;
- ii. Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin Attash and Ali Abdul Aziz Ali were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Binalshibh was detained from the time of his capture on or around 11 September 2002 through 6 September 2006;
- iii. The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006;
- iv. The enhanced interrogation techniques that were applied to an accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and
- v. Descriptions of the conditions of confinement of any of the accused from on or around the aforementioned capture dates through 6 September 2006.

²² CAT, Art. 2 (2)

The above list must be read in conjunction with the protective order's troubling expanded definition of the term "information," which is directed at concealing the personal experiences of the accused. Specifically, that definition says:

(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.

Amended Protective Order #1 further denigrates the rights articulated in the CAT by effectively pitting counsel against client. Under the protective order, Defense Counsel must sign a Memorandum of Understanding (MOU) that compels the following:

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

Att. B.

In signing this MOU, defense counsel is also required to agree "to take all reasonable precautions to prevent any unauthorized use or disclosure of any classified documents or information in my possession or control." The MOU then advises that counsel is subject to sanctions and criminal consequences for failing to follow the MOU or Protective Order, and to perjury charges for falsely agreeing to the MOU. Working together, these documents thus attempt to impose an affirmative obligation on defense counsel to silence the accused. As such, the provisions of the protective order, along with the MOU, infringe the accused's right to seek redress for torture under the CAT because these provisions completely preclude the ability to share information that must be imparted to the appropriate authorities, and to the Committee Against Torture.

C. The Inability to Avail Himself of the Assistance of his Counsel Results in Violation of the Accused's Sixth Amendment and Due Process Rights

The right to mount a defense against criminal charges is rooted in the Constitution's Due Process Clause, and the Sixth Amendment. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."²³ The Constitution protects not just the right to present a defense, but the quality of that right.

²³ See *Chambers vs. Mississippi*, 410 U. S. 284, 294 (1973).

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’²⁴ In a death penalty case, the right to present a complete defense also includes the right to have one’s counsel conduct a thorough mitigation investigation. A failure to carry out reasonable mitigation investigation raised by the evidence that is before counsel constitutes ineffective assistance of counsel, in violation of the Sixth Amendment.²⁵ Reasonable professional judgment does not support a limited investigation of personal history in this case. Rather, counsel is confronted with a situation where they are prohibited from assisting or advising their client as to how to pursue a potentially viable avenue for development of mitigation evidence or other relief. Counsel are also cut off completely from pursuing reasonable and critical avenues of investigation due to the classification restrictions in place.

Defense Counsel cannot effectively represent the accused in this capital case under these restrictions, and therefore, without the full and effective assistance of counsel, the case must be dismissed.

D. Conclusion

For the foregoing reasons, Protective Order #1 and the MOU extinguish the accused’s rights under the Convention Against Torture by silencing them and thereby prohibiting them, and defense counsel, from seeking the investigation and recourse the Convention could afford. In effect, the protective order operates unconstitutionally, infringing upon Due Process, Equal Protection, and Sixth and Eighth Amendment rights, by preventing the Defense from pursuing reasonable avenues of investigation. The Government cannot both protect classified information and engage in a prosecution that bears full allegiance to our laws in this death penalty case.²⁶

²⁴ *See generally*, 10 U.S.C. 949b.

²⁵ *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (the Sixth Amendment right to effective assistance of counsel requires counsel to pursue “all reasonably available mitigating evidence and evidence to rebut any aggravating evidence.”)

²⁶ The legal advisor in his pre-trial advice indicated, “Based on consultation with the Office of National Intelligence and appropriate intelligence agencies, I conclude that the trial of the charges would not be harmful to national security.” Page 4 Legal Advisor’s Pretrial Advice dated March 30, 2012. Now, however, the Government is seeking a protective order which acts to preclude the accused’s fundamental constitutional rights to full and fair defense of a capital case. It is apparent, therefore, that this prosecution

Therefore, the accused request that the Commission find that the infringement of rights resulting from the protective order ultimately violates Sixth Amendment, Eighth Amendment and Due Process rights, and that the case must be dismissed.

7. **Request for Oral Argument:** The Defense requests oral argument on this motion.
8. **Request for Witnesses and Evidence:** None, at this time. The Defense, however, refers the commission to the preferred charge sheet in this case, to establish the time frames for the offenses charged against each accused.
9. **Conference:** Counsel conferred via electronic mail with the Prosecution, who indicated that the Government opposes this motion.
10. **Attachments:**
 - A. Certificate of Service
 - B. Memorandum of Understanding for Amended Protective Order #1, AE 013BB
 - C. *EX PARTE/UNDER SEAL TS/SCI Filing*

//s//
WALTER B. RUIZ
CDR, JAGC, USN
Detailed Learned Defense Counsel
for Mr. al Hawsawi

//s//
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//s//
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LCDR, USN
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//s//
MARK V. BALFANTZ
Maj, USMC
Defense Counsel
Counsel for Mr. bin al Shibh

//s//
CHERYL T. BORMANN

//s//
JAMES E. HATCHER

cannot proceed with a fair and open trial against the accused without compromising national security. The remedy, under the MCA itself, is dismissal of the charges now. *See* R.M.C. 407(b); R.M.C. 506(f)

Learned Counsel

LCDR, USN
Defense Counsel

//s//
MICHAEL A. SCHWARTZ Capt, USAF
Defense Counsel
Counsel for Mr. bin 'Attash

A

CERTIFICATE OF SERVICE

I certify that on the August 12th, 2013, I caused to be electronically filed AE 200(MAH) **Defense Motion to Dismiss** Because Amended Protective Order #1 Violates the Convention Against Torture with the Clerk of Court and served the foregoing on all counsel of record by email and Attachment C *EX PARTE*/UNDER SEAL TS/SCI filing by hand delivery to the trial judiciary.

//s//

WALTER B. RUIZ

CDR, JAGC, USN

Detailed Defense Counsel for Mr. Al Hawsawi

B

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 013BB <i>Amended</i> Memorandum of Understanding Regarding the Receipt of Classified Information
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I, _____, [print or type full name], have been provided a copy of and have read Protective Order #1 relating to the protection of classified information in the above-captioned case, and agree to be bound by the terms of that order. I understand that in connection with this case I will receive classified documents and information that are protected pursuant to both the terms of this Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information. I also understand that the classified documents and information are the property of the United States and refer or relate to the national security of the United States.

I agree that I will not use or disclose any classified documents or information, except in strict compliance with the provisions of this Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information. I have further familiarized myself with the statutes, regulations, and orders relating to the unauthorized disclosure of classified information, espionage, and other related criminal offenses, including but

not limited to 50 U.S.C. § 421; 18 U.S.C. § 641; 18 U.S.C. § 793; 50 U.S.C. § 783; and Executive Order 13526.

I agree to take all reasonable precautions to prevent any unauthorized use or disclosure of any classified documents or information in my possession or control. I understand that failure to comply with this Memorandum of Understanding Regarding the Receipt of Classified Information (MOU) or this Protective Order could result in sanctions or other consequences, including criminal consequences. I understand that the terms of this MOU shall survive and remain in effect after the termination of this case, and that any termination of my involvement in this case prior to its conclusion will not relieve me from the terms of this MOU or any protective order entered in the case.

I make the above statements under penalty of perjury.

Signature

Date

Witness

Date

Witness

Date

C

United States v. KSM et al.

APPELLATE EXHIBIT 200 (MAH, RBS, WBA)
(Pages 17-26)

CLASSIFIED/ *EX PARTE*/
UNDER SEAL

Defense Motion

APPELLATE EXHIBIT 200 (MAH, RBS, WBA)
is located in original record of trial classified
annex.

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

United States v. KSM et al.

APPELLATE EXHIBIT 200 (MAH, RBS, WBA)