

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

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	AE 200II ORDER To Defense Motion to Dismiss Because <i>Amended</i> Protective Order #1 Violates the Convention Against Torture 16 December 2013
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1. PROCEDURAL HISTORY. Messr’s Hawsawi, bin al Shibh, and bin ‘Attash filed AE 200 (MAH, RBS, WBA) asserting *Amended* Protective Order #1 Violates the Convention Against Torture and requested all charges against them be dismissed. In a footnote to paragraph 3 of AE 200, they requested, in the alternative, removal of the death penalty as a possible punishment if the charges are not dismissed. Mr. Mohammad joined the motion with supplemental facts and argument also seeking dismissal and, in the alternative, modification of *Amended* Protective Order #1 by striking paragraphs 2(g)(3), 2(g)(4), and 2(g)(5). (AE 200(KSM)) Mr. Aziz Ali joined the motion and provided supplemental facts and argument for dismissal and, in the alternative, proposed a change to paragraph 2(g)(5) of *Amended* Protective Order #1. (AE 200(AAA)) The Prosecution filed a response (AE 200F) opposing all requests for relief and requested the Commission deny the Defense motion. Messr’s Hawsawi, Aziz Ali, and Mohammad filed individual replies to the Government response. (AE 200H, 200I, and 200K) The motion was argued on 22 and 23 October 2013.¹ During argument, the Commission allowed

¹ See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10/22/2013 and 10/23/2013 pp. 6355-6385, 6390-6558 and 6592-6688.

Defense Counsel to submit supplemental pleadings to rebut matters raised in the Prosecution's oral argument. Mr. Mohammad filed a supplemental pleading (AE 200(KSM Supp)) asking the Commission as "an arm of the U.S. Government" to honor the Accused's right to complain about torture and not issue a protective order that inhibits defense investigation for mitigation evidence or otherwise seek remedies through other Nation-State or international tribunals.

2. THIRD PARTY INTERVENTION. The Redress Trust, an international human rights organization, filed a Request to Intervene in Support of the Defense Motion to Dismiss Because *Amended* Protective Order #1 Violates the Convention Against Torture and for Order Granting Permission to Obtain Written Authority from Mr. al- Hawsawi. (AE 200J) This motion was denied in AE 200EE.

3. DEFENSE ALLEGATIONS. Defense asserted *Amended* Protective Order #1, as applied in this Commission, violates the Convention Against Torture and unlawfully interferes with each Accused's right to complain under the Treaty, pursue redress with the Committee Against Torture, pursue redress with the domestic courts of other Nation-States, and pursue an investigation under the Treaty. Defense also alleged *Amended* Protective Order #1 prevents their Counsel from assisting them in asserting claims with the Committee Against Torture or with the domestic courts of other Nation-States. Articles 12 through 14 of the Convention describe all these asserted rights. Additionally, Defense averred the Protective Order prevents the conduct of mitigation investigations in violation of constitutional protections. Mr. Aziz Ali asserted the impact of *Amended* Protective Order #1 causes the personal thoughts and accounts of treatment between capture and detention at Guantanamo Bay (GTMO) to be deemed classified information, which cannot be communicated outside the Commission proceedings absent the permission of an Original Classification Authority (OCA). Mr. Aziz Ali further alleged this

classification of the Accused's thoughts also violates the *jus cogens* norm against torture and the Treaty itself as it prevents him from complaining to independent third party Nation-State courts or other international tribunals.

4. FACTUAL PREDICATE. The issue before the Commission is one of law and not of fact, and thus a factual predicate is not required for the Commission to resolve the issues presented by the Defense. As was noted during the hearing on 22 -23 October 2013, the Commission accepts as true, for purposes of the motion at bar (AE 200), the treatment of each Accused at the hands of "agents of the United States" during relevant times noted in paragraph 2g(4)(b)² of *Amended* Protective Order #1 could be viewed as a violation of the Convention Against Torture.

Additionally, the Commission accepts as true, for purposes of resolving this motion, the Accused attempted to complain to authorities concerning their treatment. Finally, the Commission accepts as true, for purposes of resolving this motion, the Accused have not had contact with representatives of their parent nation's government, and if they had, they would have lodged a complaint concerning their treatment which would allow that government the opportunity to conduct investigations and file protests on behalf of the Accused with the U.S. Government.³

FINDINGS / LAW / DISCUSSION.

5. The United States signed the Convention Against Torture on 18 April 1988, with Senate ratification following on 21 October 1994. The Senate's ratification was subject to specific

² Subparagraph 2g(4)(b) of *Amended* Protective order #1 states: Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad (Mohammad) and Mustafa Ahmed Adam al Hawsawi (Hawsawi) were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin Attash (Bin Attash) and Ali Abdul Aziz Ali (Ali) were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Bin al shibh (Bin al shibh) was detained from the time of his capture on or around 11 September 2002 through 6 September 2006.

³ Requests for diplomatic correspondence and various medical fact witnesses filed by the Accused in AE 200A (Compel Discovery), AE 200M (Allow 12 Medical Personnel Testify), AE 200R (Allow Dr. 1 and HN #6 Testify), and AE 200BB (Compel Discovery) were previously denied by the Commission in separate rulings. *See* AE 200FF, AE 200CC, AE 200DD, and AE 200HH respectfully.

declarations, reservations, and understandings.⁴ Specifically, the Senate declared Articles 1-16 of the Treaty were not self-executing.⁵ Implementing federal legislation is required to give effect in federal courts to these provisions and the rights they describe.⁶ Thus, Articles 1-16 of the Convention Against Torture confer no rights to each Accused. In order for the Accused to obtain relief in a U.S. federal court, a federal statute must exist to implement the terms of the Treaty. 18 U.S.C. §2340 and §2340A define torture and criminalize the act of torture. These statutory provisions do not create individual causes of action, civil or criminal, or individual rights which might benefit the Accused.⁷ As an Article I court of limited statutory jurisdiction, the Commission is without authority to grant relief relying only on Articles 1-16 of the Convention Against Torture, assuming for purposes of this motion the facts averred in the Defense pleadings are true and accurate.⁸ In *U.S. v. Li*,⁹ the First Circuit Court of Appeals declined to dismiss an indictment of a foreign national where consular notification and access was denied in violation of Article 36 of the Vienna Convention on Consular Relations. The Commission is cognizant of the disparity between torture and the denial of consular assistance, but is compelled by the reasoning of the *Li* court and thus similarly declines to dismiss charges or remove the death penalty as a possible punishment due to a violation of a non-self-executing treaty provision herein.

⁴ 136 CONG. REC. S17,486-01; S17,492; and, S17,4904-01 (1990).

⁵ *Id.*

⁶ *Medellin v. Texas*, 552 U.S. 491, 504, 508, and 525 (2008), citing to *Igartua-De La Rosa v. U.S.*, 417 F.3d 145, 150 (1st Cir. 2005) (*en banc*). See also *Foster v. Neilson*, 27 U.S. 253 (1829), overturned in part, on other ground, *U.S. v. Percheman*, 32 U.S. 51 (1883); *Pierre v. Gonzales*, 502 F.3d 109, 119-20 (2d Cir. 2007); *Singh v. Ashcroft*, 398 F.3d 396, 404, n.3 (6th Cir. 2005); and, *M.C. v. Bianchi*, 782 F.Supp.2d 127 (E.D. PA 2011).

⁷ The United States provided the Committee Against Torture a “report of measures giving effect to its undertakings under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in accordance with article 19.” Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of The Convention, Initial reports of States Parties Due in 1995 with Addendum, United States of America, CAT/C/28/Add.5, 9 February 2000 pg 4. At pages 14 and 15 of the report is a discussion on federal statutes and case law which implement the rights outlined in CAT Articles 1-16. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/406/56/PDF/G0040656.pdf?OpenElement>

⁸ See *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003)

⁹ See *U.S. v. Li*, 206 F.3d 56 (1st Cir. 2000).

6. The Commission accepts, for purposes of this motion, torture is prohibited as a *jus cogens* norm of customary international law.¹⁰ This legal fact has no impact on this ruling. “Customary international law norms, like non-self-executing treaties, are not part of domestic U.S. law.”¹¹ Absent implementing legislation, “international norms ... are not a part of the fabric of the law enforceable by federal courts” since 1938.¹² This Commission is thus without jurisdiction, as established in the Military Commission Act of 2009 10 U.S.C. §949p-1 – §949p-7, to rely on customary international law to grant any relief. Other detainees have sought to assert rights and request relief in federal district court relying solely on the Convention, with relief ultimately being denied.¹³

7. The Defense Motion to Dismiss based on alleged restrictions placed on the Defense in seeking alternative sources of mitigation information (AE 200(MAH, RBS,WBA)) essentially requests the Commission authorize the disclosure of information classified by an OCA should charges not be dismissed. During argument, the focus of the issue fell upon the phraseology of paragraph 2g(5). Paragraph 2g introduces subparagraphs 2g(3), 2g(4) and 2g(5) as being definitional in nature and states, “The terms ‘classified national security information and/or documents,’ ‘classified information,’ and ‘classified documents’ include:”

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

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

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

¹⁰ The U.S. Court of Appeals for the 2nd Circuit recognized official torture as being prohibited by the law of nations. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹¹ *Al-Bihani v. Obama*, 619 F.3d 1, 31 (D.C. Cir. 2010).

¹² *Id.* at 33, 89, referencing *Erie R.R. Co v. Tompkins*, 304 U.S. 64 (1938).

¹³ See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010); *Araru v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); and *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir 2009).

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

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

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

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

(5) In addition, the term 'information' shall include without limitation observations and experiences of the accused with respect to the matters set forth in subparagraphs 2g(4)(a)-(e), above."¹⁴

8. The order itself and this Commission are not OCAs. Other Federal executive branch agencies made the determination the information described by these paragraphs must be protected in order to prevent harm to the security of the United States.¹⁵ The Military Judge, like any other judge, lacks authority to abridge the powers of the Executive branch to properly safeguard information relating to our national security.¹⁶ Neither can the Military Judge allow anything other than the proper safeguarding of information relating to our national security in the conduct of the

¹⁴ AE 013AA Amended Protective Order #1 To Protect Against Disclosure of National Security Information, 9 February 2013, at pg 4-5.

¹⁵ Classified Declaration of David H. Petraeus, Director, Central Intelligence Agency, dated 7 April 2012 (filed *ex parte* and UNDER SEAL) and Classified Declaration of Information Review Officer, Central Intelligence Agency, dated 12 April 2012 (filed *ex parte*, *in camera* and UNDER SEAL) as Attachment A and B, AE 013, Government Motion To Protect Against Disclosure of National Security Information.

¹⁶ See *Jewel v. National Security Agency*, __ F. Supp.2d __, 2013 WL 3829405 (N.D.Cal. 2013); *Fazaga v. F.B.I.*, 884 F.Supp.2d 1022, 1042 (C.D.Cal. 2012); *Al-Haramain Islamic Foundation v. Bush*, 451 F.Supp.2d 1215 (D. Or. 2006).

proceedings. The Commission is thus without authority to declassify information presumed to be properly classified.

9. None of the subparagraphs impose a duty or obligation on Counsel or the Accused. The duty and obligation to safeguard and protect classified information exists, to the extent an individual is in privy with the U.S. Government, by statute,¹⁷ Executive Order,¹⁸ administrative service regulation,¹⁹ and signed agreements between an individual (in this case, Defense Counsel) and the U.S. Government.²⁰ These agreements were entered into upon accepting the grant of a security clearance and with it access to classified information. Contrast these definitional subparagraphs with paragraphs 5-8 of *Amended Protective Order #1*. Paragraphs 5-8 set out *how* information determined to be classified by OCAs will be handled by the parties to these proceedings. This regulation of the handling of classified information in these proceedings is well within the limited powers granted to the Military Judge by the Military Commission Act of 2009, 10 U.S.C. §949p-1 – §949p-7. To the extent Counsel for the Accused are exposed to information they know or reasonably should know to be classified, they are bound to protect that information consistent with the duties and obligations outlined in the statutes, directives, regulations and agreements referenced in footnotes 17, 18 and 19.

10. Neither subparagraph 2g(3) or 2g(4) limits the Accused's communications with his Counsel concerning any and all aspects of representation before this Commission. Neither subparagraph 2g(3) or 2g(4) prevent the Defense from conducting necessary mitigation investigation required

¹⁷ See generally 18 U.S.C. §793, 18 U.S.C. §798, 18 U.S.C. §1924, 50 U.S.C. §421, 50 U.S.C. §426, and 50 U.S.C. §783.

¹⁸ Classified National Security Information, Exec. Order No.13526, 75 Fed. Reg. 707 (2009).

¹⁹ See generally, DoD Dir 5210.50, Unauthorized Disclosure of Classified Information to the Public, 22 July 2005; Army Regulation 380-5, Department of The Army Information Security Program, 29 September 2000; Air Force Instruction 31-401, Information Security Program Management, November 2005, through Interim Change 1, 19 August 2009; and, Secretary of the Navy Manual 5510.36, 30 June 2006.

²⁰ Classified Information Non-Disclosure Agreement, Standard Form 312 (Rev 7-2013).

by their ethical responsibilities under the American Bar Association standards.²¹ The Commission recognizes the manner in which questions are asked and information is sought must be adjusted to account prevent the inadvertent disclosure of classified information. The *Amended* Protective Order in and of itself does not prevent the required investigation. For the above reasons, dismissal of charges, removal of the death penalty, and the striking of subparagraphs 2g(3)-2g(5) relying solely on Articles 1-16 of the Convention against Torture is not required.

11. However, consistent with the findings and ruling in AE 013CCC,²² the Commission concludes, paragraph 2g(5)'s prohibition, if one exists, goes to "information" an Accused provides to persons, bound in privy to the U.S. Government due to the grant of a security clearance and access to protected information, who must protect this information from unauthorized disclosure. To this degree, the restriction, if it is a restriction, imposes no additional limitations concerning other classified information that comes into the possession of counsel and is superfluous to the regulation of handling classified information set forth by the *Amended* Protective Order. Thus it will be stricken.

12. RULING. The Defense request to dismiss the charges and to remove the death penalty as a possible punishment is **DENIED**.

The Defense request to strike paragraphs 2(g)(3) and 2(g)(4) from *Amended* Protective Order #1 is **DENIED**.

²¹ American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition, February 2003), 31 Hofstra Law Review, 913, 913-1090 (2003). Accessed at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

²² See AE 013CCC, *Second* Supplemental Ruling, Government Motion To Protect Against Disclosure of National Security Information, dated 16 December 2013

The Defense request to strike paragraph 2(g)(5) from *Amended* Protective Order #1 is
GRANTED.

So ORDERED this 16th day of December, 2013.

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