

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

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

AE363 (Mohammad et al.)

Joint Defense Motion to Compel Discovery
Regarding Unlawful Influence of the Office of
the Chairman of the Joint Chiefs of Staff
Over the Office of the Chief Defense Counsel

30 June 2015

- 1. Timeliness:** This motion is timely filed.
- 2. Relief Requested:** The military commission should compel the government to produce discovery regarding the unlawful influence of the Office of the Chairman of the Joint Chiefs of Staff (OCJCS)¹ over the Office of the Chief Defense Counsel (OCDC), as specified in Attachment B.
- 3. Overview:** In 2014 and 2015, defense teams have successfully advocated for their clients’ interests in international human rights fora and through protection mechanisms such as the Committee Against Torture (CmAT), the Inter-American Commission on Human Rights (IACmHR), the United Nations Working Group on Arbitrary Detention,² the United Nations High Commissioner for Human Rights, the Human Rights Committee of the International Covenant on Civil and Political Rights,³ the United Nations Human Rights Council for the

¹ This motion involves many organizations whose acronyms are not a matter of common usage in the military commissions. This motion uses the generally established acronyms for these organizations, but will also use the full names when appropriate.

² See, e.g., United Nations Human Rights Council Document A/HRC/WGAD/2014 No. 50/2014 (United States of America and Cuba), Opinion of the Working Group on Arbitrary Detention Concerning Mr. Mustafa al-Hawsawi, 23 January 2015 (Attachment C).

³ See Follow-up Recommendation Report of Attorneys for Guantanamo Bay prisoners Ammar al Baluchi and Khalid Shaikh Mohammad, 1 May 2015 (Attachment D); Reply of Mr. Mustafa al-Hawsawi to the United States of America’s 1 April 2015 Response to the Human Rights Committee on Priority Actions Regarding the International Covenant on Civil and Political Rights, 1 May 2015 (Attachment E).

Universal Periodic Review (UPR) of the United States government as well as the special procedures of the United Nations.⁴ The Office of the Chairman of the Joint Chiefs of Staff (OCJCS) represents the government in international fora against claims of human rights violations at Guantanamo Bay.

During the Universal Periodic Review of the United States, a state-driven process in which nations make human rights recommendations, OCJCS Legal Advisor Brigadier General Richard Gross emailed the immediate superiors of the Chief Defense Counsel (CDC) and Chief Prosecutor. Brigadier General Gross advised these senior defense officials of the presence of defense team members in Geneva, “question[ed] their presence here at government expense,” and asked that “something be done to address this.”⁵ By itself, this email constitutes an attempt, by unauthorized means, to influence the exercise of professional judgment by defense counsel in violation of 10 U.S.C. § 949b(a)(2)(C).

It is not clear to the defense how other elements of the Department of Defense responded to Brigadier General’s email. Defense counsel has access to only a small portion of the email traffic following Brigadier General Gross’ initial email. The government has refused to produce the other information surrounding this attempt to unlawfully influence OCDC, and the military commission should compel the government to do so.

4. Burden of Proof and Persuasion: The defense has the initial burden to show potential unlawful influence by “some evidence”: a low burden, but more than mere allegation or speculation.⁶ Put another way, once unlawful influence is raised at the trial level, “a presumption

⁴ These special procedures include the Special Rapporteur on Counter-Terrorism and Human Rights and the Special Rapporteur on Torture or Other Cruel, Unusual, and Degrading Treatment or Punishment.

⁵ Attachment F.

⁶ *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2003).

of prejudice is created.”⁷ The burden then shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful influence or that the proceedings are untainted.⁸ The same burden-shifting framework should apply to a motion seeking discovery regarding unlawful influence.

5. Facts:

Committee Against Torture

a. On 20 January 2010, the United Nations Committee Against Torture (CmAT), which is responsible for oversight of compliance with the Convention Against Torture (CAT), issued its List of issues prior to the submission of the fifth periodic report of United States of America (LOIPR).⁹ An LOIPR is an optional procedure which provides the information the Committee Against Torture is seeking from a state party to the Convention Against Torture. The CmAT LOIPR to the government requested substantial information about Guantanamo Bay, including fair trial standards, redress and rehabilitation for torture, inhumane conditions of confinement, and the request of the Special Rapporteur for Torture to interview Guantanamo Bay detainees.

b. On 12 August 2013, the government provided the Committee Against Torture with its Periodic Report of the United States of America.¹⁰ In its Periodic Report, the government made many claims with which defense counsel disagree, including particulars of fair trial standards and conditions of confinement.

⁷ *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010).

⁸ *United States v. Stoneman*, 58 M.J. 35, 41 (C.A.A.F. 2002).

⁹ This document is available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fQ%2f3-5&Lang=en.

¹⁰ This document is available at <http://www.state.gov/documents/organization/213267.pdf>

c. Soon after the government filed its Periodic Report in 2013, the defendants raised claims under the Convention Against Torture in the military commission.¹¹

d. On 16 December 2013, the military commission ruled that Guantanamo Bay detainees could not enforce their rights under the Convention Against Torture in a military commission.¹²

e. On 10 October 2014, Mr. al Baluchi filed an alternative report with the Committee Against Torture, entitled *The United States' Compliance with the Convention Against Torture with Respect to the Classification of Information regarding the Ill-Treatment of Detainees in Secret Detention*.¹³ Mr. al Baluchi filed this alternative report in anticipation of the November 2014 CmAT review of the United States.

f. On 10 November 2014, counsel for Mr. al-Hawsawi met privately with the Rapporteurs for the Committee Against Torture review of the United States, Dr. Jens Modvig and Mr. Alesso Bruni. During the meeting counsel explained in detail a number of troubling aspects of the military commissions including Protective Order #1, the classification of the defendants' "brains," the potential use of evidence "derived" from torture, and the lack adequate medical care and independent medical assessments for detainees such as Mr. al-Hawsawi.

g. In November 2014, civilian and military members of the Office of Chief Defense Counsel (OCDC) representing Mr. Mohammad, Mr. al Baluchi, and Mr. al Hawsawi participated in events surrounding the Committee Against Torture review of the government's compliance with the Convention Against Torture in Geneva, Switzerland. Specifically, on 11 November

¹¹ See AE200(MAH, RBS, WBA) Defense Motion to Dismiss Because Amended Protective Order Violates the Convention Against Torture; AE200(Mohammad) Notice of Joinder, Factual Supplement & Argument to AE200(MAH, RBS, WBA) Defense Motion to Dismiss Because Amended Protective Order Violates the Convention Against Torture; AE200(AAA) Notice of Joinder, Factual Supplement & Argument to Defense Motion to Dismiss Because Amended Protective Order violates the Convention Against Torture.

¹² AE200LL Order.

¹³ Attachment G.

2014, members of OCDC participated in the Committee Against Torture Formal Consideration of NGOs at Palais Wilson, Geneva, where two OCDC members read prepared statements. Later that day, two OCDC members participated in the Committee Against Torture Informal Civil Society Consultation. Of the fifteen questions CmAT members asked at the Informal Civil Society Consultation, six concerned Guantanamo Bay, and members of OCDC answered five of those six questions. Still later that day, OCDC members participated in the U.S. Government Consultation with NGOs at Palais des Nations, Geneva. Some OCDC members were in uniform during these events. Brigadier General Richard Gross, U.S. Army, Legal Counsel to the Chairman of the Joint Chiefs of Staff, was among those representing the government at the U.S. Government Consultation.

h. On 12-13 November 2014, the Committee Against Torture considered the combined third to fifth periodic report of the United States. The review had five parts, over two days: (1) opening statements of the government; (2) questions from the CAT; (3) responses from the government; (4) follow-up questions from the CAT; and (5) follow-up answers from the government.¹⁴

i. On 12 November 2014, the Rapporteurs and members of the Committee Against Torture asked many questions of the government regarding torture, Guantanamo Bay, and other issues related to the military commission, including the specific issues raised by Mr. al Hawsawi's defense team in their private consultation with the Rapporteurs. Rapporteur Dr. Modvig specifically referenced Protective Order #1 in this case in a question to the government:¹⁵

¹⁴ Attachment H. Because there is no official transcript of the event, the blog JustSecurity.org produced an unofficial transcript.

¹⁵ *Id.* at 18.

As for the Protective Order 1, high value detainees who are victims of torture are prevented from seeking remedy because of classification of the information surrounding their treatment. Could the State Party please explain why victims of torture are silenced this way, prevented from seeking remedy with reference to state security, even including remedies abroad?

j. During this same session on 12 November 2014, LtCol [REDACTED] USMC, a subordinate of Brigadier General Richard Gross at OCJCS, approached uniformed OCDC members and suggested that members should not wear their uniforms while in Geneva. LtCol Hager indicated that Brigadier General Gross had requested that he communicate that message to the uniformed counsel who were present. Subsequently, LNC(SW/AW [REDACTED] Office Manager for OCJCS, contacted the lead defense paralegal on Mr. al Hawsawi's team to inquire why an enlisted service member in Geneva who had been ordered by a Lieutenant Colonel to take his uniform off had refused to do so.

k. On 13 November 2013, the government reported back to the Committee Against Torture. The government explained that it considered the Convention Against Torture to be binding customary international law.¹⁶ The government specifically emphasized that the provisions of the Convention Against Torture govern proceedings, such as the military commissions, at Guantanamo Bay, Cuba:¹⁷

This language clearly covers the sovereign territory of the United States. In addition, we believe that it covers other places the United States controls as a governmental authority. We have concluded the United States currently exercises such control at the U.S. naval station at Guantanamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft.

¹⁶ *Id.* at 26; *see also id.* at 4.

¹⁷ *Id.* at 27. The only exclusion the government claimed is the right to monetary compensation for torture victims detained under the law of war. *Id.* at 28.

1. On behalf of the government, Brigadier General Richard Gross, Legal Advisor to OCJCS, specifically addressed the classification concerns that OCDC counsel and the Committee Against Torture raised, along with the role of defense counsel:¹⁸

Now Mr Modvig, regarding your question about the classification of certain information in military commissions. We must balance the need to comply with U.S. law and regulations regarding the protection of classified national security information with the United States' strong interest [in] ensuring the detainees meaningful access to counsel, including the ability of detainee counsel to access relevant classified information. The United States respects the critical role of detainee counsel in these proceedings and will continue to make every reasonable effort to ensure that counsel can communicate effectively and meaningfully with their clients.

m. On 24 November 2014, the Committee Against Torture issued its Concluding Observations on the third to fifth periodic reports of United States of America, which addressed numerous Guantanamo-related issues. For example, the CmAT stated the following:¹⁹

While noting the explanations provided by the State party concerning the conditions of detention at Guantanamo, the Committee remains concerned about the secrecy surrounding conditions of confinement, especially in Camp 7 where high-value detainees are housed. It Among many other Guantanamo- and torture-related recommendations, the CmAT specifically addressed the issue raised by Mr. al Baluchi in his alternative report and Mr. al Hawsawi's counsel in person, the abuse of classification to limit investigation of and redress for torture:²⁰

Abuse of State secrecy provisions and mutual judicial assistance

15. The Committee expresses its serious concern at the use of State secrecy provisions and immunities to evade liability. While noting the delegation's statement that the State

¹⁸ *Id.* at 30.

¹⁹ Attachment I at 6.

²⁰ *Id.* at 6-7.

party abides by its obligations under article 15 of the Convention in the administrative procedures established to review the status of law of war detainees in Guantanamo, the Committee is particularly disturbed at reports describing a draconian system of secrecy surrounding high-value detainees that keeps their torture claims out of the public domain. Furthermore, the regime applied to these detainees prevents access to an effective remedy and reparations, and hinders investigations into human rights violations by other States (arts. 9, 12, 13, 14 and 16).

The Committee calls for the declassification of torture evidence, in particular Guantanamo detainees' accounts of torture. The State party should ensure that all victims of torture are able to access a remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or the victim.

n. On 9 December 2014, the Senate Select Committee on Intelligence released redacted versions of a Forward to, Findings and Conclusions of, the Executive Summary of, and Minority Views regarding the *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*.²¹ The government's release of the redacted Executive Summary partially complied with the CAT's recommendation "for the declassification and prompt public release of the Senate Select Committee on Intelligence's report on the CIA's secret detention and interrogation programme with minimal redactions."²²

o. On 30 January 2015, the government filed its AE013RRR Motion to Amend AE013DDD Second Amended Protective Order #1 to Protect Against Disclosure of National Security Information. This motion, which asks to remove two categories of classified information from the protective order, is a limited step toward implementing the CAT's call "for

²¹ AE254OO(Mohammad), Mr. Mohammad's Response to AE254KK (GOV), Government Motion For An Expedited Litigation Schedule to Resolve AE254Y, Attachment E (Foreword, Findings and Conclusions, and Executive Summary).

²² Attachment I at 4.

the declassification of torture evidence, in particular Guantanamo detainee's accounts of torture."²³

Inter-American Commission on Human Rights

p. On 6 January 2015, counsel for Mr. al Baluchi and Mr. al Hawsawi submitted separate requests to the Inter-American Commission on Human Rights (IACmHR) for a thematic hearing on U.S. classification of the experience of torture.²⁴

q. On 13 February 2015, the IACmHR decided to convene a hearing on the situation of human rights of persons deprived of liberty in the Guantanamo Naval Base in response to the requests of Mr. al Baluchi and Mr. al Hawsawi.²⁵

r. In March 2015, Mr. al Hawsawi and Mr. al Baluchi separately submitted reports to the IACmHR in anticipation of the hearing on the situation of human rights of persons deprived of liberty in the Guantanamo Naval Base.²⁶

s. On 16 March 2015, the IACmHR held a hearing on the situation of human rights of persons deprived of liberty in the Guantanamo Naval Base.²⁷ Two members of OCDC spoke at the hearing, with six others in attendance. LTC Earl Matthews, Deputy Counsel at OCJCS,²⁸ attended the hearing on behalf of the Department of Defense.

²³ Attachment I at 7. *But see* AE013SSS(AAA) Response to Government Motion to Amend AE013DDD Second Amended Protective Order #1 to Protect Against Disclosure of National Security Information.

²⁴ Attachment J; Attachment K.

²⁵ Attachment L.

²⁶ Attachment M; Attachment N.

²⁷ No transcript of the hearing exists. Attachment O is a video of the hearing EEUU: Personas privadas de libertad de Guantanamo.

²⁸ Attachment P.

t. At the IACmHR hearing, the government praised the military commissions process,²⁹ claiming that it complies with both Common Article Three and Additional Protocol II.³⁰ The government extensively discussed the declassification process surrounding the redacted Executive Summary of the SSCI Report, and argued that classification changes disproved the idea that military commissions are designed to suppress evidence of torture.³¹ The government praised what it considered the commitment of the Chief Prosecutor to exclude evidence derived from torture,³² but said that it would have to defer to the Chief Prosecutor for specifics of discovery and classification review, and lamented that the Chief Prosecutor could not be present at the hearing.³³

Universal Periodic Review

u. From February through May 2015, OCDC members sought to educate international and U.S. delegations to the Universal Periodic Review (UPR) process in Geneva, Switzerland on the issues surrounding the military commissions. The UPR is a state-driven process in which other nations make recommendations on human rights issues, which the reviewed nation can accept or decline.

v. On 22 April 2015, OCDC members received clearance from the U.S. Defense Attache Office to wear their uniforms in Geneva, Switzerland in May 2015.³⁴

w. On 11 May 2015, the United Nations Human Rights Council held its 22nd session in Geneva, Switzerland, regarding the Universal Periodic Review of the United States. Members of

²⁹ Attachment O at 24:38-25:08, 28:16-32:02; 54:15-57:20.

³⁰ *Id.* at 28:53-30:24.

³¹ *Id.* at 33:09-35:25; *see also id.* at 24:55-25:08 (previewing the argument). The government mistakenly asserted that the military commission in this case had granted AE013RRR. *See id.* at 34:13-35:00.

³² *Id.* at 54:44-54:51.

³³ *Id.* at 55:30-56:02.

³⁴ Attachment F.

OCDC attended the UPR, and its side events, on behalf of Mr. Mohammad, Mr. al Baluchi, and Mr. al Hawsawi. Brigadier General Gross of OCJCS represented the Department of Defense at the UPR.

x. Apparently during the UPR itself, Brigadier General Gross sent the following email:³⁵

From: Gross, Richard Clayton (Rich) BG USARMY JS OCJCS (US)
Sent: Monday, May 11, 2015 07:35 AM Coordinated Universal Time
To: Hostetler, Darrin A SES OSD OGC (US); Koffsky, Paul S SES OSD OGC (US)
Cc: Preston, Stephen W HON OSD OGC (US); Taylor, Robert S SES OSD OGC (US)
Subject: UPR -- OMC DC participation

Paul/Darrin:

I am at the UNHRC in Geneva, with the USG delegation, for our report as part of the Universal Periodic Review (UPR).

There are military members of the MC defense counsel office here, presumably at government expense. At least two of them, both Army officers, are in uniform.

I question their presence here at government expense. They are here to publicly criticize and question US policy (at the civil society engagement), not defend their clients. The fact that some are in uniform makes this even more egregious. Many of the other members of the delegation, from other agencies, have asked me about their presence as well.

This is the second time this has occurred; the first was at the CAT presentation in November 2014. Lloyd Hager from my office contacted the MC CDC in advance of this trip to address uniform wear and was assured they would be in civilian attire (Lloyd did not address whether they be here at government expense).

Can something be done to address this?

BTW, we are here in civilian attire, out of respect for Swiss neutrality. I have never worn a uniform in Switzerland, as I have always understood it to be inappropriate.

VR, rich

y. Darrin Hostetler “is Deputy General Counsel (Legal Counsel) for the Department of Defense. In that role, he oversees and coordinates civil and criminal litigation matters for the Department of Defense, including habeas litigation involving Guantanamo detainees and Office

³⁵ Attachment F. Brigadier General Gross’s email is time-stamped 0735 UTC. In May, Geneva’s time zone is UTC+2, so it appears Brigadier General Gross sent his email at 0935 local time. The UPR ran from approximately 0900 to approximately 1230 local time.

of Military Commission prosecutions of the accused plotters of the 9-11 attacks.”³⁶ Mr. Hostetler is the direct supervisor of the Chief Prosecutor.

z. Paul Koffsky “is Deputy General Counsel (Personnel & Health Policy), Office of General Counsel, Department of Defense.”³⁷ Mr. Koffsky is the direct supervisor of the CDC.³⁸

aa. Robert Taylor is Principal Deputy General Counsel of the Department of Defense.³⁹ Mr. Taylor is the direct supervisor of Mr. Hostetler and Mr. Koffsky.

bb. Stephen Preston is General Counsel of the Department of Defense.⁴⁰ Mr. Preston is the direct supervisor of Mr. Taylor.

Discovery request

cc. On 9 June 2015, Mr. al Baluchi sent the government a request for discovery regarding Brigadier General Gross’ email.⁴¹ Mr. al Baluchi explained the background of the request as follows:

³⁶ Attachment Q.

³⁷ Attachment R.

³⁸ RTMC § 9-1(a)(1).

³⁹ Attachment S.

⁴⁰ Attachment T.

⁴¹ Attachment B.

From 2013 to the present, members of the Office of Chief Defense Counsel (OCDC) have participated in a review of U.S. policies in Guantanamo Bay by the Office of Security and Cooperation in Europe.

In November 2014, Brigadier General Richard C. Gross on behalf of the Joint Chiefs of Staff (JCS) and, separately, members of OCDC participated in the 1264th and 1267th meetings of the Committee Against Torture (CAT) in Geneva, Switzerland, regarding the CAT review of the United States.

In March 2015, LTC Earl Matthews on behalf of JCS and, separately, members of OCDC participated in the 154th Session of the Inter-American Commission on Human Rights, in Washington, DC, regarding the Situation of human rights of persons deprived of liberty in the Guantanamo Naval Base.

In May 2015, members of OCDC participated in the one-year review of U.S. compliance with the priority recommendations of the Human Rights Committee on implementation of the International Covenant on Civil and Political Rights.

In May 2015, Brigadier General Gross and, separately, members of OCDC participated in the 22nd session of the Working Group on the Universal Periodic Review (UPR) in Geneva, Switzerland, regarding the UPR of the United States. During this time, Brigadier General Gross wrote an email to senior members of the Department of Defense complaining about the participation of OCDC at the CAT review and UPR, and asking them to address the problem he perceived.

Mr. al Baluchi then requested particularized discovery:

Please produce any and all documents and information regarding discussion of OCDC participation in international bodies from 2011 to present, including but not limited to emails to or from the following persons in May or June 2015:

- (1) Brigadier General Richard C. Gross;
- (2) Darrin A. Hostetler;
- (3) Paul S. Koffsky;
- (4) Stephen W. Preston;
- (5) Robert S. Taylor.

Finally, Mr. al Baluchi explained the legal significance of the request:

Thank you for your prompt attention to this matter. The purpose of this request is to gather information relevant to potential unlawful influence over OCDC in violation of 10 U.S.C.

§ 949b(a). Please do not hesitate to contact me if you require any clarifications or additional information.

dd. One day later, on 10 June 2015, the government refused to produce the requested discovery:⁴²

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the request appear to be material to the preparation of the defense, pursuant to R.M.C. 701. Therefore, the Prosecution respectfully declines to produce the requested material.

6. Argument :

For the second time this year,⁴³ senior members of the Department of Defense have attempted to unlawfully influence elements of the military commissions. Apparently while on the dais waiting to address the U.N. Human Rights Council on Guantanamo issues, a senior member of the Office of the Chairman of the Joint Chiefs of Staff asked other senior DoD officials to silence OCDC critics of Guantanamo. Brigadier General Gross' attempt to influence the professional judgment of defense counsel through the DoD chain of command directly violates 10 U.S.C. § 949b(a)(2)(C) and other protections against interference with the defense team. Discovery is necessary, however, to determine the extent and impact of the attempt to unlawfully influence OCDC.

By itself, Brigadier General Gross' email is sufficient to establish unlawful influence, the "mortal enemy" of military justice.⁴⁴ The Military Commissions Act broadens the protections of UCMJ Article 37, providing that, "no person may attempt to coerce, or by any unauthorized

⁴² Attachment U.

⁴³ On 25 February 2015, the military commission held, on different facts, that, "The actions by the DEPSECDEF, on the recommendations of the Convening Authority, constitute, at least the appearance of, an unlawful attempt to pressure the Military Judge to accelerate the pace of litigation and an improper attempt to usurp judicial discretion; thereby, compromising the independence of the Military Judge." AE343C Order.

⁴⁴ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

means, influence— . . . the exercise of professional judgment by trial counsel or defense counsel.”⁴⁵ Brigadier General Gross brought the weight of OCJCS to bear against OCDC by asking the CDC’s supervisor and other senior defense officials to do “something . . . to address” defense advocacy in international fora “at government expense.”⁴⁶ In fact, Mr. Hostetler, one of the addressees of Brigadier General Gross’ email, is responsible for coordinating the DoD litigation strategy against the defendants in both *habeas* and military commissions.⁴⁷

Unlawful influence, particularly under the military commissions system, also infringes upon the defendants’ right to counsel and places an exceptional strain upon an already delicate attorney-client relationship. Mr. al-Baluchi and his co-defendants were subjected to extensive and sustained psychological torture and manipulation by the CIA. They remained under CIA control after the transfer to Guantanamo,⁴⁸ and have witnessed repeated intrusions by law enforcement and intelligence agencies into the military commission proceedings. As a direct result of the government’s continuing misconduct, it is reasonable for the defendants to expect that the government continues to engage in intelligence-gathering and manipulation against them. The government, by openly pressuring defense attorneys to adjust tactics and pull punches, places further strain on the defendant’s relationship with their government-funded military and civilian counsel.

Brigadier General Gross’ email did not land fortuitously in defense counsel’s hands. Instead, the office of the CDC’s supervisor forwarded it to her to ask for an explanation, which

⁴⁵ 10 U.S.C. § 949b(a)(2)(C). “While statutory in form, the prohibition can also raise due process concerns, where for example unlawful influence undermines a defendant’s right to a fair trial or the opportunity to put on a defense.” *Salyer*, 72 M.J. at 423.

⁴⁶ Attachment F.

⁴⁷ Attachment Q.

⁴⁸ AE254OO(Mohammad) Attachment E at 160 (“After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they . . . remained under the operational control of the CIA.”).

she provided. But defense counsel needs the discovery authorized by RCM 701 to learn what else happened to Brigadier General Gross' email.

RCM 701(a)(2)(A) provides for discovery, *inter alia*, of documentary and tangible information that is “material to the preparation of the defense.” The discovery rules are intended to provide a defendant with “the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case.”⁴⁹ “[A]n accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy.”⁵⁰ Information is therefore material for discovery purposes “as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.”⁵¹

Additional information about OCJCS's attempt to silence OCDC members in international bodies is clearly material to the defense. With the requested discovery in hand, the defense can bring effective motions to dismiss for unlawful influence and other protections against interference with the defense function.⁵² The military commission should order the government to produce the requested discovery.

7. Oral Argument: The defense requests oral argument.

⁴⁹ *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C.1989).

⁵⁰ *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008); *see also United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) (discovery practice is not focused solely upon evidence known to be admissible at trial).

⁵¹ *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotations omitted); *see also United States v. Caro*, 597 F.3d 608, 621 (4th Cir. 2010); *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998); *United States v. Singhal*, 876 F. Supp. 2d 82, 103 (D.D.C. 2012).

⁵² *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“Government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”); *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (dismissing charges because the government interfered with the funding for defense activities).

8. Witnesses:

Brigadier General Richard Gross

9. Conference with Opposing Counsel: The Prosecution opposes this motion. In an email dated 29 June 2015, the Prosecution's position is as follows: "Our position is accurately set forth in our response to your request and it has not changed." The government's detailed position is stated in Attachment U of AE363(Mohammed et al) and reads as follows:

“The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the request appear to be material to the preparation of the defense, pursuant to R.M.C. 701. Therefore, the Prosecution respectfully declines to produce the requested material.”

10. List of Attachments:

- A. Certificate of Service
- B. Defense Request for Discovery, dated 9 June 2015
- C. United Nations Human Rights Council Document, dated 23 January 2015
- D. Recommendation Report of Attorneys for Guantanamo Bay prisoners Ammar al Baluchi and Khalid Shaikh Mohammad
- E. Reply of Mr. Mustafa al-Hawaswi to the United States of America's 1 April 2015 Response to Human Rights Committee, dated 1 May 2015
- F. Brigadier General Gross Email, dated 14 May 2015
- G. United States' Compliance with the Convention Against Torture with Respect to the *Classification of Information* Regarding the Ill-Treatment of Detainees in Secret Detention
- H. Full Transcript US Third Periodic Report to UN Committee Against Torture, dated 12 – 13 November 2014

I. Concluding observations on the third to fifth periodic reports of United States of America

J. Letter in Support of Thematic Hearing on U.S. Classification of the Experience of Torture, dated 6 January 2014

K. Request for a hybrid thematic and individual complaint hearing during the 154th Period of Sessions on the effect of the release of the redacted version of the United States Senate Select Committee on Intelligence Report

L. Situation of human rights of person deprived of liberty in the Guantanamo Naval Base Hearing, dated 13 February 2015

M. Executive Summary For Mr. Mustafa al Hawsawi, Human Rights Situation of Persons Deprived of Liberty at the Guantanamo Naval Base, Cuba inter-American Commission on Human Rights, dated 16 March 2015

N. Situation of human rights of person deprived of liberty in the Guantanamo Naval Base Hearing 154th Sessions Submission of attorneys for Ammar al Baluchi.

O. Video of Inter-American Commission on Human Rights hearing (hand delivered)

P. Earl Matthews LinkedIn page

Q. Darrin A. Hostetler biography page

R. Paul S. Koffsky biography page

S. Robert S. Taylor biography page

T. Steven W. Preston biography page

U. Memorandum for Counsel for Ali Abdul Aziz Ali, dated 10 June 2015

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

Counsel for Mr. al Baluchi

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//

DAVID Z. NEVIN
Learned Counsel

//s//

DEREK A. POTEET
Maj, USMC
Defense Counsel

Counsel for Mr. Mohammad

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

TODD M. SWENSEN
Maj, USAF
Defense Counsel

//s//

MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

Counsel for Mr. bin 'Attash

//s//

JAMES P. HARRINGTON
Learned Counsel

//s//

TRI H. NHAN
CDR, USNR
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//s//

ALAINA M. WICHNER
MAJ, USA
Defense Counsel

Counsel for Mr. bin al Shibh

//s//

WALTER B. RUIZ

Learned Defense Counsel

//s//

JENNIFER N. WILLIAMS

LTC, JA, USAR

Defense Counsel

Counsel for Mr. al Hawsawi

//s//

SEAN M. GLEASON

LtCol, USMC

Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 30th day of June, 2015, I electronically filed the foregoing document, with the exception of Attachment O, with the Clerk of the Court and served the foregoing on all counsel of record by email. Attachment O was hand delivered to all parties.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B



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

9 June 2015

MEMORANDUM FOR Trial Counsel

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

SUBJECT: DEFENSE REQUEST FOR DISCOVERY
**Communication re Office of Chief Defense Counsel participation in
international bodies**

Discovery Request

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, 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:

Definitions

In this request, the following definitions shall govern:

"Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

"Information" means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, and to include handwritten, recorded, or electronic documents.

"International bodies" means supranational organizations addressing human rights issues, including but not limited to components of the United Nations, Organization of American States, and Organization for Security and Cooperation in Europe.

"Produce" means to convey to the defense without redaction (except as authorized by the military commission pursuant to MCRE 505) or alteration of any electronically stored information associated with the document. If the military commission authorizes substitutions or redactions pursuant to MCRE 505, the word "produce" includes a notation of the Appellate Exhibit number of the order authorizing the substitutions or redactions. To the extent that responsive documents are subject to the attorney-client or other applicable privilege, the word "produce" means to provide a privilege log of any withheld information or documents, along

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with the facts disclosed in the responsive documents that are not communications protected by attorney-client privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt.

Background

From 2013 to the present, members of the Office of Chief Defense Counsel (OCDC) have participated in a review of U.S. policies in Guantanamo Bay by the Office of Security and Cooperation in Europe.

In November 2014, Brigadier General Richard C. Gross on behalf of the Joint Chiefs of Staff (JCS) and, separately, members of OCDC participated in the 1264th and 1267th meetings of the Committee Against Torture (CAT) in Geneva, Switzerland, regarding the CAT review of the United States.

In March 2015, LTC Earl Matthews on behalf of JCS and, separately, members of OCDC participated in the 154th Session of the Inter-American Commission on Human Rights, in Washington, DC, regarding the Situation of human rights of persons deprived of liberty in the Guantanamo Naval Base.

In May 2015, members of OCDC participated in the one-year review of U.S. compliance with the priority recommendations of the Human Rights Committee on implementation of the International Covenant on Civil and Political Rights.

In May 2015, Brigadier General Gross and, separately, members of OCDC participated in the 22nd session of the Working Group on the Universal Periodic Review (UPR) in Geneva, Switzerland, regarding the UPR of the United States. During this time, Brigadier General Gross wrote an email to senior members of the Department of Defense complaining about the participation of OCDC at the CAT review and UPR, and asking them to address the problem he perceived.

Request

Please produce any and all documents and information regarding discussion of OCDC participation in international bodies from 2011 to present, including but not limited to emails to or from the following persons in May or June 2015:

- (1) Brigadier General Richard C. Gross;
- (2) Darrin A. Hostetler;
- (3) Paul S. Koffsky;
- (4) Stephen W. Preston;
- (5) Robert S. Taylor.

Thank you for your prompt attention to this matter. The purpose of this request is to gather information relevant to potential unlawful influence over OCDC in violation of 10 U.S.C.

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§ 949b(a). Please do not hesitate to contact me if you require any clarifications or additional information.

Respectfully submitted,

//s//

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

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2015-06-09

Attachment C

United Nations

A/HRC/WGAD/2014



General Assembly

Distr.: General
23 January 2015

Original: English

Human Rights Council
Working Group on Arbitrary Detention

ADVANCE UNEDITED VERSION

**Opinions adopted by the Working Group on Arbitrary
Detention at its seventy-first session, 17– 21 November 2014**

No.50/2014 (United States of America and Cuba)

**Communication addressed to the Government of the United States of
America on 25 August 2014 and to the Government of Cuba on 15
September 2014.**

Concerning Mustafa al Hawsawi

**The Government of the United States of America replied to the communication of 25
August 2014 on 29 September and 14 November 2014. The Government of Cuba has
not responded to the communication of 15 September 2014.**

**The United States of America is a party to the International Covenant on Civil and
Political Rights.**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

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A/HRC/WGAD/2014

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case has been reported to the Working Group on Arbitrary Detention as follows:

4. Mr. Mustafa al Hawsawi, aged 45, is a native of Jeddah, Saudi Arabia. It is reported that on 1 March 2003, Mr. al Hawsawi was arrested during a raid in Rawalpindi, Pakistan. He was then imprisoned by Government agents of the United States of America at undisclosed and classified locations, until his transfer to a Top Secret prison at the U.S. Naval Base at Guantanamo Bay, Cuba, on 6 September 2006.

5. According to the source, the U.S. Government has acknowledged that, prior to his arrival at Guantanamo, Mr. al Hawsawi was part of the Central Intelligence Agency (CIA) Rendition, Detention, and Interrogation Program (RDI), which has now become known as the Torture Program. Because the U.S.A. Government has classified the details of this programme, Mr. al Hawsawi and his legal representatives are prohibited from revealing any circumstances of Mr. al Hawsawi's capture, including the identities of the personnel who carried out the arrest and subsequent detention, and any details of torture, or other degrading, cruel, or inhumane treatment that he may have been subjected to during that time.

6. Mr. al Hawsawi's legal representatives have been prohibited from meeting with him at his place of detention.

7. On 21 March 2007, Mr. al Hawsawi was brought before a Combatant Status Review Tribunal (CSRT). The tribunal met for the purpose of determining whether Mr. al Hawsawi met the criteria to be designated as an enemy combatant against the U.S.A. or its coalition partners. The source reports that instead of being assigned an attorney, Mr. al Hawsawi was assigned a one-time personal representative who was a military officer without any legal training.

8. The tribunal hearing lasted one hour and nine minutes, after which time it concluded that Mr. al Hawsawi met the definition of Unlawful Enemy Combatant, and that he should remain in detention. The source informs that the tribunal failed to provide basic procedural protections such as the exclusion of coerced statements, the exclusion of unreliable hearsay evidence, the ability to cross-examine witnesses, and consideration of Government evidence as presumptively correct.

9. The source informs that Mr. al Hawsawi continued to be held without charges or legal representation until April 2008, when he was assigned a military lawyer that was not of his own choosing. Over five years after Mr. al Hawsawi's arrest, the U.S.A. Government provided notice of its intention to seek the death penalty against Mr. al Hawsawi, and

charged him with numerous allegations of violating the law of war. The violations included: murder, conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, hijacking or hazarding a vessel or aircraft, terrorism, and providing material support for terrorism. A military commission was established for the purpose of trying Mr al Hawsawi and four co-accused.

10. On 29 January 2009, all proceedings related to Mr. al Hawsawi's military commission ceased prior to having reached a resolution, or being brought before a jury, following the issuance of the Presidential Executive Order 13492, directing the review and disposition of individuals detained at the Guantanamo Naval Base and closure of detention facilities. Meanwhile, Mr al Hawsawi remained in detention at the Top Secret prison in Guantanamo Bay.

11. On 21 January 2010, all charges against Mr. al Hawsawi and four co-accused were dropped. The source reports that Mr. al Hawsawi continued to be detained without charges until 31 May 2011, when the process for prosecution was again initiated against Mr. al Hawsawi and four co-accused. Presently, Mr. al Hawsawi is charged with conspiracy, attacking civilians, attacking civilian objects intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, and terrorism.

12. The source submits that the deprivation of liberty of Mr. al Hawsawi is considered arbitrary and falls under category I of the Working Group's defined categories of arbitrary detention. The domestic law utilised by the Government of the U.S.A. to detain does not conform with international human rights law and international humanitarian law, in particular Article 9 of the Universal Declaration of Human rights, Article 9 of the International Covenant on Civil and Political Rights, and Principles 4, 10, 11, 12, 32, 36 and 37 of the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment.

13. The source reports that Mr. al Hawsawi has been subjected by a prolonged and indefinite detention, without any legal basis or known charges against him for the five years following the date of his arrest. It argues that the arrest of Mr. al Hawsawi by unidentified governments agents and his subsequent detention at undisclosed locations violates his right to be brought promptly before a judicial authority to challenge the legality of his detention. He has also been imprisoned for over 10 years without a trial, and without the reasonable means to prepare for such a trial. Further, as a result of the public pronouncements made by authorities of his guilt, his presumption of innocence has been compromised in breach of Article 11(1), UDHR, and Principle 36 of the Body of Principles.

14. According to the source, Mr. al Hawsawi has been charged for acts which the international law of war does not recognise as a legitimate crime, that is, the material support for terrorism, conspiracy and terrorism. It submits this is in contravention of Article 11(2) UDHR, and the jurisprudence of the U.S.A. Court of Appeals for the District of Columbia.

15. The source further submits that the deprivation of liberty of Mr. al Hawsawi falls under category III of the Working Group's defined categories of arbitrary detention. The detention of Mr. al Hawsawi is in total or partial non-observance of the international norms relating to a fair trial, guaranteed by Article 10, UDHR, Article 14, ICCPR, and Principles 15, 16, 17, 18 and 19 of the Body of Principles. The source highlights that Mr. al Hawsawi was held without consular access, access to family and access to legal counsel. Furthermore, the CSRT hearing provided to Mr. al Hawsawi has been deemed defective by the U.S.A. Supreme Court as the hearing was reportedly conducted in secret, on the basis of unreliable evidence, and without permitting Mr. al Hawsawi representation by qualified legal counsel.