BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES

TRIAL OBSERVATION REPORT

USA v Mohammed et al

September 2021

Written by
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Members of the Executive Committee (2020-2021)
Bar Human Rights Committee of England and Wales

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About the Bar Human Rights Committee of England and Wales

The Bar Human Rights Committee of England and Wales (BHRC) is the independent, international human rights arm of the Bar of England and Wales, working to protect the rights of advocates, judges, and human rights defenders around the world. BHRC is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. It is autonomous of the Bar Council.

Our vision is for a world in which human rights are universally protected, through every government and state actor's adherence to international law obligations and internationally-agreed norms.

Our mission is to protect and promote international human rights through the rule of law, by using the international human rights law expertise of some of the UK's most experienced human rights barristers.

BHRC members are primarily barristers called to the Bar of England and Wales, as well as pupil barristers, legal academics, and law students. Our members include some of the UK's foremost human rights barristers, legal practitioners, and academics.

Our Executive Committee and members offer their services pro bono, alongside their independent legal practices, teaching commitments and legal studies. BHRC is also supported by two Project Officers and a Project Administrator.

Introduction

1. For many years BHRC has kept a watching brief on the use of the detention facility at the United States ("US") Naval Base, Guantánamo Bay, Cuba ("the Base") and procedural developments in the Military Commissions established under the Military Commissions Act 2009. The BHRC has expressed its concerns on this together with broader issues arising out of the 'War on Terror', including extraordinary rendition and torture.[1] However, detailed observation and comment has been hampered by the logistical difficulty of being unable to view proceedings, the level of secrecy surrounding much of the evidence and the inordinate length of time that the pre-trial phase is taking. There are many reasons for the delays hampering extant trials, not least issues with high turnover of judicial personnel, much of it apparently avoidable, and persistent breaches of procedural norms, the consequences of which were observed by our team.

2. Further to a highly welcomed decision by the US to approve BHRC as an International Observer NGO[2], Jacob Bindman and Amanda Weston QC, both of whom are barristers at Garden Court Chambers in London and who are Executive Committee members of BHRC visited the Base between 9 – 22 February 2020 in order to observe the trial of **Khalid Sheikh Mohammed, Ramzi Binalshibh, Ali Abdul Aziz Ali (Ammar Al Baluchi), Walid Bin Attash and Mustafa Al Hawsawi ("the 9/11 trial")**. The five men are classed as "alien unprivileged enemy belligerents" and are being tried by the US Government under a specially created Military Commission system for a range of crimes relating to the planning of the 9/11 hijackings and attacks on the US.

[1] See Letter to UK Prime Minister Tony Blair concerning the continued incarceration of the Guantanamo Bay detainees, 14 November 2003, available at https://www.barhumanrights.org.uk/letter-to-prime-minister-tony-blair-concerning-the-continued-incarceration-of-the-guantanamo-bay-detainees/; Joint letter to the US Attorney General, 12 May 2009.

[2] One of only two non US NGO's approved to attend the trials at the GTMO Military Commission – the other being the Association of Defence Counsel practising before the International Courts and Tribunals or 'ACD-ICT'.

3. The defendants in the 9/11 trial were arraigned in 2012 and pre-trial arguments have been ongoing for over 8 years. A provisional trial date of January 2021 has been scheduled, however, in light of the COVID-19 pandemic and a number of unrelated personnel issues, that date is highly unlikely to be viable. Further, in June 2020 the military judge appointed to oversee the trial retired, the judge appointed to replace him in September cancelled the remaining 2020 hearings in order to familiarize himself with the case and its voluminous procedural history only to recuse himself a few weeks later. In October 2020 Air Force Lt. Col. Matthew McCall was assigned to the case as its sixth judge in the past eight years. At time of writing, the trial is poised to restart following a long hiatus owing to the pandemic.

4. The purpose of BHRC's visit in February 2020 was to initiate the first step in what is hoped to be a regular series of trial observations in the final run up to, and during, the trial itself. This interim report therefore provides an introduction to BHRC's interest in the proceedings and its plans to continue a programme of trial observations. It addresses the situation and status of the proceedings monitored at the time of the two missions conducted by BHRC. Once further observations can be carried out, we will publish updated reports. This report gives a flavour of the impact on progress of the departures from the principles of a fair trial, the resulting procedural complexity of the trials and the factors influencing their glacial pace.

5. The trial itself is the largest terrorism trial in US history, both in terms of the crimes being tried and the sheer volume of material. The defendants were all subject to between 8-10 years of detention before arraignment even took place in 2012. The Military Commissions system that was devised to try these men is currently in its second iteration. The first was struck down as unconstitutional by the US Supreme Court in 2006. A second one was created by the Obama administration in 2009, which (subject to amendments along the way) is the version that is currently being used to hear the 9/11 trial. The charges would have been readily prosecutable in US Federal Court and indeed some of the accused were first indicted in the Southern District of New York whose attorneys remain part of the prosecution team. From its peak of 780 detainees in 2005, 39 people remain incarcerated at Guantánamo.

Hearings Observed in February 2020

6. In order to observe any proceedings taking place at the Military Commissions, the organisation which the observer represents must be accredited by the US Department of Defence ("DOD") and clearance must be granted for the individual to travel to the Base.[3] Observers are required to stay on the Base for a full week, regardless of the hearing schedule, as air transport is only provided weekly and is in any event often subject to late changes and delays. Tensions regarding adequate funding of the Military Commissions was an oft communicated theme.

7. Jacob Bindman visited the base the week of the 9-15 February 2020 and Amanda Weston QC the week of the 15-22 February 2020. Since the start of proceedings in 2012, the hearing schedules have been affected by late changes and delays. As a result, the two weeks of witness testimony that had been scheduled ended up turning into several days of legal argument spread across the two weeks observed. Despite the unforeseen changes to the witness schedule, both observers were able to gain a clear understanding of how these extraordinary proceedings and the detention facilities operate, and of the complexity of the legal arguments and tactical approach of both prosecution and defence. Both attendees were grateful to the support and access provided by the staff of the Military Commissions and defence counsel.

[3] The only other means of the public viewing proceedings is via a feed (with a 2-minute delay for security purposes) that is broadcast to accredited observers at a US Military Base in Maryland.

Background to the Case

8. The defendants are all jointly charged with Conspiracy, Attacking Civilians, Murder in Violation of the Laws of War, Hijacking an Aircraft and Terrorism all of which are capital offences which may lead to the death penalty.

9. The 9/11 plane attacks caused the death of just under 3000 people. As has been extensively documented, following the attack the US Government began what came to be known as the "War on Terror". A significant part of the operations involved the use of CIA, Military and FBI personnel to scour the globe for those people considered to be responsible for the 9/11 attacks or who in any way supported Osama Bin Laden, Al-Qaeda or their affiliates. The five defendants currently awaiting trial were all captured in Pakistan or Afghanistan in the years that followed 9/11.

10. The defendants (as with all detainees at the Base) are held by the US Government having been brought there from various international locations. The crimes they allegedly committed took place on US soil, yet all are detained outside the US mainland and are being tried before a military tribunal which blends aspects of the US Court Martial system with principles of the laws of war and of domestic US criminal procedure. The need for robust and authoritative testing by defence counsel of this procedural and legal framework is one of the features which has contributed to the lengthy pre-trial phase, together with the tension over disclosure and reliance upon evidence tainted by torture.

The establishment of the Military Commissions

11. President Obama was elected in 2008 with a campaign promise to close the detention facility at Guantánamo. The Obama administration made attempts (the extent and efficacy of which are the subject of much debate but beyond the scope of this report) to try the 9/11 suspects (and others) on the US mainland in domestic courts. Ultimately, disputes with States earmarked to take the detainees and push back from the legislature led to laws being passed that made their transfer to the US virtually impossible.

12. In response to the failure to secure their transfer to the mainland, President Obama created the current system of Military Commissions in 2009. Jurisdiction and procedure are governed by the Military Commissions Act 2009 ("MCA 2009") which created Chapter 47A of title 10, United States Code (USC). The Commission has jurisdiction over any "*alien unprivileged enemy belligerent*", a category of persons that has never previously existed under the Geneva Conventions. Chapter 47A defines such persons as anyone who:

    a. has engaged in hostilities against the US or its Coalition Partners;
    b. has purposefully and materially supported hostilities against the US or its Coalition Partners; or
    c. was a member of Al-Qaeda at the time of the alleged offence under this chapter.

13. According to chapter 47A, "*Privileged Belligerents*" do not fall under the jurisdiction of the Military Commissions. A Privileged Belligerent is defined as anyone who falls within the 8 categories set out at Article 4 of the Geneva Convention Relative to Treatment of Prisoners of War.[4]

[4] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F681B08868538C2C12563CD0051AA8D

Pre-trial issues

Jurisdiction

14. As "hostilities" under the MCA 2009 are defined as any conflict that is subject to the laws of war (i.e. an "armed conflict" under international law), one of the most significant (and time consuming) pre-trial disputes relates to precisely when, if ever, the Commission's jurisdiction arises. In order to fall within its jurisdiction, the Commission must determine whether an armed conflict, in this case a non-international armed conflict (because it is not between two states) started between the US and Al-Qaeda.

15. The five defendants in the 9/11 trial are all accused of offences that took place *prior* to 9/11 as they are charged with its planning. As a result, the prosecution, on behalf of the US Government, have sought to argue that a non-international armed conflict began between the two sides, not on 9/11 or when the US invaded Afghanistan, but following Osama Bin Laden's "declaration of war" in 1996 or possibly when the US carried out strikes on Al-Qaeda targets in Africa in 1998.[5]

16. Unsurprisingly, such a position has been vigorously contested by the defence, who point to the apparent absence of the usual ingredients required for something to constitute an armed conflict and explicit statements to the contrary by former President Bill Clinton at the time.[6] The argument has spanned over three years and resulted in rulings that are often inconsistent across the various trials taking place. Ultimately, the current position appears to be that the Commission in the 9/11 trial has ruled that determination of whether hostilities existed at the time the acts took place is a political question that it is not competent to determine.

[5] https://www.justsecurity.org/46746/21-years-war-al-qaeda/
[6] https://www.justsecurity.org/70123/getting-it-wrong-the-9-11-military-commission-and-the-justiciability-of-armed-conflict/

Admissibility of alleged torture derived evidence

17. The second significant pre-trial issue relates to the question of the admissibility of statements obtained from the defendants after interrogation. The MCA 2009 contains a provision that prohibits the use of statements obtained through torture, inhuman or degrading treatment (Chapter 47A, Sub chapter III, §948r). It also prohibits the use of any other statement of the accused unless, among other things, it was made incidental to lawful conduct on the part of the capturing authorities and was given voluntarily. Those provisions were enacted as a direct result of the Obama administration's acknowledgment that detainees were tortured whilst in detention.

18. However, the prosecution has sought to rely on statements taken from the defendants by FBI officers who were part of what are called "Clean Teams". These were fresh teams of interrogators who were not involved in the original torture and conducted interrogations subsequently, which – on the prosecution's case - conformed to appropriate standards. The defendants are seeking to have such material excluded on the basis that the product of the 'Clean Team' interrogations was tainted by the previous use of torture and its effects on the accused; that the FBI *was* in fact involved in the torture and/or inhuman treatment of the defendants and that any confessions given after such a long period of unlawful treatment were clearly not voluntary. This particular issue has led to a vast process of discovery, including testimony from witnesses who devised the CIA's Enhanced Interrogation Programme ("EIP"). As at the end of February 2020, the number of motions filed in the pre-trial process numbered over 750.

19. The very significant practical difficulties with the Tribunal are considered further below. However, in our view the combination of the appalling history of torture and the *ad hoc* legal system that has been created in order to try these men outside of US domestic proceedings is at the heart of the Military Commission's failure to make substantial progress in the 19 years since 9/11.

The defendants

20. **Khaled Shaikh Mohammed** - Accused of masterminding the 9/11 attacks on the US. He is alleged to have proposed the idea of attacking significant US locations using hijacked planes to Osama Bin Laden in 1996. Thereafter he is charged with having overseen the plot and helping to train hijackers in Pakistan and Afghanistan. He was captured in Rawalpindi, Pakistan on 1 March 2003.

21. **Walid Bin Attash** – Accused of training a number of the 9/11 hijackers in combat and preparation for the attacks. He is also alleged to have researched plane schedules and carried out test runs to see how razors and other items could be concealed. Captured in Karachi, Pakistan on 29 April 2003.

22. **Ramzi bin al-Shibh** – Alleged to have effectively been KSM's deputy in the operation. He is accused of having organised the Hamburg cell of 9/11 hijackers and acting as a go between with KSM and the hijackers as well as wiring money to them. Captured on 11 September 2002 in Karachi, Pakistan.

23. **Ammar Al Baluchi** (Charged as Abdul Azi Ali) – the nephew of KSM. Accused of making a series of electronic money transfers to the hijackers from Dubai and some other logistical support. Captured with Bin Attash in Karachi, Pakistan, April 29 2003.

24. **Mustafa Al Hawsawi** – A Saudi citizen who is charged with fewer incidents than the others but is accused of collecting and depositing money on behalf of the hijackers and KSM, as well as applying for banking cards etc.

The legal teams

25. The legal teams for each defendant are comprised of both military and non-military personnel, plus mitigation specialists and other team members in order to have sufficient resource to

handle the enormous document load which is constantly growing. Because these are capital cases, each team is headed by a 'counsel learned in the law', that is, a senior lawyer who, according to the rules of the Bar of the US state in which they practice, has sufficient experience of death penalty cases to earn that title. As the length of the proceedings increase, and the personnel of each team necessarily changes over time owing to various factors such as retirement, the importance and difficulty of preserving each team's institutional memory increases.

26. Resource decisions, taken by the head of the Military Commission, have sometimes backfired – for instance a refusal to fund two senior counsel in each defence team means that if anything happens to senior counsel, if they for health reasons need to step back, everything stops while another senior counsel willing and able to take on the intensive work required on this case is found.

27. Defence teams are security cleared but not to the highest level. This raises a tension as to how, during the currency of the trial in quasi-open conditions, decisions concerning matters which must be excluded from the record or withheld from the defence for national security reasons, or redacted from the transcripts posted on the Military Commissions' website, are to be taken; when and by whom and applying what test of fairness. This is all fought out daily with different approaches by different National Security Agencies applying different – often seemingly arbitrary – tests, often 'discovered' by defence teams parsing the material which is disclosed. It is not unusual for one agency to deny the defence material which it has already received. Hence the huge importance of each team maintaining an increasingly historic institutional memory of what has gone before.

Observations

Compliance with international human rights standards

28. From our observations and the information that we received during our time at the Base, there are a number of issues of concern from an international human rights perspective that risk violation of the right to a fair trial. This should apply to these proceedings pursuant to the International Covenant on Civil and Political Rights ("ICCPR"), to which the US is a signatory:

(i) Allegations of torture and ill-treatment and the use of evidence obtained through torture.

29. The US is a signatory to the *ICCPR* as well as the UN Convention Against Torture 1984 ("*CAT*"). Article 7 *ICCPR* prohibits the use of torture. The extent of this prohibition has been developed by the *CAT* but, in conjunction with Article 14(3)(g) *ICCPR*, requires that confessions obtained under coercion must be excluded from the trial and the court must investigate allegations of forced confessions. With respect to the investigations of forced confessions, Article 12 *CAT* requires the State Party to promptly and impartially investigate wherever there are reasonable grounds to believe that an act of torture has been perpetrated within its jurisdiction. Article 13 *CAT* requires the State Party to ensure that any individual who alleges torture has a means of complaint and has his/her case promptly and impartially investigated by the competent authorities. The procedural obligations of these requirements have been set out in detail in the Istanbul Protocol which require the state, and in particular the trial court, to properly investigate allegations of torture and forced confessions. [7] Finally,

[7] UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Istanbul Protocol"): http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf. Both the UN General Assembly and UN HRC have encouraged states to follow the guidance in the Istanbul Protocol, and it is a key document in determining breaches of both ICCPR and CAT

Article 15 *CAT* requires the State Party to prohibit the use of evidence derived from torture in any proceedings.

30. In addition, those detained in Guantánamo are entitled to the protections of the Geneva Conventions 1949. The third article common to all the Conventions ('Common Article 3') prohibits the use of torture against those in the custody of the opposing party and states that no one shall be subjected to "humiliating and degrading treatment".

31. It is well documented that each of the defendants (along with many others who do not form part of this trial) were held during the years following their arrest in "black sites" - secret locations around the world in which the Central Intelligence Agency ("CIA") carried out or facilitated detention of those they suspected to be linked to Al-Qaeda.[8] This detention took place *incommunicado* and, as former President Barack Obama himself acknowledged, detainees were subject to torture and inhuman or degrading treatment.[9] That treatment is at the centre of a vast exercise in discovery (disclosure) on behalf of the defendants' legal teams as they seek to place the full facts of their clients' treatment on the record. This process, and the resistance to it by the various US Government agencies who have an interest in the subject, has been a substantial reason for the incredibly slow pace of the proceedings thus far.

(ii) Potential application of the death penalty.

32. Each of the charges faced by the defendants carries the death penalty if convicted. The US retains use of the death penalty within its domestic jurisdiction, both at Federal and State level, and remains a firm advocate of the death penalty, despite growing international consensus.[10]

[8] This detention was held to be arbitrary by the UN Working Group on Arbitrary Detention (Opinion No.29/2006 (UNITED STATES))
[9] See also the Senate Select Committee on Intelligence Report, 2014 (https://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf)
[10] See, Federal Death Penalty: Overview, Death Penalty Information Center (https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty); and State by State, Death Penalty Information Center (https://deathpenaltyinfo.org/state-and-federal-info/state-by-state). See also, Most American Favor the Death Penalty Despite Concerns about its Administration, Pew Research Center, 2 June 2021 (https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/).

In 2019, the US Department of Justice announced that it would resume capital punishment after a 17-year moratorium, and there have been at least ten executions in 2020.[11] BHRC is opposed to the use of the death penalty in all circumstances.

33. The US has not ratified the Second Optional Protocol to the *ICCPR* which commits states parties to abolition within their own territory. However, the US is bound by Article 6 of the *ICCPR* which prohibits the "arbitrary deprivation of life" (article 6(1)) and stipulates that in retentionist states the death penalty may only be imposed for the "most serious crimes in accordance with the law at the time of the commission of the crime and not contrary to the provisions of the Covenant". Further, that it may only be imposed pursuant to a "judgment rendered by a competent court" (Article 6(2) *ICCPR*).

34. The UN General Assembly has previously declared that *"in order to fully guarantee the right to life…the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries"*.[12] In 2018 the UN Human Rights Committee adopted General Comment 36, according to which States are required by Article 6 of the *ICCPR* to be on an "Irrevocable path" towards abolition[13] and determined that, *"Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law.*"[14] Thus, while the application of the death penalty may not constitute a breach of international law per se, if the conditions of detention and trial at the Base do not adequately provide the defendants those rights guaranteed under the Covenant, any use of the death penalty would amount to "arbitrary deprivation of life".

[11] Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse, United States Justice Department, 25 July 2019 (https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse).
[12] (UN General Assembly, Resolution 2857 (XXVI), at §3)
[13] General Comment 36, §§50-51
[14] General Comment 36, §12

(iv) The presumption of innocence.

35. Article 14(2) of the *ICCPR* guarantees that *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty in accordance with the law"*. The right is guaranteed under the US Constitution as it is in virtually every functioning criminal justice system throughout the world. Under the Military Commissions Act 2009, it is difficult to reconcile the presumption of innocence with the designation of the accused as "unprivileged enemy belligerents" which is necessary in order to bring the accused within the jurisdiction of the tribunal at all. Designation as those who have engaged in or materially supported hostilities against the US or were part of al-Qaeda at the time of the alleged offences raises a serious question as to how the presumption of innocence until proven guilty can operate. The somewhat circular US position that any attack on US forces is a war crime, and that any support of hostilities or membership of al-Qaeda can be construed as supporting terrorism appears to undermine that presumption.

(v) Classified evidence.

36. Article 14(3)(e) of the *ICCPR* and Common Article 3(1)(d) of the Geneva Conventions effectively require "equality of arms" between the parties. Domestic legal systems, including the US, have long established procedures for dealing with sensitive evidence in criminal trials. In the 9/11 Trial, potentially exculpatory evidence is frequently withheld on the basis that it is "classified", despite lead Defence lawyer on each team (the "learned counsel") having a security clearance of at least "top secret". The nature and volume of evidence withheld from the defence (and the public) appears to evolve over time and not conform to accessible and established criteria. It therefore does not appear to provide adequately for equality of arms between the parties.

37. The Tribunal judges have plainly struggled with opposing contentions over security and disclosure. During proceedings prior to our arrival, the Baluchi defence team had noticed the presence in court of a box which emitted a signal. As a consequence, the judge halted the

hearing during the oral evidence of CIA psychologist Dr James Mitchell regarding the 'enhanced interrogation program'. It later transpired during proceedings attended by Amanda Weston QC that Presiding Judge Cohen had granted a request from the prosecution to use a "device" in the courtroom, to be hidden from the Defence, allowing the CIA and other "Original Classification Authorities" ("OCAs") to follow the proceedings in real-time and communicate directly with prosecution lawyers present in the court room. The OCAs can then prompt the Government lawyers to ask the – notionally independent - Court Security Officer ("CSO"), who sits beside the Presiding Judge, to stop evidence for reasons of national security, or to prevent potential "spills" of classified information.

38. Suspicions were raised that the device could also communicate with third parties outside the courtroom, after the prosecution were unable to explain why they had asked for an interruption to the evidence. The CSO makes an independent determination before deciding to prevent evidence from entering the record so a device which would allow a government agency unilaterally to censor witnesses from outside the courtroom plainly interferes with the Tribunal's independence.

39. The Presiding judge – indicating that he had under-estimated the level of distrust between the prosecution and defence – accepted that he should not have given his permission to use the box on an *ex parte* basis but should have given the defence an opportunity to respond to the government's request, but denied that the device undermined a fair trial, stating that he would *'dismiss the charges without thinking twice about it'* if the device was being used to spy on the defence. This is no idle risk. In 2013, the smoke detectors in attorney-client meeting rooms were found to be listening devices[15] and in 2014 the FBI attempted to recruit a defence team member as a confidential informant.[16] Whether the judge would indeed have made good on his statement will never be known as he took retirement for family reasons shortly thereafter[17].

[15] See Carl Rosenberg, 'Guantanamo smoke detector/listening device revealed', *Miama Herald* (12 March 2013), https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1948120.html.
[16] See Spencer Ackerman, 'Guantanamo hearings halted amid accusations of FBI spying on legal team', *The Guardian* (14 April 2014), https://www.theguardian.com/world/2014/apr/14/guantanamo-bay-hearing-halted-fbi-spying.
[17] https://pulitzercenter.org/stories/military-judge-911-trial-guantanamo-retiring

(vi) Trial without unreasonable delay

40. Article 14(3)(c) of the ICCPR entitles an accused person, as a minimum guarantee, to be "tried without undue delay". Article 9(3) also provides the right to a trial within a reasonable time, or to release. As to what is considered a reasonable period of time, this will depend on the circumstances of each case and a number of factors, including the complexity of the case and impact on the accused. The UN Mechanisms Joint Report on detainees at Guantánamo Bay already determined that the right had been violated as long ago as 2006.[18]

41. The sheer length and complexity of the procedural history to this trial are sufficient to give rise to fundamental concerns about the fairness of its conduct.

Practicalities

42. BHRC considers that the arrangements for observers attending were efficient and designed to give a good, thorough understanding of what is happening in the trial. Thanks to the arrangements made by the Military Commission Administration we had generous access to the defence, both civilian and military, care was taken to ensure we did not miss any open court time and we were able to get a sense of the practical and legal issues affecting the trial.

43. In essence – the experience was intensely useful and those involved on the military side wanted observers to understand the impact on the trial of the apparent unwillingness of the US Government to make adequate resources available for 'Camp Justice' to function efficiently and in a timely way. The sense was of a Kafkaesque process behind which there was no will among those with power to bring it to a close despite the stated intentions and efforts of the judiciary.

44. BHRC observers witnessed the defence teams' dogged persistence in illuminating the incompatibility between the system designed for the Military Commission and principles of

[18] UN Doc. E/CN.4/2006/120 (2006) §38, at https://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2006/120

international law and the insoluble problem of a trial conducted in a legal system specifically designed to circumvent fair trial safeguards in order to accommodate unlawful state action, including and in particular state sanctioned torture and the use of evidence tainted by torture.

The Status of Detainees at the Base

45. BHRC's primary focus was the observation of the 9/11 trial. However, it is important to highlight the general legal context within which the detention facility at the Base exists. Of the 39 remaining detainees, only nine have either been charged or convicted of any crime. Of the remainder, five were cleared for release and had countries that were willing to accept them prior to President Trump's election in 2016, but all transfers were halted upon his arrival in office and the department that negotiated repatriation agreements was dismantled. The other 26 prisoners are commonly known as "forever prisoners". This means they are considered by the US Government to be 'law of war' detainees and that, because in the US Government's view the "war on terror" is still ongoing, they may continue to hold them indefinitely as battlefield captives. The change of government administration has resulted in one further release and the White House has indicated work is proceeding towards closure of the detention facility at Guantanamo[19].

46. Lawyers for the Justice Department ("DoJ") have so far successfully argued that the basis for the indefinite detention of these 26 men stems from the Authorisation for Use of Military Force ("AUMF"),[20] which was an Act passed by Congress in 2001 to give the President the authority to use "*all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11 2001*". More recently, Congress also passed the National Defense Authorization Act 2012,[21] affirming that the President's authority pursuant to the AUMF includes the authority to detain persons who "*were a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States*". Authority is granted to detain such persons "*under the law of war without trial until the end of the hostilities authorized by the AUMF*".[22] Therefore, the DOJ lawyers assert that, so long as the AUMF is still in force and the Executive confirms the

[19] https://www.independent.co.uk/news/world/americas/us-politics/biden-guantanamo-bay-detainee-trump-b1886578.html
[20] Pub.L.No.107-40, 115 Stat.224 (2001)
[21] Pub.L.No. 112-81, §1021(a), (b)(2), 125 Stat.1298, 1562 (Dec.31,2011)
[22] Ibid § 1021(c)(1)

US is still fighting Al-Qaeda (and associated forces), those purportedly detained in the course of such hostilities may continue to be held without trial or release (see for example *Hamdi v Rumsfeld*[23] and *Al Alwi v Trump*[24]).

47. Legal recourse for the 26 forever prisoners is provided by two routes. First, via Periodic Review Boards ("PRB"), which consist of senior Executive Branch officials and are required to determine whether detention is still "*justified*"[25]. At these hearings, detainees are represented by counsel but access to the material used to determine their status is extremely limited. Aside from the restricted summaries given to the detainee, some further material is classified but accessible only by the detainee's representative (and not disclosable to the detainee), while the remainder may never be seen or challenged by the detainee or their counsel. Significant parts of the hearings are held in secret and full reasons for decisions not disclosed.

48. Second, since the 2008 US Supreme Court decision in *Boumediene v Bush*[26], detainees have had the right to bring *habeas corpus* petitions before the Federal Court on the DC Circuit to have the legality of their detention determined. Whilst this represented a major breakthrough in terms of providing some constitutional rights to those in Guantánamo, it has been narrowly applied by the lower courts, who have continued to show great deference both to the view of the Executive Branch in determining whether detention is justified, and the limited procedural rights accorded to detainees before the PRB. In September 2020 in *Al Hela v Trump*[27], the DC Circuit Court finally held that detainees at Guantánamo are entitled to none of the rights under the "due process" clause of the Fifth Amendment as they are aliens who have neither presence nor property in domestic US territory. This decision means that, aside from the very limited right to *habeas* review, detainees effectively have no right to due process or other constitutional protections and are almost entirely at the mercy of the Executive when it comes to whether they will ever be cleared for release.

[23] 542 U.S. 507, 518, 521 (2004)
[24] No.17-5067 (DC Cir.2018)
[25] Periodic Review of individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011)
[26] 553 U.S. 723 (2008)
[27] No. 19-5079 (DC Cir. 2020)

49. The concept of "forever prisoners" is deeply concerning and should be anathema to any nation that considers itself a proponent of the rule of law and respect for international human rights. Law of war detention, where justified under the Geneva Conventions, has never allowed for the indefinite imprisonment of battlefield captives. The ICCPR also prohibits "arbitrary detention" (Art.9). The issue of what kind of conflict the US so called "war on terror" is, or was, is a complex one, but to suggest that it is an ongoing armed conflict that can justify keeping those captured 'on the battlefield' for as long as 18 years after it began stretches credulity. Nor do the limited (and hard fought for) right of *habeas corpus* and review by the PRB amount to effective substitutes for the proper adjudication of a detainee's alleged criminal actions with the attendant procedural protections that requires.

Conclusions and recommendations

50. The Military Commissions are plainly seeking to square the circle of a legal process with inbuilt fundamental flaws. The ability for BHRC legal observers to attend trial proceedings in person at the Base is intensely valuable in a process which is marred by endemic secrecy and departures from procedural fair trial norms. Such observations allow for independent analysis of the fairness of the proceedings and the legal issues, including, for instance, reliance upon evidence tainted by torture and other departures from fundamental principle in the name of national security.

51. Our attendees often have particular experience of the use of 'closed material procedures' in national security related matters in the UK and an understanding of the techniques that the defence must deploy to read as much as possible into what is and what is not disclosed and by the tactics deployed by the prosecution where national security is sought to justify non-disclosure. This legal expertise in invaluable in understanding the extent to which steps can effectively be taken to ameliorate the obvious disadvantages to the accused inherent in the Military Commissions. However, there are difficulties in making substantive conclusions from such short observations in a trial that has already lasted for eight years. Our observations of the Military Commissions are at an early stage and further conclusions will be drawn about the trial process itself following further visits, should these be permitted.

52. Having said that, from our observations the sense was of a Kafkaesque process behind which there was no will among those with power to bring it to a close despite the stated intentions and efforts of the judiciary. As a preliminary conclusion, the US Government should urgently make adequate resources available for 'Camp Justice' to function efficiently and in a timely way.

53. This comes against a backdrop of UN rapporteurs having already concluded in 2006 that the right to a trial within a reasonable time had been violated at the Base.[28] A further 14 years have now passed. It is hard to imagine that any procedural steps can rectify the extraordinary delay in resolving these cases and extended pre-trial detention in which the accused have been held.

54. Moreover, it is important to note that there should be no need for trial observers in a process governed by the US, which in domestic proceedings adheres steadfastly to the right to due process. As a matter of principle, there is no justification in international law for the defendants in this case to be tried absent the rights and procedures that would otherwise be accorded to criminal suspects on US soil. Attempts to try them under this system have significantly extended the length of a chapter in world history that demands a conclusion, for all those affected, including the victims of 9/11. This system, disappointingly, does nothing to enhance the US' standing as a nation built on respect for the rule of law.

55. BHRC implores the Biden administration to follow through on President Obama's promise to close down the detention facility at Guantánamo Bay Naval Base and make a renewed commitment to upholding international humanitarian and human rights law at all times and in particular for those who continue to be detained.

31 August 2021

[28] UN rights experts call for immediate closure of US Guantánamo centre after suicides, UN News14 June 2006 (https://news.un.org/en/story/2006/06/182402).