Trial Observation Report

USA v Abd al-Rahim al-Nashiri

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Who we are

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.

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 Communication, Events, and Projects Assistant.

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.

Introduction

1. This report is of a second BHRC trial observation of the specially created Military Commissions at the United States ("US") Naval Base, Guantanamo Bay, Cuba, ("the Base") colloquially known as Camp Justice.

2. For many years, BHRC has kept a watching brief on the use of the detention facility at Guantanamo and procedural developments in the Military Commissions being held there. BHRC has expressed its concerns on the establishment of the Military Commissions at Guantanamo, together with broader issues arising out of the 'War on Terror', including extraordinary rendition and torture.[1]

3. From its peak of 780 detainees in 2005, 30 people remain incarcerated at Guantánamo in "law-of-war" detention. 19 of these have been recommended for release with security arrangements to another country. 11 have been charged with terrorism related offences connected with Al-Qaeda, 10 of these are awaiting trial and one has been convicted.[2]

4. BHRC was granted NGO observer status in 2019[3] and attended the Base between 9 – 22 February 2020 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 report of that mission is available on BHRC's website.[4]

5. That report concluded:

   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.

   …

   52. …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. A further 14 years have now passed. It is

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 'The Guantanamo Docket', New York Times, last updated 2nd May 2023. Of those no longer held, 9 died in military custody and 30 are known to have died after transfer through the repatriation and resettlement agreements. One was tried in the US and is serving a sentence in a federal prison, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#top

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

4 Available at https://barhumanrights.org.uk/wp-content/uploads/2022/04/BHRC-GITMO_Trial-Observation-Report-Final.pdf

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.

6. This report is prepared against that background.

7. The case observed was that of **Abd al-Rahim al-Nashiri**, who faces a capital trial in connection with the bombing of the USS Cole on 12th October 2000, the attempted bombing of USS The Sullivans on 3rd January 2000[5] and the bombing of MV Limburg on 6th October 2002, all taking place in Yemen.

8. BHRC condemns the use of the death penalty as a method of punishment in any circumstances, irrespective of the crime committed or compliance with international fair trial standards. It is a violation of the right to life which we consider, in accordance with international law, can never be justified.

Hearings observed

9. Jodie Blackstock, who is a barrister at Garden Court Chambers in London and Treasurer of BHRC, visited the Base between 22nd and 29th October 2022 in order to observe pre-trial proceedings, which predominantly involved the consideration of a Government motion to admit hearsay evidence (and Defence motion to supress that evidence) and examination of the witnesses through whom that hearsay evidence would be elicited at trial.

10. Hearings at the Base are grouped to take place in tranches, approximately a month apart, or perhaps longer, subject to disclosure and preparation of witnesses. All parties, including the judge, are required to stay on the Base for a full week, regardless of the hearing schedule, as air transport is only provided weekly. However, legal teams were also present Crystal City in Virginia and this is where the witnesses gave evidence from. The two locations were joined via a live, closed circuit video link.[6] The hearing schedule is often subject to late changes, delays and cancellations due what appears to be an ongoing security clearance process in relation to disclosure, late disclosure by the Government and the availability of witnesses and professionals.

11. We had planned to also observe hearings in the preceding week, but these hearings were cancelled.

5 https://www.fbi.gov/history/famous-cases/uss-cole-bombing

6 The Office of Military Commissions also had a public viewing area and separate victim/family member viewing area at the McGill Training Center at Fort Meade, Maryland from which we understand it is possible to watch proceedings over a video link. It was unknown whether anyone was watching the proceedings from here during the observed hearings.

12. Ms Blackstock was able to observe a full week of court hearings involving witness examination and legal argument. A few hours in the afternoon on the Wednesday were spent in closed session when classified evidence was heard.

13. We are very grateful to the support and access provided by the staff of the Military Commissions and Defense counsel, who took the time to answer our questions regarding the proceedings. We requested to speak with the Prosecution but this was refused. We also sought to speak with the officer responsible for the detention facility but it is not clear if this request was received.

14. As such, it was not possible to visit the detention facilities to assess conditions. It was also not possible to speak with Mr Nashiri due to the strict security arrangements.

Background to the Case

15. On 12th October 2000, the USS Cole was docked in the port at Aden, Yemen for refuelling. It was approached by a small civilian boat with two civilians waving their arms to gain the attention of crew. As the boat got close to the USS Cole, it exploded, killing its occupants, causing a massive hole in the side of the ship and killing 17 American sailors and injuring 39 others. A similar attempt had been made in January 2000 on the USS The Sullivans, however, the boat was overloaded and sank before it could approach the ship. A further attack took place on 6th October 2002, when the MV Limburg, a civilian oil tanker, was approached by civilians in a small boat which again exploded close to the ship, killing its occupants, one civilian and injuring 12 others.[7]

16. Following the attack on USS Cole, FBI, Naval Criminal Investigative Service and CIA agents were sent to Yemen to investigate. The Yemeni authorities were reluctant to give them access and US ambassador to Yemen, Barbara Bodine negotiated the basis upon which they could investigate alongside the Yemeni investigation.[8]

17. Mr Abd al-Rahim al-Nashiri is a citizen of Saudi Arabia. He was identified as the "mastermind of the bombings" for al Qaeda. However, a number of other men who were alleged to be the masterminds or leaders of the attack have been killed by extra judicial US drone strikes, justified by the US Government on the basis of an ongoing armed conflict with al Qaeda.[9]

18. Mr Nashiri is classed as an "alien unprivileged enemy belligerent."[10] He was charged on 28th September 2011 with nine counts under Chapter 10 US Code § 950t (crimes to be tried by military commission) in relation to the three incidents with which he is allegedly connected. Earlier charges were dropped when the Obama administration ordered a review of the detention facility.

19. In relation to the bombing of the USS Cole in Yemen on 12th October 2000, Mr Nashiri is charged with perfidy (or using treachery)[11], murder in violation of the law of war, attempted murder in violation of the law of war, terrorism, and intentionally causing serious bodily harm.

7 https://www.bbc.co.uk/news/world-us-canada-26277556

8 An account of the attack and investigation is contained in the 9/11 Commission Report, chapter 6.3, https://govinfo.library.unt.edu/911/report/911Report_Ch6.htm The conclusions reached are not accepted by Mr Nashiri and will be tested at trial.

9 See for example https://edition.cnn.com/2019/01/04/politics/uss-cole-al-badawi-killed/index.html; https://www.washingtonpost.com/wp-srv/special/world/yemen/yementimeline.html; https://www.thehindu.com/news/international/us-airstrike-kills-senior-alqaeda-leader-in-yemen/article3392964.ece

10 "The term 'alien' means an individual who is not a citizen of the United States." 10 U.S.C. § 948a(l). "The term 'unprivileged enemy belligerent' means an individual (other than a privileged belligerent) who: (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter." 10 U.S.C. § 948a(7).

11 *"(17) Using treachery or perfidy.— Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."*

20. In relation to the attempted bombing of USS The Sullivans on 3rd January 2000,[12] Mr Nashiri is charged with attempted murder in violation of the law of war.

21. In relation to the bombing of MV Limburg on 6th October 2002, Mr Nashiri is charged with terrorism, intentionally attacking civilians, intentionally attacking a civil object, and intentionally endangering the safe navigation of a civilian vessel.[13]

22. Mr Nashiri is also charged with conspiracy to commit terrorism and murder in violation of the law of war, of which 26 specifications allege planning and preparing the boat operations with Al Qaeda.

23. In light of the deaths of sailors in the attacks, Mr Nashiri is arraigned for a capital trial, punishable by death.

24. Mr Nashiri was detained in 2002 and kept in CIA black sites, including at Guantanamo, where he was subjected to "enhanced interrogation techniques", until arriving back at the Base and being place in military custody in 2006.[14] He was arraigned in 2011 and has been in pre-trial proceedings ever since.[15]

The establishment of the Military Commissions

25. 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.

26. 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.

27. 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.[16]

12 https://www.fbi.gov/history/famous-cases/uss-cole-bombing

13 These charges were originally dismissed in 2014 for a lack of evidence that the offences took place in the context of hostilities against the US but reinstated in 2016 after the Government appealed to the US Court of Military Commission Review.

14 The detail of the torture to which Mr Nashiri was subjected in CIA sites across the world is summarised at paragraph 39 below and documented in the judgment of the European Court of Human Rights ("ECtHR") *Al-Nashiri v Romania* App. No. 33234/12 (31 May 2018), available at https://hudoc.echr.coe.int/eng?i=001-183685

15 https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#detainee-10015

16 https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war

Legal Personnel

28. Since 2008, four judges have consecutively been assigned to preside over Mr Nashiri's case, along with changes in legal counsel, due to retirement from the military and various allegations of impartiality.[17] The current presiding judge is Judge Colonel Lanny J. Acosta, Jr.

29. The legal teams for defence and prosecution are comprised of both military and non-military lawyers, plus mitigation specialists and analysts in order to have sufficient resource to manage the enormous document load which is constantly growing. On the hearings observed, there were approximately 14 attorneys for the prosecution and six for the defence, split between the Base and the Remote Hearing Room. 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.

30. The defence team, led by Anthony Natale, has extensive experience of litigating death penalty cases and criminal cases generally. However, the prosecution team has no prior capital trial experience, nor does the presiding judge. This is a cause of concern for ensuring that due process decisions are made with the heightened scrutiny necessary of capital cases, and against the backdrop of jurisprudence relating to criminal procedure in capital cases and international law relating to terrorism and war crimes.

31. Defence and prosecution teams are security cleared to the highest level. However, the Government is able to submit documents ex parte and under seal to request that the judge allows them to provide summaries to the defence rather than the actual documents. 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 the defence parsing the material which is disclosed. It is not unusual for one agency to deny the defence material which it has already received, or has been released to another detainee on trial. With so many documents to review and catalogue, institutional memory in the case is critical.

17 For example, *"In September 2018, Air Force Colonel Shelley Schools announced her retirement, just one month after being assigned as the third judge to preside over the USS Cole military tribunal. In April 2019, the U.S. Court of Appeals for the District of Columbia Circuit vacated more than two years of pretrial decisions, including more than 450 written orders, in the Cole prosecution because of an undisclosed conflict of interest by her predecessor as military commission judge, Air Force Colonel Vance Spath. Spath had retired after months of frustration over developments in Nashiri's case following the resignation of Nashiri's entire civilian defense team in October 2017 in protest of the government's illegal eavesdropping on their legal meetings":* 'At Odds with Biden Administration's Concern Over Use of Statements Obtained by Torture, Chief Guantánamo Prosecutor Retires,' *Death Penalty Information Center,* 21st July 2021 available at https://deathpenaltyinfo.org/news/at-odds-with-biden-administration-over-use-of-statements-obtained-by-torture-chief-guantanamo-prosecutor-retires. The article's main focus is the fact that Army Brigadier General Martins, the chief prosecutor in the Military Commissions trials, retired from the military in 2021, it was suggested, in connection with his opinion that the due process clause of the US Constitution did not apply and evidence obtained through torture could be admitted in evidence.

Pre-trial Issues

32. The key pre-trial motions in the case relate to whether evidence tainted by torture is admissible at trial and during pre-trial motions; whether double, and sometimes triple, hearsay evidence is admissible; and whether the Commission has jurisdiction to try the case. There are a vast number of documents in the case, with a tranche of some 14,000 pages released in the summer of 2022 relating to conditions and treatment of Mr Nashiri during detention, and a docket of some 4,000 motions, responses and rulings.

Jurisdiction

33. 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 to try the cases 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 countries) started between the US and Al-Qaeda.

34. The defendants in the 9/11 trial are raising the same concern. The US Government has 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.[18]

35. In the Nashiri case, this issue is even more complex, since the bombing of the MV Limburg oil tanker had no connections with the US, such that the prosecution must prove that this was part of an overall plot to attack the US.[19]

36. This position is 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.[20] The argument has spanned over many years and resulted in rulings that are often inconsistent across the various trials taking place. The Commission 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, since the political branches have given it the jurisdiction to try these cases.

37. However, the Commission has also ruled that, in the context of the *merits* of whether hostilities existed at the time, namely can the context to the charges be made out, this is a mixed question of fact and law to be determined at trial.

38. Yet, it is a standard matter of criminal proceedings that jurisdiction is not left for the jury to determine. It is a preliminary, *legal* issue to be resolved by a judge prior to trial. This was accepted in *Hamdan v Rumsfeld*

18 There are a number of difficulties for the US with giving this status to Al Qaeda and its alleged combatants in terms of the law of international armed conflict and protections of prisoners of war, explored in this blogpost https://www.justsecurity.org/46746/21-years-war-al-qaeda/

19 It was a civilian tanker registered under a French flag, chartered by a Malaysian firm (Petronas), and carrying almost 400,000 barrels of crude oil from Iran to Malaysia. The attack killed one person (a Bulgarian crew member), injured a dozen others, and caused about $45 million in damage: https://www.justsecurity.org/31888/cmcrs-decision-mv-limburg-charges-al-nashiri/

20 https://www.justsecurity.org/70123/getting-it-wrong-the-9-11-military-commission-and-the-justiciability-of-armed- conflict/

548 U.S. 557, 589 (2006). The difficulty here is that the Commission does not apply standard US criminal procedure it is operating under the MCA 2009.

Admissibility of alleged torture derived evidence

39. The State has admitted that Mr Nashiri was considered a High Value Detainee and subjected to torture during his four years of detention at CIA sites. This torture involved waterboarding, being stripped naked and held in stress positions, being hung up from the wall or ceiling for long periods, being placed in a standing box for long periods without any room to move, sensory deprivation, sleep deprivation, anal assault and denial of religious rights. Unauthorised violent techniques were also used.[21] The Government has accepted that anything said by Mr Nashiri during this four-year period is inadmissible.

40. The second significant pre-trial issue, which is pending determination, relates to the question of the admissibility of statements obtained from Mr Nashiri and other detainees implicating him that were made during later interrogations. 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.

41. However, the prosecution has sought to rely on statements taken from the detainees 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 which – on the prosecution's case - conformed to appropriate standards. These statements are relied upon as they apparently provide incriminating evidence against Mr Nashiri.

42. Mr Nashiri is 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 upon him; that the FBI was involved in the torture and/or inhuman treatment of the defendants; that the questioning took place in the same location as torture was committed at Guantanamo, within six months of formal military detention commencing (following secret CIA detention for the preceding four years) and by similar looking and sounding US officers. The Defense also contend that some of the Clean Team agents were previously involved in CIA conducted interrogations. Consequently, the Defensearguе, any confessions given after such a long period of unlawful treatment were clearly not voluntary.

43. Further, the Defence is concerned that medical treatment around the time of the 'Clean Team' interrogations may have been manipulated, rendering that evidence unreliable in any event.

44. Moreover, Mr Nashiri, like all the remaining detainees, has never been provided with appropriate medical treatment for the harm caused to him, both physically and mentally, by the torture he was subjected to. There are no trauma informed practitioners at the Base and the healthcare professionals present are not authorised to ask about the history of the detainees' complaints, making it impossible to properly treat them.

21 Documented in *Al-Nashiri v Romania* App. No. 33234/12 (31 May 2018) (ECtHR), available at https://hudoc.echr.coe.int/eng?i=001-183685

45. This issue has led to a vast process of discovery, including testimony from witnesses who devised the CIA's Enhanced Interrogation Programme ("EIP") and medical staff. Many documents are classified and the defence team are uncertain that the extent of the torture has been fully investigated and revealed.

46. Evidence relating to this issue was heard during the week that Ms Blackstock was at the Base, however this was heard in closed session.

Hearsay

47. The third key pre-trial issue under consideration is whether double, and in some cases triple, hearsay evidence can be admitted at trial against Mr Nashiri.

48. Hearsay is a statement made out of court, whether oral or written, which is sought to be relied upon for the truth of its contents. Double and triple hearsay is where someone else records that they heard someone else make a statement rather than its original maker.

49. 116 witnesses were interviewed by FBI and NCIS agents in Yemen. However, statements were not taken from these witnesses. The prosecution seeks to rely on the reports later written up by the agents of what was said in those interviews ("Form 302s").

50. Almost the entirety of the evidence against Mr Nashiri is contained within those reports and the admissibility of their evidence is therefore critical to the prosecution case against him.

51. The admissibility of hearsay in criminal cases is very heavily circumscribed, since it is a fundamental principle of the right to a fair trial that the accused is entitled to question those accusing them, to test the veracity of their account. A statement admitted into evidence without its maker giving their evidence live before the tribunal of fact and being subject to cross examination is a significant impairment of that right.

52. In the Military Commission, hearsay can be heard in broader circumstances, but these are still circumscribed.[22] A ruling has determined that the evidence relied upon be heard in its entirety before the Judge decides whether it should be admitted at trial or not. This in itself is a departure from the standard rule that each piece of hearsay is considered on its own merits, but there does not appear to have been

22 MCA 2009 § 949a. Rules (b)(3)(D):
Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—
(i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and
''(ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, ***including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne***, determines that—
(I) the statement is offered as evidence of a material fact;
(II) the statement is probative on the point for which it is offered;
(III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and
(IV) ***the general purposes of the rules of evidence and the interests of justice will best be served*** by admission of the statement into evidence. (emphasis added)

a previous case where so many hearsay statements have been relied upon, or in such circumstances. The Government is likely to seek to rely on similarity of hearsay statements as a measure of the reliability of the content.

53. The evidence of the agents in relation to each of the 116 witnesses interviewed is therefore being heard. Evidence was heard in July, in the October session that BHRC observed, and in subsequent sessions. Judge Acosta will then hear submissions in relation to the admissibility of that evidence before ruling on whether it should be admitted.

The Commission Hearings

54. The courtroom at the Base is located in a secure compound which requires security clearance from the Pentagon to enter and is heavily guarded by military personnel.

55. Once inside, there is a large courtroom, necessary to accommodate the 9/11 accused and large legal teams. It has a traditional dais or court bench, with a backdrop of each of the US military forces' emblems, emphasising that this is a military rather than civilian court. The judge enters the courtroom from a separate door close to this dias.

56. The rows of desks facing the bench have stations of microphones and screens which enable the accused and lawyers to see the participants in the North Virginia court site. A large screen on the wall also displays the visual link. A small room at the back of the courtroom houses technical and security staff. Rows of desks are positioned with an aisle that separates the prosecution and defence. Between the first row of desks is a lectern from which the advocates address the court.

57. The public gallery is at the back of the courtroom, separated by a glass screen. The courtroom is sound proofed. The audio feed from the courtroom to the public gallery has a 40 second delay to prevent any classified information revealed inadvertently from being heard by the public. Television screens are placed along the glass screen which show a closer view of the court proceedings and, interchangeably, the Remote Hearing Room when someone in that location is speaking, likewise with a delay for security purposes. A curtain intersects the public gallery to provide the option of separating the observers from any survivors or bereaved family also present.

58. Mr Nashiri entered the courtroom with an armed guard from a third entrance and sat with his legal team and interpreter. A further interpreter simultaneously interpreted from a remote location to an earpiece that Mr Nashiri used. This ensured that there could be constant and accurate interpretation.

59. US military personnel are stationed across the side of the courtroom where the accused enter(s) and at the main entrance.

60. On one occasion during the proceedings, there was a concern that classified information was about to be raised by a witness – a location used by an intelligence officer. Immediately the security officer stationed below the dais pressed a red button which cut the audio and visual feed to the public gallery. The screen showed an explanation saying "secure session – please stand by" while discussion took place in the courtroom as to what information needed to be elicited from the witness and the judge resolved it.

Hearings observed

61. Ms Blackstock was able to attend hearings on Monday 24th October until Friday 28th October, save for a closed session on the afternoon of Wednesday 26th October.

62. Almost all of the hearings observed related to the consideration of the Prosecution motion to rely upon hearsay evidence, resisted by the Defense.

63. Each session commenced with confirming that the attorneys appearing had the requisite qualifications and security clearance.

64. At the start of the hearings on the Monday, one of the defence attorneys could not be present and the Judge explained her absence to Mr Nashiri and confirmed that he consented to this. The Judge also explained to Mr Nashiri that he had a right to be present at each session; His absence required an unequivocal waiver of that right and his absence might negatively impact the presentation of his case. The Judge also explained that a refusal to consult with his legal team may also impact upon his case. The Judge explained that there may be some occasions where Mr Nashiri's presence was required. For others, he may decide whether to attend a morning or afternoon session, subject to the above caveats. He would be given notice to decide.

65. The Judge also informed Mr Nashiri that he had a right to be represented by detailed military defence counsel free of charge and also by civilian defence counsel. The Judge confirmed the members of the legal team representing Mr Nashiri and asked that he confirm that he understood his rights as detailed. Mr Nashiri confirmed this by way of his interpreter.

66. Mr Nashiri was absent on the Wednesday. Defence attorney Ms Annie Morgan had previously explained to Ms Blackstock that the hearing process can be very stressful as Mr Nashiri is transported to court in a prison van, which involves being in a confined space and can be distressing in light of his previous trauma. A request for him to be moved the prior day and housed by the court has been denied because the Government says that his distress is unevidenced. This may or may not have been relevant to his absence. Witness evidence was taken from the joint task force legal support section officer in charge of the detainees that Mr Nashiri was advised of his right to attend the hearing in Arabic and said that he did not want to come. No reason was provided. He signed a waiver form.

67. Each session involved the examination of FBI and/or NCIS agents who were questioned regarding the hearsay evidence that they would give at trial relating to interviews they conducted in Yemen in accordance with an agreement between Yemen and the US (the Bodine guidelines). 116 witnesses were interviewed in total and Form 302 records kept of those interviews. Almost all the interviews were conducted between November 2000 and January 2001. However, the final witness that evidence was given about had been interviewed in October 2002.

68. The evidence heard during the week related to 32 witnesses interviewed in Yemen out of the 116. The evidence was given by three US agents from the FBI and NCIS.

69. It was clear from their evidence that initially there was uncertainty over which US agency would lead the US investigations, and how these would operate alongside the Yemeni investigations. An arrangement was reached between then US ambassador Bodine and the Yemeni authorities as to how interviews would be conducted. These were considered to be extremely restrictive and not an appropriate way to

interview someone but had to be complied with. After initially arriving in Yemen shortly after the bombing, and starting to make investigations and interviews, there was a security alert which meant that the US agents had to leave Yemen and no interviews could be conducted for a couple of months.

70. The witnesses giving evidence ranged from alleged:

    a. estate agents who dealt with contracts relating to properties allegedly used in the planning and preparation stage of the bombing;
    b. neighbours to a property who heard heavy machinery and/or saw work being carried out on a boat or a boat going into the yard/compound of a property, and/or saw some people coming and going;
    c. worker on the roof next to a property where he saw an SUV and boat on a trailer travelling very slowly
    d. landlord to a man who rented a room and worked on a boat at the property with other men, and visited the property infrequently;
    e. landlord's son who was under 18 and did not require the support of a parent or other supporter to be interviewed under Yemeni law unless a suspect, also visited infrequently;
    f. hired help to lift a boat stuck in the water in around January 2000;
    g. fishmongers who allegedly saw a boat put into the water and later heard the bomb explode/heard about it later;
    h. traffic officer who allegedly stopped a vehicle pulling a boat on a trailor early in 2000;
    i. workers in various positions at the harbour who saw or heard the explosion and saw boats in the harbour before the explosion, including the master mariner tasked to visit USS Cole about whom one US agent recalled other witnesses saying he appeared to be working more quickly than usual and there were rumours of an inside job;
    j. contract writer for transfer of ownership of the boat;
    k. brother of Abu Nibras who heard rumours and provided DNA to confirm that his brother was one of the bombers.

71. The questioning was both detailed and formulaic in direct and cross examination, in a way very similar to how the evidence might be led at trial.

72. For each record of interview taken by the investigator, the Prosecution sought to establish the circumstances of the interview – where it was held, who was present, what knowledge the investigator had of the witness and how they came to be questioning them, the manner of questioning, the substantive evidence that the witness gave, the follow up to that evidence and why the witness could not attend the Commission to give their evidence.

73. Aside from the substantive evidence of each witness, the answers to the other direct questions were largely uniform:

    a. One US agent said they knew in advance who would be questioned and had a list of witnesses. From this they were able to prepare their questions as a team, aware that the interview could be terminated at any moment and so the important questions were asked first;

b. The interviews took place in the Yemeni Political Security Office headquarters which is located at a prison in Aden[23];
c. The interviews took place in a large conference room on the second floor with velvet curtains. It was in an administrative section of the compound of buildings;
d. Either the US agents (usually two) were sat in the room and the person was brought in by PSO officers, or they were already in there when the US agents arrived;
e. The US agents sat at one end of the table and the witness at the other. They were sat many feet away and at a distance further than normal for building rapport. The PSO officers usually stood or sat either side of the witness. There were multiple officers;
f. In the early phase, for some interviews the General who was head of the PSO would attend for a while and then leave;
g. Nothing stood out about most witnesses' appearances and the agents could not recall what they looked like, other than to say that they were wearing local attire. However, one witness had a Sudanese appearance and wore a turban that Yemenis would not wear. He also wore glasses and had poor eyesight;
h. The environment was not intimidating;
i. The witnesses did not show signs of abuse, this would have been noted. They appeared to be healthy;
j. The witnesses did not appear to be frightened;
k. No witness was confined to the room;
l. Each witness was freely answering questions;
m. Each witness had made a prior statement to the PSO and this was read out by a PSO officer and adopted by the witness at the start of the interview;
n. Interviews took place in Arabic. The US agents were native or advanced Arabic speakers but an interpreter was present and the question had to go through the interpreter;
o. The PSO officers could veto the question. There were times when this was done because they thought the question was irrelevant or not important. No important questions were refused;
p. One agent wrote notes onto the Form 302 while the other questioned. The note taker was the primary drafter of the 302, which was then reviewed by the questioning officer usually the same evening or within a few days while the events were fresh in their mind. One agent couldn't recall the accuracy of their partner's notes but these were used to refresh their memory and review for the record of interview;
q. There was no basis to doubt the reliability of the witnesses from what was observed in interview;
r. There were several interviewing teams and they didn't know who else was interviewed who may be connected with the witnesses that they interviewed or whether other agents conducted follow up interviews;
s. The interviews were fairly short – 30 minutes to 2.5 hours and no more than three were conducted each day.

23 According to the Human Rights Watch annual report 2001, the PSO is "an agency that reported directly to President Ali Abdallah Salih and operated without any judicial or other formal authorization. According to press reports, [in relation to the USS Cole bombing] some 1,500 persons were picked up for questioning and about sixty were reportedly being held at the end of October. The U.S. Federal Bureau of Investigation (FBI) dispatched several score of agents to assist in the investigation, but were not allowed to participate in interrogations. The PSO contributed to a general atmosphere of political intimidation through its routine recourse to harassment, beatings, and arbitrary detention. PSO plainclothes agents in past years infiltrated the independent press, syndicates, and civic organizations, in some cases forcing those organizations to cease their activities. Persons seeking to work for government institutions, including the university, required PSO clearance." https://www.hrw.org/legacy/wr2k1/mideast/yemen.html The report also references use of torture and ill- treatment in prisons and detention facilities.

74. For the substantive evidence given by each witness, it was necessary for each agent giving evidence to refresh their memory regularly from the Form 302s. None had an independent recollection of the detail of what was said given the passage of time.

75. Witnesses were also shown a photobook which had been put together of 34 images of men that the US agents considered were potentially involved in the bombing, some showing the same person twice. A photograph of Mr Nashiri was identified by two witnesses, but this was a composite photograph rather than a real one. The alleged landlord witness identified the composite photograph of Mr Nashiri as the man who rented a room (but by another name) and another photograph as one of the men who worked on the boat. The other man was asserted by the Government to be one of the suicide bombers (Hussan al Khamri). The two real photographs of Mr Nashiri in the photobook were picked by the Landlord's son. In cross examination it was confirmed that the Form 302 record stated the photographs "bore a slight similarity" to the man staying at the property, which the US agent agreed meant it was difficult to know if it was in fact that person. It was also confirmed that the landlord said the man had no beard whereas the son said that he had a light beard.

76. Many witnesses had apparently also identified no. 23 but this person had no involvement and was confirmed to be entirely innocent and had been misidentified when included in the photobook.

77. During one session, the judge raised that the version of the photobook in evidence was dated after some of the witnesses were interviewed. The agent under questioning at that time could not recall if different books were used, or whether the numbers changed. When asked again in relation to a subsequent witness, he believed that additional photographs were added to the back rather than the numbering being changed. It is not known if there is witness evidence to explain the chain of production in relation to the photobook(s) but none was heard during the observed hearings.

78. There were other difficulties with the photobook – the first agent under direct examination reviewed the numbered images in the book and the identifications made by a group of witnesses. The prosecutor asked the agent to confirm that these were Mr Nashiri which he did. Later under cross examination for the defence, it was clarified that the images identified were in fact of another person, not Mr Nashiri.

79. Only one witness was questioned on a site visit (noted at para 66(c) above), the day the agent arrived, who was brought to them by the General. This was then followed up in January with an interview at the PSO headquarters.

80. There were differences in the description of a boat sighted between some of the witnesses, which may mean these were different boats or that their recollection or eyesight was poor.

81. In cross examination, it was established from the US agents that:

    a. The PSO headquarters was a two story, concrete black building, with offices on the second floor;
    b. The lower floor had a forensic laboratory and rooms for interviewing people in custody. It was not big enough to be a prison, so could only provide short-term holding facilities;
    c. The US agents did not see anyone in a holding cell;
    d. They did interview people who were in custody but none of the witnesses we heard about were said to have been. Some of those in custody were shackled, not all of them were. Those in custody were taken in and out by officers;
    e. It was not possible to tell by attire whether someone was held in custody or not;

f. They did not try to interview the witnesses without the PSO officers present -this was required as part of the arrangements for US engagement;
g. One agent said that they did not know which witness would be interviewed ahead of time, other than for some, for which they would be told the day or morning before. Some witness types they requested to see (for example anyone from the control tower at the harbour). Another said they had a list of the types of witnesses they needed to see;
h. They didn't request to interview other workers from that person's office or building - named by the witnesses or otherwise - to verify the accuracy of their account as they weren't the case agents. They didn't know if anyone else had done so. One agent said they would have liked to question all the people named by a witness or in the relevant office or location but was not asked to. He would have liked to know why this particular employee out of 13 others was brought as a witness;
i. One agent said no questions were prepared or provided by the US Government ahead of the interview; another said some questions were provided to be asked;
j. They didn't know ahead how the witness came to be providing their evidence or ask the PSO in advance. The PSO and Ministry of Interior were investigating the attacks. They had access to some reports through the US embassy which were a summary of the Yemeni suspicions so far;
k. Two US agents said all witnesses had been interviewed by the PSO officers prior to the US agents interviewing them. One of these said they would have preferred to ask questions to verify the prior statement rather than the witness be coached on it first. He also said that in the later interviews, rarely were these statements read out prior to the interview commencing. The third agent said that he had been told the witnesses he interviewed had not been prior interviewed and he thought that this was their first interview. He was not aware of any prior statement for the witnesses he interviewed. He would not have wanted the PSO to interview the witnesses first, that would have been "horrible";
l. The other two agents said that the PSO officer would read out the witness' statement and ask if it was true. The witness was not provided with a copy to read. Some statements were signed, some had a thumb print;
m. The US agents were not provided with any copies of the witness' prior statements;
n. They did not ask about the circumstances of the prior interviews – where they took place, what they were asked about, whether they were shown any photographs of anyone, whether they were held in custody at the time, whether they were promised anything to give their statement or threatened if they did not provide a statement. These were not appropriate questions to ask in the context of being afforded access to a witness, nor would they be able to tell from the answer whether it was truthful given that the PSO officers were present;
o. They did not ask if the witness' identity had been confirmed when they were questioned by the PSO officers;
p. They had no idea where the witnesses had been prior to the interview with the US agents, where they had come from or what conditions they had been in;
q. They did not know how they got to the PSO office;
r. They did not know whether other witnesses were there to give evidence or whether they spoke together;
s. They did not confirm any of the witnesses' identities through any documentary proof of identification or otherwise. Two witnesses provided forms of identification but this was not followed up by these agents. If it had been by another agent it would have been documented in the 302 forms, but they did not think it had been;
t. They did not independently verify places of work and/or roles, or personal addresses that were provided and as far as they were aware, no one else did. Anything done on the ground had to be coordinated with the PSO due to national sovereignty issues. It was also a difficult and dangerous country to operate in as it was hostile to Americans. They did not ask to go to any of the offices mentioned by the witnesses. They did go to some key scenes where there was evidence, such as safe houses but

were not allowed to speak to any people there. If this had been done by other agents, it would have been documented in the 302 forms but they were not aware of any;

u. They did not take a telephone number to contact the witnesses in future or provide a number to contact the US agents if any other details came to mind. There was a general Rewards for Justice number but not for the agents. Yemenis at that time generally did not have telephone numbers;
v. The Rewards for Justice programme produced flyers. Money would be paid for information;
w. The last contact had with each witness was in that interview, save for one of the fishmongers who was seen again at the bridge location where he said he worked and he waved;
x. No efforts had been made by these agents to locate any of the witnesses to give evidence at trial as this was not within their role. They did not know if anyone else had tried to do that in the last 20 years, although they were advised generally that the FBI tried to;
y. The photobook identifications were carried out with minimal intervention "the less said the better with a photo array." They did not explain that some of the photographs may be old, the person's appearance may have changed etc. The agents did not know who the people in the photobook were initially, though they came to identify some of them as they went along. The photographs were in a ring binder, in plastic wallets and either the US agents would sit or stand next to the witness and turn the pages when they were ready, or the witness turned them themselves. Witnesses were simply asked that if they recognised someone, to let the agents know and that they did not have to identify anyone;
z. They could not recall if all the witnesses were asked how confident they were in the identification. Some gave a gauge or percentage figure. If there was follow up it would be in the Form 302s;
aa. One of the agents did not realise photo 22 of Mr Nashiri was a composite photograph;
bb. One witness identified a person from two photographs, one being the composite picture of Mr Nashiri, but the second was in fact a different man. No prior description was recorded in the Form 302 so it is not possible to know if the description in his mind was confirmed by the photobook;
cc. Negative responses to questions would not be recorded in the Form 302s, so the line of questions to try to ascertain the level of detail known was not recorded, only the substantive information given. For example, in relation to the neighbour witnesses, the 302 notes do not record seeing the boat leaving the compound, a crane or a flatbed trailer; nor do they record how many times the witnesses saw the person and over what timeframe;
dd. The US agents didn't recall whether they asked for circumstances of the interaction in more detail than is recorded – how long a person or object they mention was observed for, whether it was inside or outside, the time of day, proximity etc.;
ee. They didn't recall asking if the witnesses had spoken with neighbours or co-workers about the incident before giving their interview;
ff. It would be suspicious for a Yemeni person at that time to have provided particular dates, times and number of occasions for when they sighted someone. These are hard to know unless you have a diary. They did not have a specific memory of how they tried to obtain accurate times, but would have tried to do so with everyone, for example, how close was it to Ramadan?;
gg. Some of the events were as much as a year prior to the interview taking place;
hh. If the interviews had been conducted without conditions placed upon them by Yemen, one US agent would have asked more questions as to detail and follow up questions. He would also have asked to see any documents referenced by the witness and particularly a video tape which was said to have captured the aftermath of the explosion. He didn't know if that had been seized nor whether other employees at that company were interviewed. He would have liked to have been more thorough;
ii. The same agent accepted that the Form 302 records were not endorsing the truth of the witness, only answers to the questions they were allowed to ask;
jj. Notes were taken during the interview by the other agent. There could be some discrepancies because of the Arabic accent where the note-taking agent was non-native and needed interpretation.

There was also a lot of local dialect which needed to be clarified. These notes were used to type up the official Form 302, which both agents then verified. In almost every case there would be suggested edits;

kk. One (at least) of the prior interviews of the witnesses had been conducted by a PSO Colonel who had come to be the main contact person in Aden for witness interviews. It was known that he did not like the US and was described as being sympathetic to those who attacked the USS Cole. He later assisted in the escape of prisoners and was arrested for his actions.

82. Aside from the witness questioning, representations were made in relation to two motions, on the Wednesday and on the Friday.

83. The first related to a discovery violation in the context of confession evidence tainted by torture in the case of Walid Muhammad Salih Mubarak bin Attash (known as "Khallad") (being tried in the 9/11 case). The defence explained that material had been provided in July 2022, amounting to 14,000 pages, concerning treatment during detention. However, it was clear from the pleadings in Khallad's case that this was not all the documents that should have been disclosed; around 10,000 pages were missing. It was argued that as a consequence, the doctor being called to give evidence in December concerning treatment of Khallad could not be properly examined without seeing all of this material. It was already apparent that some medical witness testimony given in July had been contradicted by another doctor and they did not want to question a witness without being able to properly challenge them, otherwise the witness would have to be recalled. The documents released refer to articles written, a cable on rectal feeding between doctors and proprietary of personnel.

84. The Government argued that it was a mischaracterisation to say this material was new when most of it had been disclosed in 2017 or earlier. If further discovery was required, this should be sought from the Commission, not by way of the 9/11 material that was not relevant in this case. The new information related to email communications opining in relation to detainee abuse previously produced and undisputed.

85. The defence argued that they should be on an equal footing with Khallad in relation to challenging the use of evidence tainted by torture and that required all documents to be disclosed.

86. The Judge took the representations under consideration and determined to give a ruling ahead of the hearing in December where the witness was due to give evidence. This appears to have been overtaken by a further motion in relation to consistent classification guidance and discovery with Khallad.

87. The second argument heard on the Friday related to motion AE482 to suppress statements allegedly made by Mohammad Rashed Daoud Al-'Owhali during interrogations. He was one of four convicted and sentenced in the US to life without parole in 2001 for the 1998 embassy bombings. The Defence sought the Commission to compel Mr 'Owhali to give evidence in relation to the motion to supress the statements attributed to him, rather than be admitted as hearsay. The statement implicates Mr Nashiri in conspiracy to commit bombings and goes to a fundamental constitutional issue to be able to confront witnesses who make accusations against you. There were also other witnesses – a Kenyan prison officer and a female translator who was said to have ran from the room on what she heard of how the interrogation was conducted. Both could be called to give evidence. The Defence cannot compel witnesses in the Commission, this has to be approved by the judge.

88. The judge queried why the statement Mr 'Owhali made in his own trial would not be sufficient evidence of what he wanted to say. The Defence countered that this was a very narrow statement and without the pressures of trial he would be able to reply to questions in a more fulsome way. The Defence further ob-

served that the Commission was not inhibited by the decision of another court (in relation to the US District Court ruling that the statement was made voluntarily).

89. The Government argued that there may be difficulty in making Mr 'Owhali come to court. The Judge asserted that the hearsay could only be relied upon if the witness was unavailable. If he is available, he should come to give evidence. The Government suggested that the Judge could make a conditional decision subject to his availability as to whether his evidence is relevant or not. There was no evidence to suggest he would say anything other than what was set out in his affidavit for the criminal trial. Moreover, a US agent had given evidence to the Commission which refutes the allegations that his will was overborne during the interrogations and the evidence of the female interpreter. The court could take notice of that without an evidentiary hearing. The fact that this is a capital case does not affect the usual procedure before a military commission and there was ample evidence in the record and from the District Court as to credibility of the witnesses for the judge to provide a ruling.

90. The judge reserved judgment on the issue but interestingly made it known that since this was a capital case – "death is different". He emphasised that no greater scrutiny was required than in a death case, and the judge was trying to do everything he could to be vigilant and take responsibility to the greatest extent possible for the fairness of the proceedings.

Observations

91. This part of the report considers whether international and national fair trial standards have been complied with in the case, organised under the following headings[24]:

    (a) the independence and impartiality of the court and/or judges
    (b) the jurisdictional authority of the court
    (c) observance of the principle of the presumption of innocence
    (d) observance of the principle of legality in relation to the offences
    (e) the conduct of the prosecuting body
    (f) observance of the rights and judicial guarantees to which the defendant was entitled

92. As a party to the ICCPR, the standards set for the right to a fair trial in international law apply to the US. We note the maintained position of the US during the most recent 2014 UN Human Rights Committee 4th periodic review of the application of the ICCPR in the US ("the 4th Periodic Review") that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory. This is despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice.[25] Nevertheless, in line with international law we consider the ICCPR standards apply to this trial as all trials for States parties to the Convention.[26]

(a) the independence and impartiality of the court and/or judges

Article 14 ICCPR(1)
…in the determination of any criminal charges against him or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing before a competent, independent and impartial tribunal established by law

93. The fifth and sixth amendments to the US Constitution afford a right to a fair and public hearing before an independent jury. However, the due process rights of the Constitution are not applicable to individuals at Guantanamo Bay[27]. The MCA 2009 provides for trial by members of the Commission (i.e. a jury made of

24 Although the US is a member of the Organisation of American States, it has not ratified the American Convention on Human Rights nor accepted the jurisdiction of the Inter American Court of Human Rights. Regional law is therefore not applicable to the US.

25 Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, 23 April 2014, para 4, available at https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsijKy20sgGcLSyqcc X0g1nnMFNOUOQBx7X%2BI55yhIwlkDk6CF0OAdiqu2L8SNxDB4%2BVRPkf5gZFbTQO3y9dLrUeUaTbS0RrNO7VHzbyxGDJ%2F

26 Common article 3(1)(d) of the Geneva Conventions governing non-international armed conflicts also prohibits the passing of sentences and the carrying out of executions "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples...", considered to reflect customary international law.

27 *Boumediene v Bush* 553 US 723 (2008) confirmed that detainees must have a right to challenge the legality of their detention at the Base through habeas corpus review. However, US District Courts have repeatedly refused to determine whether Constitutional due process rights apply, saying that detainees are afforded adequate due process. A full court (*en banc*) review was heard on this issue in *Al Hela v Biden* in 2021 but a decision is still pending, but in light of previous decisions may not be helpful to the detainees: J. Elsea, 'Due Process Rights for Guantanamo Detainees', 2nd November 2021, available at https://crsreports.congress.gov/product/pdf/LSB/LSB10654

five members). These must be made up of commissioners on active duty who are not a witness, nor have they investigated or been counsel in the case (§948i).

94. Independence means that a tribunal must be free from any form of direct or indirect influence, whether this comes from the government, from the parties in the proceedings or from third parties such as the media.

95. Given that the case concerns an attack on the USS Cole and is being tried in a US navy base, we are concerned that trial by members of the Commission may not be independent and impartial. It is unclear how the members will be selected, whether some officers may out rank each other and how officers with deployment in connection with the "War on Terror" will be avoided.

96. This is one of the fundamental problems with the determination that the "unprivileged enemy combatants" are detained in the context of an armed conflict and therefore must be tried by a military rather than civilian process.

97. Moreover, the requirement for a competent tribunal in the context of the most serious of crimes would lend itself to appointing a senior judge with many years' experience of presiding over capital trials. While the Commission judge has military experience, it ought to be of concern that he has never previously tried a capital offence. His final remarks at the end of the hearings provided some reassurance that he fully recognises his responsibility. Yet the very act of ordering hearings to assess the admissibility of hearsay in this case (to which see below) suggests a lack of experience in practice.

98. A public hearing is also a fundamental right under article 14, yet it is clear that the hearing is not fully public since security clearance is required to attend. The US Government argues that these measures are necessary to protect against further terrorist attacks and security risks concerning the detainees at the Base. The compromise made is to ensure that there is a feed that can be watched by those with clearance, and NGOs, such as BHRC, and members of the press can apply to attend the hearing in person and report what happened. There is also a transcript eventually made available for each hearing, though this is subject to unhelpful and lengthy declassification delays.

99. While this is not wholly satisfactory in a capital trial, and the importance of a public hearing should not be minimised, we accept that some efforts have been made to allow access to the hearings.

100. However, given the significance of the trial, we consider that much broader access could be provided by a broadcast feed from the hearings, which could be accessed by anyone able to satisfy security clearance requirements. This would enable far better transparency and scrutiny of the process than currently provided.

101. We also recognise that classified material can require in camera proceedings, such as occurred for taking evidence on the Wednesday afternoon in the hearings that we observed. The Defence attorneys have obtained security clearance for some aspects of the material and were able to make their representations concerning that material on Wednesday, but they are not cleared for all of the material held by the State in connection with Mr Nashiri's case and therefore it is unknown whether any classified documents are relevant and significant. It is important that the Commission judge ensures a summary of the gist of the arguments is made available for the public to understand the issues under consideration.

(b) the jurisdictional authority of the court

102. Paragraph 22 of UN General Comment 32[28] recognises that trials may take place before a military tribunal but emphasises that such trials must fully conform with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.[29]

103. The Special Rapporteur on the Independence of Judges and Lawyers, amongst other Special Procedures of the UN Human Rights Council, has repeatedly observed the "regrettably common practice" of using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism.[30] She concluded that the jurisdiction of military tribunals should be restricted to offences of a strictly military nature committed by military personnel, save in strictly exceptional cases concerning civilians assimilated to the military who have allegedly perpetrated a criminal offence outside the territory of the State and where regular courts are unable to undertake the trial. The burden should fall on the State to prove this on a case by case basis.[31]

104. We further note the recommendation of the Human Rights Committee in the 4th Periodic Review at paragraph 21 that, *"any criminal cases against detainees held in Guantánamo and in military facilities in Afghanistan are dealt with through the criminal justice system rather than military commissions, and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant."* [32]

105. As emphasised above, a fundamental concern with trials at Guantanamo is the unique process established for trying the charges alleged against the detainees at the Base. The MCA confers this power and is a process established by law, approved by Congress. It was also reviewed and refined in 2009 to afford greater due process rights. Nevertheless, and notwithstanding the current jurisprudence in the case, the question of whether Mr Nashiri should be tried by a military commission remains unanswered and it is by no means certain that his trial should take place in a military commission in light of the observations made by the international jurists. In our view, it is fundamental that a preliminary decision on this issue is made before any other determinations are given. Otherwise, the entire legitimacy of the trial process under the MCA will be undermined.

28 HRC General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial,* UN Doc CCPR/C/GC/32 (2007).

29 See UN HRC communication No. 1172/2003, *Madani v. Algeria,* para. 8.7.

30 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul (A/68/285), 2013, para. 46. See also A. Conte, "Approaches and responses of the UN human rights mechanisms to exceptional courts and human rights commissions", in *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective*, F. Ní Aoláin and O. Gross, eds. (Cambridge University Press, 2013).

31 At paras 46-56 and see other international sources cited therein.

32 See note 25 above.

(c) observance of the principle of the presumption of innocence

Article 14(2) ICCPR
Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

106. In the same way as the jurisdiction of the court has yet to be determined, the status of Mr Nashiri as an "alien unprivileged enemy belligerent" presupposes that he should be tried under the MCA regime.

107. In our view this fundamentally undermines the presumption of innocence as the entire process set up under the MCA is assumed to apply in his case without having first determined whether the status should actually be applied to Mr Nashiri.

108. We reiterate, it is fundamental that a preliminary decision on this issue is required before any other determinations can be made. Otherwise, the entire legitimacy of the trial process under the MCA will be undermined.

(d) observance of the principle of legality in relation to the offences

Article 15(1) ICCPR
No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

109. The UN Special Rapporteur on human rights and counter-terrorism has observed that it is essential for terrorism offences to be confined to conduct that is genuinely terrorist in nature. Terrorism offences should also plainly set out what elements of the crime make it a terrorist crime. Similarly, where any offences are linked to "terrorist acts", there must be a clear definition of what constitutes such acts. [33]

110. The charges which Mr Nashiri faces exist as criminal offences set out under Title 18 of the US Code. Mr Nashiri is charged with these crimes specifically in the context of military acts under Title 10, relating to the armed forces, and in particular chapter 47A relating to Military Commissions, originally created in 2006 by 120 State 2624. However, section 950p makes clear that the chapter does not establish new crimes that did not exist before its enactment, rather codifies those crimes for trial by military commission.

111. The crimes with which Mr Nashiri is charged were therefore existing crimes at the time they were alleged to have been committed. But, as set out above, the question remains whether Mr Nashiri should be facing charges under Title 10 or Title 18 of the US Code.

33 UN Doc. E/CN.4/2006/98 (2005), para 46.

(e) the conduct of the prosecuting body

UN Guidelines on the Role of Prosecutors, Guideline 12
Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

112. The UN Guidelines on the Role of Prosecutors,[34] set out in detail how prosecutors should be organised to enable them to perform their functions in accordance with the rule of law.

113. Prosecutors in this case are drawn from military and civilian expertise. However, it is concerning that there is a lack of experience in civilian capital prosecution. The limited knowledge of the heightened scrutiny to which capital trials are held was perhaps evidenced in final argument on the Friday hearing we observed concerning hearsay evidence in relation to confessions argued to be tainted by torture.

114. Likewise, the attitude to disclosure and the length of time that has passed in this case, as well as the failure to accede to adaptations for Mr Nashiri in light of his physical and mental health following extensive State torture, belies a lack of fair, expeditious and independent practice in the public interest.

115. As such, we are concerned that, on the evidence we observed, the Prosecution is not acting with regard for the due process rights of the accused in this case.

(f) observance of the rights and judicial guarantees to which the defendant was entitled

(i) notification of the charges

Article 14(3) ICCPR
In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him

116. MCA §948q(b) provides that the accused shall be informed of the charges and specifications against the accused as soon as practicable.

117. Mr Nashiri has received a charge sheet setting out the basis of the charges against him. The was made available in Arabic. However, it was by no means prompt, being laid originally in 2011, some nine years after Mr Nashiri was detained.

34 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

(ii) Adequate time and facilities to prepare a defence

Article 14(3)(b) ICCPR
To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing

118. "Adequate facilities" must include access to documents and other evidence held by the prosecution. Access must include to all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material includes not only material establishing innocence but any other evidence that could assist the defence,[35] for example by undermining witness evidence.

119. Mr Nashiri has a large defence team and has the opportunity to speak with his counsel concerning the preparation of his defence.

120. However, as was clear on the defence request for further time prior to the Court dealing with a witness at the December hearing, vast amounts of documentation are relevant in the case. A recent disclosure in the context of a 9/11 accused's confession evidence illustrated significant difficulty for the defence in ensuring that they have all relevant material prior to questioning a witness. This is critical to being able to challenge that evidence effectively.

121. From conversations with the defence team, it is clear that providing a defence in his case is particularly difficult given the classified nature of many documents, the volume of documents that have to be sifted for relevance, and the passage of time. This raises fundamental concerns for the equality of arms in this process.

(iii) to be tried without undue delay

Article 14(3)(c) ICCPR
To be tried without undue delay

122. Paragraph 35 of General Comment 32 provides that the right of the accused to be tried without undue delay is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.

123. UN experts concluded that the right to a trial within a reasonable time for the Guantanamo detainees was violated as long ago as 2006[36] – some four years after Ms Nashiri was detained and six years after the attack on USS Cole.

124. It is now 22 years since the crime was committed, 20 years since Mr Nashiri was detained and 11 years since he was arraigned on the charges he currently faces.

125. On no possible measure can the trial be considered to be proceeding without undue delay.

35 HRC General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial,* UN Doc CCPR/C/GC/32 (2007) at 33.
36 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.

126. Moreover, the only witness evidence that can be brought against Mr Nashiri in relation to to the charges against him is hearsay evidence because there is no possible way of locating the witnesses interviewed after such passage of time. Even if it was possible to locate them, it would be inconceivable for them to now have an adequate recollection of events. Likewise, attempting to mount a substantive defence under these conditions is nigh on impossible.

127. If all other conditions of the trial process were fair, we would still be compelled to conclude that attempting to continue to trial in this case is utterly misconceived and must be, along with the other 9/11 cases, one of the longest periods between a criminal act being committed and trial ever to be tried. In our view it makes a mockery of the US justice system.

(iv) to defend himself in person or through legal assistance

Article 14(3)(d) ICCPR
To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing

128. Paragraph 36 of General Comment 32 emphasises that Article 14, paragraph 3(d) requires that accused persons are entitled to be present during their trial. This right is provided for in MCA §949a(b)(2)B and was adhered to appropriately at the hearings observed.

129. However, Mr Nashiri was not present on the third day of the process. While the reasons for his absence are unknown, having been informed that transportation each day is specifically traumatic for Mr Nashiri in light of the torture techniques used against him, and that the hearings must undoubtedly be a strain for him, we are concerned that adaptions have not been made to assist Mr Nashiri to be present at all hearings with as minimal additional trauma as possible.

130. The right also includes to be *effectively* assisted by legal representation.

131. Defence lawyers must act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession. They must advise their clients of their legal rights and obligations and inform them about the legal system. They must aid their clients in every appropriate way, taking such action as is necessary to protect their clients' rights and interests, and assist their clients before the courts. In protecting the rights of their clients and in promoting justice, lawyers must seek to uphold human rights recognised by national and international law.[37]

132. Mr Nashiri is assisted, through public funding, by a team of defence lawyers who include some very experienced capital defence attorneys. His team appear to be doing their best to challenge every unfair aspect of the process, despite the difficulties that they face with obtaining disclosure and limited due process rights.

133. We commend his team for their diligence and continued commitment over the years of this case.

37 Principles 6, 13 and 14 of the Basic Principles on the Role of Lawyers and Principle 12 of the Principles on Legal Aid.

(v) to examine witnesses

Article 14(3)(e) ICCPR
To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

134. Paragraph 39 of General Comment 32 provides that:

"As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the pros-ecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the pro-ceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, it is primarily for the domestic legislatures of States parties to deter-mine the admissibility of evidence and how their courts assess it."

135. MCA §949a(b)(2)(A) recognises this as a minimum right of the accused. However, subsection (3)(D) allows for hearsay evidence to be used where:

*"(ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, **including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne**, determines that—*

(I) the statement is offered as evidence of a material fact;
(II) the statement is probative on the point for which it is offered;
(III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and
*(IV) **the general purposes of the rules of evidence and the interests of justice will best be served** by admission of the statement into evidence." (emphasis added)*

136. In this case, there is not an application to rely on perhaps one or two hearsay statements of absent witnesses alongside key witnesses. The Government's application is to rely almost entirely on hearsay evidence to prove their case against Mr Nashiri.

137. Not only that, it was also clear from the evidence of the US agents who were fully cross examined during the hearings observed, that there are not even any statements of the witnesses to produce in evidence. The State therefore purports to rely on double hearsay, documented in the notes taken by agents during the interviews.

138. Furthermore, these notes were taken in the context of interviews where the US agents had no knowledge of how the witnesses came to be identified, in what circumstances they were brought to interview, and what incentives may have been used to obtain their evidence by the PSO. They were also taken in native Arabic, using dialect unique to Yemen. The witnesses did not see the notes of evidence upon which the US agents rely to verify their contents. Moreover, the US agents did nothing to verify any of the accounts given by these witnesses, or their prior accounts given to the PSO. No documentary evidence was obtained from any of the witnesses.

139. It is not known whether any efforts were taken by other agents to obtain contact details from these witnesses following their interviews. Certainly, each US agent giving evidence suggested that it would not have been possible for them to obtain this information according to the protocol in place at the time. Even if such diligence had been undertaken to preserve evidence, after twenty years, it is unsurprising that these witnesses have not been located.

140. Furthermore, these witnesses were asked by the US agents to take part in a wholly unconventional identification process that would clearly not adhere to US criminal procedural standards. Questions put to US agents by the prosecutor were revealed through cross examination to have initially incorrectly identified Mr Nashiri in circumstances which were extremely surprising and confusing. Moreover, the inclusion of a composite photograph was clearly unorthodox and unfair due to its distinctive appearance among real photographs. Furthermore, there appears to have been very poor attention to the accuracy of each identification and the certainty of the witness. We therefore consider the approach to identification to be extremely flawed and unreliable.

141. The cross examination of the US agents has illustrated that the circumstances in which interviews took place was highly questionable. But in any event, the agents' accounts do nothing to establish the credibility and reliability of the witnesses, which cannot be examined by Mr Nashiri's counsel.

142. In addition to this "eye-witness" testimony, the State also seeks to rely upon the hearsay confession evidence of a convicted terrorist who apparently may have implicated Mr Nashiri in one or more preparatory acts. This evidence is challenged by the defence for being tainted by torture. In the hearings observed, the defence sought to compel the appearance of this witness to give evidence since he is located in a US correctional facility and could be produced. The State appeared to resist this application for reasons that we could not fathom, given the fundamental right to have witnesses examined in person.

143. We find it utterly remarkable that, in a capital trial of such magnitude, it has even been entertained that this collective, (double) hearsay could be used as evidence against Mr Nashiri.

144. Having heard the nature of the evidence sought to be relied upon, we consider it inconceivable that Mr Nashiri could have a fair trial based upon this evidence.

(vi) interpretation and translation

Article 14(3)(f) ICCPR
To have the free assistance of an interpreter if he cannot understand or speak the language used in court

145. There did not appear to be any difficulty with the availability and quality of interpretation that Mr Nashiri received and no concerns were raised with us by the defence team.

146. On a number of occasions during the hearings, the Commission Judge reminded prosecuting counsel to slow down in his statements and questions to allow the interpreter to provide a simultaneous translation.

(vii) right not to self incriminate

Article 14(3)(g) ICCPR
Not to be compelled to testify against himself or to confess guilt

147. Paragraph 41 of General Comment 32 explains that:

"This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant [prohibition on torture] in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will."

148. MCA §948r asserts that statements obtained through torture will not be admissible, except as described in the paragraph above. Likewise, self incrimination at trial is prohibited. However, the rules allow for a judge to admit a statement from the accused if it is reliable, and probative, was taken lawfully and was voluntary. Voluntariness is determined by the judge considering all the circumstances, including the details of how it was taken, the characteristics of the accused, and the lapse in time, change of place or change of questioners between the statement sought to be admitted and any prior questioning.

149. The hearings observed did not directly address the issue of confession evidence, but representations were made in relation to the taking of witness testimony on this issue. It is understood that the State wishes to rely on certain admissions made by Mr Nashiri during questioning at the Base some six months after the use of "enhanced interrogation techniques" ended. Since the specific circumstances in which these questions were asked are unknown to us, we are unable to definitively determine the impact that they would have on the fairness of the proceedings.

150. However, in international law, there is no derogation permissible from the prohibition on torture.[38] The very fact that Mr Nashiri was subject to questioning through the use of torture over a four-year period in different locations, some of which took place at the Base, should raise serious questions as to the reliability of any statement he made to US agents subsequently.

151. Moreover, in our view it raises serious concerns as to whether Mr Nashiri can effectively participate in a trial in any event. We understand that none of the detainees have ever received proper physical or psychological treatment for the injuries that they have sustained through State approved torture.

152. On 18th January 2023 UN experts, twenty years after the first detainee was housed at Camp X-ray in Guantanamo, observed that:

"*Guantanamo Bay is a site of unparalleled notoriety, defined by the systematic use of torture, and other cruel, inhuman or degrading treatment against hundreds of men brought to the site and deprived of their most fun-damental rights.*"[39]

153. They also said Guantanamo was a profound symbol of the systematic lack of accountability for and censorship of the practice of state-sponsored torture and ill treatment and the unacceptable impunity granted to those responsible. They condemned the lack of adequate medical assistance and torture re-habilitation treatment for detainees both at Guantanamo and after transfer away from the prison - both of which are plainly required under international law.

Detention

154. Detainees are housed in a modern detention facility at a distance from Camp Justice. It is far from the desolate and chilling stain the now empty Camp X-ray continues to paint on the Cuban island's hills above the Base. Ms Blackstock was denied access to the prison to see the conditions that the detainees are housed in. We understand from defence attorneys present at the Base that these are adequate, save for the lack of appropriate physical and mental health treatment for torture rehabilitation, and, of course, the impracticality of any meaningful access to friends and family.

38 Article 2 UN Convention Against Torture 1984 UNGA 39/46. The Convention sets out the steps that should be taken to prevent, investigate and prosecute acts of torture.

39 UN Experts, 'Guantanamo Bay: "Ugly chapter of unrelenting human rights violations" – *United Nations press release,* 10 January 2023, available at https://www.ohchr.org/en/press-releases/2022/01/guantanamo-bay-ugly-chapter-unrelenting-human-rights-violations-un-experts

Conclusion and Recommendations

155. Jodie Blackstock was granted access to the hearings taking place in the pre-trial case against Mr Nashiri. It was possible to observe five days of witness testimony and argument.

156. Defence lawyers were able to fully examine witnesses and address the Commission judge to make representations on Mr Nashiri's behalf. To this extent, he has been afforded a defence team of excellent skill and ability.

157. Since Ms Blackstock attended the pre-trial hearing in October, hearings have continued in the subsequent months, taking further evidence in relation to the admissibility of hearsay and torture evidence. At the time of writing, we understand that there has not as yet been a ruling on these pre-trial motions.

158. Nevertheless, and no matter how skilled his team, in our view, the conditions in which Mr Nashiri faces trial are fundamentally flawed and cannot be cured. Twenty-two years have passed since the attacks on the USS Cole. Mr Nashiri has been detained for 20 years, the first four of which involved repeated and abhorrent acts of torture by US agents under a State approved programme to obtain confessions. Mr Nashiri was not even indicted until 2011 but has since found the case mired by pre-trial process. The passage of time is so extensive that it is impossible to conceive that a trial could now be fair.

159. Moreover, it is clear that almost the entirety of the evidence against him is double hearsay obtained in circumstances that cannot substantiate the veracity of the statements made, all witnesses having being produced by the notorious Yemeni special forces.

160. The remaining evidence is said to be admissions obtained after the regime of torture concluded. Medical and contextual evidence is being heard so that the Commission can attempt to ascertain if this information is voluntary and reliable. In the context of "enhanced interrogation techniques" being used for so long against these detainees, we express serious reservations about the admission of this material. It is tainted by torture.

161. In light of all the above, we cannot conclude that the trial process against Mr Nashiri is fair. We further question how, after such abhorrent conduct by the State during his detention, it is in the interests of justice to continue to prosecute him.

162. We note that such a trial would not proceed under US capital laws. That it has been possible to get this far after so long under the Military Commission process throws serious doubt on the independence and fairness of the proceedings.

163. To this end, we echo our previous report and the recent call of the UN experts *"to close the site, return detainees home or to safe third countries while respecting the principle of non-refoulement, provide remedy and reparation for those egregiously tortured and arbitrarily detained by their agents, and hold those that authorized and engaged in torture accountable as required under international law."* [40]

40 *Ibid.*

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