BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND & WALES

TRIAL OBSERVATION REPORT

USA v Khalid Sheikh Mohammed, et al

September 2024

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Huge thanks are also owed to **Sahar T Sadoughi**, who worked hard to obtain the onerous clearances and organise the logistics for the BHRC trial observation to take place in a place like Guantánamo Bay; and **Dr Louise Loder**, who tied all the loose ends together and helped to put together the final version of this report and its launch.

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About the Bar Human Rights Committee of England and Wales

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

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

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

Our Executive Committee and members predominantly offer their services pro bono, alongside their independent legal practices, teaching commitments and legal studies.

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.

Introduction

For many years BHRC has closely followed the use of the detention facility at the United States Naval Base, Guantánamo Bay, Cuba ("the Base") and procedural developments in the Military Commissions established under the Military Commissions Act 2009. BHRC has consistently expressed concern about the use of the detention facility and the lack of procedural safeguards within the trials, together with broader issues including extraordinary rendition and torture.[1] Accurate assessment of the trial process was initially hampered by the logistical difficulties in observing proceedings due to the level of secrecy surrounding much of the evidence.

In 2019, the Bar Human Rights Committee of England and Wales (BHRC) became the only UK-based organisation to be granted official observer status for the ongoing trials at the Military Commission. BHRC has observed three cases and has submitted amicus briefs to the Court and Court of Military Commissions Review. Previous BHRC work since being given observer status includes:

BHRC Amicus to the Guantánamo Bay Military Tribunal, February 22, 2019

BHRC Trial Observation Report, USA v Mohammed et al, September 2021

BHRC Trial Observation Report, Guantánamo Bay Detention Camp, April 26, 2022

BHRC Update to Guantánamo Military Commissions 2023, launched with a panel event June 2, 2023

BHRC Amicus Brief in the matter of Al Nashiri, Court of Military Commission Review, September 25, 2023

This report follows the BHRC visit to the Base for the 49th set of pretrial hearings in the case of *USA v Khalid Sheikh Mohammed, et al* - the trial of five men for a range of crimes relating to the planning of the 9/11 hijackings and attacks on the US. BHRC continues to highlight human rights issues and express serious concern that the proceedings before the Military Commissions

[1] For example, see BHRC's Letter to UK Prime Minister concerning the continued incarceration of the Guantánamo Bay detainees, 14 November 2003; Joint letter to the US Attorney General, 12 May 2009.

demonstrate a fundamental departure from fair trial norms and the rule of law. We also continue to call for the closure of Camp Justice.

The Establishment of the Military Commissions

The United States Congress created the Military Commissions in 2006 through the enactment of the Military Commissions Act of 2006 (which authorised the trial by military commission of 'alien unlawful enemy combatants engaged in hostilities against the US for violations of the law of war and other offenses triable by military commission) and revised them in 2009 when Congress passed the Military Commissions Act of 2009 which remains in force today.[2] The Obama administration made attempts close the detention facility at the Base (on January 22, 2009, President Obama issued a request to suspend proceedings at the Base) and to try the 9/11 suspects on the US mainland in domestic courts but ultimately, for political reasons and due to domestic pushback, was unable to achieve that. In response, President Obama created the current system of Military Commissions in 2009 with jurisdiction and procedure governed by the Military Commissions Act 2009 ("MCA 2009") which introduced 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;[3]
> 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.

[2] See here for more background on the Military Commissions

[3] Chapter 47a defines the term 'coalition partner', with respect to hostilities engaged in by the United States, to mean any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities.

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

The Commission is a hybrid of the military court-martial and federal criminal court systems. The judge and jury are together called a panel. The judge serves as President of the Court and presides over the pretrial proceedings. As the court deals with pre-trial issues, the jury will only be empanelled just prior to the commencement of the trial. A jury of 12 military officers is to be drawn from a pool of active-duty military officers from any or all of the four services — the Army, Navy, Air Force and Marine Corps. The Pentagon overseer of the Military Commissions, called the Convening Authority, will create the pool from those 'best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament'.[5]

Hearings observed in February & March 2024

To observe any proceedings taking place at the Military Commissions, the organisation which the observer represents must be accredited by the US Department of Defence and clearance must be granted for the individual to travel to the United States Naval Base at Guantánamo Bay. Observers are required to stay for a full week, regardless of the hearing schedule, as air transport is only provided weekly and is in any event often subject to late changes and delays.

Zimran Samuel MBE, who is an Executive Committee member of BHRC, was approved by US Department of Defence to travel to Guantánamo Bay to conduct our trial observation. Mr Samuel is a barrister at Doughty Street Chambers in London and serves as a Visiting Professor in Practice at the London School of Economics.

[4] United Nations, Geneva Convention Relative to Treatment of Prisoners of War
[5] See Manual for Military Commissions

During February and March 2024, Mr Samuel observed the 49th set of pretrial hearings in the case of *USA v Khalid Sheikh Mohammed, et al* – the trial of five men classed as 'alien unprivileged enemy belligerents' at a specially created Military Commission for a range of crimes relating to the planning of the 9/11 hijackings and attacks on the US.

Mr Samuel travelled from Joint Base Andrews in Washington, DC to Guantánamo Bay on 24 February. He stayed in a tent at Camp Justice where the trials take place. He was given access to most of Camp Justice and a space to work within a dedicated NGO temporary office. He was also provided with a mechanism to raise queries and requests in relation to the ongoing court hearings.

Mr Samuel was invited to meet various members of the defence team (for example, the team representing one of the co-accused Mr Al-Baluchi). This provided an invaluable opportunity to discuss the case with experienced defence counsel such as Alka Pradhan, an expert on the application of human rights and humanitarian law to counterterrorism situations, and the impact of torture on fair trials, as well as many others working at Camp Justice. There were chaperones to accompany trial observers in making their way around the Naval Base, which has 5,000 residents, an open-air cinema, a pub, a bowling alley, seven dining rooms and four fast-food restaurants.

As a BHRC trial observer, Mr Samuel arrived at a good understanding of how these extraordinary proceedings and the detention facilities operate, and an appreciation of the complexity of the legal arguments and tactical approach of both prosecution and defence. He was grateful for the invaluable support and access provided by the staff of the Military Commissions and defence counsel.

Who else could observe?

There were five other NGO trial observers who had travelled to Guantánamo Bay, each representing an approved organisation. Mr Samuel was the only foreign national. There were three accredited journalists present to observe proceedings, including Carol Rosenberg from the *New*

York Times (who has been closely reporting on the proceedings for several years and has written extensively about the trials at Guantánamo Bay since the first detainees were brought to the US base in 2002).

There were also five members of the public present. A liaison to the victims in the Chief Prosecutor's Office selects five people to observe the proceedings at Guantánamo from a pool of volunteer observers who include spouses, parents and children of those killed on 9/11, as well as designated survivors of the attacks. Each is allowed to bring a companion. They are brought to the base on the same aircraft that transports the judge, lawyers and witnesses. The only other means of the public viewing proceedings is via a feed (with a two-minute delay for security purposes) that is broadcast to accredited observers at a US Military Base in Maryland.

The Case

In May 2012, the defendants were charged with eight war crimes carrying the death penalty. The charges include conspiracy and murder in violation of the law of war and terrorism. The defendants are accused of directing or training the hijackers and providing them with financing and travel. The defendants were captured in 2002 and 2003, moved to several 'black sites'[6] of the Central Intelligence Agency (CIA) where they endured the repeated use of Enhanced Interrogation Techniques ('EITs') and were ultimately transferred to Guantánamo Bay in 2006.

The Defendants

The defendants are not officially referred to as being 'detained' but are instead said to be 'clients' of the US government 'housed' at the Naval Base. The clients in this case are:

[6] Black sites are secret detention facilities where prisoners who have not been charged with a crime are incarcerated without due process, and in this context were operated by the US Central Intelligence Agency in locations across the world as part of the so called "war on terror".

Khaled Shaikh Mohammed ('KSM') – a Pakistan citizen of Baluchi descent, accused of masterminding the 9/11 attacks on the US. He is alleged to have proposed the idea of attacking significant US locations using hijacked planes to Osama Bin Laden in 1996. Thereafter he is charged with having overseen the plot and helping to train hijackers in Pakistan and Afghanistan. He was captured in Rawalpindi, Pakistan on 1 March 2003. As lead defendant, he sits in the front row of the courtroom.

Walid Bin Attash – a Saudi national, who is accused of training two of the hijackers and researching flights and timetables. He is also accused of training several of the 9/11 hijackers in preparation for the attacks and carrying out test runs to see how razors and other items could be concealed. He was captured in Karachi, Pakistan on 29 April 2003.

Ammar Al Baluchi (charged as Abdul Azi Ali) – a Pakistani national and nephew of KSM, accused of transferring money from the United Arab Emirates to the hijackers. He allegedly made a series of electronic money transfers to the hijackers from Dubai and provided other logistical support. He was captured with Bin Attash in Karachi, Pakistan on 29 April 2003.

Mustafa al-Hawsawi – a Saudi citizen, who is accused of assisting the hijackers with finances and travel arrangements. He allegedly collected and deposited money on behalf of the hijackers and KSM, as well as applying for banking cards to facilitate their access to funds.

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

Al-Hawsawi has the fewest charges against him, and he sits at the counsel table furthest from the judge at the back of the courtroom. Al-Hawsawi frequently waives his right to appear in court, as the rectal damage he suffered during his interrogations makes it painful for him to sit for extended periods of time. During plea negotiations last year, Al-Hawsawi's attorneys argued that if Khalid Sheik Mohammed received a life sentence, their client should receive far less, a sentence like that

of Majid Khan[7]. Al-Hawsawi's lawyers have also asked that their case be severed from that of the other three defendants. Thus far, their requests to sever have been denied by the court. Ramzi bin al Shibh, a Yemeni, was one of the five individuals charged in the planning and execution of the 9/11 attacks.[8] Al-Shibh was captured in Karachi, Pakistan after a gun battle with Pakistani and CIA intelligence agents. He was transferred to US custody in September 2002, held in solitary confinement, and transported between CIA black sites in Jordan, Morocco and Poland, where he was subjected to EITs including waterboarding, beatings, rectal feeding, electric shock, sleep deprivation, forced nakedness and other techniques.

In August 2023, a military medical panel diagnosed Al-Shibh with post-traumatic stress disorder with secondary psychosis and linked it to the torture and solitary confinement that he had endured during his four years in the CIA black sites.[9] In September 2023, the military judge overseeing the 9/11 trial found that al-Shibh's diagnosis made him incompetent to stand trial and severed his case from that of the other four defendants. Al-Shibh is expected to remain in custody and officials plan to resume his trial if he ever regains competency.

The Military Commission has not yet set a trial date for the remaining four 9/11 defendants.

The Legal Teams

All lawyers and support staff who work in the Court must be United States citizens. They must also have obtained security clearances.

[7] Khan pleaded guilty in 2012 to conspiracy in the murder of 11 civilians in the 2003 Marriott Hotel Bombing in Jakarta, Indonesia. The Guantánamo Military Commission sentenced him retroactively to a term certain of incarceration, and a senior Pentagon official declared that Khan had completed his sentence on March 1, 2022. Khan was transferred to Belize on February 2, 2023, where he joined his wife and teenage daughter. The US. government agreed to provide him with a home, a laptop, a phone, and a car. See: US Department of Defense, Guantánamo Bay Detainee Transfer Announced, 2 February 2023

[8] Prosecutors claim that Osama bin Laden chose al-Shibh to be one of the hijackers involved in the attacks, but he was unable to participate because his repeated requests for a US visa were denied. After the attacks, he was identified as 'the 20th hijacker'.

[9] While incarcerated at Guantánamo, al-Shibh alleged that his guards were attacking him to deprive him of sleep and cause him pain.

The legal teams for each defendant are comprised of both military and non-military personnel. Each team is headed by a senior lawyer who has sufficient experience of death penalty cases.

Prosecutors have higher security clearance than defence lawyers and therefore have greater access to classified information than defence lawyers and, in many instances, get to decide what information and evidence the defendants' lawyers are entitled to see in trial preparation. Because this is a national security case, the prosecutors collaborate with the CIA and judge at times to redact original case evidence and provide substitutions of original information to the defence lawyers.

The Chief Prosecutor is Aaron Rugh, a career Navy lawyer who was promoted to Rear Admiral for the job. He replaced Brig. General Mark Martin who retired in September 2021. Mr Rugh is supported by a team of primary prosecutors and staff just as each lead defence counsel is supported by a legal team.

The chief defence counsel is Brig. General Thompson Jr. of the Army. For KSM, Mr Gary D Sowards serves as the lead counsel. Mr bin Attash is represented by Matthew Engle, a Virginia lawyer who has specialized in capital punishment cases. For Mr bin al-Shibh, David Bruck is the lead counsel. For Mr Al-Baluchi, James G Connell III serves as lead counsel. For Mr Hawsawi, Walter B Ruiz, who is a commander in the Navy Reserves but serves as a civilian, is lead counsel.

The Judge

To date, at least four judges have presided over the pretrial proceedings. The first judge presided for six years and those who have succeeded him include one judge who retired, another who left for a command position, and one who disqualified himself because of his ties to the victims. The current judge, Colonel Mathew McCall, was assigned the case on 20 August 2021. He has announced his retirement but has resolved to sit until December 2024.

Observations

The below observations are based on the BHRC trial observer's visit from 24 February 2024 to 3 March 2024.

General

The hearings are held in a modified command centre converted into a courtroom. The facility is said to be so sensitive to national security that taking a picture of even the exterior of the outermost of three perimeter fences is punishable by years of imprisonment.

There is a second courtroom which has previously been used. A third courtroom has now also been built but to date has not been used. The BHRC trial observer requested permission to see it, but this was not granted, and no reason was provided. No independent observer or journalist has yet seen it. Its purpose is to expedite proceedings so that multiple hearings may be held simultaneously.

Trial observers are closely monitored. No electronic devices are permitted and have to be deposited in lockers before entering the facility. Military Police provide security for the legal complex. Press and observers sit behind triple pane soundproof glass and hear the proceedings on a 40-second delay. Court security officials and the prosecution team can mute the audio if classified information is elicited.

One of the government coordinators liaising between the trial observers was keen to emphasise the improvements that had been made in the conditions at the detention facility - for example, the fact that inmates could undertake activities like painting. The same official also stated it is important to control how much access is provided to journalists as they did not want people to write negative stories. The official gave an example of someone who had written an article describing that the cells that the detainees stayed in had rusty bars. The official stressed the point that many prisons in the mainland US have rusty bars and therefore such articles were simply written to present the Naval Base in a bad light.

The BHRC Trial Observer sat in a pre-allocated seat and was accompanied by a chaperone at all times, even to use the toilet. This experience was different to past BHRC observers who did not have set allocated seating.

Every morning commenced with several rounds of security checks. A protocol of court etiquette is read aloud to the observers. One moment which illustrated the unnecessary rigour of these rules came on day four of the observations. A Military Police Officer read out as usual from a script, in a strict and firm voice that no one should show, "disrespect, such as doodling and sleeping, during the trial and if they do, they will be subject to discipline". An hour or so after the hearing commenced the same Military Police guard proceeded to slump back into his chair and fall fast asleep. Unfortunately, visible to the entire public gallery.

The defendants were asked every morning if they wished to attend court for the proceedings. They are required to attend for the first day of every series of hearings. They may refuse to attend the remaining days. During the time of the current pre-trial observations, the defendants consistently refused to come to court to attend proceedings to protest their conditions of confinement. To evidence that refusal, each morning a member of the Military Police would attend court and provide oral evidence that the accused were advised with the benefit of a translator about their rights and had declined to attend. The relevant guard would always use a code name (on one occasion during the visit, the guard's code name was 'Bandit'). Their identities were also not made available to the defence teams.

During the BHRC Observer's time at the pre-trial hearings, some of the court sessions were held in private due to national security concerns. The defence team of Ammar Al-Baluchi in particular expressed grave concern at the expansion of the principle of national security to cover matters which they asserted were in fact not sensitive or a threat to national security.

Defence application to exclude statements

The defence lawyers in the current set of pre-trial hearings sought to suppress confessions that agents of the Federal Bureau of Intelligence (FBI) elicited from the detainees in early 2007, over a

year after the men had been transferred into formal detention at Guantánamo from various CIA black sites. They argued that the torture the detainees had suffered at the hands of CIA contract interrogators made the confessions unreliable. The FBI had then used these coerced statements to help build the criminal case against the detainees.

In 2018 the presiding judge at that time suppressed the statements, citing the inability of the defence teams to contact and interview CIA witnesses who had knowledge of the interrogation protocols. The judge's successor overturned that ruling the next year and ordered counsel to reargue the motion. Submissions resumed before the third judge, but his retirement, coupled with the pandemic, interrupted those hearings, which resumed last year. Since then, efforts to negotiate a plea deal were unsuccessful, resulting in the current hearings.

During the current hearings observed by the BHRC, prosecutors argued that the detainees' statements were made voluntarily, long after the EITs used against them were discontinued. This theory was termed as 'fear extinction' because it was contended that whatever interrogation and conditioning the detainees had faced initially, its effect had diminished or had been extinguished with the passage of time.

The defence teams countered that the statements were made because of, and under the threat of, continued torture, and should not be used against them in the trial. They further contended that their inability to contact or examine several unnamed CIA operatives involved in the black site program hindered their ability to effectively represent their clients.

Much of the pre-trial arguments observed focused on the defence motion to suppress the statements obtained in these interviews on the theory that the statements were not, in fact, voluntarily given. From the defence's perspective, the idea that the detainees were not influenced by the risk of being tortured for a failure to cooperate was not credible. This meant that the evidence was tainted by the prior torture. Prior evidence in these pre-trial proceedings, and also in the case of *Al-Nashiri,* had established that the EIT programme was designed to psychologically instil a fear of torture if satisfactory answers were not provided during interrogation, which meant that while torture was used frequently at the outset in the black sites, its use was held as a threat

once it was felt that the detainees were suitably conditioned. This formed an important part of the defence argument as to why the detainees would still feel fear of torture a year after arrival at Guantánamo Bay.

Motions to suppress statements obtained following earlier torture were also raised in the *Al-Nashiri* case. On 18 August 2023 the trial judge in that case ruled that confession evidence was tainted by torture and would not be admissible at trial. The State appealed to the US Court of Military Commissions Review and BHRC filed an amicus brief as to the international treatment of evidence obtained through torture. The appeal remains pending.

Oral evidence

As well as hearing submissions by all parties, the court heard the oral evidence of key witnesses.

Dr James Mitchell

The court heard evidence from Dr James Mitchell (a psychologist hired by the CIA) who took part in the interrogation of the detainees. Dr Mitchell worked for the US Air Force SERE (Survival, Evasion, Resistance and Escape) School for seven years while serving on active military duty. He holds four college degrees, including a PhD in clinical psychology. Many of the techniques he used while a SERE instructor mirrored the techniques used against the detainees, and he has written several CIA white papers on the subject.

Dr Mitchell's testimony in the present case had been delayed by several days because one of the legal counsel in the case tested positive for COVID-19 and required isolation (Commission rules require that counsel be present for each defendant during the proceedings, necessitating the delay). Dr Mitchell testified from the Military Commission's remote hearing room in Virginia, an offsite facility created during the pandemic to ease travel complications among the large defence and prosecution teams.

Dr Mitchell previously testified in this case over nine days in 2020 and he also testified in the *Al-Nashiri* case over three days in 2022.

Much of Dr Mitchell's testimony in the current set of hearings was taken in sessions that were closed because classified information was discussed. Dr Mitchell acknowledged that he had little contact with Mr Al-Hawsawi, or any of the current detainees under trial except KSM. He was familiar with the methods used to process the detainees after their capture and rendition. Dr Mitchell gave evidence that the detainees were housed at ten different CIA black sites over a period of four years before they were transferred to Guantánamo.

Dr Mitchell gave evidence about the EITs used against the detainees, including waterboarding, water dousing, repeatedly slamming detainees' heads against the wall with little notice (termed 'walling' by Dr Mitchell in court), sleep deprivation, rectal feeding when they refused to eat, and scrubbing their genitals and buttocks with a stiff bristle brush. Interrogators would shackle the prisoners, force them to their knees, and bend them backwards with a broomstick placed behind their knees. Interrogators also tied the detainees' arms behind their backs and lifted them up from behind.

The court heard from Dr Mitchell about several techniques used to elicit positive responses from the defendants more generally. One such example was *Operation Kebab* where detainees undergoing EITs (and therefore denied access to solid food for weeks on end) were put behind one-way glass to watch other detainees get to eat kebabs with the intention of wearing them down.

The EITs were conducted in what was described as a 'dungeon' and Dr Mitchell acknowledged that the conditions themselves may have helped to "overcome" the detainees' resistance. The initial EIT's were used against the detainees before they were eventually discontinued. Dr Mitchell stated that the threat of returning to the EITs, the loss of 'privileges' or withholding medical care helped to ensure the detainees' cooperation.

Dr Mitchell told the court that while he deliberately structured his program to condition detainees to fear the consequences of withholding information, he also made sure the fear would only last in the short term. This is how the 'fear extinction' argument was developed. It was suggested in evidence that the more frequently the defendants were moved to other black sites, following the

application of EITs, the more their fear subsided. When cross examined, Dr Mitchell was not able say how he assessed that this was working.

The court heard evidence at length from Dr Mitchell on how his aim was to condition responses in the short term but not long term. It was contended that the instilled fear naturally abated by the time the 'clean teams' arrived. Dr Mitchell was cross examined for several hours on the first day of proceedings by defence counsel for Ammar Al-Baluchi who reminded the court and the witness that despite the longstanding proceedings, the defence had only learned of the 'fear extinction' theory three days prior to this hearing. Dr Mitchell was cross examined on the research and literature on the topic. Dr Mitchell eventually conceded that the literature suggested fear extinction often wasn't permanent.

However, Dr Mitchell, who had defended EIT for years and had perhaps anticipated the line of questioning, then stated that while fear extinction could be undermined, it was unlikely to happen when the individual found themselves in a new environment. He reiterated that the detainees had moved from one black site to another before arriving in Guantánamo Bay.

Often in his cross-examination Dr Mitchell stated, while turning to the public gallery, that anyone who wanted to understand the psychology behind the techniques should buy his book and that Chapter 6 would be especially helpful. In the view of the BHRC Trial Observer, Dr Mitchell's demeanour and responses were self-assured and adversarial. He was often patronising to counsel when he did not like the way a question was worded. He reiterated his pride in his work and his strong support for the use of EITs.

Dr Mitchell was skilfully questioned by Mr Gary D Sowards (lead counsel for KSM) who focused on unpacking the theory of fear extinction and the torture his client had faced. Mr Sowards asked Dr Mitchell why he had not tested the efficacy of fear extinction in KSM, to which he replied: "I did not do that, because that would actually be a war crime". That remark was followed by silence in the courtroom. Mr Sowards asked Dr Mitchell about a time when his client's hands were shackled above his head in the freezing cold. He was interrupted by Dr Mitchell who clarified that, contrary to the question, that KSM did not have his wrists shackled above his head but rather ,

they were shackled together lower down his body. Mr Sowards responded with: "Well, that was good of you to give him a little privacy"; the significance of this exchange being that KSM was naked during this incident, as he was during many interrogations.

Mr Walter Ruiz (representing Walid bin Attash) also cross-examined Dr Mitchell. His questions (and subsequent submissions) drew focus to the fact that bin Attash was insufficiently related to the attacks to be tried with the other accused and should be severed.

When giving evidence in January 2020, Dr Mitchell did not recall making a threat to kill KSM's son. However, during the evidence in current hearings, Dr Mitchell acknowledged that he was with KSM at a CIA black site and told him he would take a knife to his son's throat and kill him if KSM failed to provide intelligence that could stop another terrorist attack in the United States.

Dr Mitchell gave evidence that the accused were videotaped 24 hours per day at first, and all their interrogations were videotaped. The CIA destroyed all the videotapes before the Senate Select Committee on Intelligence began an investigation of the black sites. He confirmed that a detainee had died while housed at one of the black sites. Dr Mitchell later learned that the Chief Interrogator used a power drill (near the heads of detainees so that they would have the impression that he would use it as weapon) and a gun to question some of the detainees after the waterboarding stopped. Upon his return to the US, Dr Mitchell informed officials at the CIA about the use of unapproved techniques, such as the use of a power drill, used against the accused and an Inspector General's investigation ensued. The trial observer's impression of this part of the witness's evidence was that he was trying to minimise the impact of his own involvement and highlight that others had implemented or overseen worse techniques which he had tried to raise concerns about.

Dr Mitchell's evidence that KSM acknowledged his role in the 9/11 attacks almost immediately after the EITs began was striking. Dr Mitchell stated that he believed KSM's confession was made to divert attention away from a future Al Qaeda operation to detonate a nuclear device on US soil. When KSM insisted on discussing his role in 9/11, Dr Mitchell resumed the EITs. He stated that while the FBI investigators were interested in what happened in the past, leading up to 9/11, the CIA operatives were concerned with what Al Qaeda had planned in the future.

As Dr Mitchell's evidence continued, court sessions over the following two days were closed to trial observers due to national security.

FBI Special Agent Hodgson

The next person to give evidence was Special Agent James Hodgson. Mr Hodgson earned a Bachelor of Science Degree in Criminal Justice in 1987, and he joined the army as a Military Police officer in 1987. He became an investigator for the Army Criminal Investigation Division in 1995 and was promoted to Warrant Officer in 2001. He retired from the Army in 2010 as a Chief Warrant Officer 3 (CW3). Since that time, he has been employed as a civilian investigator for the Army.

The defence lawyers sought to establish a connection between his agency and the CIA in the early days after the capture of the detainees in these proceedings. Fitzsimmons partnered with CIA investigators while the detainees were still in Pakistani custody. He also interviewed Al-Hawsawi after he had endured several rounds of EITs. During one round of hearings, prosecutors asked court security officers to cut the public feed at least nine times, citing national security concerns and frustrating both the defence team and the judge.

Mr Hodgson gave evidence that he was part of an operation called the *Fan Mail Project*, where he and other investigators examined the detainees' incoming and outgoing mail to elicit intelligence information.

During BHRC's observations, the court heard of a letter signed by the 9/11 defendants in which they confessed to every matter on the indictment and justified their actions in the name of Islam. The letter was said to be written by Al-Baluchi to his mother and apparently intercepted during the *Fan Mail Project*. In the letter he described his and his fellow detainees' role in the 9/11 attacks and their motivations.

The prosecution's suggestion was that the letter corroborated their case that the accused had voluntarily confessed to the FBI 'clean teams'. However, it was revealed by the defence questioning that the prosecution only had an English translation of the letter and that when the

defence lawyers obtained the original letter written in Arabic, its contents were very different, and it was not signed by the five accused. It was suggested to Mr Hodgson that the letter had been forged to attempt to bolster the prosecution case. Mr Hodgson claimed to have never seen the original letter and could not comment on it or on any discrepancy with the English version.

A military member of Al-Baluchi's defence team also attempted to discredit the chain of evidence of that letter. He also focused on Mr Hodgson's role in facilitating meetings between those CIA operatives who physically conducted the torture. The identities of these operatives who physically conducted the EITs are categorised as so sensitive that even defence counsel cannot have access to their names (their identities were anonymised by Unique Functional Identifiers and were referred to in court as 'UFIs')[10].

The court heard that Mr Hodgson was also part of the FBI 'clean team' interviews conducted by his agency. The interviewers were previously unknown to the detainees, they were conducted in different sites than the EITs, and the interviewers did not use the detainees' prior statements. The US government had directed the FBI to create these clean teams of agents to interview the detainees and obtain so-called untainted confessions. The accused were told at the outset that, this time, they could terminate these conversations at their convenience. The resulting incriminating statements were said by the prosecution to be voluntary and admissible against the accused.

The court heard from Mr Hodgson that to assist the defendants with obtaining access to the UFIs for the purposes of their motion to suppress the confession evidence, the government had resolved to gather all the UFIs they could into one amphitheatre (which the court was told was at CIA headquarters) and give them all a letter from the defence requesting to meet with them, with the CIA's counsel present.

Mr Hodgson's direct evidence included details of his participation in that meeting with the CIA General Counsel where they reviewed the letter sent to him by Al-Hawsawi's counsel. The defence

[10] Protective Order No 4

counsel sought access to several of the CIA operatives who were part of the black site program. Mr Hodgson stated that he was not aware of whether the operatives were forbidden to speak with defence counsel. Hodgson described his role at the meeting as a "glorified mail man" as he physically handed the letters to the interrogators, who he said were "none too pleased to be there". He mentioned that three of the interrogators told him that they did not want to be interviewed by the defence teams. During the meeting, he saw one of the operatives, identified as NX-2, scold the General Counsel. It was not clear why he was scolded but the clear suggestion was that the operatives were generally unhappy at being approached to cooperate.

Mr Hodgson stated that the meeting took place for over an hour but that nothing else was discussed other than handing over the letters to the operatives. Mr Hodgson also confirmed that he had spent most of his time since 2007 on the case involving Hadi Al-Iraqi and has never met KSM or Al-Hawsawi.

The defence teams questioned Mr Hodgson about his role in the government's efforts to make interrogators who were potentially willing to speak with the defence available to them. Given that the defence were attempting to investigate those interrogations, they had a strong interest in speaking with the UFIs.

Mr Hodgson stated that he asked the UFIs to decide, in the presence of their colleagues, if they would take the defence up on that offer. He was unable to answer the question: "If all you were doing at this meeting was handing them a letter, why did it take eighty minutes?" The lead attorney representing Mustafa Al-Hawsawi also asked questions regarding Mr Hodgson's amphitheatre meeting. Although no UFI had offered to give evidence, the Military Commission had permitted each defence team to have the government ask specific sub-sets of UFIs who interacted with the accused if they would be willing to speak to the teams, which Hodgson again supervised.

It made uncomfortable listening in court as it became apparent that one UFI, known as 'KU3' was 'open to possibly' meeting with Al-Hawsawi's defence team. Mr Hodgson relayed this information to the prosecution in October 2019. However, in court a letter dated January 2020 was discussed in which the government informed the defence teams that, despite asking again, *none* of the UFIs

would be willing to speak with them or had even expressed any interest in doing so. Mr Hodgson was unwilling to answer the question if the government had been untruthful in its handling of this process.

The BHRC Trial Observer noted moments when the prosecution's words appeared to be directed more for the benefit of the families of the victims who were listening. On one such occasion, submissions were made by the defence teams that Mr Hodgson had travelled to Faisalabad to visit the site where one of the detainees had been captured and had taken extensive photographs, but no such access had been given to the defence to the black sites (the locations of some of which have still not been revealed to them) under Protective Order 3. To justify why they wanted to access the sites of the interrogations, defence counsel compared their position to a detective wanting to be able to physically visit a crime scene. The chief military prosecutor responded: *"The defence's comparison to a crime scene in this case is outrageous. There are only three in this case: one in New York, one in Arlington, and one in Shanksville, Pennsylvania".*

Analysis

From the observations and information received during the hearings attended by the BHRC Trial Observer, several issues of concern arise from an international human rights perspective that indicate a significant risk of violations of the right to a fair trial.

Potential application of the death penalty

Each of the charges faced by the defendants carries the death penalty if convicted. The US retains use of the death penalty within its domestic jurisdiction, both at Federal and State level, and remains an advocate of the death penalty, despite growing international consensus that the 'infliction of the death penalty is profoundly difficult to reconcile with human dignity, the

fundamental right to life, and the right to live free from torture or cruel, inhuman or degrading treatment or punishment'[11].

In 2019, the US Department of Justice announced that it would resume capital punishment for federal crimes after a 17-year moratorium, and there were several executions in 2020.[12] The US has not ratified the Second Optional Protocol to the ICCPR which commits states parties to abolition within their own territory. However, the US is bound by Article 6 of the ICCPR which prohibits the "arbitrary deprivation of life" (Article 6(1)) and stipulates that in retentionist states the death penalty may only be imposed for the "most serious crimes in accordance with the law at the time of the commission of the crime and not contrary to the provisions of the Covenant". Further, that it may only be imposed pursuant to a "judgment rendered by a competent court" (Article 6(2) ICCPR).

The UN General Assembly has previously declared that "in order to fully guarantee the right to life…the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries".[13]

In 2018 the UN Human Rights Committee adopted General Comment 36, according to which States are required by Article 6 of the ICCPR to be on an "irrevocable path" towards Abolition and determined that: "Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law".[14]

While the application of the death penalty may not constitute a breach of international law per se, if the conditions of detention and trial at the Base do not adequately provide the defendants those

[11] See Federal Death Penalty: Overview, Death Penalty Information Center. See also, Pew Research Center, Most American Favor the Death Penalty Despite Concerns about its Administration, 2 June 2021; and UN, Death penalty incompatible with right to life, 31 January 2024
[12] United States Justice Department, Federal Government to Resume Capital Punishment after Nearly Two Decade Lapse, 25 July 2019
[13] UN General Assembly, Resolution 2857 3
[14] UN Human Rights Committee, General Comment 36, 2018

rights guaranteed under the Covenant, any use of the death penalty would amount to arbitrary deprivation of life.

On July 1, 2021, Attorney General Merrick Garland announced that a moratorium on the federal death penalty was being reinstated. The Justice Department will not issue orders to execute anyone while the moratorium is in place, but the moratorium does not stop the department from pursuing the death penalty and it does not stop US prosecutors from continuing to fight legal action by death row inmates trying to avoid execution.

BHRC remains opposed to the use of the death penalty in all circumstances. BHRC endorses the conclusion of the UN Secretary General in 2022 that "all measures aimed towards limiting the application of the death penalty constitute progress in the protection of the right to life",[15] and the call of the UN High Commissioner for Human Rights in 2023 for all nations to work harder towards abolition of the death penalty.[16] As of March 2024, there were 42 inmates on federal death row in the US.[17]

Allegations of torture and ill-treatment and the use of evidence obtained through torture

The prohibition of torture is universally recognised and enshrined in primary international human rights instruments. This prohibition has achieved *jus cogens* status under customary international law and imposes obligations *erga omnes* on each State. As a result, no State may recognise as lawful a situation arising from a violation of the prohibition of torture, and all States have a legal interest in the performance of the obligations arising from the prohibition.

Rule 1 of the UN Standard Minimum Rules for the Treatment of Prisoners provides: "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No

[15] A/77/274 Secretary-General's report on a moratorium on the use of the death penalty
[16] UN, UN human rights chief calls on all nations to abolish death penalty, 28 February 2023
[17] deathpenaltyinfo.org

prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times".[18]

The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UNGA Res. 3452, *adopted* Dec. 9, 1975 ("Declaration against Torture") contains a guideline of measures that should be taken by States to ensure the prohibition of torture.

The US is a signatory to the International Covenant on Civil and Political Rights ('ICCPR') as well as the UN Convention Against Torture 1984 ('CAT'). Article 7 ICCPR prohibits the use of torture, stating: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The extent of the prohibition has been developed by the CAT in conjunction with Article 14(3)(g) ICCPR and requires that confessions obtained under coercion must be excluded from the trial and the court must investigate allegations of forced confessions.

With respect to the investigations of forced confessions, Article 12 CAT requires the State Party to promptly and impartially investigate wherever there are reasonable grounds to believe that an act of torture has been perpetrated within its jurisdiction. Article 13 CAT requires the State Party to ensure that any individual who alleges torture has a means of complaint and has his/her case promptly and impartially investigated by the competent authorities. The procedural obligations of these requirements have been set out in detail in the Istanbul Protocol which require the state, and in particular the trial court, to properly investigate allegations of torture and forced confessions.[19]

Article 15 CAT requires the State Party to prohibit the use of evidence derived from torture in any proceedings. In addition, those detained in Guantánamo should be entitled to the protections of the Geneva Conventions 1949. The third article common to all the Conventions ('Common Article

[18] UNGA Res. 70/175, 17 December 2015

[19] UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Istanbul Protocol'). Both the UN General Assembly and UN HRC have encouraged states to follow the guidance in the Istanbul Protocol, and it is a key document in determining breaches of both ICCPR and the CAT.

3') prohibits the use of torture against those in the custody of the opposing party and states that no one shall be subjected to "humiliating and degrading treatment".

Each of the defendants were held during the years following their arrest in secret locations now commonly known as *black sites* around the world in which the CIA carried out or facilitated detention of those they suspected to be linked to Al-Qaeda. This detention was held to be arbitrary by the UN Working Group on Arbitrary Detention.[20]

As it has since been widely acknowledged, the detainees were subject to torture and inhuman or degrading treatment.[21] Whilst it has been known for some time that the treatment of the detainees at the sites was unacceptable, it was nevertheless concerning to hear some of the details in oral evidence and its ongoing justification.

The BHRC observer notes that the oral evidence of Dr Mitchell in particular, as described in the observations in this report, were gravely concerning. There was no expression of regret and insistence that the EITs were justified in the circumstances.

The absolute and non-derogable nature of the prohibition of torture is reflected, for example, in Article 4(2) ICCPR and Article 3 of the Declaration Against Torture. Article 2(2) CAT provides that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture". The exclusionary rule is now well established in international law. Both Article 12 of the Declaration Against Torture and Article 15 CAT provide that any statement which is established to have been made as a result of torture must be *excluded* as evidence. The exclusionary rule protects the right to a fair trial enshrined in Article 14 ICCPR. The UN Human Rights Committee has observed that this safeguard must be understood in terms of the absence of any direct or indirect

[20] Opinion No.29/2006 United States
[21] See, for example, the Senate Select Committee on Intelligence Report 2014

physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt[22].

Keeping in mind the requirement that allegations of torture be impartially investigated, it was concerning to hear in the oral evidence of Mr Hodgson that the meeting with those that undertook the alleged torture took over an hour but yet all that is recorded to have happened was the passing over of envelopes. Mr. Hodgson, even when pressed, was unable to explain why the meeting took this long if nothing was discussed. His evidence, on the face of it, gave rise to the suggestion that pressure may have been put on the agents not to cooperate with defence counsel during the meeting, which was not recorded.

Whether this is what happened or not, Mr Hodgson was unable to explain why the defence teams had been explicitly told that none of the agents agreed to cooperate when at least one agent had expressed a possible willingness to engage with questions from defence lawyers. Mr Hodgson was asked directly in evidence if the US government had been untruthful here. He struggled to answer that question but eventually stated that the US government had put forward an inaccurate position. On the face of it, this is demonstrative of a failure to investigate torture, as the defence teams could have spoken to the UFI but were denied the opportunity.

It was equally concerning to hear details of the alleged confession letter obtained by Mr Hodgson in the Fan Mail Project. It became apparent in court that the US had tried to manipulate the contents of the English translation of the alleged confession letter. When the original was produced its contents were very different and it had not in fact been signed by all the defendants. Mr Hodgson claimed that this was the first time he had seen the original.

With respect to the investigations of forced confessions, Article 12 CAT requires the State Party to promptly and impartially investigate wherever there are reasonable grounds to believe that an act of torture has been perpetrated within its jurisdiction. It is concerning that this has not been

[22] Paragraph 41 of UN Human Rights Committee General Comment No. 32

done in the present case and the US is still trying to rely upon statements taken after extensive torture and ill treatment on the basis that the interrogations were conducted by so called 'clean teams'.

The BHRC observer agrees with the amicus submissions filed by BHRC in its amicus brief in the matter of *Al-Nashiri* that when construed in accordance with the object and purpose of the prohibition on torture, it should be interpreted broadly and purposively as encompassing subsequent *clean statements* made, if such statements are derived from prior treatment and merely confirm or replicate the statements obtained during torture. International law seeks to avoid statements obtained as a result of torture being used against an individual given the inherent unreliability of statements taken against these conditions. The context is determinative of whether a subsequent statement is considered to have been obtained as a result of torture.

Article 13 CAT requires the State Party to ensure that any individual who alleges torture has a means of complaint and has his/her case promptly and impartially investigated by the competent authorities. The procedural obligations of these requirements have been set out in detail in the Istanbul Protocol which require the state, and in particular the trial court, to properly investigate allegations of torture and forced confessions.[23] The assessment of this BHRC observation is that this clearly has not happened here, for the reasons highlighted above, and that the US has not been forthcoming with the evidence of torture it may have.

The presumption of innocence

The presumption of innocence is fundamental to a functioning criminal justice system. In the US Constitution, the right follows from the Fifth, Sixth and Fourteenth Amendments and the jurisprudence of the courts.

[23] The Istanbul Protocol

Article 14(2) of the ICCPR guarantees that: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty in accordance with the law".

Under the Military Commissions Act 2009, it is difficult to reconcile the presumption of innocence with the designation of the accused as 'unprivileged enemy belligerents' which is necessary in order to bring the accused within the jurisdiction of the tribunal at all. The position that any support of hostilities can be construed as supporting terrorism appears to undermine that presumption. Designation as those who have engaged in or materially supported hostilities against the US or were part of al-Qaeda at the time of the alleged offences raises a serious question as to how the presumption of innocence until proven guilty can operate.

It is concerning that in the past defence lawyers representing detainees at Guantánamo Bay have faced threats and repercussions. The BHRC trial observer's own impression was that the detainees at Guantánamo Bay are generally talked about (by those working for the Military Commission, those working for the detention facility generally and those visiting Base) as if they are guilty and the case is simply in place as a formality. This leads the observer to the conclusion that the system is stacked against them having a fair trial.

Trial without unreasonable delay

The pre-trial phase has taken an inordinate length of time. There are many reasons for the delays, including the high turnover of judicial personnel and persistent breaches of procedural norms. The treatment of the detainees (and the associated pre-trial issues) and exercise of disclosure have also been substantial reasons for the incredibly slow pace of the proceedings thus far.

The Military Commission has not yet set a trial date for the remaining four 9/11 defendants. The original trial date of 11 January 2021 was vacated because of the COVID 19 pandemic. Since that time, the trial has been delayed because of personnel changes, plea negotiations and Al-Shibh's medical and psychological issues.

The BHRC observer noted with regret that when speaking to family members of victims of 9/11, the fact that the trial has not started over two decades later has caused significant hurt and disappointment. It is clear that the system has not been fit for purpose and it is striking that the process has not been fair on the detainees as well as the victims. The BHRC observer noted that one of the other NGO trial observers would have been 2 years old at the time of the 9/11 attacks.

Article 14(3)(c) of the ICCPR entitles an accused person, as a minimum guarantee, to be "tried without undue delay". Article 9(3) also provides the right to a trial within a reasonable time, or to release. As to what is considered a reasonable period of time, this will depend on the circumstances of each case and a number of factors, including the complexity of the case and impact on the accused. However, The UN Mechanisms Joint Report on detainees at Guantánamo Bay had already determined that the right had been violated as long ago as 2006.[24] The sheer length and complexity of the procedural history to this trial is sufficient to give rise to fundamental concerns about the fairness of its conduct.

Classified evidence

On several occasions during the period of observation, concerns were raised by defence counsel that national security was being used by the prosecution to exclude evidence from the defence (and even more often from the public) with increased frequency.

The judge had a large red light next to him on the bench which started flashing every time something was mentioned which may have breached national security. This prompted the live audio and television feeds to be cut and the observers ushered to leave the court room.

The judge had limited control over what evidence could be heard in public. Whenever the government counsel invoked national security privilege in court, the judge had no discretion to refuse. The final judgment call was in fact made to the prosecution via those instructing them through an in-court machine with a direct link to what prosecutors described as "a government

[24] UN Doc E/CN.4/2006/120 (2006) 38

agency in Northern Virginia". The judge had frequent meetings with the US Government representatives (excluding the defence) to discuss classification protocols.

During the last few moments of the final day in the current BHRC trial monitoring visit, an important observation was submitted before the judge by Mr James Connell, who represents Mr Al-Baluchi. Mr Connell highlighted that the use of national security privilege had been gradually expanded in this case. Such an approach made it very difficult for the defence to challenge the accuracy or probative value of material relied upon by the prosecution.

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

This report recalls with concern the observations in the 2021 BHRC trial observation report in the present case (during proceedings attended by Amanda Weston QC) that the judge had granted a request from the prosecution to use a 'device" in the courtroom, to be hidden from the Defence, allowing the CIA and other 'Original Classification Authorities' ('OCAs') to follow the proceedings in real-time and communicate directly with prosecution lawyers present in the court room. This device is clearly still in operation.

Conclusion & Recommendations

On 12 March 2024, the US Ambassador to the UN spoke at the Human Rights Council 24th session on counterterrorism, asserting that the US Government is taking serious efforts to transfer detainees out of Guantánamo and that it is taking transparent efforts to close the facility.[25]

[25] UN HRC, 24th Meeting of the 55th Regular Session of the Human Rights Council, 12 March 2024

Despite this, the detention and trial regime at US naval base Guantánamo Bay remains shrouded in secrecy and hugely controversial internationally. Of the 779 people detained there since January 2002, 740 have been transferred elsewhere with 30 remaining. Nine detainees have died in custody.

The whole setup and process of the proceedings is a bizarre and fascinating cocktail of contradictions. It is remarkable that the facility still exists and operates today and is likely to continue for the foreseeable future. For many the detention facility is no longer in the public eye in the manner it once was, nor does it inspire the same level of outrage among the public and the international community as it once did. However, that does not take away from the significant breaches of international law and norms still taking place and the significant revelations that are heard at hearings by only a handful of people. The whole process does little to achieve justice for the victims of 9/11 and remains heavily stacked against the detainees receiving a fair trial.

This report again endorses, as did the BHRC trial observation report in the *Al-Nashiri* case, the view of the UN Special Rapporteur Fionnuala Ní Aoláin who concluded from her visit to Guantánamo Bay detention facility that currently several of the procedures in place establish structural deprivation and non-fulfilment of rights necessary for a humane and dignified existence and constitute at a minimum cruel, inhuman, and degrading treatment across all detention practices at Guantánamo Bay. The Special Rapporteur was gravely concerned at the failure of the US Government to provide torture rehabilitation programs, such available healthcare falling short of the requisite holistic, independent, fully resourced, and designated treatment.[26]

BHRC continues to recommend that the US close 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. Whilst the Base remains open, transparency should be increased with wider mechanisms to be able to follow what is happening in proceedings.

[26] UN, Technical Visit to the United States and Guantánamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 14 June 2023

The ability for BHRC legal observers to attend trial proceedings in person at the base is immensely 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 principles in the name of national security.

The hearings are expected to continue later this year, and a decision on the motion to suppress is expected from the judge before his retirement at the end of the year.

Postscript

Following the BHRC trial observational visit, it was announced on 3 August 2024 that a plea deal with the defendants in the present case had been reached. The deal would reportedly have spared the defendants from the death penalty.

However, the US Defence Secretary Lloyd Austin almost immediately revoked the pre-trial agreement. Following what would appear to be significant executive involvement in the deal reached, Gary Sowards (lead counsel for KSM) stated:

"If the secretary of defence issued such an order, I am respectfully and profoundly disappointed that after all of these years the government still has not learned the lessons of this case … And the mischief that results from disregarding due process and fair play."

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