Association of Defence Counsel practising before the International Courts and Tribunals

ADC-ICT Guantánamo Bay Observer Programme

Trip Report to the Khalid Sheikh Mohammed et al Pre-Trial Hearings at the Military Commissions in Guantánamo Bay

15 – 22 February 2020

Observer:

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Overview

The pre-trial hearings in the Khalid Sheikh Mohammed et al trial ("9/11 proceedings") during week of 15-22 February 2020 were procedural in nature. Following the postponement of the testimony of the next scheduled witness, Admiral Christian L. Reismeier (discussed below), the parties were instead given the opportunity to make oral submissions on a number of outstanding procedural motions.

The week was dominated by oral arguments and a decision on the request for withdrawal of the learned counsel for Ramzi bin al-Shibh. Mr. Harrington, who is 75, has represented Mr. bin al-Shibh since January 2012. His request for withdrawal sparked concern about further delays to the proceedings, which are already occurring nearly two decades after the events. The strict ABA criteria for "learned counsel" in a capital case make it difficult to find qualified available counsel, particularly any who are willing to spend such a significant period in Guantanamo Bay, Cuba.

The hearings were presided by Col. W. Shane Cohen, the third Judge to be assigned to the 9/11 proceedings. There was inconsistent attendance from the accused persons, although at least two of the five were present each day.

When arguing or responding to oral motions, the parties were given 10 minutes each, which could be extended if a sufficient justification was given. The lawyers would raise and argue the motions at a separate podium located just in front of the bench. The tone of the debates was generally calm, although with some heated moments between the parties, and the Presiding Judge's visible anger at the submissions from the learned counsel for the accused Khalid Sheikh Mohammed and Ammar al-Baluchi on the question of the "device" (also discussed below). At least one Government lawyer's consistent reference to female Defence attorneys as "she" or "her", while addressing their male colleagues by name, also stood out to a number of observers.

At the end of the week, the proceedings were adjourned until June 2020, with the March hearings having being cancelled.

HEARINGS, 18 FEBRUARY 2020

The five accused were present in court.

(a) Transport Complaints

The hearing began with an oral motion made on behalf of Mr. bin al-Shibh concerning the prison van transporting the accused in the mornings between the Joint Task Force ("JTF") prison facilities to the Camp Justice courtroom. The Defence explained at least one of the vans being used to transport the accused was small, and the accused could not sit up straight in it. Given the fact that they were shackled, the accused hit their heads on

the roof going over any bump, and this either injured them and exacerbated old injuries. This was said to be a recurring issue.

The Defence for Walid bin Attash ("bin Attash") joined the motion, saying that because Mr. bin Attash's side is damaged, sitting in the small van puts him in excruciating pain. On this morning, he was only presented with two options – get in the smaller van or don't go to court. He couldn't modify the "waiver" (the document an accused must sign if he chooses not to attend court) to explain why he didn't want to come. The accused only have the right to sign a "clean" waiver. The Defence for Mr. al-Baluchi then explained that it also causes him problems; his back issues are a matter of record, and he travels with pillows.

The Government responded that the complaints were unfounded, and noted that there have been 7 years of no complaints about the vans. According to the Government, the debate can't turn on what the accused want, given that they don't get choices in how they are transported. The Government lawyers said "no-one wants to hurt these gentlemen" but reacted angrily to the suggestion that they were hitting their heads on the roof of the van, and suggested that the Defence were attempting to invade the jurisdiction of the JTS.

Judge Cohen suggested a "site visit" after Court with the accused, their lawyers and the Government lawyers, to inspect the vans. The issue was not raised again in open session, other than to say that the site visit had taken place.

(b) Scheduling

Judge Cohen then explained that given that it was unlikely they would hear the testimony of Admiral Christian Reismeier, the next scheduled witness, he would like to spend the week trying to hear oral arguments on pending motions filed by the parties.

Admiral Reismeier's status of a witness was now uncertain given that his position as the "Convening Authority" of the Military Commissions was being challenged by the Defence teams on the basis of previously legal advice he had given to the chief Government lawyer Brigadier General Mark Martins on this case. As such the Defence submitted that he could not properly occupy the role of "Convening Authority" as there was reason to doubt his impartiality.

(c) Motion to withdraw on behalf of learned counsel for Mr. Bin al-Shibh

Mr. Harrington, the learned counsel for Mr. bin al-Shibh, presented oral arguments in justification of his motion to withdraw from the case. He expressed regret at having to argue this publicly, and stated that although he was not about to drop dead, and his cardiologist had left the choice up to him, he had come to the conclusion that he was no longer in a position to keep travelling to Guantanamo and representing Mr. al-Shibh in the present proceedings. He rejected the Government's submission that Ms. Hernandez (a current team member) could take over from him, as she did not meet the ABA requirements for learned counsel. He expressed extreme regret that the Government

response had focused on the amount of money he had allegedly made in the case, and set out in detail the expenses he incurs running a law firm.

The Government responded by emphasizing that regardless of the decision, an indigent accused does not have the constitutional right to choose his attorney, only to effective representation, and noted that the accused could be compelled to proceed with a counsel that is not of his choosing. This was particularly relevant because, according to the Government, Mr. bin al-Shibh is the most difficult accused, he has been complained about everything for 7 years, and no lawyer will satisfy him. The Government urged Judge Cohen to keep this in mind, should they allow Mr Harrington to withdraw. The Government expressed no preference as to the replacement, as long as there was no delay resulting from the appointment. But in the Government's view, the role of the learned counsel had become weaponised, and was being used as a means of stalling the trial.

The Judge indicated he would rule the following day. The proceedings adjourned into a closed session "802 conference" for the remainder of the day.

HEARINGS, 20 FEBRUARY 2020

Only Khalid Sheikh Mohammed ("Mohammed") was present at the start of the hearings. The chief Government lawyer General Martins swore in the Assistant Judge Advocate (a Major) who gave evidence as to the waivers of the other accused, testifying that they were given voluntarily. Mr. bin al-Shibh then appeared in the courtroom.

(a) Summary of closed session 802 conference

Judge Cohen then gave an oral summary of the issues that were raised in the closed session 802 conference. All parties and accused had been present. Topics discussed were; (i) Defence motion on surreptitious surveillance in the courtroom; (ii) Defence motions to compel discovery; (iii) Defence motion to compel the discovery of witness information; (iv) Defence motion to compel public release of information; (v) Defence motion to compel the identification of FBI agents; (vi) and Defence motions to dismiss unreasonably multiplied charges. A motion for the ex post facto refusal of the right to a fair trial had been dismissed.

The Judge then asked the parties if he had missed anything in his summary. Learned counsel for Mr. al-Baluchi (Mr. Connell) took the opportunity to raise the issue of the Government's "device" in the courtroom, and gave extensive detail in open session. He explained that the "device" had first been noticed by the Defence lawyers during the testimony of Dr. Mitchell, when it appeared the Government lawyers were reacting to it, and the could not explain why they had asked for evidence to be suppressed. Mr. Connell pointed to the device on the Government's bench, and said that it appeared that the Government had had ex parte contact with the Judge and CIA, and had been authorized to use the device. He said that allowing the CIA to monitor the proceedings inside the courtroom "flies in the face of every adversarial system and due process".

Judge Cohen reacted angrily, and drew a distinction between trying to prevent "spills" of classified information and the Original Classification Authorities ("OCAs") advising on litigation strategy. Everyone in the courtroom has a 100% responsibility to prevent spills, and according to the Judge there are currently two options available (i) monitoring through technology; or (ii) 12 OCA staff sitting in the courtroom. At one point yelling at Mr. Connell, Judge Cohen then accused him of causing spills of classified information during his follow-up questions to Mr. Mitchell. He said the reality of the situation was that the Government was trying to work with the Defence to allow them to have access to the most information possible, and insisted that there was "no spying going on in this courtroom".

Mr. Connell responded that he slavishly follows his obligations in relation to national security and confidential material. Given that the Government lawyers don't know why they activate the device, nor can the Judge. Mr. Connell highlighted that there has been a qualitative change in how spills are prevented, and a change in practice, done behind the backs of the Defence. Mr. Connell informed the Judge that the Defence does not have classification guides, despite having asked for them, and often the Defence will put something on the screen that the Government has disclosed, and be told that it is classified.

Judge Cohen then backtracked significantly, emphasizing that this was just a matter of leveraging technology, and that it had been a mistake to authorize the device ex parte. He said he had done so before he realized the level of distrust in the courtroom, stating that he had "never seen this level of mistrust and skepticism between the parties in any case in 21 years". He insisted that "no-one is being listened to" and that "if the Defence is being listened to, I would dismiss the charges no problem".

Mr. Sowards, learned counsel for Mr. Mohammed, then accused the Commmission of using "20th century technology to cover up 15th and 16th century torture", telling Judge Cohen that he has an obligation under international law and treaty to report those involved in torture, and he hadn't discharged that duty. As for the level of distrust, Mr. Sowards asked Judge Cohen to read filing AE530S, at pages 14-23, which shows documented and actionable intrusions into Defence teams by the Government, including material evidence being destroyed (being a reference to the destruction of black sites). He says the current system has nothing to do with classification concerns, but with protecting those who tortured and who covered up torture. Mr. Sowards then asked for (i) classification guides, (ii) the schematics of the courtroom, and (iii) the transcripts of the ex parte hearing. To which the Judge replied "not going to happen".

The Judge further responded that the OCAs have done a "horrible job" of covering up torture, given that everyone knows it happened. He did not rule on the requests.

(b) Oral decision on Mr. Harrington's Request to Withdraw

Judge Cohen gave a speech of some length about how much progress had been made since he took over the case, and that "for the first time in 8 years the case is heading to trial". He discussed that no system is perfect, and that the military commissions had had

some growing pains. He revealed that he had met ex parte with Mr. Bin al Shibh to discuss this question. Ultimately he had decided that Mr. Harrington had shown good cause to justify his withdrawal from the case, and noted that it was being done with the consent of the accused.

The conditions on Mr. Harrington's withdrawal were (i) the appointment of a replacement learned counsel approved in writing by the convening authority; (ii) Mr. Harrington's review of all filings by the Bin al Shibh team until the new learned counsel was appointed; (iii) the provision of updates every two weeks on the status of the appointment of the learned counsel from the team; (iv) within three weeks of the new learned counsel's appointment, provide the court with a transition plan, and (v) whoever is available and qualified will be appointed, regardless of the preference of the accused.

Judge Cohen then cancelled the March 2020 session, and undertook to issue decisions on all outstanding motions before the June 2020 session, and make interim findings of fact. Assuming the new learned counsel took a year to get up to speed with the case, the trial could start in June 2021, which "would not be the worst thing".

(b) Oral arguments on procedural motions

(i) Motion to compel discovery re FBI interrogations (AE632E)

A lawyer for Mr. Mustafa Ahmed al Hawsawi ("al Hasawi") presented their motion to compel discover of material for which they had been asking since 2013, concerning the so-called "clean team" interrogations by FBI agents once the accused arrived in Guantanamo.

Explaining the background, the Defence submitted that everyone now knows that the Government's position that the FBI statements are admissible because they were removed from torture is not true. According to the Defence, it was now clear from S.A. Perkins' testimony that when she interrogated prisoners in Guantanamo, she used information collected in the black sites to prepare. The information in the possession of the Defence is that the situation in Camp 7 of Guantanamo was much worse that the black sites.

The Defence submitted it is asking for: (i) names and contact information of Camp 7 guards who interacted with Mr. al Hasawi during the 4 months leading up to his interrogation; (ii) names and contact information who watched his FBI interrogation in 2005 (33 names have been given by the Government) including any noes that they took during this 4 days of interrogation; (iii) the information that S.A. Perkins and S.A. Fitzgerald reviewed in order to interrogate the accused (although the Government is saying this has been destroyed) and (iv) recordings of these interrogations (and if the Government continues to say there are none, the Defence wants the Judge to make a finding of fact that they can't produce them); and (v) Mr. al Hasawi's CIA detention records, including detention records that mention him by name.

For all of this information, the Defence asked that the Government be ordered to say what due diligence steps have been taken to obtain this information, and whether it exists.

The Government responded that (i) they are unaware of any recordings of the FBI interrogations, and this has already been litigated, and is covered by previous orders; (ii) they have no logbooks as to who attended or watched the interrogations; (iii) they have no knowledge of any notes taken during the investigations; and (iv) CIA detention records discovery is complete.

Mr. bin al-Shibh's lawyers then discussed their own motion to compel disclosure of identification of any of the guards in Camp 7. In the lead up to the FBI interrogations their client was forcibly shaved, given a restrictive diet, and was forcibly extracted from his cell. Screams and other noises were played over the intercom in his room to remind the accused of how he felt being tortured.

(ii) Motion to compel discovery of unredacted spreadsheets (AE656)

The al Hasawi team made oral submissions on their request for unredacted spreadsheets from the Government expert on financing of the 9/11 plot; Agent Drucker. The Defence explained that it had received a spreadsheet, but it was mainly redacted, and given that the gravemen of the charges against Mr. al Hasawi are financial, this information could not be more relevant. The Defence submitted that it was still unaware of the documents that were relied upon in his report.

The Government responded that an accused is not entitled to request disclosure in any particular form or style. The Defence has the information they need in one form or another

(iio) Motion to disclose eyewitnesses to Mr. al Hasawi's torture (AE672)

The al Hasawi team made oral submissions on their request that the Government be ordered to provide the Defence with the names and information of people who were eyewitnesses to Mr. al Hasawi's torture and treatment, and his reaction and conduct. This information was submitted to be necessary for a case in mitigation. The Defence are requesting access to 7 categories of people: (i) ICRC personnel who met with Mr. al Hasawi before the clean team interrogations; (ii) Camp 7 personnel who interacted with him between September 2006 an February 2007; (iii) medical personnel who interacted with him, including in the context of his May 2006 surgery for prolapsing hemorrhoids due to his rectal examinations with excessive force, given that the pain that he suffers as a result is a constant reminder of the torture itself; (iv) persons detained with Mr. al Hasawi at the black sites; (v) Other foreign nationals with whom he came in contact; (vi) persons with whom he was detailed in Guantanamo; (vii) persons who generated medical or psychological records relating to Mr. al Hasawi when he was in CIA custody or detained in Guantanamo.

The Government responded that it had already been ordered to provide records of medical personnel and records themselves.

HEARINGS, 21 FEBRUARY 2020

The proceedings commenced with the swearing in of another member of he al Hasawi Defence team, while Mr. al Baluchi brushed his teeth in the courtroom with an electric toothbrush.

(b) Oral arguments on procedural motions

(i) Motion for more timely publication of material on the website (AE551M)

The learned counsel for Mr. al Baluchi, Mr. Connell, referred to a previous ruling of 20 December 2018 concerning the timing of publication of transcripts and filings to the publicly available website, and submitted that compliance with timelines was the exception rather than the rule. He said that as of the present day, transcripts of hearings from January 2019 had not been published; many filings from 2018 had not been posted; and cited a filing from 2013 that had not been posted.

In terms of what works well, he referred to Defence Information Security Officers (DISOs) who reviewed every pleading to redact classified information. Regardless, the SISOs do not necessarily accept filings for publication unless they unclassified or properly marked as classified. There needs to be a systemic solution to speed up this process. Judge Cohen then said that the website is an extension of this commission. But his concern is that even if a document has been given a "hard scrub", something could be missed.

Mr. Connell informed Judge Cohen that the Defence is not informed if there has been a "spill" of classified information in the courtroom, and the Judge agreed this has to change. Both agreed that once a document is marked as unclassified and has been reviewed by a SISO, it should go straight from the chief clerk to the website. However, if there is doubt, it goes in a "15 day basket". And there is a huge backlog now at that point in the process.

The Judge also said that once a document has been displayed in a public gallery, it is also then public, and can go straight to the public website. The Government disagreed with the Judge on this point, drawing a distinction between documents being (briefly) displayed in a courtroom, and being permanently on a website where it can be saved, and mined for information. The Government lawyers cautioned against just "sacrificing" national interests and spoke of many different types of Government information interests that require care to be taken.

For the Government, the openness of the proceedings is not in doubt; 95% of the words spoken in the courtroom are visible to everyone; 95% of the testimony is in open session; 90% of filings had been made available as of May 2018. There is no breach of a right to a public trial.

(ii) KSM Motion for access to medical records

A lawyer for the KSM team explained that in response to an order, the Government had produced 1000 pages of redacted medical records for KSM through the NIPR disclosure system. Later, 850 pages were produced in unredacted form through the SIPR disclosure system. Unfortunately, the pages were impossible or very difficult to match up, because the dates were redacted in the original 1000 documents. However, it appears there are (at least) 35 documents for which unredacted versions are unavailable. For example, one document says “head trauma and bleeding” followed by two lines of redactions. There is another which says “Mr. Mohammed’s family history of trauma” followed by two redacted paragraphs. When the Government says they have fully complied with orders about disclosure of the medical records, they haven’t.

The Government argued that the redactions were already applied in the original documents they received. They are not holding back any medical records. There is nothing else they can do.

(iii) Motion on the unreasonable multiplicity of charges (AE730)

A lawyer for the al Hasawi team argued that many of the charges against his client are not charges of war crimes, and therefore do not belong in a military court, but should rather form the basis of charges in a civilian court. For example, “Charge 6” charges Mr. al Hasawi with “Hijacking” which is not a war crime. They underlying acts could perhaps stretch to an attack against civilian objects or civilians, but the charge would then be redundant given that these are charged under Charge 2 and Charge 3. Mr. al Hasawi is also charged with “terrorism” which is not a war crime. Civilian crimes should not be charged in a war crimes court.

Moreover, there are 3 charges for that have at their core “attacking civilians” and 4 charges that allege “attacking civilian property”. As such, the charges are duplicative, abusive, and illustrative of overreach.

The al Baluchi team also joined these submissions, criticizing the Government’s charging in the alternative. Mr. al Baluchi’s lawyer said that the motivation behind the Government’s charging strategy is to have convictions on as many distinct counts as possible in order to influence sentencing. She argued that it was wrong to charge Mr. al Baluchi with “murder” and “conspiracy” in the alternative, when he was never personally involved in any murders and is only alleged to have been being part of the planning.

The Government responded that Mr. al Baluchi is alleged to have killed 2,976 people. Just because he wasn’t sitting in the cockpit of one of the planes as it flew into the World Trade Centre tower, he is just as liable as those who were. If he was directing or planning the attack, he is as liable as a perpetrator. It is not an exaggeration to charge him with murder. The Government is not required to show that he was a direct perpetrator of murder, it just needs to prove any overt act in furtherance of the conspiracy.