

ASSOCIATION OF DEFENCE COUNSEL
PRACTISING BEFORE THE
INTERNATIONAL COURTS AND TRIBUNALS

**ADC-ICT Guantánamo Bay Observer
Programme**



Trip Report regarding Abd al-Hadi al-Iraqi Pre-Sentencing
Hearings at the Military Commissions in Guantánamo Bay

5th June 2023 – 9th June 2023

Observer:

Rhys Davies

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I. Overview

The ADC-ICT was granted NGO Observer Status at the Military Commissions in August 2019 by the Pentagon's Guantánamo Bay Military Commissions Convening Authority. This granted permission for ADC-ICT representatives to travel to Guantánamo Bay, Cuba, or Fort Meade, Maryland to carry out the role as an observer at the Military Commission proceedings. There are currently only 26 participant organisations worldwide which have been granted permission to observe proceedings.

Between 5th June and 9th June 2023, Rhys Davies, a Barrister at Temple Garden Chambers in London, practicing in international human rights law and international criminal law, travelled to the US Naval Station at Guantánamo Bay, to observe the Abd al-Hadi al-Iraqi proceedings.

The charges against al-Iraqi and more context in relation to those pre-sentence hearings are set out in more detail below.

This document intends to give an overview of the nature of the hearings attended as well as some detail in relation to the experience of an NGO observer at Guantánamo Bay more generally. This document is necessarily impressionistic: it does not purport to give a detailed narrative or commentary on the broad structure of the Military Commission hearings which take place at Guantánamo Bay. Nor does this document purport to give any detailed commentary on the weaknesses of those Military Commissions, created by the Bush administration back in 2001. It is likely that every reader of this document will already know that those Military Commissions were set out in the aftermath of the 9/11 attacks to try suspects committed of terrorism in proceedings that critically lacked the due process protections of United States Courts.

The Guantánamo Bay detention facility and the associated Military Commissions/tribunals have been the subject of significant international scrutiny due to their controversial status and the legal challenges surrounding the detention and treatment of individuals held there. The facility has been the focal point of much debate on human rights, due process and the rule of law. Any reader of this document will be well aware of the excellent work done by Amnesty, Fair Trials International and many other rights organisations on the defects of those proceedings. Coincidentally, at the time of writing this report in June/July 2023, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism released a report into the detention facility at Guantánamo Bay¹. In response to the publication of that report, Amnesty International Secretary General Agnès Callamard commented, "*the findings presented today highlight the urgent need for President Biden to finally close the detention facility at the Guantanamo Bay*

¹<https://www.ohchr.org/en/press-releases/2023/06/expert-welcomes-historic-visit-united-states-and-guantanamo-detention>

*military base, and to end the unlawful practice of indefinite detention without charge or trial.... The scathing report reviews more than 21 years of indefinite detention for 780 Muslim men and boys, and the myriad human rights violations against them.*²”

I was very fortunate to meet and spend time with the legendary New York Times journalist Carol Rosenberg who was present throughout the week-long trip to Guantánamo Bay and provided invaluable advice and colour when observing what sometimes were, on occasion, slightly opaque proceedings. I would urge anyone interested in the Guantánamo Bay proceedings to read Carol’s in-depth and fascinating journalism on the topic. Carol has covered the proceedings at Guantánamo Bay since the first prisoners were brought there in 2002³.

Rhys Davies
July 2023

² <https://www.amnesty.org/en/latest/news/2023/06/usa-un-special-rapporteurs-findings-reinforce-urgent-need-to-close-guantanamo-and-provide-redress-for-past-and-present-detainees/>

³ <https://www.nytimes.com/by/carol-rosenberg>

II. Abd al-Hadi al-Iraqi

Abd al-Hadi al-Iraqi is charged with “*denying quarter, attacking protected property, using treachery or perfidy, and attempted use of treachery or perfidy in a series of attacks in Afghanistan and Pakistan between about 2003 and 2004, and conspiracy to commit law of war offenses*”.

Documents relevant to the case can be found here:

<https://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=47>

Abd al-Hadi al-Iraqi (Al-Hadi) is now believed to be in his 60s. He pleaded guilty in 2022 to war crimes relating to attacks on US and other allied soldiers in Afghanistan in 2003 and 2004. It is anticipated that the plea bargain and deal could result in his transfer to the custody of a third country by 2024.

The crimes to which he has pleaded include attacking “*protected property*” – a US military medivac helicopter as well as other matters related to bombings and attacks on allied troops which are said to have killed a number of troops from the UK, Canada and Germany. Carol Rosenberg of the New York Times has written a number of articles on al-Hadi including one from 2022 which indicates “*the plea deal still represented a drastic scaling back of the government’s charges against him. None of the crimes to which he pleaded guilty made him directly or indirectly responsible for some of the most serious allegations made by prosecutors when they charged him in 2014*”.

Al-Hadi is believed to be one of the final handful of prisoners held as part of the CIA’s detention programme. According to Washington Post reports, he was captured in Turkey in late 2006 and was rendered into CIA custody likely between 1st November 2006 and 9th November 2006. He was thereafter kept in secret detention at an unknown location for between 170 and 177 days before his transfer to Guantánamo Bay in April 2007.

According to an Amnesty International press release, al-Hadi was transferred to Guantánamo Bay in April 2007 and was said to be a high value detainee at that time.

Al-Hadi is also believed to be one of the oldest prisoners (if not the oldest) in Guantánamo Bay. He is said to suffer from serious health conditions including a degenerative disc disease in his spine.

III. Attendance at Guantánamo Bay and Hearing

(i) Travel to and arrival at Guantánamo Bay

In part, it is my intention in drafting this report to provide a document which may be useful to other NGO visitors to Guantánamo Bay, and also to give something of a more general flavour of my experience there. Anyone who has ever been involved in any kind of litigation will know that court proceedings are rarely a spectator sport, even in cases where the underlying subject matter is as serious, and indeed compelling, as in the instant case.

It is also worth noting, in the index al-Iraqi proceedings, the length and frequency of the pre-sentence hearings were somewhat limited – the Court sat on three days of the week and, on two of those three, only in the morning. Furthermore, these were what might properly be described as interlocutory hearings/applications on matters relating to disclosure/discovery as well as some other mechanics leading up to the sentencing hearings which are due to take place next year. Whilst we were provided with some limited documentation, as NGO observers we were not, for example, provided with the relevant applications giving rise to the hearings. Thus, I hope that it will be of use to any reader of this document if I give something of a holistic impression, as well as a specific narrative of the hearings themselves.

3rd June 2023

An early start to the day – the scheduled meeting point at Joint Air Base Andrews in Maryland was at 5.30am. I travelled from downtown Washington DC (Dupont Circle) and note: it seems that Uber's don't seem to be operating at that time of day so my hotel had to arrange a last minute taxi. That having been said, it is only about 30 minutes from downtown DC to the airbase. I spoke with the other NGOs when I arrived, one of whom informed me that she had stayed at one of the motels immediately opposite the airbase and it was a less than pleasant experience. In my group, there were two other NGOs – one from Georgetown University and one from Mississippi University, a fourth NGO having pulled out at the last minute. We were met at the airbase by two escorts who brought us on to the base.

There was a brief moment of complexity when the guard at the entry to the base did not have all of our names on the approved list – but we provided the relevant documentation and he was able to okay our entry.

First impressions of Joint Air Base Andrews: it is perhaps not quite what one would imagine. Whilst it is the main airbase for Air Force One and a US airbase in more general terms, it was far less militaristic than I anticipated. As an aside, one of the planes on the tarmac – certainly not Air Force One as it was far too small – was a US government plane in the Air Force One type livery with the pale blue undercarriage

and the gold stripe.

The terminal itself appears like a private general aviation terminal and/or a small regional airport. Security is very similar to that which one would get at an ordinary airport. A note on packing – I travelled relatively light with a holdall and a small carry-on bag as well as a briefcase – many travellers have significantly larger bags including very large wheely bags. We arrived well before 6am and our flight was not scheduled to depart until 9.20am. It is worth bringing books and work to do. It is also worth noting that we were then kept on the plane for around probably 55 minutes or so before we took off.

The terminal is fairly basic although there are vending machines with drinks and basic snacks.

All in all, the process to departure was relatively straightforward.

A further note for future travellers: I did not receive the APACS document until about 4pm the day beforehand. This was email 3 of 3 which had been stated to arrive, but did not arrive until that time. After numerous phone calls and chasing emails, Diego, the relevant contact, confirmed via email that the documents were en route but had not yet been approved. As a result, there were some moments of anxiety in the run up to this email being sent, as all the other documentation makes it clear that one must have the APACS document in order to depart. I understand from Dominic also that he previously was given documents later, so perhaps do not worry unduly if you do not receive them a number of days in advance.

The flight itself is a little over 3 hours and we travelled on a chartered United Airlines plane. We were provided with an on-board sandwich and coffee, drinks, etc.

Impressions Upon Arriving at Guantánamo Bay

The plane landed on the only airstrip on the base. There is a basic immigration type process when one arrives – paperwork and passports need to be provided. There is then a short bus ride to the ferry port, a modest affair with a covered waiting area. The ferry travels across the bay to the main section of the base every hour, I believe. We missed a ferry by a few minutes and therefore had to wait for about 45 minutes or so. Water was provided. I would estimate there were probably about 70 people on our plane, which I understand to be larger than usual – there were several weeks of hearings and thus a significant number of people coming down for the longer trip rather than, say, for one week only.

The ferry ride is around ten or fifteen minutes or so to get to the other side of the base. In general terms, again the base does not, oddly, appear to be particularly militaristic. It has a slight air of being a little run-down – rusty plant machinery, imperfect roads, etc. Upon arrival at the other side, boarding another bus to take the very short two or three minute journey up to Camp Justice. The main Camp Justice blocks are set behind

a mid-sized tarmac car park. Immediately in front of the main block is the NGO tent. There was a little waiting around again at this stage whilst the main body of people went off to have their COVID tests. We were not required to do so and we were thus driven, after a few minutes, to our tents.

The Tents

The tents are rigid semi-circular constructions. They are set behind the main Camp Justice compound. Most of the lawyers, translators and contractors stay in portacabin type accommodation and one can also see a large compound being built with very modern, almost holiday chalet style, portacabin accommodation which is intended to accommodate an influx of individuals for the forthcoming 9/11 trials. I would estimate there is probably something in the region of a dozen or so tents back to back in the NGO area, although I don't believe that all of them are for the use of NGOs. Given that there were only three of us, I was accommodated in the male tent on my own and my two colleagues were accommodated in one of the female NGO tents.

We were taken shortly after arrival to a cabin on the edge of Camp Justice to be photographed for our passes. A pretty straightforward affair, with passports needed.

The tents are adjacent to an unmetalled road and it was perhaps a little bit muddy nearby – it is perhaps worth noting that upon our arrival everyone commented on how green Guantánamo was looking – apparently it is much more dusty normally and there had been recent heavy rainfall, I was informed. The tents themselves are basic but comfortable. Each tent is split into four cabins, those cabins separated by wooden partitions. Given that I was on my own, I had total privacy but there would have been limited privacy if the tent was being shared – the cabins don't go up to the ceilings and they are, effectively, partitions/cubicles. The tent has a central corridor running down the middle with two cabins on each side. Each cabin contains a bed with mattress and bedding and towel provided as well as a wardrobe and a chest of drawers. There is a large air conditioning unit with a fridge containing water at the entrance to the tent. As has been extensively spoken and written about elsewhere, the AC is kept on to deter creepy crawlies and the native wildlife. Much has also been said about the froideur of the tent – I didn't find it as cold as anticipated although perhaps the air conditioning could have been turned down a little more. Certainly, on my first night, I was confident that I could hear some sort of critter inside the tent, but that may have been my imagination.

Each cabin has power sockets hanging down from the ceiling with standard American plugs on which all my devices worked. A note on Wi-fi: Wi-fi is available at certain points around the island – notably in O'Kelly's Pub. However, my roaming did seem to work, and I have also bought a T-Mobile hotspot which cost me \$90 for the hotspot and \$50 for the data package which I bought in DC. I suspect that I might have been able to get a cheaper hotspot had I shopped around.

The lighting in each cabin is two energy saving bulbs inside a cage and the on and off

mechanism is deployed by the act of unscrewing the lightbulb to turn the light off.

Much has also been made elsewhere of the basic nature of lavatorial and washing facilities. I understand that these have, in fact, been upgraded to more impressive ones than previously – and certainly they don't look quite as I saw in the photographs in the previous manual provided. I would describe these as being festival-type affairs – they are pretty basic, but they are effectively metal portacabins with six lavatories or six shower cubicles wholly self-contained inside. They are basic, but certainly nothing to complain about.

We were assigned a daytime and an evening NGO chaperone who did all the driving and Cindy, or afternoon/evening chaperone took us to the Commissary which is a *NAAFI* type supermarket. Again, driving around the island, one is very much given the sense of an odd mixture of small town America meets the Caribbean, perhaps slightly run down. The Commissary, for example, is a well-stocked supermarket with most products that one might want and we bought lunches for the week as well as breakfasts. We were told that because Al-Haidi is elderly and also it is a pre-sentence hearing, we would not be sitting all day so we only bought a limited number of lunches. We were then given a brief driving tour of the island, returning to store our purchases in the fridges at the tents.

We then went for dinner at O'Kelly's Pub – standard American fare of burgers, chicken tenders, pasta, that sort of thing and a few beers. Then we returned to our accommodation.

Sunday 4th June

We were looked after by our two escorts – Daryl in the morning and Cindy from mid-afternoon onwards. Sunday on the Base was extremely quiet – very few people around. We had brunch at one of the restaurants overlooking the bay and then coffee thereafter at the Starbucks supplied coffee shop.

After a return to the Commissary to pick up some further supplies, we were driven by Daryl, the escort, to one of the beaches where we had a late lunch/picnic. Later in the afternoon, Cindy gave us a driving tour of the totality of the island. We were shown, via car, the various accommodations, all the main public buildings – all again very much consistent with small-town America. For example, the clinic, the library, the church/chapel, the hospital, the radio station, etc.

Perhaps most notably on this day, we were driven to Camp X-Ray. Camp X-Ray is on the eastern side of the base. There are plainly large swathes of the base to which the public/non-military personnel do not have access. There appears to be a large contiguous area to which we did have access and we were permitted to be driven up to Camp X-Ray, but did not exit the vehicle. We were also told that we could not take photographs. I would guess that Camp X-Ray was probably some 200 yards away from the road and we had a clear view of the same. It very much fits with the public

image of the same – one could see the razor wire, chain-link fences and observation towers. The whole site appeared to be the size of only an acre or two and was significantly overgrown with vegetation having taken over all of the cages, a lot of the roofing and much of the watchtowers. We understood that the reason that the camp was still in existence was that it was being preserved for evidential purposes, well then we were also informed later in the week that permission had been given his demolished account, but it was now being preserved as a result of some kind of arcane on base. Mindful of the notoriety of the camp, and the allegations of what took place there, it presented as a very eerie site. One could see that there were a number of pens or holding cells which were open to the environment and one could also see slightly pitched flat corrugated iron type roofs which I understand to be the roofs of the cells.

We were probably adjacent to Camp X-Ray for no more than a minute or so before being driven away and given a tour of the remainder of the island, including its beaches, etc.

We drove down to the final beach – Windmill Beach, which is on the southern coast of the base towards the east. The roadway heading down to Windmill Beach abuts a restricted area which is the home of the JTF or Joint Task Force within which I understand there to be the main prison area. Whether or not this is “*Camp Delta*” is not clear to me. Interestingly, our guide was very cagey (no pun intended) about discussing the comings and goings of the main detention area and prison and effected not to know a great deal about the same. I have no reason to doubt this relative lack of insight, but it seemed to me that there was almost a wilful myopia as to what took place there. For example, our guide was unable to answer any questions about how prisoners were moved back and forth and simply stated that people didn’t really talk about it.

(ii) The Hearing Days

We were part way through the week provided with a copy of the docket in the matter of *United States of America v. Abd al Hadi al-Iraqi*. That document sets out the scheduling guidance for the hearing set for 5th to 9th June 2023. The programme was as follows:

- (i) 5th June 2023 – an open session with the accused present. The commission will take up the following matters, starting at 0830 hours:
 - (a) Voir dire of the military Judge; and
 - (b) Discussion of the status of matters in controversy within AE230 and AE098 etc.

- (ii) 6th June 2023 – “*The commission will not be an open session, but will hold a government ex-parte presentation under military commission rule of evidence 505(f)*”.

- (iii) 7th June 2023 – An open session with the accused present, commission will continue as necessary discussion of the matters set out at (i) above, starting at 0830 hours.
- (iv) 8th June 2023 – The commission will not be in session.
- (v) 9th June 2023 – the commission will complete the discussion of the matters addressed above, starting at 0830 hours. Further, “*the parties should also be prepared to discuss the way ahead to presentencing proceedings in this commission, with the expectation that such proceedings will commence no later than June 2024.*”

The Leading Counsel were as follows:

- (i) Douglas Short – Leading Counsel for the Government
- (ii) Suzie Hensler – Leading Counsel for the Defendant

Monday 5th June: The first day of hearings:

Abd al-Hadi al-Iraqi (Al-Hadi) is now believed to be in his 60s. He pleaded guilty in 2022 to war crimes relating to attacks on US and other allied soldiers in Afghanistan in 2003 and 2004. It is anticipated that the plea bargain and deal could result in his transfer to the custody of a third country by 2024.

Al-Hadi is believed to be one of the final handful of prisoners held as part of the CIA’s detention programme. According to Washington Post reports, he was captured in Turkey in late 2006 and was rendered into CIA custody likely between 1st November 2006 and 9th November 2006. He was thereafter kept in secret detention at an unknown location for between 170 and 177 days before his transfer to Guantánamo Bay in April 2007.]

Court hearing 0830

We were picked up at Camp Justice on one side by our escort to be driven to the other side of the camp (about 200 yards away) for entry into the Court building itself. One goes initially through an airport-style security scanner and gives a name and then travels across an inner courtyard to the Court building itself. The hearing began at 0830 and the Judge entered. It was apparent that HHJ Pritchard was a new Judge and the session began, perhaps a little unusually to English eyes at least, with a number of questions that had been posed to the Judge about his background, training, future experiences, etc. In essence, a number of questions were asked by both the prosecution

and the defence in writing which the Judge responded to orally, dealing with questions of conflict of interest.

Al Hadi was present in the courtroom before we arrived (at around 0810). It appeared that he may have been brought in on a hospital bed – there being one present in the corner, but he was seated in a large backed chair. At certain times he moved around the Court building using a zimmer frame with wheels type contraption. He was visibly in good spirits – laughing and joking with his defence counsel. When he was asked to confirm one or two matters, he spoke clearly in English.

This *voir dire* session took probably about half an hour or so with the Judge answering the various written questions. The layout of the courtroom was pretty straightforward, perhaps with the notable exception that there was no dock for the Defendant. Indeed, down the left hand side of the room one could see chains bolted to the floor at the end of each one of the bank of about half a dozen or so desks and it is clear that the defendants typically are held in those positions, rather than being behind a dock.

After the Judge gave his answers to the questions, he asked whether or not any of the parties wished to have any further responses or pose further questions. The prosecution did not, but the defence asked for a little more time and the Court rose for around half an hour or so before returning at 1030. There were a number of clarification questions posed about some of the Judge's experience, none of which seemed to be particularly consequential – although essentially, the defence focused in on some of the Judge's experience in Basra and Baghdad and his experience of one or two fatalities and the times he sat on a number of tribunals. It was apparently to see whether or not there were a number of matters which the defence might be able to challenge by way of conflict of interest, but there were none immediately obvious.

Ultimately, it was made clear that neither side had any objection although the defence responded to the question whether or not they wished to object, "*No, not at this time*", which the Judge indicated he would take as a no for the time being, but the parties could raise an objection at any time.

The matter then turned to a number of other procedural matters relating to disclosure/discovery. It was plain that the prosecution had previously filed a disclosure statement or similar indicating which medical documents might be disclosed. The Judge went through this document in quite some detail and it was plain that not only was he a robust Judge, but also he was less than satisfied with some of the inconsistencies and potential omissions in the prosecution's disclosure stance. He also gave the defence some opportunity to deal with minor matters of disclosure before ultimately adjourning the matter, indicating that the prosecution would have to go off and remedy the defects in their disclosure statement. The matter was then adjourned until Wednesday, rising at around 1130.

In summary, a very brief day in Court, dealing with essentially procedural matters.

What was perhaps most interesting was the fact that not only was al-Hadi plainly in high spirits, but the level of detail to which the Judge condescended in relation to his background and the questions in relation to conflict were impressive. I should also note that it was clear that the Judge was profoundly engaged in the disclosure protest.

In many ways, the hearing resembled any other procedural or interlocutory hearing that one often sees in courts around the world. However, by the end of day one, it was perhaps a little difficult to form any particular views about the mechanics of the process.

Further, it may be of note that the courtroom was nowhere near as cold as I had anticipated – previous talk of the need to wear a jumper or similar in the gallery is perhaps now a little redundant, although one supposes that the air conditioning temperature may be changed!

6th June 2023: No Court sitting that day.

Coffee arranged with defence team during which a number of members of the defence team gave their unvarnished, and very interesting, view about proceedings. The conversation was essentially an off-the-record one, so one must tread carefully about what was disclosed. In short, descriptions were given about some of the rather Kafkaesque nature of the disclosure process/discovery process which was being undertaken. I was told, for example, of documents being disclosed and the entire page was redacted. We were also informed, for example, of some of the conditions of detention, which marry with those already well publicly known. In particular, we were informed as to the lengths that the prison goes to ensure that detainees are unaware of surroundings and the use of disorientation tactics.

The defence team were very friendly and accommodating, although refrained from discussing their client with any particularity, save again to air matters which were publicly known – not least the fact that al-Hadi is a profoundly unwell man and has a serious degenerative condition to his spine.

We were also fortunate in that Carol Rosenberg of the New York Times had lunch with us. Carol plainly has a profound knowledge of both Guantanamo Bay in general terms, but also the various prison camps – Camp X-Ray, Camp Delta, she indicated that at a certain time there had also been a secret prison. She was also able to tell us a bit more about the levels of security surrounding the prisoners and the island more generally. She was also able to speak to us at length at the difficulty facing the US government and indeed the defence team concerning the transfer of al-Hadi to a third country. It is a matter of record that al-Hadi has struck a plea deal significantly on the basis that he will be transferred to a third country upon the expiration of his sentence. The particular difficulty relates to the fact that al-Hadi's serious medical conditions mean that there are only a handful of countries with the relevant Medicare facilities who might even be in the running to consider whether or not they would take him.

As I understand it, should al-Hadi not be in a position to be transferred on the completion of his sentence and/or sentencing, al-Hadi has the right to terminate the plea agreement and have matters for which he is accused heard at a full trial. It seems that this is plainly in the interest of neither the prosecution nor the defence, but remains a real possibility.

7th June 2023

HHJ Pritchard sat at 0836. He referenced that the preceding day, 6th June 2023, there had been an ex-parte hearing with the prosecution but gave no material details.

The disclosure hearing/discovery hearing continued and the Court began by referring to an updated chart provided by the government which had been filed, but also provided new information. Major Milton for the prosecution responded to various questions raised by the Learned Judge in relation to the amended chart and various questions were posed by the Court relating to the timing of disclosure.

The matter then proceeded to a hearing of the Defendant's "*presentation*" by Captain Casiola. Captain Casiola was particularly impressive, and it was clear that she has a profoundly detailed knowledge of the disclosure provided thus far. It was striking that throughout the course of the hearings on 7th, when Captain Casiola was pressed by the Judge to give justification for the disclosure being sought, she did not waver and was able to give compelling and coherent arguments for the same.

It is noteworthy that what was referred to as a "*presentation*" was likely a spreadsheet or similar document presented by the defence in support of its request for specific disclosure/discovery. The nomenclature of presentation is perhaps therefore a little misleading and the document (which, of course, we didn't see) was likely to simply be a detailed chart in support of the Defendant's request for disclosure.

The Court spent some considerable time going through the defence document. On occasion, the Learned Judge presented as somewhat irascible but nevertheless plainly was fully engaged and had a forensic knowledge of the documents presented from both sides. The Court made diverse specific challenges as to why particular matters of contested disclosure would be necessary for sentencing.

Whilst it appeared that the Judge may not have been impressed by some of the niche aspects of requests for specific disclosure, I was left with the impression that he may simply have been testing the limits of the request.

The Court rose frequently – first rising at 0910 before returning at 0923 whereupon there was more proceeding through by the Court with a granular analysis of the Defendant's presentation. In broad terms, the central thrust of the Defendant's requests were that the medical records and associated documentation had not fully been

disclosed. In essence, the defence appeared to be trying to build a case that there had been a sustained pattern of failures by the government in its medical treatment of al-Hadi leading to potentially falling below the requisite standard and thus that that falling below requisite standard might be useful by way of mitigation. The defence further articulated that they required a complete understanding of what the medical treatment records and all future records to assist in any resettlement proposal.

The Court then rose at 1009 and sat again at 1029. It is worth noting that throughout al-Hadi appeared to be present in his seat during proceedings although occasionally he would shift in his seat and occasionally walk on his zimmer frame type device. There was some consideration as to whether or not discovery motions had in fact been waived by the defence in light of the plea and there was some particular consideration of the relevant military regulations. The Judge seemed to take the point, which had not previously been raised by the prosecution, although if I understood matters correctly the prosecution then attempted to piggy back on this a little bit later on and indicated that it felt that disclosure/discovery entitlement had previously been waived although this didn't seem to be something which terribly impressed the Court at that stage.

There was then a line-by-line analysis of the various complaints of nonresponsive discovery/disclosure. The Learned Judge then turned to the prosecution, cutting to perhaps the heart of the matters for the first time, asking why it could simply not be the case that the totality of the medical records should be obtained and disclosed subject to any redaction on classified grounds. As an aside, there was some conversation in the gallery that one of the particular difficulties facing the prosecution was that it was likely that a number of the records were held by the CIA, although this is speculation and was not articulated by either party in open Court.

The prosecution ultimately accepted that it knew where all the medical records were and in what format and believed it had given everything to the Defendant although it accepted that there may well have been various documents missing. The Court appeared to be noting that effectively the prosecution conceded the Defendant is entitled to medical discovery and ultimately indicated that in due course an Order would be made that the prosecution should ensure that the person who has control of the medical records should make a certification that everything was available and had now been found.

The Court rose at 1122 and returned at 1156. The Court went on to note at that stage that it was going to hear from the defence in relation to other specific items of disclosure which the government had refused to search for. The Court went on to consider various requests for emails in relation to the preparation and mechanics of arranging for surgery as well as documents relating to forced cell extractions (although these may overlap with medical disclosure) as well as requests for other miscellaneous documents.

At this stage, at around 1245, Counsel for al-Hadi indicated that he was in pain, and it

was determined that he would ultimately be voluntarily absent after the Court rose again, given the level of pain. Various options were canvassed as to whether or not he should remain, or whether or not the question of disclosure should be adjourned till the next day, but ultimately, after those options were canvassed al-Hadi was told that he could be voluntarily absent. Court rose at 1250 before returning at 1400. The prosecution was, at that stage, given an opportunity to respond to the various requests and, in terms, insofar as the non-medical disclosure was concerned, the prosecution indicated that the requests were ill-defined, without materiality and were effectively a fishing expedition, although that phrase was not used (I understood later from press in the gallery that that phrase is always used and this was something of an unusual event!)

The Court then rose at 1430 for a brief adjournment, returning at 1440 and rising at 1442. The Court indicated that an Order and determination would be made as to the requests for discovery in due course. Al-Hadi appeared to be engaged throughout and it was clear that some reasonable accommodations were being made in light of his ongoing pain. When one sets aside the potential conditions of detention and the history of the same, the way that the Court proceedings were heard didn't seem, in my view, to cause any particular concerns as to fair trial consideration. Whilst al-Hadi was briefly absent, that was by mutual agreement.

9th June 2023

Fifth day of the working week – but the third day of open sitting.

Al Hadi was already in his usual position in Court. The purpose of today's hearing was to consider application AE29 which I understood to be a challenge to the policy or mechanics of the prosecution liaising as an intermediary with witnesses to whom the defence wished to speak. In short, whilst in usual circumstances there is no property in a witness, as usual, in these proceedings, any requests made by the defence to speak to a particular witness must be vetted or in some way processed through the prosecution.

The Judge came in at 0830 and the Judge noted, by way of preliminary matters, that there were a number of email conferences which had taken place since the last hearing. He set out the basis of those email conferences and the emails. They were essentially administrative in nature.

The government then proceeded to the lectern and there was a discussion between the government and the Judge of the mechanics of a witness advice statement and what must be read to witnesses or provided to witnesses to whom the defence wishes to speak.

There was some discussion thereafter of various categories of witnesses – as ever, not having had the totality of the documents, it was not wholly clear how these categories

attach, but I understood there to be four categories of witnesses and different “*witness advice statements*” are provided to different categories or historically have been done. Those witness advice statements are, as I understand it, an advice of rights statement – that is to say, each witness is told what their rights are and what their obligations are. There was then some discussion as to whether or not there were particular protocols and processes in place to witnesses from different service branches. Thereafter, the Court appeared to establish which type of advisements the prosecution proposed to give to different categories of witnesses. The Court then allowed the defence a response and there were one or two matters raised. As ever, the submissions made by both parties were peppered with three letter acronyms which were perhaps a little difficult to follow.

It is worth noting that al-Hadi appeared again to be engaged throughout and he was moving in his chair in the usual way. Thereafter, the Court then proceeded to set out some of the mechanics ahead of the sentencing proceeding, and the sentencing hearing was said to take place no later than June 2024 and the Court noted that it would set out a timetable proposal in due course. The Court noted that the parties may between them agree that the sentencing hearing takes place earlier than June 2024, but it will occur likely no later than the end of June 2024 come what may. The Court noted that there will be several – perhaps three or four one-to-two-week hearings likely taking place before June 2024.

The Court noted that the timetabling document will include various milestones including the resolution of all relevant issues, witness statement and exhibit exchanges, any further evidentiary motions to be filed, any proposed voir dire hearings, any proposed sentencing instructions. A full copy will be sent out to the parties in due course.

There were no further matters to be raised and the Court rose at 0925 with the matter adjourned to 7th August 2023.

Therefore, another short hearing, less than an hour or so which was semi-administrative in nature. These hearings effectively were predicated upon written submissions already provided by the parties, with the Learned Judge then asking specific questions and hearing additional specific submissions on particular points as necessary. Whilst the hearings appeared to be opaque, they were nevertheless semi-clear to follow.

Concluding Remarks

In preparing this Report, I have read previous reports submitted by NGO observers from the ADC. I certainly echo the thoughts of both Dominic Kennedy and Dragan Ivetic in their report subsequent to their visit in October/November 2019: they observed the surreal nature of the experience and how the abnormal began to feel quite normal at Guantánamo Bay. It is certainly an unusual and alien environment, but one settles down into the rhythm of day to day life fairly quickly as well as, for example, accommodation in the tents. For us sybaritic lawyers, more used perhaps to the Ritz and the Four Seasons, the accommodation was perhaps not that typically experienced, but it was no particular hardship.

The 40 second delay which is imposed on the audio which comes through behind the glass screen separating the courtroom itself from the gallery. This does lend a further surreal and rather disjointed nature to proceedings, but when one gets used to it, it becomes normalised and doesn't pose, in my view, any particular problem in following proceedings.

Perhaps the main criticism for the "*experience*" of the NGOs was the failure to have any of the documentation which was being referred to in the proceedings, making matters very difficult at times to follow. That having been said, I recognise that there may be good reasons not to provide those documents to members of the public.

A further criticism might be made of speed at which proceedings were conducted. The hearings were immediately recognisable, in the main, as disclosure/discovery proceedings well familiar to international lawyers and, indeed, domestic lawyers in the UK. Notwithstanding the Learned Judge's very clear grasp of the detail of the information, there seemed to me a number of moments throughout when the Judge was sending a message to the parties that he would brook no nonsense rather than perhaps moving things on as quickly as possible. To expand on this, there were prolonged periods when the Court was criticising the parties rather than, say, constructively grappling with the issue of what should and should not be disclosed. Whilst I am wholly cognisant of the profoundly sensitive and likely voluminous nature of the discovery task at hand, there was certainly times when it occurred to me that Judges in other tribunals would have just got on with it and made some robust direction. As a reader of this document will observe from the above, the time spent in open court was very limited. I am aware that on one of the days there was a hearing in the morning which was a closed hearing, but I was not necessarily given to the impression that the use of court time was the most efficient. Of the three days where there were open sittings, the Court only appeared to be sitting for a full day once with two other morning sessions. Mindful of the costs and complexities involved, I cannot help but wonder whether or not there might have been a more efficient use of precious court time.

I am conscious that later attendees were able to see more detailed hearings and defer to their reports. My overall impression was that there was an extraordinary level of engagement and professionalism from the lawyers from both teams, but the pace of progress felt glacial. Also,

as I set out at the outset of this document, it is not my intention to consider in any particular detail the background to the Guantánamo hearings or the broader picture in relation to the way in which detainees have arrived there and the conditions of detention. There is plainly a paradox in the way that these proceedings are being conducted: the hearings have all the appearances of free and fair hearings conducted by a professional tribunal and with highly professional lawyers – however, one cannot help shake the feeling that there are other documents and matters which the prosecution may have which they are unwilling to disclose which might otherwise be disclosable.

There is plainly far more to these proceedings than meets the eye, but I will conclude by saying this: in the brief periods during which we were able to watch these proceedings, there was nothing which immediately gave me particular concerns as to fair trial procedures, but again, it may be difficult to form a proper view in the absence of further information.

Rhys Davies
July 2023

