

Guantánamo Bay Observer Dispatch

By Lael R. Rubin

Background

January 6-14, 2019: Hearings in Guantanamo for 58-year-old Abd al Hadi al Iraqi (Hadi), who says his true name is Nashwan al Tamir.

He is accused in a series of attacks in 2003-2004 in Pakistan and Afghanistan. The U.S. government alleges that fighters who answered to Hadi committed a series of war crimes, including shooting at a U.S. military medical helicopter, setting roadside charges that killed allied soldiers, and attacking civilians. Prosecutors are seeking a life sentence. Hadi is charged in what is the only contested non-capital case in Guantánamo.

He was captured in Turkey in 2006 where he was held for almost six months by the CIA and was brought to Guantánamo in 2007. He was arraigned on charges in 2014.

On January 18, 2019, Marine Lieutenant Colonel Michael Libretto, the judge, set forth a timetable to begin a jury trial on February 19, 2020. Judge Libretto, appointed in August 2018, is the third judge to preside over this case.

There are currently 40 detainees at Guantanamo. Six detainees have not yet been charged.

Daily Impressions

Sunday, January 6, 2019

There are 110 passengers on the flight from Andrews Air Force Base to Guantánamo, including members of NGOs, the media, interpreters, court reporters, and prosecution and defense lawyers. Each group is kept separate, although in the long check-in line, we had conversations with prosecution and defense lawyers who were going to Guantánamo on other matters (not Hadi) to talk with clients. They generally have been making this trip once a month.

It is quite a slog to get here and it will be many hours before we get to Camp Justice (apt name). Once this plane lands, we are to take a bus to a ferry and then yet another bus. Probably the only other event we will have will be to get our badges which we will be required to wear in secure areas (and put them away at other times when we want to take photos).

Photographing badges is strictly prohibited. Also, we have been warned that our behavior and comments are strictly monitored by cameras. In fact, we are to be assigned seats in the courtroom so that if the camera monitor has a concern, he will know the identity of the person in that seat.

We were scheduled to tour the court complex today, but since we will be so late in arriving, it is to be scheduled for a later time.

We were scheduled to leave Andrews at 10:30 this morning, but didn't end up leaving until 3 p.m. All that wait time did provide an opportunity to talk with the 10 other NGO's in our group, half of whom are law students. We've been told that the hearings each day will likely be broken up in short segments because Hadi will be in the courtroom on a bed as he's had five back surgeries and is in pain. (I question how he is able to cooperate with his lawyer, particularly if he's on pain medications. I guess that issue will be a recurring defense motion). And what caused his back issues? So far, no one is saying. Hopefully we'll hear about that in court (unless it is bleeped out) or from his defense counsel when we meet with him. We are told that neither the judge nor the prosecutor will meet with us although we will request a meeting. We have been given a variety of reasons for their not meeting with us, but I think we will make the request again.

One of the regular reporters who attends every hearing is Carol Rosenberg with McClatchy Newspapers, and formerly the Miami Herald. She said that Guantánamo is her beat and attends every hearing. She seems open to having conversations about her experiences and her writing.

I will be very interested in how the week progresses.

We finally landed at almost 5:30. We then had to take a bus, ferry, and another bus before landing at the "Red Carpet" area where we retrieved our luggage and walked to Camp Justice. We were all a little shell shocked at the nature of our tents, and outdoor shower and toilet areas. It will be an interesting living situation.

Monday, January 7, 2019

Following breakfast with the group, we had to freeze in place until the detainee had been moved from his location to the court. All movement stops on the until he is delivered to the court complex. Mobile towers on trucks seemed to spring up in order to increase security and surveillance because it was a hearing day.

We then walked to the Court (ELC) through many levels of security before finally being admitted to our assigned seats in the courtroom. We were behind a glass wall, not just a partition. The courtroom was about 150 feet by 150 feet. We could watch on monitors. Each morning an MP reads a list of rules to those of us in the gallery. Any of the military associated with Camp Justice is not identified by name on his uniform. For security purposes, the only identification is by service and assignment.

The morning session dealt with Hadi's medical condition. He had multiple back surgeries and was in pain, taking opioids for pain related to muscle spasms. How can he competently assist his counsel if he's in pain? There was much discussion and argument about how to make him comfortable and more recesses so he could rest, even with a hospital bed in the courtroom. The most catch-22 type of questions related to the defense not having access to information claimed to be classified to know whether to object. This claimed classified information related to testimony from the Senior Military Doctor and neurosurgeon about Hadi's medical condition. Defense attorneys argue how can this information be classified if the defendant knows it.

Prior to the noon recess, the judge expressed hope that at least there would be testimony in the afternoon from the neurosurgeon. He also mentioned that there would likely be closed sessions on Tuesday and Thursday and that defendant could waive his presence so that he could rest.

The afternoon session involved the testimony of the neurosurgeon who performed surgery on Hadi and prescribed medication. Defense attorneys elicited testimony that transporting Hadi to court exacerbated his pain from muscle spasms and that he believed that Hadi was open about his pain. I suspect that the judge will fashion some adjustment in how Hadi is transported.

Tuesday, January 8, 2019

No court today.

Following breakfast, we toured Radio Gitmo, a military radio station that has broadcasts on three different stations. The station is limited as to what they are permitted to air (e.g. local news and different types of music).

We then headed to Ferry Beach. It had beautiful, crystal clear water, lots of sand glass, and there was almost no one there. I'm not sure of schedule for rest of day, but am looking forward to hearings tomorrow. It's so hard to be required to have an escort to go just about everywhere. While I understand that many areas are off limits to us because of security issues, it feels like the underlying intent is to paint only a rosy picture for us. I'll have a better sense as the week goes on. At least I got the go ahead to try and set up a casual meeting with Carol Rosenberg, the Guantánamo reporter for McClatchey.

Wednesday, January, 2019

Up early and dressed for court to leave at 6:30 a.m. for breakfast. We returned to Camp Justice and walked to the ELC by 8:30 a.m. We are all getting accustomed to the security drill where they check badges and the two levels of metal detector security. As we waited in the holding area, we were informed that Hadi was not coming to court today and we wondered whether the court would be dark or have anything heard at all. We finally were able to get into the courtroom by 10 a.m.

We heard testimony about the current state of Hadi's medical condition and his state of mind about coming to court. The Senior Medical Officer was on the stand the longest discussing Hadi's medication and the accommodations that have been provided to him, which seemed quite extensive and humane. They even moved him from one location where he was in isolation to another where he would have more interaction with his "brothers" in a common area. According to the doctor, he seemed happier in that environment even though it was further away from court.

The extended distance to transport Hadi to court exacerbated his muscle spasms. Tomorrow will be another closed session and then we are expected to be in session for half day on Friday morning. The judge seems determined to try and find some accommodation long term so that hearings may continue. The defense is objecting to even these proceedings continuing in Hadi's absence without a waiver. The judge has determined that since these proceedings are not substantive matters, they can be held even without his presence or waiver.

Thursday, January, 2019

We toured the area on the north end of Guantánamo adjacent to the Cuban border. We were escorted by two Marines who gave the tour which included driving behind the locked north gate and ending right up to the line with Cuba. The area is surrounded by barbed wire, just behind unexploded mine devices which have been found. In fact, one was responsible for a major fire last February. The area is surprisingly lush and green which is in contrast to the dry parched area of Camp Justice and the ELC area. That evening, back at Camp Justice, we had a lengthy impromptu

conversation with Carol Rosenberg lasting almost two and a half hours. She's a wealth of information, not only about background in the Hadi trial but about the other detainees who are or have been here. Primary issues have arisen because of continuing problems with consistency of lawyers, judges, and medical personnel. Hadi is the only high risk detainee not charged with a capital offense and for a variety of reasons he does not trust his lawyers and wants to be present in court to make sure of what they are doing. Rosenberg said that while he doesn't speak English, he understands English pretty well. She also described his living conditions in Camp 7 even though she hasn't been inside. While this very quick summary only barely gives a flavor of our serendipitous conversation with her, those of us who were there were so grateful that we had this opportunity because so much was put into context.

Friday, January 11, 2019

We had a shortened morning session with the testimony of Mr. Yamashita who heads the JDT. He talked about the detainee's living conditions and what efforts they have employed to implement medical requests for accommodation, not only in his cell in Camp 7, but in the location where he could meet with his lawyers, the holding cell outside of court, and his method of transportation to court. A new holding cell within the vicinity of the court complex has been ordered and is expected to arrive in March. According to the government, this will better accommodate his medical needs. The afternoon was spent in closed session with anticipated resumption with open testimony on Monday.

Saturday, January 12, 2019

Camp Justice is built on what was an old air field, McCalla Field. That explains why there are large open spaces that appear to be built on a huge parking lot.

We drove to the Lighthouse which is built like a missile and no longer used. There was a wonderful collection of old photos and memorabilia. I saw the lead prosecutor, Commander Doug Short, who was very pleasant and engaging in conversation, especially after I told him that I was a former prosecutor. He indicated that he expected a full day of hearings on Monday on motions although didn't expect the judge to issue any rulings, only make findings of fact.

He seemed to think that the case could get to trial next year (sounds pretty optimistic to me). He's been on the case two years and expects his commission to continue to be extended.

Since the prosecutors are proscribed from making any public statements, he was very clear that I not quote anything he said, which included an opinion that Hadi was getting more accommodations than he would have received in federal court.

That evening, the defense barbecue took place at a group of townhouses which house the defense teams. It was considerably upscale compared to our tents. The evening was informal with no agenda. I met all of the defense team which not only included the lawyers we've seen in court but their chief investigator and considerable support staff and paralegals. Their team has 13 members, many more than I had expected. One of them reviews documents coming both ways to make sure classified/unclassified materials are exchanged and/or protected. As he said, his job is to make sure that the defense doesn't get in trouble.

I probably spent most of the time talking to the lawyers, learned much about them, and learned a great deal from their chief investigator, John. He couldn't even estimate how much money the government is paying for salaries and the medical care for Hadi. Since the legal staff are either

military or Pentagon employees (Susan Hensler, the lead defense lawyer), they are paid well. John said that because Hadi is the only high security detainee who is not a capital detainee, they would like to get his case to trial as soon as possible so that he would have an opportunity to be released (depending on the sentence). He also said that since the Convening Authority didn't address Hadi's back issues until he was found on his cell floor incontinent and had to fly in surgeons to immediately address his problem, it was likely that his condition was much worse than had it been addressed sooner. He stated that the Convening Authority had no interest in his medical care until forced to by circumstances. Further, in his opinion, that there was no way out of this situation going forward. Because the charges are not recognized in federal court or by military court martial, Hadi, as well as the 9/11 detainees, had nowhere else to go to be tried. It might have been different had things been set up differently at the outset in terms of charges.

The attorneys are all new as of November. Susan Hensler is the lead attorney, a former federal public defender, who is expecting her third child in May. Both of the Navy JAGs, Dahoud Askar and Charles Ball, don't know how long they will be on the case. It depends on the wishes of the Navy.

Sunday, January 13, 2019

Tomorrow will be an incredibly busy day, with, hopefully, all day hearings and a briefing afterward from General Baker who was also at the barbecue for a while. He said that he would make a presentation and then hoped we would ask lots of questions. I told him not to worry, that this group was not shy.

Monday, January 14, 2019

We only had a morning session because of Hadi's increasing back pain. The Senior Medical Officer was recalled briefly by the defense to establish inconsistent testimony between his previous testimony and earlier declarations. He was quite a good witness in terms of demeanor and making sure that he only answered questions asked. The judge took five-minute recesses every 30 minutes to attempt to minimize Hadi's pain. The defense raised issues regarding Hadi's inability to have Skype conversations with his family (the Convening Authority changed the date causing Hadi's family to travel three hours each way in Iraq to sit for conversation only to learn that the date had been changed.). Skype conversations of 15 minutes only occur every three months. Also raised were issues regarding the location of attorney-client visits and questioning why they couldn't occur at Camp 7 rather than transporting him to another location. The next issue raised related to the defense wanting a mitigation-extenuation expert to be appointed. The government objected only because the defense didn't seek approval from the Convening Authority rather than going to the judge.

Defense motions were then argued. The motions to dismiss the conspiracy charge followed as well as an interesting discussion of the law of conspiracy and its different interpretations under the Military Commissions Act. All motions were taken under submission for future written rulings. The remainder of the motions were ordered to be argued in supplemental pleadings because Hadi was in increased pain.

The highlight of the afternoon was a 4 p.m. meeting with General Baker. We spent over an hour with General Baker who presented a detailed PowerPoint which was later emailed talking about the commission process, his role as chief defense counsel since 2015, and how difficult it is to get permission to hire staff and how long the process takes; insufficient office space and housing issues including massive amounts of mold; and insufficient space generally if all detainees were charged

and proceedings were set. Their mission is zealous, ethical, independent, client-based defense services under the Military Commissions Act. In his opinion, capital cases should be tried in federal court to assure due process which he believed was not occurring at Guantánamo.

Considering how the commission process was set up and subsequently changed by court decisions and statutes, the current process was one that they were stuck with. He also talked about cases where bugs were found in attorney-client meeting rooms for the 9/11 detainees and the pending Bahlul case set for argument in the D.C. Circuit regarding his authority to excuse lawyers for which he was held in contempt for three days. The other cases on appeal in the D.C. Circuit involve the issue of whether a detainee can waive his right to appeal following a guilty plea, whether a conviction for providing material support is sustainable when the Supreme Court has found that it is not set forth in the Military Commissions Act, and whether a detainee has the right to his own civilian counsel. He is very bright and principled and wants his defense teams to have what they need to adequately defend their clients. He also expressed concern for burn out and lack of consistency of staff who rotate in and out.

The Convening Authority is appointed by the Secretary of Defense and has unfettered discretion. The current Convening Authority is the sixth one. He believes that the Convening Authority is unlawfully involved in the defendants' business and that the system is not independent. General Baker does not believe that Guantánamo can manage these cases. He must go to the Convening Authority to approve his budget requests. He believes that he is understaffed and is unable to secure what he needs. His government counterpart, General Martins, can secure assistance from the FBI; Baker cannot. He states that obtaining security clearances is a slow process and that there is insufficient office space at Guantánamo.

He is concerned about discovery issues and IT systems that date back to the 1990s.

There is an ongoing tension between defending the rule of law and protecting national security. Recently, the FBI interviewed a 9/11 team member which caused difficulty in the detainee trusting defense counsel.

Tuesday, January 15, 2019

Everyone was up, packed, and ready to go by 6:30 a.m. Following a last minute group photo, we got in line at the "Red Carpet" to check bags and get on the bus, the ferry, and the bus to the airport to check in and board the plane. We actually boarded the plane early. I'm glad the horror stories of delayed flights or canceled flights didn't occur.

Final Impressions

Everyone involved in the Hadi hearings was well meaning, dedicated, and genuinely interested in assuring that Hadi has a fair trial. The Military Commissions Act, however, does not guarantee the right to a speedy trial. In my opinion, Hadi's lengthy time in Guantanamo, from 2007-2014, before he was charged seems unconscionable. Since the court now believes that his trial will begin in 2020, Hadi will have spent 13 years in Guantanamo prior to trial.

Considering Hadi's medical condition, it may be that commencing a trial in 2020 is optimistic. The difficulty of maintaining consistency of lawyers and bench officers exacerbates the ability to move this case forward. Were travel distances lessened, hearings might be able to proceed more efficiently and effectively. These issues would be significantly reduced if Hadi's case were tried in

a federal court in the United States. The transfer of these cases to federal court has, unfortunately, been rejected.