UNITED STATES OF AMERICA

From ill-treatment to unfair trial

The case of Mohammed Jawad, child 'enemy combatant'

1. Introduction – International law sidelined

What kind of statement do you want? Do you want me to make a statement about my jail time and how it has been an injustice? Do you want a statement about my torture? Do you want me to make a statement about my time here?

Mohammed Jawad, Administrative Review Board hearing, Guantánamo, 6 December 2005

Mohammed Jawad was taken into custody in Afghanistan minutes after an incident on 17 December 2002 in which two US soldiers and an Afghan interpreter were injured when a grenade was thrown through the window of their vehicle in a crowded bazaar in Kabul. Jawad has said that he was 16 or 17 years old at the time (he has no birth certificate), and the US government has confirmed that he was indeed under 18. He was held for over six hours in Afghan government custody, during which time he alleges that he was beaten, threatened and intimidated into confessing to having thrown the grenade. The US authorities have said he "made a written confession to this attack, signed it and marked it with his fingerprint".[1] According to his US military lawyer, this "confession" was written out by an Afghan police officer, is in Farsi, and bears Jawad's thumbprint. Mohammed Jawad's language is Pashto, and it is said that at the time he could barely read or write.

The teenager was handed over to US Special Forces on the evening of 17 December 2002 and held in US military custody overnight in Kabul. After about four hours of interrogation in the Kabul base the following day, he was transported to the US air base in Bagram where he was detained for the next seven weeks. In Bagram, he was interrogated without access to counsel, during a period when ill-treatment of detainees at the base is believed to have been at a peak. Two Afghan detainees had died under torture in Bagram in the two weeks before Jawad was brought there. The teenager was allegedly subjected to isolation, sleep deprivation, cruel use of restraints, hooding, forced standing, stress positions, and physical assaults as part of the interrogation process. Transferred to the US naval base in Guantánamo in Cuba in early February 2003, he was repeatedly interrogated without access to legal counsel. After his arrival he was put into isolation for 30 days, and this was repeated over a 30-day period in September and October 2003 on the reported recommendation of a psychologist with Guantánamo's Behavioral Science Consultation Team (BSCT) who suggested that he was feigning homesickness and depression as a technique to resist interrogations.

Apparently driven to despair over his plight, Mohammed Jawad attempted suicide in December 2003. Despite his delicate mental well-being, in May 2004 he was subjected to sleep disruption and deprivation in the form of the euphemistically named "frequent flyer program"

[1] Unclassified summary of evidence for Administrative Review Board. Department of Defense, Office for Administrative Review of the Detention of Enemy Combatants at US Naval Base Guantánamo Bay, Cuba, 7 November 2005. This was repeated in unclassified evidence for next ARB, dated 26 October 2006.

– moved from cell to cell every few hours, day and night, over a 14-day period. He was not interrogated during this time, or for several weeks after it, leaving unanswered the question of why he was targeted in this way. There were apparently two versions of the frequent flyer program, one aimed at coercing information from detainees, the other at coercing detainee compliance with the rules of detention. The program was supposedly ended in March 2004, but it was used against at least five detainees after that, including Jawad (see appendix 2).

This report traces the development, authorization and use of "counter-resistance" techniques in Guantánamo – the frequent flyer program appears to have evolved from the combination of "environmental manipulation", "sleep disruption" and isolation – and how the conditions the USA attached to its ratification of human rights treaties prohibiting torture and other ill-treatment left loopholes that were exploited by the US administration in its resort to such techniques. In examining the question of Mohammed Jawad's ill-treatment and the context in which it occurred, the report also notes how the US authorities deliberately blurred the detention and interrogation functions at Guantánamo, thereby undermining a fundamental safeguard against torture and other ill-treatment in this "strategic interrogation facility".

Around the time of Mohammed Jawad's subjection to the frequent flyer program and his subsequent transfer to the harsh and isolating conditions of Guantánamo's then newly opened Camp 5, the authorities decided that he had little intelligence value, but that he was a prime candidate for trial by military commission under the Military Order signed by President George W. Bush in November 2001. This report recalls how, in 2004 the administration was looking to obtain confessions or guilty pleas from detainees to kick-start its beleaguered military commission trial scheme. Mohammed Jawad underwent a number of interrogations by Pentagon criminal investigators in 2004 and 2005. He had no access to legal counsel for any such interrogations, just as he had no lawyer present when he was subjected to intelligence interrogations. Indeed, Mohammed Jawad had no access to legal counsel at all for almost five years, until after he was charged in late 2007.

As shown in Appendix 1 to this report, the timing of interrogations with an apparent prosecutorial focus to which Jawad was subjected in 2004 and 2005 mirrored what was happening in the US federal courts relating to legal challenges to the military commission system. His interrogations stopped abruptly in November 2004 on the day when a District Court ruled the commissions unlawful. They resumed eight months later, on the day that a higher court reinstated the system. At this point, Jawad faced a spate of almost daily interrogations, raising suspicion that the authorities were attempting to obtain incriminating information from an unrepresented teenager to use at his future trial, possibly in the knowledge that his "confession" obtained two years earlier in Afghanistan had been given under severe duress, and in a bid to obtain a "clean" statement from him.

Eventually the commissions were ruled unlawful by the US Supreme Court in 2006, in *Hamdan v. Rumsfeld*. Mohammed Jawad, who was not charged under the Military Order, has since been charged under the Military Commissions Act (MCA), the legislative response to the *Hamdan* ruling. The MCA commissions are little better than their predecessors under the Military Order, in Amnesty International's view.[2]

[2] USA: Justice delayed *and* justice denied? Trials under the Military Commissions Act, March 2007, http://www.amnesty.org/en/library/info/AMR51/044/2007.

Whatever the reason for his subjection to the frequent flyer program – and whether related to intelligence gathering, prosecution or the camp's disciplinary regime – its use violated the international prohibition on torture and other cruel, inhuman or degrading treatment or punishment. However, as in other cases of human rights violations committed by US personnel in the "war on terror", the investigations into it have been less than adequate and impunity has been the general order of the day. Those who were in senior command positions at Guantánamo at the time Mohammad Jawad was subjected to this sleep deprivation technique have claimed they knew nothing about it.

The government has compounded this lack of accountability and the absence of remedy by seeking to rely in prosecution briefs in Jawad's case on "understandings" and "reservations" the USA lodged upon ratifying the UN Convention Against Torture and the International Covenant on Civil and Political Rights (ICCPR) to assert that Mohammed Jawad was never subjected to anything that amounted to torture or cruel, inhuman or degrading treatment, despite the undisputed fact that he was subjected to the frequent flyer program. In any event, the government says, he has no enforceable rights under international law. This has been the government's position towards its "war on terror" detainees from the outset.

Mohammed Jawad – in his sixth year of military detention

1985 – Mohammed Jawad born in Afghanistan. He spends much of his youth in Pakistan to where his family fled to a refugee camp

13 November 2001 – President Bush signs Military Order authorizing military commission trials of foreign nationals

7 February 2002 – President Bush signs memorandum that Article 3 common to the four Geneva Conventions will not apply to detainees captured in Afghanistan, and that humane treatment is a "matter of policy" rather than a legal requirement. In a public "fact sheet", the White House says the Guantánamo detainees "will not be subjected to physical or mental abuse or cruel treatment"

17 December 2002 – Jawad, aged 16 or 17, arrested in Kabul by Afghan police after a grenade attack on a US military vehicle; transferred to US custody that night, and taken to Bagram airbase the next day. Allegedly subjected to hooding, isolation, sleep deprivation, stress positions, forced standing, physical assaults, and cruel use of restraints in Bagram

6 February 2003 – Mohammed Jawad transferred to US Naval Base in Guantánamo Bay, Cuba. He is put into 30-day isolation

7-20 May 2004 – Mohammed Jawad subjected to 14 days of the sleep disruption technique known as the "frequent flyer program". Subsequently transferred to conditions of isolation in Camp 5.

28 June 2004 – Supreme Court rules, in *Rasul v. Bush*, that US courts have jurisdiction under federal law to consider *habeas corpus* petitions from foreign nationals detained in Guantánamo.

4 November 2004 – Combatant Status Review Tribunal affirms Mohammed Jawad's status as an "enemy combatant"

29 June 2006 – Supreme Court rules in *Hamdan v. Rumsfeld* that military commission system under 2001 Military Order is unlawful

17 October 2006 – Military Commissions Act (MCA) passes into law, stripping US courts of jurisdiction to consider *habeas corpus* petitions from foreign "enemy combatants" and authorizing revised military commissions to try "alien unlawful enemy combatants"

9 October 2007 – Charges under MCA sworn against Jawad. He is given access to a lawyer for the first time in nearly five years

30 January 2008 – Charges approved by Convening Authority and referred on for trial by military commission

2 June 2008 – Guantánamo guards allegedly beat, kick, and pepper spray Mohammed Jawad, who is already shackled. He is then moved from Camp 5 to Camp 6 and subject to disciplinary regime

12 June 2008 – Supreme Court rules, in *Boumediene v. Bush*, that the Guantánamo detainees have the right to challenge the lawfulness of their detention in *habeas corpus* petitions

Instead of his status as a minor being recognized and instead of the teenager being treated accordingly as required under international law, Mohammed Jawad was designated – along

with hundreds of other detainees, including other children – as an "enemy combatant". This status, at least with the legal consequences ascribed to it by the USA, is unrecognized in international law. Like other detainees, Mohammed Jawad was denied access to an independent and impartial court to challenge the lawfulness of his detention, and his "enemy combatant" status was instead reviewed, some two years after he was captured, by the improvised and wholly inadequate executive review scheme known as the Combatant Status Review Tribunal. In 2005 and 2006 his case was reviewed by the equally inadequate annual Administrative Review Board (ARB), which determined that he should remain in detention.

He is now facing a "war crimes" trial in front of a military commission the procedures of which do not comply with international fair trial standards and contain no juvenile justice provisions. According to the US government's stance, the "enemy combatant" label is synonymous with "terrorist", and any foreign national so labeled does not deserve the same trial standards as "lawful combatants", ordinary criminal offenders, or US citizens. In seeking congressional approval for the MCA, President Bush said: "today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes."[3] Yet whether someone is guilty of "terrorism" is a matter to be decided at a fair trial, applying international standards including respect for the presumption of innocence. Here, the US government effectively labels the defendant as guilty, makes that label a prerequisite for military commission jurisdiction, and subjects the individual to trial before a tribunal that is not structurally independent from the branch of government applying the label to the detainee in the first place. In 2007, the UN Special Rapporteur on the independence of judges and lawyers expressed his "serious concern" about the MCA, "which deprives Guantánamo detainees of the right to be tried by an independent tribunal that affords the fundamental fair trial guarantees required under United States and international law."[4]

The former Chief Prosecutor of the military commissions, who resigned in October 2007 after concluding that the system "had become deeply politicized", alleged that the Legal Advisor to the military commission's Convening Authority (the legal advisor is a position created and appointed by the Secretary of Defense) had pushed for charges in cases that were "sexy" enough to attract public interest or ones involving "blood". He is alleged to have specifically favoured the case against Mohammed Jawad. His legal advice to the Convening Authority on Jawad's case made no reference to the fact that Jawad was under 18 years old at the time of his alleged crime and his arrest. In a two-line note two days later, on 30 January 2008, the Convening Authority approved "all recommendations" of her legal advisor.

Mohammed Jawad faces the possibility of a life prison sentence if convicted. The presumption of "guilt" can continue even after an acquittal, however. Even if Jawad were to be tried and acquitted by military commission, he could be returned to indefinite detention as an "enemy combatant".[5] The US Government confirmed this to the UN Committee on the Rights of the Child when it appeared before this treaty monitoring body in Geneva in June 2008. Regardless

[3] President Discusses Creation of Military Commissions to Try Suspected Terrorists, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.
[4] Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, addendum: Situations in specific countries or territories. UN Doc: A/HRC/4/25/Add.1, ¶ 386, April 2007.
[5] Manual for Military Commissions, Rule 1101(b)(3), discussion. "This section acknowledges that even in the face of an acquittal, continued detention may be appropriate under the law of war".

of age, the government said, "an individual who is not successfully prosecuted by military commission may still warrant detention under the law of armed conflict in order to mitigate the threat posed by the detainee". On 5 August 2008, the day before Yemeni detainee Salim Hamdan was convicted in the first full trial by military commission, the Pentagon reiterated that regardless of the verdict, the defendant could remain in indefinite military custody as an "enemy combatant" subject to the annual ARB process.[6] Clearly, in such a case, the international legal right to a trial within a reasonable time – already a fiction in Guantánamo – would have little meaning to the individual in question.

Mohammed Jawad's trial – or any of the other military commission trials at Guantánamo – cannot be divorced from the backdrop against which such proceedings are occurring. This backdrop is one of practices pursued in the absence of independent judicial oversight that have systematically violated international law. At any such trials, the defendants will be individuals who have been subjected to years of indefinite detention, whose right to the presumption of innocence has been systematically undermined by a pattern of official commentary on their presumed guilt. Among the defendants already charged are victims of enforced disappearance, secret detention, secret transfer, prolonged incommunicado detention, torture and other cruel, inhuman or degrading treatment. Their treatment has not only been unlawful, it has been highly and deliberately coercive in terms of the interrogation methods and detention conditions employed against them. Now a selection of detainees are facing trial proceedings before military commissions tailored to be able to tolerate government abuses and to admit information obtained under such abusive conduct, including ill-treatment.

International human rights law – which includes an array of juvenile justice provisions – applies at all times. However, the US administration maintains that its activities outside the USA in the "war on terror" are exclusively regulated by the law of war (international humanitarian law, IHL), as it defines and interprets it, and that human rights law is generally inapplicable in this global armed conflict. This is misconceived, as numerous international bodies and UN experts have found. Even where IHL does apply, such as in Afghanistan when Mohammed Jawad was arrested, it does not displace international human rights law. Rather, the two bodies of law complement each other. The International Court of Justice (ICJ) has stated, for example, that the protection of the ICCPR and other human rights conventions "does not cease in times of armed conflict, except through the effect of provisions for derogation". The USA has made no such derogation. In any event, there can be no derogation from the prohibition against torture or other ill-treatment and, as a UN Special Rapporteur said on 30 June 2008, "the fundamental principles of a fair trial may never be derogated from". He had concluded that trials under the MCA would "utterly fail to meet the basic due process standards required for a fair trial under international humanitarian and human rights law", and called on the USA to discontinue all such proceedings, and ensure fair trials for those charged.[7]

Mohammed Jawad has been charged under the MCA, in relation to the grenade incident in Kabul on 17 December 2002, with "attempted murder in violation of the law of war" and "intentionally causing serious bodily injury", also "in violation of the law of war". Despite having been accused of throwing the grenade from the time of his arrest, he was not charged

[6] Department of Defense news briefing, Geoff Morrell from the Pentagon Briefing Room, 5 August 2008.
[7] Special Rapporteur on extrajudicial, summary or arbitrary executions, UN press release, 30 June 2008.

until five years after he was taken into custody. The right to be promptly charged and brought to trial within a reasonable time – a right the importance of which the UN Committee on the Rights of the Child has emphasized is heightened in the case of a child – has been violated by the USA's detention policy. Moreover, the charges themselves have been framed as violations of the law of war. Yet it is not a war crime to kill or attempt to kill a soldier in an armed conflict, unless that soldier is *hors de combat*, that is, is not engaged in military action as a result of illness, injury, capture or surrender, or unless the method used to carry out the attempted killing violates the law of war. Throwing a grenade is not such a method. A member of an armed group or a civilian who takes direct part in hostilities, who kills or attempts to kill a combatant, can be charged with murder or attempted murder under common or domestic law.

In June 2008, the USA sought to justify bringing even those detained as children before military commissions with the assertion to the UN Committee on the Rights of the Child that "it is not unprecedented for juveniles to face the possibility of a war crimes trial". What the USA conveniently ignores is the fact that no existing international tribunal has ever prosecuted a child for war crimes, reflecting the wide recognition that the recruitment and use of children in armed conflict is a serious abuse in itself. This does not mean that a child above the age of criminal responsibility cannot be held accountable for crimes committed in the context of armed conflict, as in any other context. Appropriate recognition must be given to the age of the child at the time of the alleged crime and the rehabilitative priority, however. Mohammed Jawad's subjection to military commission, as with other detainees, adds the injustice of unfair trial to the injury of unremedied ill-treatment.

The USA has ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol) which among other things prohibits the recruitment or use in hostilities by non-state armed groups of under-18-year-olds, and requires states to provide any such child who comes within their jurisdiction "all appropriate assistance for their physical and psychological recovery and their social reintegration". The US authorities do not allege that Mohammed Jawad is a member of *al-Qa'ida* or the Taleban, but affiliated with *Hezb-e-Islami Gulbuddin* (HIG), an Islamist anti-Taleban group founded by Gulbuddin Hekmatyar, former Prime Minister of Afghanistan. There is evidence that Mohammed Jawad may have been manipulated (or even drugged) into cooperating with HIG, whose founder the USA designated as a Specially Designated Global Terrorist in February 2003, two months after the allegedly HIG-inspired grenade attack for which Jawad is now facing trial. If so, as a child recruited or used by an armed group, Mohammed Jawad's case would fall within the scope of the Optional Protocol.

The USA ratified the Optional Protocol less than a week after it took Mohammed Jawad into its custody. States ratifying the Protocol reaffirm (as articulated in its preamble) that this international instrument "will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children". However, the USA's treatment of child "enemy combatants" has been conducted through the prism of its own perceived national security interests rather than the best interests of the child.

Five and a half years later, Mohammed Jawad, now a young adult, has recently been held in Guantánamo's Camp 6, a facility which opened in December 2006, and where detainees are confined for a minimum of 22 hours a day in individual steel cells with no windows to the

outside. The detainees are completely cut off from human contact while inside their cells, and have no access to natural light or fresh air. No activities are provided, and detainees are subjected to 24-hour lighting and constant observation by guards through the narrow windows in the cell doors. Detainees exercise alone in a high-walled yard where little sunlight filters through; they are often only offered exercise at night and may not see daylight for days at a time.

His confinement in the harsh conditions of Camp 6 followed years of detention and interrogations in indefinite, isolating custody in Camp 5 and other facilities. An incident raising serious concern occurred in Camp 5 on 2 June 2008, when force was used against Mohammed Jawad by guards for reasons unknown to Amnesty International. During the incident Jawad alleged that he was beaten and kicked, thrown to the ground and sat upon by the guards and had his face pushed into the concrete floor.

According to his military lawyer, the Guantánamo authorities have confirmed that there was a use of force incident, during which Jawad was shackled at the ankles and wrists and pepper spray was used against him. When he saw Jawad 15 days later, his military lawyer has told Amnesty International that the detainee had visible bruises and marks on his arms, shoulder, knees, ribs and forehead. A report of the investigation is said to have determined that the use of force was excessive, but provided no remedy other than improved training for guards. The investigation consisted of interviews with Mohammed Jawad and with guards. The authorities did not interview the numerous other detainees who had witnessed the incident, and have refused Jawad's military counsel access to the witnesses.

After the incident, according to his lawyer, Mohammed Jawad was moved from Camp 5 to Camp 6, and had his "comfort items" removed. Under this disciplinary regime, his blanket and

Glossary of acronyms	
ARB	Administrative Review Board
BSCT	Behavioral Science Consultation Team
CAT	UN Convention Against Torture
CIA	Central Intelligence Agency
CITF	Criminal Investigative Task Force
CSRT	Combatant Status Review Tribunal
DIMS	Detainee Information Management System
DoD	US Department of Defense
DTA	Detainee Treatment Act
FBI	Federal Bureau of Investigation
GTMO	Guantánamo
HIG	Hezb-e-Islami Gulbuddin
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
JIG ICE	Joint Intelligence Group Interrogation Control Element
JPRA	Joint Personnel Recovery Agency
JTF	Joint Task Force
LEA	Law Enforcement Agencies
MCA	Military Commissions Act
MSU	Maximum Security Unit
SECDEF	US Secretary of Defense
SERE	Survival Evasion Resistance Escape
SOP	Standard Operating Procedure
SOUTHCOM	US Southern Command

mattress were removed from him in the morning and not returned until night. Jawad was still in Camp 6 on 19 June 2008 when his military lawyer was in Guantánamo for a pre-trial military commission hearing in his case. At the time of writing it was not known in which facility Jawad was being held, Camp 5 or 6. The authorities apparently do not notify a detainee's lawyer when his or her client is moved.

On 12 March 2008, Mohammed Jawad had appeared at another pre-trial commission hearing in Guantánamo. At the hearing, attended by an Amnesty International observer, Jawad was visibly agitated throughout the proceedings. Handcuffed and shackled, he frequently rubbed his forehead and put his head in his hands.[8] At times he rocked forward and exhaled audibly. He said that he was innocent, that he had been taken into custody when he was a teenager, interrogated and tortured. He said that all he wanted was fairness and justice, and that this trial was illegal. He then removed his headphones (for interpretation) and put his head on the desk. The military judge asked him to put them back on, but he said he could not – that he was suffering from a severe headache and that years of being under bright florescent lights had made him permanently ill. At one point he put his fingers in his ears, but eventually just put his head down on the table and did not raise it again for the rest of the proceedings.[9] Mohammed Jawad's military lawyer has raised the question of whether his client is competent to stand trial as a result of the mental health effects of "the extended and severe conditions of detention to which he has been subjected".[10] This matter was before the military commission judge at the time of writing.

In June 2008, the UN Committee on the Rights of the Child expressed its concern about the USA's treatment of children detained as "enemy combatants", and their subjection to trial by military commission.[11] It called upon the USA to investigate allegations of their ill-treatment and to avoid criminal proceedings against them in military tribunals. Amnesty International urges the USA to fully comply with this recommendation. It should either bring Mohammed Jawad to trial in an ordinary civilian court, with all appropriate recognition of his age at the time of his alleged crime and refusing to admit any information obtained under torture or other cruel, inhuman or degrading treatment or punishment, or else release him, with full protections against further abuse. There should be no impunity for human rights violations, and no denial of access to redress for those who have been subjected to such violations.

[8] At a hearing on 19 June 2008, Jawad appeared in the courtroom in leg shackles, remaining shackled for the entire morning session before the military judge granted the defence request to have them removed. International standards require that restraints be removed "when the prisoner appears before a judicial or administrative authority". UN standard minimum rules for the treatment of prisoners, rule 33.
[9] *USA: Disturbing appearance of Mohammed Jawad, child 'enemy combatant', at Guantánamo military commission hearing*, 13 April 2008, http://www.amnesty.org/en/library/info/AMR51/019/2008/en.
[10] *USA v. Jawad*, Defense application for mental examination pursuant to RMC 706, 23 May 2008.
[11] Mohammed Jawad and Canadian national Omar Khadr are the only two detainees detained when they were children who have been charged for trial by military commission. See also USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing trial by military commission, April 2008, http://www.amnesty.org/en/library/info/AMR51/028/2008/en. The UN Committee on the Rights of the Child is the monitoring body for the UN Convention on the Rights of the Child and its Optional Protocols.

2. Torture alleged, accountability absent

In June 2008 in Geneva, the US government offered the following assurance in response to the UN Committee on the Rights of the Child's concerns about children detained by the USA in the "war on terror":

> "The Department of Defense recognizes the special needs of young detainees and the often difficult or unfortunate circumstances surrounding their situation. We have procedures in place to evaluate detainees medically, determine their ages, and provide for detention facilities and treatment appropriate for their ages. Every effort is made to provide them with a secure environment, separate from the older detainee population, as well as to attend to the special physical and psychological care they may need."

Nevertheless, the Committee responded with serious concern about reports that children have been ill-treated in US custody in Afghanistan, Iraq and Guantánamo.[12] As the "war on terror" has shown, torture and other cruel, inhuman or degrading treatment flourish when principled human rights leadership is absent. Without such leadership, especially at a time of perceived or actual crisis or conflict, the human rights of any detainee depicted as "the other" or "the enemy" will be at risk. Even children.

On 7 February 2002, President Bush issued a memorandum stating that "the war against terrorism ushers in a new paradigm" requiring "new thinking in the law of war".[13] The memorandum stated that common Article 3 to the four Geneva Conventions – a baseline standard of customary international law, applicable in armed conflict, which prohibits torture, cruelty, "outrages upon personal dignity, in particular, humiliating and degrading treatment", and unfair trials – would not apply to any "al Qaeda or Taliban detainees". The detainees would be treated in a manner "consistent" with the principles of the Geneva Conventions, but only "to the extent appropriate and consistent with military necessity", a dangerous concept in the hands of a government which, in the words of a former senior US Justice Department official, "chose to push its legal discretion to its limit and rejected any binding legal constraints on detainee treatment" in the "war on terror".[14] Humane treatment, according to the presidential memorandum, was "a matter of policy", not a legal requirement. Meanwhile, administration officials had begun a public commentary labelling the Guantánamo detainees as "the worst of the worst", "killers", "terrorists", and "bad people", and, it would transpire, had also initiated private discussions about how to bypass the prohibition on torture or other ill-treatment and facilitate impunity for US personnel.[15]

2.1. Detention and interrogation in Afghanistan

Mohammed Jawad was arrested at gunpoint by Afghan police on the afternoon of 17 December 2002 within minutes of the grenade incident in a crowded Kabul bazaar that injured two US soldiers, Sgt. Michael Lyons and Sgt. Christopher Martin, and their interpreter, Afghan national

[12] UN Doc.: CRC/C/OPAC/USA/CO/1, 6 June 2008, Concluding observations: United States of America.
[13] Memorandum. Subject: Humane treatment of al Qaeda and Taliban detainees, 7 February 2002.
[14] Jack Goldsmith (Head of Justice Department's Office of Legal Counsel, 2003-2004). *The Terror Presidency: Law and judgment inside the Bush administration*. W.W. Norton (2007), pp.119-120.
[15] See, generally, USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004 (hereinafter: "Human dignity denied").

Assadullah Khan Omerk. At his Administrative Review Board (ARB)[16] hearing in Guantánamo three years later, Jawad alleged that he was tortured during interrogation in Afghan custody and that he had confessed to carrying out the attack: "They beat me. They beat me a lot. One person told me, 'If you don't confess, they are going to kill you.' So, I told them anything they wanted to hear. I told them anything they wanted me to say. By forcing me, beating me, and scaring me, I confessed".[17] He was held first at the local police station and then at the Ministry of the Interior. Senior Afghan officials, including the Interior Minister and the Kabul chief of police, are reported to have been personally involved in the interrogation of the teenager. The ARB alleged that Jawad had "told a senior Afghani police officer that he was proud of what he had done, and if he were let go, he would do it again". Mohammed Jawad denied ever having said that.[18] The ARB also alleged that "a senior Afghani official stated he heard the detainee admit to throwing the grenade at the two United States soldiers". Jawad stated that he was "afraid of being terrorized by the police. I was afraid of being beaten and tortured. It is possible that when [the police] were beating me and forcing me to confess, someone may have overheard me". In its prosecutorial briefs filed with the military commission in 2008, the US government has continued to rely on the claim that in "interviews by Afghan and Coalition forces, Jawad admitted that he threw the grenade and boasted that, if given the chance, he would do so again".[19]

While failing to address allegations that Jawad was ill-treated in Afghan custody, the government has asserted in recent pre-trial briefs that "the [US] Special Forces unit appointed its battalion chaplain as a 'human rights observer' to ensure that US service members respected Jawad's rights at all times during his subsequent interviews by US forces, during which Jawad again confessed to having thrown the grenade".[20] It seems that, at most, the chaplain was appointed to this role for Jawad's first night in detention only. Mohammed Jawad had been transferred to the custody of US Special Forces after about six and a half hours in Afghan police detention, on the evening of 17 December 2002. That night he was held and interrogated briefly in US Forward Operating Base 195 at the Kabul Military Training Center. The following day he was interrogated for some four hours by US military interrogators in the Kabul base.

[16] Once a Guantánamo detainee is confirmed as an "enemy combatant" by a Combatant Status Review Tribunal (CSRT), unless he has been charged for trial by military commission, his case goes for annual review by an Administrative Review Board (ARB), which like the CSRT consists of panels of three military officers who can rely on classified and coerced information in making their determination. In the case of the ARB, the panel can recommend that the detainee be released, transferred to the custody of his government, or remain in US detention. The administration considers the ARB discretionary.
[17] Jawad has indicated that he was drugged prior to the incident (see below). If so, this would raise further concerns about the voluntariness of any statements he made in Afghan custody that day.
[18] Mohammed Jawad is reported to have requested to be allowed to take a polygraph (lie detector) test in Guantánamo. His request has not been granted. In 2003 interrogators apparently planned to use a Computer Stress Voice Analyzer, manufactured by the National Institute for Truth Verification, who numbers the US military among its clients (see http://www.cvsa1.com/FAQ.htm). Amnesty International does not know if this was used, either with or without Jawad's knowledge.
[19] E.g. *USA v. Jawad*, Government's response to the defense's motion to dismiss for failure to state an offense and for lack of subject matter jurisdiction under RMC 907, 3 June 2008.
[20] *USA v. Jawad*, Government response to defense motion to dismiss based on torture of detainee pursuant to RMC 907, 4 June 2008.

Later on 18 December 2002, Mohammed Jawad was taken to the US air base at Bagram.[21] This was at a time when detainees in US custody in Afghanistan were being subjected to stripping, prolonged isolation, "stress positions", sleep and light deprivation, and the use of dogs to instil fear, as the US military has itself acknowledged.[22] Agents of the Federal Bureau of Investigation (FBI) in Afghanistan reported personally observing military interrogators employing stripping of detainees, sleep deprivation, threats of death or pain, threats against the detainee's family members, prolonged use of shackles, stress positions, hooding and blindfolding other than for transportation, use of loud music, use of strobe lights or darkness, extended isolation, forced cell extractions, use of and threats of use of dogs to induce fear, forcible shaving for the purposes of humiliating detainees, holding unregistered detainees, sending detainees to other countries for "more aggressive" interrogation and threatening to do this.[23] Documents made public in June 2008 by the Chairman of the US Senate Armed Services Committee reveal that at a meeting of US military personnel on 2 October 2002 to discuss interrogation techniques for use in Guantánamo, one of the participants noted that "we have had many reports from Bagram about sleep deprivation being used", to which another participant replied "true, but officially it is not happening".[24] Two Afghan nationals died under torture or other ill-treatment at Bagram in the two weeks before Mohammed Jawad was transferred to the base.

Mohammed Jawad was interrogated on at least 11 occasions in Bagram in December 2002 and January 2003, without access to a lawyer or other adult representative (see appendix 1). According to the transcript of his ARB hearing conducted in Guantánamo in December 2005, Mohammed Jawad said that he had "never seen or endured any torture in Bagram or here in Cuba by Americans". Amnesty International does not consider the ARB hearings to be a forum conducive to detainees fully relating their treatment at the hands of their US captors, however. The ARBs are conducted by uniformed military officers of the detaining forces, and the ARB has the authority to recommend the detainee's release from the base. A detainee – held in indefinite detention without access to legal counsel – may fear that making allegations of ill-treatment against US personnel will hinder this outcome. It is now known – and the government does not dispute – that Mohammed Jawad was subjected to a 14-day program of sleep "disruption" in Guantánamo about a year and a half before he told his ARB hearing that he had not been ill-treated in the US prison camp in Cuba.

[21] The US government told the UN Committee on the Rights of the Child in June 2008 that the USA has held about 90 children in Afghanistan, and that as of April 2008, 10 children were being held in the Bagram detention facility.

[22] "[F]rom December 2002, interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation." AR 15-6 investigation of intelligence activities at Abu Ghraib, 2004, page 29. Amnesty International believes that detainees in US custody in Afghanistan were being subjected to torture or other ill-treatment before December 2002 (as the comment about sleep deprivation made in the 2 October 2002 meeting referred in the text above indicates).

[23] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Oversight and Review Division, Office of the Inspector General, US Department of Justice, May 2008 (hereinafter, "Inspector General's FBI report").

[24] Counter resistance strategy meeting minutes, 2 October 2002. Quotes are paraphrases.

At a military commission pre-trial hearing in Guantánamo on 19 June 2008, according to Amnesty International's observer there, Mohammed Jawad was anxious to talk about what happened to him at Bagram. Through an interpreter, he indicated that sleep deprivation was not limited to Guantánamo: "When I was confronted with the sleeplessness program, it was not only at Guantánamo. This was done in Bagram by Americans... I want to start the story from Bagram." However, the proceedings moved immediately on to focus on his treatment at Guantánamo.

It was widely known among the detainees at Bagram at the time of Jawad's detention that other detainees had died at the base, and guards and interrogators would allegedly refer to the fate of these detainees. Mohammed Jawad has said that he felt great fear on account of this, according to his military lawyer. Information has now come to light about Mohammed Jawad's treatment in Bagram. For about an hour on 25 June 2004 in Guantánamo, Jawad had been interviewed as part of a military investigation into abuse of detainees in Bagram, including the deaths in custody there 18 months earlier. The military investigator's report of the interview reveals that Mohammed Jawad has alleged that he was subjected to isolation, hooding, cruel use of restraints, forced standing, stress positions, sleep deprivation and physical assaults while held in the Bagram detention facility (known as Bagram Collection Point, BCP):[25]

> "While at the BCP, he was held for a period of time within the isolation cells. He described the isolation cell as a small room on the second floor made of wood. There was a door in one of the walls and he did not pay attention to the ceiling. [Jawad] stated he was made to wear a black bag over his head and he was unable to make observations. [He] stated while he was held in the isolation cells, they kept him restrained in handcuffs and a hood over his head, also making him drink lots of water. He said the guards made him stand up and if he sat down, he would be beaten. [He] said he could not identify anyone who struck him, as he wore a black bag over his head and could not see to identify anyone. [He] said the detainees were chained 24 hours, day and night. He said at one point, he became sick from his treatment in the isolation cells and was taken to the hospital where the doctors treated him for pain in his chest and problems with urination, after which he was returned to the BCP. [Jawad] was unable to identify any other detainees within the isolation cells as they were not permitted to speak and the black sacks they wore over their heads prevented them from observing anything.[26] [He] stated he was made to stand to keep him from sleeping and said when he sat down the guards would open the cell door, grab him by the throat and stand him up. He said they would also kick him and make him fall over, as he was wearing leg shackles and was unable to take large steps. He said the guards

[25] "The most frequently reported techniques used by military interrogators in Afghanistan were sleep deprivation or disruption, prolonged shackling, stress positions, loud music, and isolation". Inspector General's FBI report, May 2008, *op. cit.*, paged 356. This was based on observations of FBI agents deployed to Afghanistan between late 2001 and 2004.

[26] The UN Special Rapporteur on torture has stated: "The practice of blindfolding and hooding often makes the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their torturers. Thus, blindfolding or hooding should be forbidden." UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

> sometimes would fasten his handcuffs to the isolation cell door so he would be unable to sit down.
>
> [Jawad] denied having witnessed other detainees being struck, but said he could hear a lot of crying and noise including cries of, 'for God's sake, do not beat me up', and detainees crying for their mothers.[27] [He] related he was kicked and hit, as well as being pushed down stairs at the BCP, but was unable to identify anyone who may have kicked or punched him. He said when the guards were escorting him with the BCP (mostly to the bathroom and between trips to his interrogation rooms), they would push he [sic] and other detainees down the stairs. [He] stated the interrogators never struck him, but they told the MP's [guards] to beat him after the interrogations were completed. He said the interrogators often placed him in a position along the wall where he was sitting without a chair with his arms outstretched. [He] said due to being kicked and beaten at the BCP, he experienced chest pains and difficulty with urination. He said he could not tell if it was from the beatings, but his physical condition did not improve."[28]

Mohammed Jawad was asked by the military investigator how he knew that the interrogators were instructing the guards to assault him. According to the investigation report, Jawad replied that the interrogators had "told him they were going to have the MPs beat me and the beatings always followed an interrogation session". The investigator also reported that Jawad had said that after he was moved out of the isolation cell "to the large holding cell with other detainees, the beatings stopped". According to a US army report in 2003, in Afghanistan US detention authorities had adopted a "template whereby military police actively set the favourable conditions for subsequent interviews".[29]

The military report states that Mohammed Jawad was shown a number of photographs of interrogators and guards who were working at the Bagram facility during the time he was there.[30] Jawad was apparently unable to identify any of the interrogators, but the photographs apparently prompted his identification of a number of the guards as individuals he said had been responsible for some of the abuse, including forced standing and physical assaults. At the time of writing, Amnesty International did not know if any of the guards named in this report had been subjected to investigation or any disciplinary or court martial proceedings.

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[27] The report also later says that Jawad "did not know of anyone else being mistreated in the BCP but added 'you could not see anything, but you could hear screaming from the areas of the isolation cells'."
[28] Agent's Investigation Report, 28 June 2004. USACIDC, Investigative Operations Division, Fort Belvoir, VA 22060. pages 10-11.
[29] Report on detention and corrections operations in Iraq. Office of the Provost Marshal General of the Army, page 27, 5 November 2003.
[30] He was also shown photographs of the two Afghan detainees, Dilawar and Mullah Habibullah, who had died in the base in December 2002 (see USA: Human dignity denied, op. cit., page 148), but did not recognize them. This was unsurprising as they had been killed before Jawad was brought to Bagram.

2.2. Transfer to the coercive environment of Guantánamo

On 6 February 2003, after some 50 days in Bagram, Mohammed Jawad, thought still to be only 17 years old, was transferred to the US naval base in Guantánamo, Cuba, like others, in conditions of sensory deprivation and degradation.[31] Article 3 of the UN Convention on the Rights of the Child – which the USA has signed, thereby binding itself under international law to refrain from acts that would defeat the object and purpose of the treaty[32] – requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The transfer of Jawad and other teenagers to the detention facility at Guantánamo contravened this and other specific international standards relating to children. [33] The International Committee of the Red Cross (ICRC), the only independent organization that had access to the detainees, stated that it "does not consider Guantánamo an appropriate place to detain juveniles... It worries about the possible psychological impact this experience could have at such an important stage in their development."[34] The UN Committee on the Rights of the Child has said that the "detention of children at Guantánamo Bay should be prevented". [35] In May 2006, the UN Committee Against Torture called on the US government to end the Guantánamo detentions. The treaty monitoring body said, among other things, that indefinite detention without charge *per se* violated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture).

At the time of Mohammed Jawad's transfer to Guantánamo (and subsequently), the authorities were employing deliberately coercive detention conditions – in addition to the inherently coercive nature of being held in indefinite and virtually incommunicado detention in a remote location thousands of miles from home. The use of isolation as a coercive technique was particularly prevalent. A government email dated 4 October 2002, entitled *Camp Delta Update,* said that the next "Air Flow" – referring to detainees transferred by plane from Afghanistan to Guantánamo – was set for to take place between 2 and 10 November 2002. The email

[31] The UN Rules for the Protection of Juveniles Deprived of their Liberty require that any transport of juveniles be carried out "in conveyances with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity. Juveniles should not be transferred from one facility to another arbitrarily". §B26. The UN Standard Minimum Rules for the Treatment of Prisoners prohibit the transport of detainees in inadequate light or ventilation, "or in any way which would subject them to unnecessary physical hardship". Principle 45(2).

[32] Article 18, Vienna Convention on the Law of Treaties.

[33] "The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society... The design of detention facilities for juveniles and the physical environment should be in keeping with the rehabilitative aim of residential treatment, with due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities." Rules 12 and 32, UN Rules for the Protection of Juveniles Deprived of their Liberty.

[34] *Guantánamo Bay: Overview of the ICRC's work for internees*. International Committee of the Red Cross, 30 January 2004, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5qrc5v?opendocument.

[35] UN Doc.: CRC/C/OPAC/USA/CO/1, 6 June 2008, Concluding observations: United States of America.

continued: "There will be between 20 and 34 new detainees on the flight. We strongly suggested total isolation for as long as possible for these individuals... until all available information is obtained from them."[36] FBI agents reported that prolonged isolation was used at the base "as part of an interrogation strategy to wear down a detainee's resistance" as well as for "disciplinary or security purposes".[37] Two FBI personnel deployed to Guantánamo in early 2003 reported that the use of isolation was common at the detention facility, and was "not considered abusive".[38] Isolation was nevertheless described in a 2005 military report on Guantánamo as an "aggressive" technique.[39] The UN Human Rights Committee, the expert body established by the International Covenant on Civil and Political Rights to monitor implementation of that treaty, has stated that "prolonged solitary confinement of the detained or imprisoned person may amount to [torture or other cruel, inhuman or degrading treatment or punishment]".[40]

In December 2002, Secretary of Defense Donald Rumsfeld authorized interrogators at Guantánamo to subject detainees to "the isolation facility" for up to 30 days (extendable with approval) as a "counter-resistance" technique. This was based on advice that isolation was "legally permissible" as long as "no severe physical pain is inflicted and prolonged mental harm intended, and because there is a legitimate governmental objective in obtaining the information necessary...for the protection of the national security of the United States, its citizens and allies".[41] In a meeting on 2 October 2002 attended by the military lawyer who wrote that advice, psychologists from the military's Behavioral Science Consultation Team (BSCT) had stated that "psychological stressors are extremely effective (i.e. sleep deprivation, withholding food, isolation, loss of time)".[42] BSCT psychologists and psychiatrists have served as consultants to interrogators at Guantánamo, and "provide recommendations to enhance the effectiveness of interrogation operations".[43]

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[36] Email available at http://action.aclu.org/torturefoia/released/022306/1205.pdf. Not long before this, on 25 September 2002, senior administration lawyers visited Guantánamo. Among the stated purposes of their visit was to "receive briefings" on intelligence successes, challenges, techniques and future plans. They were William Haynes, General Counsel, Department of Defense; John Rizzo, Acting General Counsel, CIA; David Addington, Counsel to Vice President Cheney; and Michael Chertoff, Assistant Attorney General, head of the Criminal Division, Department of Justice. Trip report, DoD General Counsel visit to GTMO, USSOUTHCOM (Office of the Staff Judge Advocate), 27 September 2002.

[37] Inspector General's FBI report, May 2008, *op. cit.*, page 186.

[38] *Ibid.*, page 187.

[39] Army Regulation 15-6: Final Report. Investigation into FBI allegations of detainee abuse at Guantánamo Bay, Cuba Detention Facility, 9 June 2005 unclassified version (hereinafter "Schmidt/Furlow Report").

[40] UN Human Rights Committee, General Comment 20. The UN Special Rapporteur on torture has also stated that solitary confinement can in itself "constitute a violation of the right to be free from torture", UN Doc. A/59/324, para. 20, August 2004.

[41] Memorandum for Commander, Joint Task Force 170: Legal brief on proposed counter-resistance strategies, Lieutenant Colonel Diane E. Beaver, Staff Judge Advocate, 11 October 2002. Hereinafter "Legal brief on proposed counter-resistance strategies, 11 October 2002".

[42] Counter resistance strategy meeting minutes, 2 October 2002. Quotes are paraphrases.

[43] Behavioral Science Consultation Team, Joint Intelligence Group, Joint Task Force-GTMO, Standard Operating Procedures, 28 March 2005. This "supersedes the previous BSCT SOP", which Amnesty International has not seen. http://www.aclu.org/projects/foiasearch/pdf/DODDON000760.pdf.

The Standard Operating Procedures (SOPs) for the BSCT at Guantánamo (at least the 2005 version) recognize the vulnerabilities of child detainees, but define children as under the age of 16, rather than 18 as international standards require. The SOPs state that:

> "JTF-GTMO does not normally detain Juvenile Enemy Combatants, however, in order to deal with this possibility, special procedures must be established. Juveniles are defined as any person below the age of 16. Gathering intelligence from juveniles will require special precautions and extra care because juveniles are often more vulnerable with less developed coping skills than adults."

It adds that "many juvenile detainees have come from deprived environments" and so "special effort will be made to ensure their protection, to provide necessary emotional support, and to provide education as available."[44] No such protections were ever provided to Mohammed Jawad, either in Bagram or Guantánamo.

In a memorandum to the interrogation authorities at Guantánamo, dated 3 January 2003 and made public in June 2008, a specialist who had conducted training sessions with Guantánamo interrogators in late December 2002 (see below) wrote that the use of physical and psychological pressures around such themes as isolation, induced debilitation, threats and degradation "are most effective if used in concert with each other since they are all mutually supporting and build upon the effects of others. They are all designed to elicit compliance from [human intelligence] sources by setting up the 'captive environment'. This is ideally accomplished by establishing control, instilling dependencies for basic existence, rewards and punishments, gaining compliance and in the end cooperation."[45]

At the 2 October 2002 meeting mentioned above, the military lawyer who provided the initial legal advice on which Secretary Rumsfeld's authorization of isolation and other techniques was based, said that "we may need to curb the harsher operations while ICRC is around. It is better not to expose [the ICRC] to any controversial techniques", adding that the humanitarian organization had the potential to "draw a lot of negative attention" to any treatment of detainees that was of concern to it. A senior CIA lawyer present at the meeting said that "in the past when the ICRC has made a big deal about certain detainees, the DoD [Department of Defense] has 'moved' them away from the attention of the ICRC. Upon questioning from the ICRC about their whereabouts, the DoD's response has repeatedly been that the detainee merited no status under the Geneva Convention".[46] A memorandum a month later from the US Department of the Navy said that "Navy staff concurs with developing a range of advance [sic] counter-resistance techniques to apply to foreign detainees", but was concerned that the ICRC or foreign government delegations might learn of such techniques during their visits to Guantánamo, "which could lead to international scrutiny". The Navy recommended that "the classification level of counter-resistance techniques be increased to Top Secret level".[47]

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[44] Behavioral Science Consultation Team, Standard Operating Procedures, 28 March 2005, *op. cit.*

[45] Memorandum from John F. Rankin, SERE Training Specialist, FASOTRAGULANT Det. Brunswick ME. To Captain Weis, ICE, JTF-GTMO. Subject: Physical and Psychological pressures during interrogation, 3 January 2003.

[46] Counter resistance strategy meeting minutes, 2 October 2002. Quotes are paraphrases.

[47] Memorandum for the Director for Strategic Plans and Policy Directorate (J-5), Joint Staff. Subject: Navy planner's memo wrt [with respect to] counter-resistance techniques. From US Navy Captain D.D.

The Standard Operating Procedures (SOPs) for Guantánamo detentions, dated March 2003 and leaked into the public domain in late 2007, emphasised that the purpose of the so-called "Behaviour Management Plan" for each newly arrived detainee was to "enhance and exploit" in the interrogation process their "disorientation and disorganization." The Plan concentrated on "isolating the detainee and fostering dependence of the detainee on his interrogator". For at least the first 30 days, but longer if so determined by interrogators, the detainee would have no contact with the ICRC or the Chaplain, and no Koran, prayer mat, books or mail.[48] The "interrogator decides when to move the detainee to general population".[49] The areas used for isolation included Camp Echo, the Navy Brig, certain sections of Camp Delta, and Camp X-Ray.[50]

This was the environment into which Mohammed Jawad was dropped. The Standard Operating Procedures make no mention of different treatment for children, and 17-year-old Jawad was placed in isolation for 30 days after his arrival, from 7 February to 8 March 2003, with no access to the outside world. If this use of coercive isolation of detainees held in incommunicado detention, including denial of access to the ICRC, were to happen at the hands of other governments – against child or adult detainees – the US authorities would presumably condemn it. Every year since the USA began operating its Guantánamo detention facility, for example, the US State Department's entries on Cuba in its annual human rights reports have – under the heading torture and other cruel, inhuman or degrading treatment or punishment – criticized the Cuban authorities for subjecting prisoners to prolonged isolation in punishment cells. Included in its criticisms was that the Cuban authorities had denied the ICRC and independent human rights groups access to prisons.[51]

After an initial interrogation by the FBI on 7 February 2003, Mohammed Jawad was interrogated three times during the period of his initial 30-day isolation, by military intelligence personnel from the Joint Intelligence Group Interrogation Control Element (JIG ICE). Article 40 of the Convention on the Rights of the Child requires governments to ensure that "every child deprived of his or her liberty" receives "prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial

> "During the investigative period, detainees typically were not allowed access to a lawyer or family members, especially in national security cases. During this period some detainees were strongly compelled to admit guilt in support of the government's case against them. Investigators sometimes used physical isolation, excessively lengthy interrogation sessions, and sleep deprivation to compel detainees to admit guilt."
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> US State Department, entry on Vietnam, human rights country reports, issued on 11 March 2008.

Thompson, Special Assistant to the CNO [Chief of Naval Operations] for JCS [Joint Chiefs of Staff] matters, 4 November 2002.

[48] Camp Delta Standard Operating Procedures, Headquarters, Joint Task Force – Guantanamo, 28 March 2003, §4-20a.

[49] *Ibid*. §4-20b(4).

[50] Inspector General's FBI report, May 2008, *op.cit*., page 185.

[51] Amnesty International has repeatedly requested access, both to Cuban prisons and the Guantánamo detention facility.

authority, and to a prompt decision on any such action". Mohammed Jawad would not get access to a lawyer for another four and a half years. At the time of writing, five and a half years after his initial detention, the lawfulness of his detention had still not been reviewed by a court.

On 16 April 2003, in a memorandum classified as secret for 10 years, Secretary Rumsfeld re-authorized isolation as a "counter-resistance" technique on the basis of the recommendation of a Pentagon Working Group he had convened to provide advice on interrogations of "enemy combatants". The authorization noted that the use of isolation required "detailed implementation instructions", including "medical and psychological review", and that "this technique is not known to have been generally used for interrogation purposes for longer than 30 days". According to Secretary Rumsfeld's memorandum, any interrogator intending to use isolation would have to "specifically determine that military necessity requires its use and notify me in advance". General James T. Hill, Commander of Southern Command (SOUTHCOM, under which Guantánamo falls) at the time, issued "guidance" on the Defense Secretary's authorization memorandum. Commander Hill's "guidance" included that he did "not consider the use of maximum security units as isolation. A detainee placed in a maximum-security unit is segregated, but not truly isolated."[52]

Secretary Rumsfeld's authorization of isolation and other techniques noted, as had the Working Group report, that "techniques are usually used in combination", and came with the "safeguard", more accurately described as a glaring loophole, that "interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have". On the technique of isolation, it warned that, although the Geneva Conventions "are not applicable to the interrogation of unlawful combatants", other countries might consider this technique as a violation of the Conventions.[53] The authorization was classified as secret for 10 years and marked as information that was "not releasable to foreign nationals".

From early September 2003, after nearly a year in indefinite detention, Mohammed Jawad's mental health reportedly deteriorated as he became increasingly distressed about his isolating conditions. During his interrogations in the spring and summer of 2003, he had reportedly expressed concern about his family. He asked to be moved to a cell block where he would be able to communicate with other Afghanis, as there was no one where he was being held with whom he could communicate in Pashto.

On 13 September 2003, a psychologist with the BSCT was consulted about Mohammed Jawad's case. She reportedly concluded that he was faking homesickness, sadness and depression as a resistance technique, and recommended that Jawad be placed in physical and

[52] The Fay/Jones military investigation into US abuses at Abu Ghraib in Iraq noted that "there was significant confusion" among interrogators and guards about the definitions of "isolation" and "segregation.", and the latter frequently amounted to the former.

[53] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003. And, Memorandum for the Commander, US Southern Command, Counter-Resistance Techniques in the War on Terrorism, from Secretary of Defense Donald Rumsfeld, 16 April 2003.

linguistic isolation to increase his discomfort as a way to induce his cooperation.[54] Mohammed Jawad, still only 17 or 18 years old, was segregated for another 30 days in the isolation facility, from 17 September 2003 to 16 October 2003. This was carried out under the order of the Joint Interrogation Group (JIG), in other words, for intelligence purposes.

It seems that Mohammed Jawad's isolation fell under Chapter 9 of the Camp Delta SOPs. Under these procedures, placement of detainees in the Maximum Security Units (MSUs) could be for "their own protection or for security or safety reasons", including in the case of those who had self-harmed, or for "INTEL [intelligence] purposes".[55] If for the latter purpose, as in Jawad's case, ICRC access was denied or restricted, and the placement "coordinated" with the interrogation authorities "to ensure there is a valid reason for detainee placement in MSU".[56] The food tray slot in the door (the only means through which the detainee can communicate or view outside the cell) had to remain closed when not being used for passing food through.[57] The temperature of the cells was set "within five degrees of the week's average high temperature", clearly a policy that would raise concern in relation to the climate in Cuba, where the average temperature in September and October is around 29-31 degrees Celsius.[58] The detainee's "comfort items" were kept from them "until time served".[59]

During this period in isolation, Mohammed Jawad was interrogated twice, once by JIG-ICE intelligence personnel (on 26 September 2003), and once by investigators with the Pentagon's Criminal Investigation Task Force (CITF, on 1 October 2003).[60] This latter interrogation may have been the first with a specifically prosecutorial focus (see further below, §2.8). The teenager still had no access to legal counsel.

In a meeting on 9 October 2003, according to leaked Pentagon notes of it, the ICRC raised its concerns about the "excessive isolation" of detainees in punishment cells for refusing to

[54] Rear Admiral David Thomas, Commander of JTF Guantánamo, recently stated that "we go to great lengths to make sure we don't linguistically isolate someone". Convicts at Guantánamo will be jailed apart, Miami Herald, 2 August 2008. In December 2003, the US Court of Appeals for the Ninth Circuit noted evidence that Afghan and Pakistani detainees recently released from Guantánamo had stated that "the uncertainty of their fate, combined with linguistic isolation from others with whom they could communicate, confinement in very small cells, little protection from the elements, and being allowed only one one-minute shower per week led a number of detainees to attempt suicide multiple times." *Gherebi v. Bush*, US Court of Appeals for the Ninth Circuit, 18 December 2003, note 2.

[55] Camp Delta Standard Operating Procedures, 28 March 2003, Chapter 9, Section 3 (b) and (f).

[56] *Ibid*, Chapter 9, Section 2 (a). FBI agents have also reported that Guantánamo detainees were put in isolation "immediately before and after they met with the Red Cross". Inspector General's FBI report, May 2008, *op.cit.*, page 187.

[57] *Ibid*. Chapter 9, Section 3 (d).

[58] *Ibid*, Chapter 9, Section 3 (j).

[59] *Ibid*, Chapter 9, Section 3 (k).

[60] At Guantánamo, "the CITF is made up of representatives from the Army Criminal Investigation Department, the Navy Criminal Investigation Service, and the Air Force Office of Special Investigations. Federal Bureau of Investigation Special Agents, along with members of the CITF, are tasked with conducting interviews of the detainees, preparing cases for presentation to military tribunals..." FBI Memorandum to All Divisions, 1 May 2002. Document DOJFBI-001411 available at http://www.aclu.org/projects/foiasearch/pdf/DOJFBI001327.pdf. An FBI email, believed dated 31 July 2003, states that the FBI and the CITF "have parted ways as CITF is concentrating on the tribunals". Email "re GTMO", sender and recipient redacted. Document DOJFBI-001428, at above.

provide information in interrogations, and the effect this interrogation regime was having on the mental health of the detainees. According to the official notes of the meeting, "the ICRC feels that interrogators have too much control over the basic needs of detainees. That the interrogators attempt to control the detainees through the use of isolation in which the detainees were kept; the level of comfort items detainees can receive; and also the access of basic needs to the detainees". Major General Geoffrey Miller, then commander of detention operations at Guantánamo, responded that the detainees are "enemy combatants picked up on the field of battle in Afghanistan. There is no issue with interrogation methods. The focus of the ICRC should be the level of humane detention being upheld not the interrogation methods".[61]

According to the records released to Mohammed Jawad's lawyer, Jawad was interrogated four more times in 2003, at least three of which interrogations were conducted by CITF personnel. Then, on 21 December 2003, he was disciplined with removal of "comfort items" for attempting to talk to other detainees in his block. Four days later, on 25 December 2003, he reportedly attempted suicide. According to his military lawyer, the camp records indicate that Jawad had "attempted self harm" by "banging his head off metal structures inside his cell" and "by using the collar of his shirt to hang himself from the mesh inside his cell". Asked about this at his pre-trial military commission hearing on 19 June 2008, Jawad confirmed that it had been a suicide attempt. He explained that although Islam does not permit suicide, he was driven to it because he was in "great trouble", and "it was beyond my control".

2.3. Subjection to the 'frequent flyer program'

Despite his apparent detention-induced distress, Mohammed Jawad was within months of this suicide attempt subjected to a 14-day regime of sleep disruption and deprivation euphemistically dubbed by the military as the "frequent flyer program". During this period, 7 to 20 May 2004, Jawad was moved between two different cells 112 times, on average every two hours and 50 minutes, day and night. Every time he was moved, he was shackled. At points during his subjection to this program, he was reportedly again disciplined with loss of comfort items for attempting to talk to other detainees.

In addition to his psychological problems, he appears also to have suffered from physical ailments at this time that may have been triggered or exacerbated by his subjection to the sleep disruption program. He lost about 10 per cent of his bodyweight during May 2004, and did not regain this weight for another five months. Eight days after he emerged from the frequent flyer program, according to his reported medical records, he complained that for the past week he had been experiencing painful urination, with blood present in his urine. Referring to the frequent flyer program at a pre-trial hearing in Guantánamo on 19 June 2008, he said that "after this punishment, no doctor came to see me", despite his "major problem" of high blood pressure. He had told the military investigators who interviewed him about Bagram on 25 June 2004 (see §2.1), a month after he came out of the program, that he had "lost faith" in doctors. He "complained of painful urination and intestinal pain", and told the investigators that "the interrogators always tell him they will provide him with a doctor and

[61] See pages 122-123 of USA: Human dignity denied, *op. cit.*

according to [Jawad] doctors never came." After the interview, one of the investigators found out from guards that Jawad had been "on sick call several times for similar complaints".[62]

Three days after his subjection to the frequent flyer program ended, Mohammed Jawad was again put in isolation, from 23 to 25 May 2004. Then, on 26 May 2004, he was put into the harsh and isolating conditions of Camp 5, a maximum security facility built as a long-term detention and interrogation centre which had opened earlier that month. Detainees have been held in Camp 5 for up to 24 hours a day in small, enclosed cells.[63] At his pre-trial military commission hearing on 19 June 2008, Mohammed Jawad characterized his move to Camp 5 as "another punishment" to follow the sleep deprivation he had endured. He said that "I was the first person to be moved to Camp 5. There they were treating me very badly".

Other detainees were reportedly interrogated during the period of their subjection to the frequent flyer program. For example, Palestinian detainee Maher Rafat al-Quwari was allegedly moved between cells six times a day for 12 days in July 2003, with a four-hour interrogation in the middle of the program.[64] However, the authorities have released no records indicating that Mohammed Jawad was interrogated during his period in the frequent flyer program. According to the records that have been released, he was interrogated on 26 April 2004, 10 days before he went into the program, and then not again until 18 August 2004, nearly three months after he emerged from it. The question remains, then, as to why he was targeted with this ill-treatment. For example, was it punishment for a perceived disciplinary infraction, an attempt to coerce compliance with some measure, or to soften him up for an interrogation that never happened following a shift in focus to prosecution rather than intelligence gathering (see §2.8)? At Mohammed Jawad's pre-trial hearing before a military judge on 19 June 2008, his military lawyer said that he had asked to speak to the guards who carried out the program, but that he had been denied. He said that "in the absence of information to the contrary, we are left to conclude that it was simply gratuitous cruelty". Given the number of detainees who have been subjected to the frequent flyer program (see appendix 2), however, it appears to have been an integrated part of the coercive Guantánamo detention regime, not the rogue action of any personnel.

If severe physical or mental pain or suffering was the result of such treatment, it would constitute torture under article 1 of the UN Convention against Torture, whether the purpose was intelligence-gathering, punishment, intimidation, coercion, or for any reason based on discrimination of any kind. The UN Committee against Torture has said that "prolonged sleep deprivation" violates articles 1 and 16 (cruel, inhuman or degrading treatment) of the Convention against Torture.[65] In Amnesty International's opinion, prolonged sleep deprivation,

[62] Agent's Investigation Report, 28 June 2004, *op. cit.*, page 12.
[63] USA: Cruel and inhuman – conditions of isolation for detainees in Guantánamo Bay, April 2007, http://www.amnesty.org/en/library/info/AMR51/051/2007/en.
[64] Tactic used after it was banned. Washington Post, 8 August 2008. See also Who are the Guantánamo detainees? Case sheet 23, 1 February 2008, http://www.amnesty.org/en/library/info/AMR51/014/2008/en.
[65] Concluding observations on Israel, 1997. UN Doc. A/52/44, para. 257 ("Those methods include: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly

on its own or in combination with other techniques or conditions (e.g., isolation from other detainees, lack of access to the outside world, indefinite detention without charge), can constitute torture. If not torture, it would still amount to cruel, inhuman or degrading treatment or punishment, equally prohibited under international law.

After interviewing a number of released Guantánamo detainees, the UN Special Rapporteur on torture concluded in 2006 that some of the techniques used in the base, including exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering.[66] Recent research involving survivors of torture is instructive in this regard, concluding that:

> "[A]ggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to aversive environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment, and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects. Such stressors satisfy the criterion of 'severe mental suffering', which is central to the definition of torture in international conventions".[67]

The 1992 version of the US Army's Field Manual for interrogation (FM 34-52) categorizes "abnormal sleep deprivation" as an example of "mental torture". The legal advice that preceded Secretary Rumsfeld's 2 December 2002 authorization of "counter-resistance" interrogation techniques, however, noted that the procedures in FM 34-52 were "constrained by" the Geneva Conventions, and were therefore "not binding" on the treatment of detainees held as "enemy combatants" at Guantánamo.[69]

> "The torture consisted of treatment which prevented him from sleeping for ten days. Sleep was forbidden during the day. At night, lying under a bright electric light in his cell, he was awakened every fifteen minutes. Fifteen minutes after 'lights out' he would be awakened by pounding on his cell door, fifteen minutes later there would be shrill whistling, and next the electric light would be connected to an automatic device alternating a dim red light with a fierce white light from a powerful bulb… This was repeated night after night for ten nights until [he] collapsed with shivering fits and hallucinations. After this softening-up process he was considered fit for interrogation…"
>
> 1956 news report of the treatment of a West Berlin journalist coerced into confessing in an East German prison[68]

There was some concern within the military with such an approach. A memorandum from the CITF's chief legal advisor a month earlier, for example, had said that he could "not advocate any action, interrogation or otherwise, that is predicated upon the principal that all is well if the ends justify the means

evident where such methods of interrogation are used in combination, which appears to be the standard case.")

[66] Situation of detainees at Guantánamo Bay, UN Doc.: E/CN.4/2006/120, 27 February 2006.

[67] Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić. *Torture vs Other Cruel, Inhuman, and Degrading Treatment. Is the Distinction real or apparent?* Arch. Gen. Psychiatry, 2007; 64:277-285.

[68] The Times, London, 18 May 1956, quoted in William Sargant, Battle for the Mind (1957).

[69] Legal brief on proposed counter-resistance strategies, 11 October 2002, *op. cit.*

and others are not aware of how we conduct our business".[70] Nevertheless, in the USA's "war on terror", any previous adherence to internationally recognized standards of humane treatment was eroded in the name of national security, coupled with the notion that "enemy combatants" were not "legally entitled" to humane treatment. Their treatment instead became a matter of executive discretion. Meanwhile, secrecy has been used to obscure from public view the full picture of the human rights violations that have ensued.

2.4. USA's 'humane treatment' falls short of international law

In response to recent revelations that the frequent flyer program in Guantánamo was more widespread than the US government had previously admitted, a spokesperson for the detention authorities stated that: "There is no such program currently in place. JTF Guantánamo conducts the safe and humane care and custody of detained enemy combatants legally, ethically and transparently".[71] Over the course of the "war on terror", the USA's assurances about its commitment to the "humane treatment" of detainees and the adequacy of its investigations into abuses have been shown to lack credibility.[72] Moreover, it is clear that the USA's interpretation of its absolute legal obligation not to subject anyone to torture or other cruel, inhuman or degrading treatment falls short of international law.[73]

The prosecutor in Mohammed Jawad's military commission case has acknowledged that, at a pre-trial hearing on 6 May 2008, he had "derided" the claim that Jawad had been subjected to the frequent flyer program, in the "good faith but mistaken belief that the claims were unfounded".[74] Today, the US government "does not deny that Mr Jawad was moved frequently from cell-to-cell during the period 7 May 2004 through 20 May 2004".[75] Indeed, in a brief dated 4 June 2008, the military prosecutor acknowledged that "Mr Jawad's treatment from 7 May 2004 through 20 May 2004 – for whatever reason, and however it proceeded – may be unjustifiable coercion that resulted in inadmissible statements or other adverse consequences".[76]

However, the government withdrew this 4 June brief (although it remained publicly available more than two months later), and issued a new one on 13 June 2008. This revised version, the

[70] Memorandum through Division Chief, Plans, Policy and Integration, DoD CITF, Virginia. For Commander, CITF. Assessment of JTF-170 Counter-resistance strategies and the potential impact on CITF mission and personnel. Major Sam W. McCahon, Chief legal advisor, 4 November 2002.
[71] Tactic used after it was banned. Washington Post, 8 August 2008.
[72] See, e.g., USA: To be taken on trust? Extraditions and US assurances in the 'war on terror', March 2008, http://www.amnesty.org/en/library/info/AMR51/009/2008/en.
[73] USA: Slippery slopes and the politics of torture, 9 November 2007, http://www.amnesty.org/en/report/info/AMR51/177/2007. USA: Impunity and injustice in the 'war on terror', 12 February 2008, http://www.amnesty.org/en/library/info/AMR51/012/2008. USA: Torture in the name of 'civilization', 10 March 2008, http://www.amnesty.org/en/library/info/AMR51/016/2008/en.
[74] *USA v. Jawad*. Government reply to Defense third supplemental filing in support of D-008 motion to dismiss, 23 July 2008, note 2.
[75] *Ibid*.
[76] *USA v. Jawad*. Government response to defense motion to dismiss based on torture of detainee pursuant to RMC 907, 4 June 2008. The brief also said that Jawad's military lawyer's description of this treatment as torture is "incendiary", and that "the conduct Mr Jawad complains of, cannot, as a matter of law, be considered torture".

style and content of which suggests it was written or heavily influenced by US Justice Department lawyers, asserts that "the United States has never 'tortured' Jawad, and it has never used 'coercion' to collect a single statement from Jawad for use in these proceedings".[77] It states that "there is no evidence – absolutely none – that Jawad was ever 'tortured', and there is no evidence – absolutely none – that he was ever subjected to cruel, inhuman, or degrading treatment". To reach this conclusion, as Justice Department memorandums on interrogations have done throughout the "war on terror", the revised brief relies upon "understandings" and "reservations" attached to the USA's ratification of the Convention Against Torture (CAT), and adds that, in any event, Mohammed Jawad "has no enforceable rights under the CAT".

The conditions that the USA attached to its ratification of the CAT in 1994 and the ICCPR in 1992 in relation to the prohibition on torture and other cruel, inhuman and degrading treatment have been among the loopholes systematically exploited by the US administration in its resort to such treatment in the "war on terror".[78] At the 2 October 2002 meeting of Pentagon and other government personnel to discuss interrogation techniques (see above), a senior CIA lawyer said that "under the Torture Convention, torture has been prohibited by international law, but the language of the [US] statutes is written vaguely…Severe physical pain described as anything leading to permanent damage to major organs or body parts. Mental torture described as anything leading to permanent, profound damage to the senses of personality. It is basically subject to perception. If the detainee dies you're doing it wrong."[79] On the CAT's prohibition of cruel, inhuman or degrading treatment, the CIA lawyer advised that

[77] The brief does not state whether or not the government has *attempted* to coerce such statements from Jawad. *USA v. Jawad*, D-008, Government response to the defense's motion to dismiss based on alleged torture of detainee, 13 June 2008. At a meeting of the "Senior Oversight Group" in September 2006, then Under Secretary of Defense for Intelligence Stephen Cambone said that military lawyers were not sufficiently experienced to handle commission cases and Department of Justice lawyers should be involved. In January 2007, the Pentagon revealed that they might turn to civilian prosecutors in some instances in military commissions because the experience gained by the Justice Department "in some of the earlier terrorist cases would make it logical for them to be part of a prosecution team". Thus, when the government decides that it is favourable to its objectives, it may turn to components of the criminal justice system, while denying that the system itself can be the appropriate forum for prosecutions. The defendant, by contrast, is denied the opportunity to seek the protections of the criminal justice system. Justice Department lawyers have since been assigned to military commission prosecutorial teams.

[78] See e.g., USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004. USA: Five years on 'the dark side': A look back at 'war on terror' detentions, December 2006, http://www.amnesty.org/en/library/info/AMR51/195/2006. USA: Law and executive disorder: President gives green light to secret detention program, August 2007, http://www.amnesty.org/en/report/info/AMR51/135/2007. USA: Slippery slopes and the politics of torture, 9 November 2007, http://www.amnesty.org/en/report/info/AMR51/177/2007.

[79] This echoes the approach of a now infamous Justice Department 2002 memorandum, produced in response to a CIA request for legal protections for its agents. The memorandum suggested that interrogators could cause a great deal of pain before crossing the threshold to torture, and specifically that torture would only occur if the pain caused rose to the level "that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions". Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002.

"the US did not sign up to [this] second part", which he said "gives us more license to use more controversial techniques". In addition to explaining how "waterboarding" induces the feeling of drowning, he suggested that "it is very effective to identify phobias and use them (i.e., insects, snakes, claustrophobia)."[80] The subsequent legal memorandum written by a military lawyer who attended the meeting culminated in Secretary Rumsfeld's authorization of techniques such as isolation, stress positions, stripping, hooding, deprivation of light and auditory stimuli, and exploitation of individual phobias. The memorandum (which had also recommended approval of waterboarding) noted that the USA's conditional ratification of the ICCPR and CAT meant in relation to the prohibition of cruel, inhuman or degrading treatment under those treaties that "we would only be bound by" the ban on "cruel and unusual punishments" under the Eighth Amendment of the US Constitution. The memorandum cited a federal court ruling that sleep deprivation resulting in "emotional distress, loss of memory, headaches and poor concentration, did not show either the extreme deprivation level, or the officials' culpable state of mind" that would constitute a violation of the Eighth Amendment. Ultimately, the legal advice went, "an Eighth Amendment analysis is based primarily on whether the government had a good faith legitimate governmental interest, and did not act maliciously and sadistically for the very purpose of causing harm".[81]

The USA's reservations themselves are void, however as they are incompatible with the treaties.[82] The expert monitoring bodies for these treaties, the UN Committee against Torture and the UN Human Rights Committee, have called on the USA to withdraw these reservations and understandings. Nevertheless, citing these ratification conditions in its 13 June 2008 pre-trial brief on the torture issue in Mohammed Jawad's case, a brief written four years after Jawad was subjected to the frequent flyer program, the government rejected the claim that his subjection to the frequent flyer program constituted torture on the grounds that it did not cause "prolonged" mental harm.[83] Here the government returns to its "understanding" of the meaning of torture, as set out at the time it ratified the CAT.[84] To constitute torture, according to the USA, the mental suffering caused must be "prolonged". This "understanding" permeates the administration's "torture memos" in the "war on terror", including the Pentagon Working Group report of April 2003 which recommended use of sleep disruption and deprivation. Similarly, the legal advice that preceded Secretary Rumsfeld's authorization of isolation and other "category 2" techniques in December 2002 emphasized that the mental

[80] Counter resistance strategy meeting minutes, 2 October 2002. Quotes are paraphrases.
[81] Legal brief on proposed counter-resistance strategies, 11 October 2002, *op. cit*.
[82] Under Article 19(c) of the Vienna Convention on the Law of Treaties, a state may not formulate a reservation if it is "incompatible with the object and purpose of the treaty".
[83] *USA v. Jawad*. D-008 Government response to the defense's motion to dismiss based on alleged torture of detainee, 13 June 2008.
[84] The USA attached the following "understanding" to its ratification of the CAT: "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

suffering must be "prolonged" for the treatment to rise to the level of torture in US law: "Assuming that severe physical pain is not inflicted, absent any evidence that any of these strategies will in fact cause prolonged and lasting mental harm, the proposed methods will not violate the [anti-torture] statute."[85]

The UN Committee Against Torture has rejected the USA's "understanding" on torture. In May 2006, it called on the USA to "ensure that acts of psychological torture, prohibited by the Convention, are not limited to 'prolonged mental harm' as set out in the [US] understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or duration".[86] Despite this, the US government maintains that "there is not a shred of evidence that Jawad suffered from one iota of 'metal [sic] harm', much less did he suffer (as the CAT requires) from 'prolonged mental harm'." For this reason, the government maintains, he was not tortured. The government has selected a number of entries from Jawad's Guantánamo medical record to file with its brief which it says are "the cold, hard facts" that prove he suffered no harm, and that "at all relevant times, Jawad has enjoyed good health".[87] Jawad's military lawyer has filed other records which he says tell a different story.

The existence or absence of after-effects on Mohammed Jawad of his ill-treatment, whether or not it amounted to torture, cannot alter the fact that an international law-violating program of sleep disruption and deprivation was used against him, and that there has been a total lack of accountability for it.

As indicated above, on the question of cruel, inhuman or degrading treatment or punishment, the USA's reservations to the CAT and the ICCPR mean that, even with the passage of the Detainee Treatment Act in 2005, it only considers itself bound by the prohibition on such treatment to the extent that it matches existing US law. Under US Supreme Court jurisprudence, conduct is banned that "shocks the conscience", but conduct "that shocks in one environment may not be so patently egregious in another", thereby requiring an "exact analysis of circumstances before any abuse of power is condemned as conscience-shocking".[88] Thus, in contrast to the unequivocal and absolute international prohibition on torture and other ill-treatment, the door is opened to the government attempting to justify conduct in the name of national security that would otherwise be considered illegal under US law.

The government argues that "while conscience-shocking claims are tough to make under any circumstances, Jawad faces an even higher hurdle insofar as he must disprove the legitimate 'government interest' in his detention. Time and time again, the Supreme Court has recognized that the weightiest Government interest of them all may be the protection of national

[85] Legal brief on proposed counter-resistance strategies, 11 October 2002, *op. cit.*
[86] "Strikingly, Washington's narrow redefinition of 'mental harm' [under the CAT ratification] excluded sensory deprivation (hooding), self-inflicted pain (stress positions), and disorientation (isolation and sleep denial) – the very techniques the CIA had refined at such great cost over several decades". McCoy, A question of torture, *op. cit.*, page 100.
[87] *USA v. Jawad*. D-008 Government response to the defense's motion to dismiss based on alleged torture of detainee, 13 June 2008.
[88] *Rochin v. California* 342 U.S. 165 (1952) and *Sacramento v. Lewis* (1998).

security."[89] It is a sad reflection on how US authorities have turned to torture and other ill-treatment in the "war on terror", that subjecting a teenager to isolation, incommunicado detention, denial of legal counsel, indefinite detention, and sleep deprivation in a remote island base is perceived as promoting national security. Amnesty International agrees with the former General Counsel to the US Navy when he said in June 2008, "the net effect of this policy of cruelty has been to weaken our defenses, not to strengthen them, and has been greatly contrary to our national interest... Many of the 'counter-resistance techniques' authorized for use at Guantánamo in December 2002 constitute 'cruel, inhuman or degrading' treatment that could, depending on their application, easily cross the threshold of torture".[90]

The USA should apply to itself the standards it so often demands of others. Three months before Mohammed Jawad was subjected to two weeks of the frequent flyer program, the US State Department issued its annual report on human rights in other countries. In the entries on Iran, Jordan, Libya, Saudi Arabia, Tunisia, Pakistan and Turkey, for example, it reported that sleep deprivation was among the "torture" techniques allegedly used by the governments in those countries in 2003. Three months before the government's military commission brief in Mohammed Jawad's case rejecting the claim that his treatment amounted to torture, the State Department issued its report on human rights in 2007. It once again defined sleep deprivation as torture in other countries, including in Iran, Tunisia, Libya, Turkey, Vietnam and Pakistan.

Statements and actions by individuals who have had chain of command responsibility over the detainees have further illustrated how US notions of humane treatment fall short of international standards. General James Hill was Commander of SOUTHCOM from August 2002 to November 2004, the period during which Mohammed Jawad was subjected to the frequent flyer program. On 7 October 2005, General Hill was asked in an interview with an investigator from the Army Inspector General's Office how he would define "humane treatment". General Hill responded that his definition would be that "We should as a nation and as a military treat everybody with a degree of respect irrespective of who they are."[91] However, in a secret memorandum he signed three years earlier, General Hill said that so-called "category 2" interrogation techniques such as stress positions, use of isolation, deprivation of light and auditory stimuli, hooding, use of 20-hour interrogations, removal of all comfort items (including religious items), removal of clothing, and exploiting individual detainee's phobias (such as fear of dogs) to induce "stress", were "legal and humane".[92] The memorandum suggests that he also believed that "category 3" techniques, such as "exposure to cold weather or water", waterboarding, and death threats, could be humane, as he only expressed doubt as to whether they were legal. He sought Pentagon and Justice Department legal advice on such

[89] *USA v. Jawad*. D-008 Government response to the defense's motion to dismiss based on alleged torture of detainee, 13 June 2008.
[90] Statement of Alberto J. Mora (US Navy General Counsel, 2001-2006), Senate Committee on Armed Services, Hearing on the treatment of detainees in US custody, 17 June 2008.
[91] Testimony of General James T. Hill taken on 7 October 2005 by the Department of Army Inspector General, Investigations Division.
[92] Memorandum for Chairman of the Joint Chiefs of Staff, Washington, DC. Subject: Counter-resistance techniques, 25 October 2002.

techniques as "I desire to have as many options as possible at my disposal" for use against detainees at Guantánamo.[93]

Asked at a press conference on 3 June 2004 which interrogation techniques had been used in Guantánamo, including whether sleep deprivation was among them, General Hill responded that he would not discuss particular techniques for "operational" reasons.[95] When he was asked to define "humane treatment" in the October 2005 army interview mentioned above, he responded that "you can't physically hurt somebody, even minor". He did not address the question of psychological harm.

> "Their sleeping conditions are probably better than anything they've had in Afghanistan. And they're being treated well because they're in the hands of the men and women of our military. And they're being treated well, because that's what Americans do... They will be treated in accordance with the principles of the Geneva Convention. There's no question about that. And the core of the Geneva Convention is focusing on humane treatment, which is something the Americans have always done, and other nations around the world have not always done. We will do it because it's the right thing to do and it's the way our military treats people."
>
> White House spokesperson on the Guantánamo detainees, 28 January 2002[94]

On 12 November 2002, General Hill orally approved use of the category 2 techniques against a detainee held at Guantánamo, and the following day he approved an interrogation plan for that detainee which included the use of 20-hour interrogations, forced shaving of the detainee's head and beard for "psychological" purposes, and authorized the subjection of the detainee to stress positions while blindfolded if he was uncooperative. He also authorized the use of dogs. If required, the plan could go into Phases 3 and 4. Phase 3 referred to "Level III techniques" (apparently referring to category 3 techniques, above), and under Phase 4 the detainee would be sent "off Island" temporarily or permanently to "either Jordan, Egypt or another country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information".[96] That detainee, still in Guantánamo, is reported to have attempted suicide in April 2008. So far, four detainees are reported to have killed themselves in Guantánamo. There have been numerous reported suicide attempts among the detainees, including by Mohammed Jawad not long before he was put into the frequent flyer program.

[93] According to the Pentagon's then General Counsel, Category 3 techniques were "legally available", although not to be authorized at this time. Action memo: Counter-resistance techniques. From William Haynes, General Counsel, to Secretary of Defense Donald Rumsfeld, 27 November 2002. In August 2002, the US Justice Department approved the use of waterboarding by the CIA, finding that it did not violate the USA's anti-torture statute.

[94] Press briefing by Ari Fleischer, http://www.whitehouse.gov/news/releases/2002/01/20020128-11.html.

[95] Media Availability with Commander, U.S. Southern Command General James T. Hill, US Department of Defense news transcript, 3 June 2004.

[96] Inspector General's FBI report, May 2008, *op.cit.*, pages 87-88. The detainee was Mohamed al-Qahtani. See USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, http://www.amnesty.org/en/library/info/AMR51/042/2008/en. Whether Phase 4 remained in the plan or not, it was not acted upon. However, it is alleged that in mid-2003, al-Qahtani was sedated, and put on a plane in a fake "rendition" to the Middle East. See *ibid*.

2.5. Blurring the lines between detention and interrogation

On 3 June 2004, about two weeks after Mohammed Jawad emerged from the frequent flyer program and a week after the teenager was put in isolation in Camp 5, General Hill spoke at a press briefing at which he said:

> "JTF [Joint Task Force] Guantánamo is a professional, humane, detention and interrogation operation. It is bounded by law and guided by the American spirit. It has contributed and continues to contribute to winning the war on terror... Our leaders are continually checking and refining our procedures and balancing humane treatment of the detainees with the security requirements of our troops and our nation. All detainees are treated humanely... Guantánamo guards provide an environment that is stable, secure, safe and humane. And it is that environment that sets the conditions for interrogators to work successfully and to gain valuable information from detainees..."

On this issue of "setting conditions for interrogation", General Hill said:

> "When we use the term 'set the conditions for interrogations,' let me talk about that. The guards perform a detention function first. They maintain a safe, humane, disciplined detention facility. That helps set the conditions for the fair treatment in the interrogation facility. In addition to that, in setting the conditions, we have an extensive computer network between all of the cellblocks so the guards in a passive manner watch all the detainees. If they see you talking to so-and-so, they put that into the computer system and we know that you talked to this detainee. We know, in some cases, what they've talked about. We know if you've had your lunch that day. We know if you've been despondent. We know if you've been homesick. We know what you've done in terms of your presence in the detention facility. That is given to the interrogators and that helps the interrogators format and formulate their interrogation plan. That is what is meant by 'setting the conditions for interrogation'."[97]

When considering Mohammed Jawad's subjection to isolation and the frequent flyer program and whether it was driven by disciplinary, prosecutorial or intelligence aims, it should be noted that the US authorities have blurred the lines of separation between detention and interrogation, undermining a basic safeguard against torture and other ill-treatment.[98] In Afghanistan, as noted above, "military police actively set the favourable conditions for subsequent interviews". In August and September 2003, Major General Miller, commander of detention operations at Guantánamo, went to Iraq to advise on how to obtain better

[97] Media Availability with Commander, U.S. Southern Command General James T. Hill, US Department of Defense news transcript, 3 June 2004.

[98] For example, the UN Special Rapporteur on torture has stated: "Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted". UN Doc. A/56/156, para. 39(f), 3 July 2001. The UN Committee against Torture has stated that it "expects that the detention and interrogation functions will be separated". UN Doc. A/50/44, para. 176 (referring to Jordan).

intelligence from US detentions there. His report stated that it was "essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees". Of the Guantánamo detention regime, he said "we're enormously proud… to be able to set that kind of environment where we were focussed on gaining the maximum amount of intelligence".[99]

On the day that Mohammed Jawad's subjection to the frequent flyer program began, 7 May 2004, Secretary of Defense Rumsfeld announced the formation of the "independent" Schlesinger Panel to review the Pentagon's detention operations. In its report issued on 24 August 2004, the panel noted that at Guantánamo, the commander of SOUTHCOM had originally established two "joint task forces" (JTFs) at the base to carry out the detention operations (JTF-160) and the interrogation operations (JTF-170). In August 2002, General Hill took over command of SOUTHCOM and the two JTFs were reorganized under a single command as JTF Guantánamo. After Major General Miller was appointed as Commander of JTF Guantánamo on 4 November 2002, he called on the military guards and military intelligence personnel to collaborate. According to the Schlesinger Panel, "this collaboration helped set conditions for successful interrogation by providing the interrogator more information about the detainee – his mood, his communication with other detainees, his receptivity to particular incentives, etc."[100] General Hill himself reiterated in a 2005 interview with an investigator from the Army Inspector General's office that the Guantánamo guards would watch the detainees, "knowing their moods. Recording their moods", so that the interrogators would know "who, when to interrogate, how to interrogate".[101]

Mohammed Jawad's "mood" a few weeks before being placed in the frequent flyer program was apparently one of desperation which drove him to attempt suicide. Moreover, about 10 days after this suicide attempt, he was interrogated by intelligence personnel, on 6 January 2004. This is believed to have been the first JIG-ICE interrogation of the teenager for over three months. A few days after this interrogation, on 11 January 2004, he asked to see a "psych doctor", according to prison records. A month after this, he was again questioned by JIG-ICE. This interrogation, on 10 February 2004, was the last time, according to the records so far released, that he was questioned by intelligence officials.[102] The question arises, therefore, whether such interrogators were engaged in a final effort to exploit his mental vulnerability to obtain information. If so, it would have been another clear breach of international standards.[103]

Sami al-Hajj, a Sudanese national released from Guantánamo in May 2008, has said that one use of the frequent flyer program was as a pre-interrogation tool. Detainees were subjected to the program prior to interrogations, with cell moves every two hours for up to a month. He said

[99] See Human dignity denied, *op. cit.*, pages 117-122.
[100] Final report of the independent panel to review DoD operations, August 2004, pages 71-72.
[101] Testimony of General James T. Hill taken on 7 October 2005 by the Department of Army Inspector General, Investigations Division.
[102] There was apparently another interrogation by JIG ICE in "early 2004", but Amnesty International had no specific date for this interrogation at the time of writing.
[103] "It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person". UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 21.1.

that he himself was subjected to the program on the orders of interrogators. He further alleged that another reason that detainees were subjected to the program was to destabilize them, and as a method to learn from what they said to other detainees after periods of isolation interspersed with moves back to cells situated next to other occupied cells.[104] Presumably such information could have intelligence or prosecutorial value, in the view of the US authorities.

According to Amnesty International's observer at the 19 June 2008 military commission hearing at Guantánamo, Mohammed Jawad recalled that during his subjection to the frequent flyer program, "day and night they were shifting me from one room to another room". Asked by his military lawyer whether he had been told why this was happening to him, Jawad responded that he understood that it was being done "for interrogators", but from "what I remember, no-one answered why they were giving me this punishment". If his treatment was being conducted at the instigation of interrogators, the next question would be whether they were JIG ICE or CITF personnel, intelligence gatherers or criminal investigators (see §2.8).

2.6. Authorization and use of sleep disruption/deprivation

At Mohammed Jawad's 19 June 2008 commission hearing, his US military lawyer stated of his client's subjection to the frequent flyer program: "It is high time that someone in a position of authority be held accountable, and not just the guards who were just carrying out orders". In a pre-trial brief to the military judge on the torture issue, he has written that "the government has categorically refused to provide the names of any of the guards who actually carried out the program on Mr Jawad, (who might be able to explain who ordered the program and why, and what effect it had on Mr Jawad) citing their right to privacy".[105] The right to privacy cannot override the obligation on the state to promptly and impartially investigate all allegations of torture or other cruel, inhuman or degrading treatment or punishment,[106] and the right of victims of human rights violations to remedy (see §4 below). In this section, with the question of official accountability in mind, Amnesty International further traces the origins of the frequent flyer program, and its authorization and use.

The "new thinking in the law of war" called for by President Bush in his central "war on terror" detention memorandum of 7 February 2002, led to certain techniques used in US military training morphing into techniques used to "exploit" detainees held in indefinite US detention. Under the SERE (Survival, Evasion, Resistance, Escape) program, overseen by the US Department of Defence [DoD]'s Joint Personnel Recovery Agency (JPRA), members of the US armed forces are trained in how to resist interrogation in the event they fall into enemy hands. "Water-boarding", the torture technique that simulates drowning, for example, used in this training, was approved in August 2002 by the Justice Department for use against detainees held in the CIA's secret detention program. A December 2002 document, entitled

[104] Ex-Gitmo prisoner: I was denied rest. Miami Herald, 27 June 2008.
[105] *USA v. Jawad*, Defense reply to government revised response to D-008 motion to dismiss (torture of detainee), 13 June 2008.
[106] Convention against Torture, articles 12, 13 and 16. Under Article 2.3 of the International Covenant on Civil and Political Rights, a state must ensure that any person whose rights under the treaty are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

Guantánamo's "SERE Interrogation Standard Operating Procedure", states that "the interrogation tactics used at US military SERE schools are appropriate for use in real-world interrogations. These tactics and techniques are used at SERE school to 'break' SERE detainees. The same tactics and techniques can be used to break real detainees during interrogation operations".[107] In a training situation, the "victim" knows that he or she is ultimately in the care of her colleagues, and can stop the "torture" at any point. Detainees have no such comfort zone. In the SERE training program, the psychological effects of being subjected to the techniques are "minimized" by "extensive debriefings", to "mitigate the risk of turning a 'dramatic' experience into a 'traumatic' experience".[108] Detainees have no such debriefing. Any trauma, like the interrogation, will be real.

A number of JPRA documents, including memorandums to the Office of the Secretary of Defense General Counsel, dated July 2002 but not made public until 2008, among other things state that "psychological stresses are inherent in detention situations", but that "from an exploitation perspective", rather than one in which resistance is being taught, "the goal would be to induce these [stresses] in detainees". Among the "tactics to induce control, dependency, compliance, and cooperation" are "isolation/solitary confinement"; "induced physical weakness and exhaustion", "degradation"; "sensory deprivation", "sensory overload" and "disruption of sleep and biorhythms". The latter is annotated with the following: "sleep patterns are purposefully disrupted to make it more difficult for the subject to think clearly, concentrate and make rational decisions".

Sleep deprivation was authorized for use in Guantánamo by Secretary Rumsfeld in his memorandum issued on 2 December 2002. It came in the form of his authorization of "the use of 20-hour interrogations". That this incorporated sleep deprivation is not only intuitive, but was clear in the legal advisory memorandum that preceded his decision. This advice stated that both sleep deprivation and the use of 20-hour interrogations were legally permissible "so long as there is an important governmental objective, and it is not done for the purpose of causing harm or with the intent to cause prolonged mental suffering". The advice continued: "There is no legal requirement that detainees must receive four hours of sleep per night", but "as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm will result". Towards the end of the meeting mentioned above that the author of this memorandum attended a week before writing her legal advice, "a discussion about ways to manipulate the environment ensued", which included "Let detainee rest just long enough to fall asleep and wake him up about every thirty minutes and tell him it's time to pray again".[109]

Also in late December 2002, according to documents released at a Senate Armed Services Committee hearing on 17 June 2008, military trainers visited Guantánamo and ran "an in-depth class" for about 24 interrogators using a chart that depicted coercive methods of

[107] JTF GTMO 'SERE' Interrogation Standard Operating Procedure. Guidelines for employing 'SERE' techniques during detainee interrogations, 10 December 2002.
[108] Psychological effects of resistance training. Memorandum for JPRA: Attention: Lt Col Baumgartner, From: Major Jerald F. Ogrisseg, Chief, Psychology Services, Department of the Air Force, Air Education and Training Command, 24 July 2002.
[109] One of the participants had said that "we can't do sleep deprivation", to which Lt. Col. Beaver had replied "Yes, we can – with approval". Counter resistance strategy meeting minutes, 2 October 2002, *op. cit.* (comments attributed to participants are paraphrased in this document).

interrogation and conditions of confinement (under the title "coercive management techniques"). These methods included "isolation"; "threats" (such as "death threats", "threats against family"); "degradation" (for example, "denial of privacy", "insults and taunts", "demeaning punishments"); and "induced debilitation" (including "prolonged constraint", "prolonged interrogation" and "sleep deprivation").[110] This chart of "Biderman's Principles" was "copied verbatim from a 1957 Air Force study of Chinese Communist techniques used during the Korean War to obtain confessions, many of them false, from American prisoners".[111] In addition to US interrogators resorting to techniques with disturbing historical connotations, an added twist to the human rights scandal of the USA's Guantánamo detention regime has been the involvement of agents of other governments, including China, at the base (see box).

On 15 January 2003, Secretary Rumsfeld rescinded his 2 December 2002 authorization, and established a Working Group to advise him on interrogations of "enemy combatants" in the "war on terror". The Working Group's 4 April 2003 report, classified as secret by Secretary Rumsfeld for 10 years, differentiated between "sleep adjustment" and "sleep deprivation" (see below). Asserting that both had a potentially "high" utility value in contributing to intelligence collection, it recommended that both be adopted, but that sleep deprivation should be restricted to detainees believed to possess "critical intelligence", who had been medically cleared for its use, and who were held at "strategic interrogation facilities" (such as Guantánamo). The report noted, "as a matter of policy, for consideration of other nations' views", that the UN Committee against Torture had found that prolonged sleep deprivation constituted torture and other cruel, inhuman or degrading treatment. The report warned that public knowledge that the government was resorting to sleep deprivation "may have a significant adverse effect on public opinion". It nevertheless recommended its use.

In a memorandum dated 16 April 2003, Secretary Rumsfeld authorized "sleep adjustment" for use in Guantánamo. The technique was described as "adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night to day)", and was accompanied by the note that "this technique is NOT sleep deprivation".[112] On 2 June 2003, General Hill issued clarification on this reference to "sleep deprivation". He defined sleep deprivation as "keeping a detainee awake for more than 16 hours, or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession". This echoed the Working Group report which defined this technique as "keeping the detainee awake for an extended period of time (allowing individual to rest briefly and then awakening him, repeatedly)."[113] The

[110] Memorandum from John F. Rankin, SERE Training Specialist; Christopher Ross, SERE Coordinator, to Officer in Charge, FASOTRAGULANT Det Brunswick. Subject: After action report Joint Task Force Guantánamo Bay (JTF-GTMO) training evolution, 15 January 2003.
[111] China inspired interrogations at Guantánamo, New York Times, 2 July 2008. The chart appears in an article by Albert D. Biderman, Communist attempts to elicit false confessions from Air Force prisoners of war, published in the Bulletin of the New York Academy of Medicine, Vol. 33, No.9, September 1957.
[112] The memorandum did not authorize sleep deprivation, but stated that additional interrogation techniques could be requested for on a case-by-case basis. It also stated that "nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees".
[113] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

Working Group recommended that this should not exceed four days in succession. Mohammed Jawad's subjection to the frequent flyer program lasted for more than three times this long.

The frequent flyer program appears to have evolved as a hybrid of a number of the techniques authorized by Secretary Rumsfeld. As already noted, Secretary Rumsfeld's 16 April 2003 authorization came with the "safeguard" that interrogators should be allowed "reasonable latitude to vary techniques" according to the detainees strengths and weaknesses, and also noted that "techniques are usually used in combination". Along with sleep adjustment and isolation, two other techniques Secretary Rumsfeld authorized were "dietary manipulation", and "environmental manipulation". The latter was described as "altering the environment to create moderate discomfort", and was accompanied with the note that "some nations may view application of this technique in certain circumstances as inhumane".

In May 2004, Amnesty International alleged that agents of the Chinese government had been in Guantánamo in 2002 and had directed the ill-treatment of Uighur detainees, including by sleep deprivation, threats and environmental manipulation.[114] The following month, Commander Hill was asked about these allegations and would only state that government "delegations" from various countries "have come and they have talked to their detainees, but they do so, following our rules and under our direct supervision and never by themselves."[115] The May 2008 report of the Office of the Inspector General of the US Justice Department revealed that an FBI agent had reported that "several Uighur detainees were subjected to sleep deprivation or disruption while being interrogated at Camp X-Ray by Chinese officials prior to April 2002". One of the detainees had alleged that "the night before his interrogation by Chinese officials, he was awakened at 15-minute intervals the entire night and into the next day". The Inspector General's report stated that "some Chinese officials visited GTMO and were granted access to these detainees for interrogation purposes".[116]

An FBI agent who was deployed to Guantánamo in August 2003 has said that at weekly meetings with military interrogators, the military personnel "described what they were doing in detainee interrogations, including frequent movements of detainees and isolation". The FBI agent said that he had received a list of Pentagon-approved "interrogation tactics that could be utilized and that programs were built around them, including 'the frequent flyer program and isolation techniques…dietary disruption and sleep disruption'."[117] The frequent flyer program was allegedly not designed to deprive the detainee of sleep, but to increase the discomfort and disorientation of detainees and "to keep them off balance".[118] Nevertheless, deprivation of sleep would be an entirely predictable side (if not central) effect of such a program, as

[114] See http://www.amnesty.org/en/library/info/AMR51/090/2004/en.
[115] Media Availability with General James T. Hill, 3 June 2004, *op. cit.*
[116] Inspector General's FBI report, May 2008, *op.cit.*, pages 183-184. See also: USA: Guantánamo: Any and all interrogation tapes must be preserved, 5 August 2008, http://www.amnesty.org/en/library/info/AMR51/088/2008/en.
[117] Inspector General's FBI report, May 2008, *op.cit.*, page 307.
[118] *Ibid.*

acknowledged by the FBI agent.[119] Mohammed Jawad's treatment surely incorporated sleep deprivation.

Despite the use of the frequent flyer program against numerous detainees during his time in charge of the Guantánamo detentions (see appendix 2), General Miller asserted in May 2004 that sleep deprivation had not been used under his command at Guantánamo, which ended in March 2004.[120] Nevertheless, in May 2008, the US Justice Department's Inspector General revealed that sleep deprivation and disruption against detainees in military custody in Guantánamo was the interrogation technique most frequently reported by FBI agents deployed to the base between 2002 and 2004, with more than 70 FBI agents reporting knowledge of it. This included the use of the frequent flyer program, and also of "Operation Sandman". The latter program also involved sleep interruptions and frequent cell relocations, and was apparently targeted at Saudi Arabian detainees to keep them "mentally off balance, to isolate them linguistically or culturally, and to induce them to cooperate".[121] It appears that its use was not limited to Saudi Arabian nationals, however. At least one Yemeni detainee, Salim Hamdan, was subjected to it (see §2.8).

At the 19 June 2008 commission hearing, Jawad's military lawyer said that he had learned from Esteban Rodriguez, who was director of the Joint Intelligence Group at Guantánamo from 2003 to 2006, that there were two different frequent flyer programs. One, run by the Joint Intelligence Group, was aimed at intelligence gathering; the other, run by the Joint Detention Operations Group, was for the purpose of disciplining detainees. According to the military lawyer, Rodriguez had said that he had no knowledge of Jawad's subjection to the frequent flyer program. Jawad's lawyer has also said that Major General Nelson Cannon, who was the Joint Detention Operations Group Commander from July 2003 to August 2004, also "disavows any knowledge of Mr Jawad's treatment".[122]

As detailed further below, both General Hill and (now) Major General Jay W. Hood (commander of Guantánamo detentions at the time) claim to have known nothing of the use of the frequent flyer program against Mohammed Jawad. That no-one in command at or over the base or over its detention or intelligence operations knew of a 14-day program of abuse against this young Afghan detainee defies belief, if what the Guantánamo authorities themselves have said about the safeguards built into the detention regime is taken at face value:

> "[Brig.Gen.] Hood said the leaders of the joint task force have built numerous checks into the system that immediately would bring any mistreatment of detainees to light. 'We have a whole series of checks for literally everything we do here in the joint task force, but specifically with any actions that involve detainees,' he said. 'We are constantly checking to see that we maintain standards in terms of how we deal with

[119] "sleep deprivation could be a byproduct of implementing this program". *Ibid.*, page 312.
[120] "And in my experience and with over 22,000 interrogations, I did not use sleep deprivation. My frame of reference in Guantánamo Bay. I did not use sleep deprivation". Detainee Operations Briefing, US Department of Defense, 4 May 2004. At the time of this briefing, Major Miller was Deputy Commander of Detainee Operations in Iraq, where he said that "for example, sleep deprivation and stress positions and all that could be used. But they must be authorized… We do not use sleep deprivation, unless that is approved at the general officer level".
[121] Inspector General's FBI report, May 2008, *op.cit*.
[122] Oral argument, *Jawad v. USA*, Guantánamo, 19 June 2008.

> the detainees.' For example, he said, guards on the cellblocks have their own chain of command to ensure proper procedures are followed. But in addition, non-commissioned officers from outside the guards' chain of command periodically inspect the area and go through a checklist."[123]

General Hill said in an interview with the Department of Army Inspector General in October 2005, subsequently leaked, that "Everything we've done at Guantánamo, from the moment I took command was always predicated on the idea that you expect people to do the right thing, and there are a set of rules, but you better be checking. So you don't just assume that everything is going to go well. So you put in procedures to ensure that at least the chain of command is in there looking". [124] He said that under General Miller, detention and interrogation procedures were "refined", "checks and balances" put in place, and "improved all that process".

Under such a system, it should be relatively easy for the authorities to pin down who was responsible for the use of a sleep deprivation technique over a two-week period, and why.

2.7. Inadequate investigations

Following the Abu Ghraib torture revelations in late April 2004, the US administration went into a damage limitation and "review" mode, rather than a fully investigative one. On 3 May 2004, Vice Admiral Albert T. Church, the US Naval Inspector General, was directed by Secretary Rumsfeld to conduct a review of Pentagon detentions at Guantánamo, and to report back to the Secretary on 10 May 2004. The Vice Admiral emphasized that his remit was neither an inspection nor an investigation, and described the review as "a snapshot of current existing conditions", and had operated under the assumption that "treatment provided for in Presidential and SECDEF [Secretary of Defense] orders constitutes 'humane treatment'."[125] The Vice Admiral and his team visited Guantánamo on 6 and 7 May, the latter date being the day on which Mohammed Jawad's subjection to the frequent flyer program began.

Vice Admiral Church – whose team's interviewees did not include detainees – returned from Guantánamo saying that he had "done enough to give [Secretary Rumsfeld] a high degree of confidence of [sic] what I found", [126] and reported to the Defense Secretary that he had found "no indication of unauthorized interrogation techniques being used" and "no evidence of non-compliance with DoD orders". [127] He was assigned by Secretary Rumsfeld to conduct a review of Pentagon interrogations globally. In January 2005, the Principal Deputy Assistant Secretary of Defense for Public Affairs, Lawrence Di Rita, said that Admiral Church was "about to wrap up his investigation" and would conclude that there was "no policy of abuse".

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[123] Guantanamo Detainees Still Yielding Valuable Intelligence, Army Forces Press Service, 24 March 2005, http://www.defenselink.mil/news/newsarticle.aspx?id=31279.
[124] Testimony of General James T. Hill taken on 7 October 2005 by the Department of Army Inspector General, Investigations Division.
[125] Brief to the Secretary of Defense on treatment of enemy combatants detained at Naval Station Guantánamo Bay, Cuba, and Naval Consolidated Brig Charleston. Vice Admiral A.T. Church III, USN, 11 May 2004, available at http://www.aclu.org/projects/foiasearch/pdf/DOD056544.pdf.
[126] Media availability with Vice Admiral Church, US Department of Defense, 12 May 2004.
[127] Brief to the Secretary of Defense, 11 May 2004, *op. cit.* (DoD = Department of Defense).

Vice Admiral Church duly revealed on 10 March 2005 that he had indeed found that "there was no policy that condoned or authorized either abuse or torture. There was no linkage between the authorized interrogation techniques and the abuses that in fact occurred."[128] The unclassified summary version of the Church report released at this time makes no reference to the question of sleep deprivation.[129] The full classified report of more than 360 pages has a short passage on this technique, but the text is redacted (censored) in its entirety from the unclassified version. According to the US Justice Department's Inspector General in 2008, the Church report found that the distinction between permissible "sleep adjustment" and prohibited "sleep deprivation" was imprecise and "blurry".[130] Apparently, the only cases of sleep deprivation described in the Church report were in relation to the deaths of two detainees in Bagram on 4 and 10 December 2002, killed under torture and other ill-treatment a few days before Mohammed Jawad was brought to the US airbase.[131]

If the Church review missed the use of the frequent flyer program against Mohammed Jawad that began on the evening of the second day of the Church team's visit to Guantánamo, or simply took the position that such treatment was authorized and humane, a military investigation in 2005 into FBI allegations of abuse at the base also failed to discover it. The investigation by Lieutenant General Randall M. Schmidt and Brigadier General John T. Furlow – whose "independently derived findings regarding the development and adjustments to policy and interrogation techniques are identical to the Church report"[133] – found that the frequent flyer program was used against a number of detainees "to disrupt sleep patterns and lower the

> "In 1963, the CIA distilled its findings in its seminal *Kubark Counterintelligence Interrogation* handbook. For the next forty years, the *Kubark* manual would define the agency's interrogation methods and training programs throughout the Third World… Reflecting its underlying behavioural approach, the *Kubark* manual proclaims, on page 1, that 'sound interrogation…rests upon… certain broad principles, chiefly psychological.'… As the subject clings 'to a world that makes some sense' and struggles to 'reinforce his identity and powers of resistance,' the interrogator counters with a 'confusion technique… designed not only to obliterate the familiar but to replace it with the weird' until this systematic assault on personal identity becomes 'mentally intolerable'.
>
> Such confusion can best be effected by attacking the victim's sense of time, by scrambling the biorhythms fundamental to every human's daily life… *Kubark* suggests interrogators engage in the 'persistent manipulation of time, by retarding and advancing clocks and serving meals at odd times… Day and night are jumbled'. By 'thwarting' the detainee's effort 'to keep track of time, to live in the familiar past', interrogators are 'likely to drive him deeper and deeper into himself, until he is no longer able to control his responses in an adult fashion'… In this first stage, interrogators are instructed to employ simple, non-violent techniques, such as hooding or sleep denial, to disorient the subject…"[132]

[128] Department of Defense briefing on detention operations and interrogation techniques, 10 March 2005.
[129] Review of Department of Defense Detention Operations and Detainee Interrogation Techniques, VADM A.T. Church, III, USN.
[130] Inspector General's FBI report, May 2008, *op. cit.*.
[131] *Ibid.*, page 224,
[132] Alfred W. McCoy, A question of torture: CIA interrogation, from the Cold War to the War on Terror. Holt Books, 2006, pages 50-51. See also USA: Human dignity denied, *op. cit.*
[133] Schmidt/Furlow Report, June 2005, *op. cit.*

ability to resist interrogations".[134] The Schmidt/Furlow report said that "records indicated that some interrogators recommended detainees for the 'frequent flyer program'. A current GTMO interrogation analyst indicated that this was a program in effect throughout 2003 and until March 2004." The investigators found that such sleep disruption was authorized between 2 December 2002 and 15 January 2003, and from 16 April 2003 to late March 2004, under the Defense Secretary's authority. They reported that when Brigadier General Hood replaced Major Miller as commander of the Guantánamo detentions in March 2004, he had terminated the program.

The Schmidt/Furlow report concluded that the allegation that military interrogators had "improperly used sleep deprivation against detainee" should be closed. It noted that there was no need for an "organizational response", such as disciplinary action, and merely noted that the program had been terminated in March 2004. The inadequacy of the Schmidt/Furlow investigation is illustrated by the fact that Mohammed Jawad's subjection to this sleep deprivation technique over 14 days in May 2004 was not discovered by the investigators despite the fact that it had been logged by the detention authorities, as found by Jawad's military lawyer. In the leaked transcript of an interview with the Army Inspector General in August 2005, Lieutenant General Schmidt said that "there was no documentation on [the frequent flyer program]", although "we knew it had happened. There were enough witnesses". Lt Gen Schmidt added that "we don't know it was ever sustained on any individual". The two weeks of the program endured by Mohammed Jawad is surely a sustained assault on an individual's sleep and well-being. Others have been subjected to even longer.

Vice Admiral Church found a culture of "strong leadership, strong chain of command" at Guantánamo.[135] Yet it appears that Mohammed Jawad was not the only detainee subjected to sleep deprivation under the frequent flyer program after Commander Hood had prohibited it in March 2004 (see Appendix 2). It has been reported that the program was renamed "secure move", and that prison records suggest that it was used at least until July 2004.[136] Swedish national Mehdi Ghezali told Amnesty International in July 2004 that he was subjected to sleep deprivation in April 2004, in what appears to have been a version of the frequent flyer program, and that he had seen an Australian national subjected to the technique too:

> "*They kept doing it for about two weeks around 11 April 2004. The Americans took me to an interrogation that lasted 14-16 hours. Then they brought me back to my cell. Shortly thereafter, just as I was going to bed, the guards came and said that I was going to be moved to another cell. One hour later I was moved once more to another cell. I once saw how the guards treated an Australian prisoner in this way, by moving him from cell to cell and thus preventing him from getting any sleep. At the end, there was blood coming from both his nose and his ears. He was so tired.*"[137]

Mohammed Jawad's military lawyer has said that Major General Hood "states unequivocally that he did not authorize this program, and would not authorize it. He states that he was unaware that Mr Jawad had been subjected to the frequent flyer program until defense counsel

[134] Investigation into FBI allegations of detainee abuse at Guantanamo Bay, *op. cit.*
[135] Media availability with Vice Admiral Church, 12 May 2004, *op. cit.*
[136] Detainee's attorney seeks dismissal over abuse. Washington Post, 8 June 2008.
[137] USA: Human dignity denied. Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en, page 67.

brought it to his attention earlier this month".[138] In oral arguments in the pre-trial hearing in Guantánamo on 19 June 2008, the lawyer said that when he informed Major General Hood of Jawad's subjection to the frequent flyer program despite Hood having prohibited it, his reaction had been "a resounding thud of indifference". The military lawyer continued: "Here was a Major General in the Army who has just learned that a detainee was subjected to grave abuse, on his watch, in direct violation of his orders. One would have expected him to go through the roof – to order heads to roll, to launch an immediate investigation – and he couldn't be bothered".

The military lawyer has also been told by General Hill that he had not authorized the frequent flyer program either generally or specifically for use against Mohammed Jawad. Like Major General Hood, General Hill said that the first time he had learned of the program was when Jawad's military lawyer had brought it to his attention earlier that month (June 2008).

In a leaked August 2005 interview with the Army Inspector General's office, Lt Gen Randall Schmidt referred to General Hill's 2 June 2003 "guidance" on Secretary Rumsfeld's authorization of "sleep adjustment" on 16 April 2003 (see above):

> Schmidt: ...some additional guidance by General Hill that said, okay, this is the guidance, and I as the COCOM [Combatant Commander] now am going to lay some things on there like what is – what's sleep deprivation.
>
> Q: Right.
>
> Schmidt: You know, it's 16 hours. Blab-blab-blab. No more moving these guys around and doing all this sort of things. I forget what it's called. But moving them around.
>
> Q: The Frequent Flyer Program?
>
> Schmidt: The Frequent Flyer Program, moving them around from cell to cell... So anyway when it came in April, April 16th, General Hill said also bang, bang, bang, laid a bunch of extra guidance rules on it...[139]

Mohammed Jawad's military lawyer has written in a recent brief: "The defense has not been provided a single document purporting to provide the authority for the frequent flyer program, any legal review of the program, any document ordering that any individual detainee be subjected to the program, any complaints about the program, or any documentation about the origins of the program. It is simply impossible to believe that dozens of detainees were subjected to a formalized program and there is no paper trail other than a few entries in the log books or the DIMS [Detainee Information Management System] showing that detainees were moved around. Either all documents relating to this program were intentionally destroyed, or the government simply hasn't looked hard enough".[140]

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[138] *USA v. Jawad*, Defense reply to government revised response to D-008 motion to dismiss (torture of detainee), 13 June 2008.
[139] Testimony of LTG Randall M. Schmidt, taken 24 August 2005 by Department of Army Inspector General.
[140] *USA v. Jawad*. D-010. Reply to government response to supplemental defense motion to compel discovery pursuant to RMC 701(1) and 905(b)(4) and request for other appropriate relief and motion for sanctions, 11 August 2008.

Who knew what, when, about the frequent flyer program, remains unclear. Accountability is absent. A full investigation is still called for.

2.8. Interrogations switch to a prosecution focus, still no lawyer

At the time of Mohammed Jawad's subjection to the frequent flyer program and his subsequent move to the cruel and coercive conditions of Camp 5, the authorities had begun to view him less as a potential source of intelligence and more of a candidate for prosecution by military commission.[141] In November 2001, President Bush had signed a Military Order authorizing trials by military commission for foreign nationals held as "enemy combatants".[142] Official activities in this regard had begun gathering steam from mid-2003.

Related to this, the US administration was also preparing itself in May 2004 for the possibility of an adverse ruling in the US Supreme Court in *Rasul v. Bush*, on the question of whether the US courts had jurisdiction to consider *habeas corpus* petitions from Guantánamo detainees. The administration had chosen the Naval Base in Cuba for such detentions upon Justice Department advice that the federal courts should not be able to "properly entertain an application for a writ of *habeas corpus* by an enemy alien" captured abroad and detained in the base, including those held "pending possible trial by military commission".[143] Five days before the *Rasul* ruling, the Secretary of the Navy held a press conference at which he announced that he had been designated by the Secretary of Defense to oversee an annual administrative review process for the Guantánamo detainees. Two and a half years after the detentions began, the Navy Secretary said that "we are anxious to start this process".[144]

The Supreme Court ruled against the administration in *Rasul v. Bush* on 28 June 2004. The administration responded by pursuing a litigation strategy aimed at draining the *Rasul* ruling of any meaning for the detainees, and establishing the Combatant Status Review Tribunals (CSRTs) – panels of three US military officers who could rely on secret and coerced information in affirming or rejecting the "enemy combatant" status of each Guantánamo

[141] Brigadier General Hood, who was commander of Guantánamo detentions in 2004 (having replaced General Miller), has said that Jawad was considered to be of "little interest" in relation to intelligence-gathering by 2004. *USA v. Jawad*, Defense reply to government revised response to D-008 motion to dismiss (torture of detainee), 13 June 2008. Other documents, dated late May 2004, are reported to confirm this and indicate the focus on his case switched around this time to a prosecutorial one. The documents, one from intelligence authorities and another from criminal investigation authorities reportedly state that Mohammed Jawad was a possible candidate for prosecution by military commission, and that his naming under the November 2001 Military Order should be considered likely.

[142] See http://action.aclu.org/torturefoia/released/022306/1261.pdf. In 2002, however, it had reportedly been determined that a determination had been made that "not one single [detainee] will see the inside of a courtroom in the United States". Inspector General's FBI report, May 2008, *op.cit.*, page 78.

[143] *Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba*. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, From Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, US Department of Justice, 28 December 2001.

[144] Special Defense Department briefing with Secretary of the Navy Gordon England, 23 June 2004. In the end, the "discretionary" annual Administrative Review Board (ARB) scheme was not implemented until 14 September 2004 and the first ARB was held in mid-December 2004, nearly three years after detentions began.

detainee.[145] It also responded to the ruling by moving forward with its military commission prosecutions. The day after the ruling, the Pentagon announced that charges against three Guantánamo detainees had been referred for trial by military commission, the first such occurrence. Prior to this, there had been no announcements relating to charges for more than four months.

In late October 2004, after some 20 months in Guantánamo, Mohammed Jawad had a CSRT hearing, one of 334 such hearings held in October and November 2004. At his hearing, conducted at a time when his interrogations had generally switched from an intelligence gathering to a prosecutorial focus, Mohammed Jawad said that he thought that the purpose of the tribunal was "to find out if I am a criminal or not". He was told that it was to decide if he was an "enemy combatant". He wanted to call witnesses, specifically "the people that were captured with me", but he did not know where or who they were (see further below, §3). The CSRT said that it would not be able to locate them. It affirmed his status as an "enemy combatant" on 4 November 2004.[146] Mohammed Jawad would be held without charge for another three years.

Like the other detainees, the teenager had no legal counsel for the CSRT proceedings. Some detainees would subsequently gain access to lawyers for the purposes of pursuing *habeas corpus* after the *Rasul* ruling, but the government far from ensured that all detainees were assigned legal counsel for this purpose.[147] Mohammed Jawad was one of those detainees who never received *habeas* counsel as a result of the *Rasul* ruling. After five and half years of detention, Jawad was finally assigned *habeas* counsel in late June 2008 when his military commission lawyer was authorized to file a *habeas corpus* petition in US federal court on his behalf, following the *Boumediene v. Bush* ruling that the Guantánamo detainees have the constitutional right to *habeas corpus*.

In any event, all post-*Rasul* interrogations continued without the presence of legal counsel for any of the detainees despite the fact that any information gleaned from them could be used in possible prosecutions by military commissions, as well as by the CSRTs or ARBs to justify their continued detention as "enemy combatants". This was also the case for Mohammed Jawad.[148]

In late 2002, there had been concern within sections of the military that the use of harsh interrogation techniques proposed for use in Guantánamo could jeopardize prosecutions, even

[145] See pages 44 to 51 of USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005/en. The strategy was successful, keeping detainees away from the courts until the *habeas corpus*-stripping Detainee Treatment Act and Military Commissions Act were passed in 2005 and 2006 respectively. It was only in June 2008, that the US Supreme Court found that §7 of the MCA was unconstitutional and that the detainees had the constitutional right to *habeas corpus* review (*Boumediene v. Bush*).

[146] The definition of "enemy combatant" used by the CSRT was "an individual who was part of or support Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces". Memorandum for the Secretary of the Navy. Order establishing Combatant Status Review Tribunal, Deputy Secretary of Defense Paul Wolfowitz, 7 July 2004.

[147] See p.46 of Amnesty International's USA: Guantánamo and beyond, May 2005 *op. cit.*

[148] It remains the case today that interrogations in Guantánamo are conducted without the presence of legal counsel for the detainee in question.

under the low evidentiary standards allowed by the November 2001 Military Order.[149] There was also concern within the CITF about the SERE-inspired interrogation techniques developed for use in Guantánamo. A CITF memorandum in December 2002 noted that "the military and LEA [Law Enforcement Agencies, CITF and FBI] share the identical mission of obtaining intelligence in order to prevent future attacks on Americans. However, LEA has the additional responsibility of seeking reliable information/evidence from detainees to be used in subsequent legal proceedings." The memorandum expressed concern that despite LEA opposition to harsh interrogation techniques, "there appears to be a tendency to revert to a shortsighted coercive model of interrogation".[150] A May 2004 FBI email recalled that there was general agreement within the LEA that the Pentagon-approved interrogation techniques were "going to be an issue in the military commission cases", but that "the DoD has their marching orders from the SECDEF [Secretary of Defense]".[151]

The policy decision to disregard the rules normally governing the gathering of information for use in criminal investigations forms at least part of the reason for choosing trials by military commission. In early 2002, the Justice Department advised the Pentagon that the protection against self-incrimination under the Fifth Amendment of the US Constitution would not be applicable to defendants facing trial by military commission for violations of the law of war. Therefore, such detainees did not have to be given "Miranda" warnings (right to remain silent, right to a lawyer) before being interrogated, whether for intelligence-gathering or prosecutorial purposes.[152] This memorandum noted that the decision about which courts any trials would be held in had "not yet been made" and so "the possibility still exists that some detainees may be prosecuted on criminal charges in Article III courts [i.e. civilian federal courts]." The memorandum advised that, unlike in the case of military commissions, the issue of the admissibility of statements in ordinary courts would be more complex, and would turn on questions relating to whether the interrogation was conducted for prosecutorial or intelligence-gathering purposes, or a mixture of both. No such complexity would arise in the case of military commissions, it advised. It continued: "To the extent that the only trial-related use of statements obtained in an interrogation will be before a military commission, there is no need

[149] E.g. Memorandum for UN and Multilateral Affairs Division (J-5), Joint Staff. Counter-Resistance Techniques. From US Air Force Colonel Donald E. Richburg, 4 November 2002 ("Successful prosecutions in military commissions or subsequent use of detainee statements in Federal prosecutions will require that the evidence obtained be admissible. Although the President's military order establishes a fairly low evidentiary threshold of probative value to a reasonable person, many of the techniques described in the memo [which led to Secretary Rumsfeld's 2 December 2002 authorization of such techniques] will place a burden on the prosecution's ability to convince commission members that the evidence meets even that standard".)

[150] Memorandum for JTF-GTMO/J2. Subject: JTF GTMO 'SERE' Interrogation SOP DTD 10 Dec 02, From Timothy James, Special Agent for Orange CITF GTMO, 17 December 2002.

[151] Instructions to GTMO interrogators. Email to T.J. Harrington, 10 May 2004, available at http://www.aclu.org/projects/foiasearch/pdf/DOD000949.pdf.

[152] "US military tribunals convened abroad are not required to grant aliens rights under Self-Incrimination Clause". Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 26 February 2002. *Miranda* warnings refer to the 1966 US Supreme Court ruling, *Miranda v. Arizona*, holding that detainees must be told of their right to remain silent and their right to a lawyer. The Fifth Amendment, together with *Miranda*, governs the admissibility of statements given in custody in the USA.

to provide Miranda warnings". At some point after July 2002, with the Department of Justice apparently favouring trials by military commission, it was reportedly determined by the administration that "not one single [detainee] will see the inside of a courtroom in the United States".[153]

The April 2003 Pentagon Working Group report on interrogations noted that "one of the Department of Defense's stated objectives is to use the detainees' statements in support of ongoing and future prosecutions." The report noted that the use of certain techniques such as sleep disruption, sleep deprivation, threat to transfer the detainee to a country that would torture, isolation, prolonged standing, and exploitation of phobias, could affect the admissibility of statements at any subsequent trial, but that this would be a "lesser issue for military commissions". [154] It remains a "lesser issue" under the MCA, with military commissions judges able to admit into evidence information coerced under cruel, inhuman or degrading treatment (see below, §2.9).

On 3 July 2003, the Pentagon announced that six detainees had been made eligible for trial under the Military Order, the very first such announcement. One of them was Yemeni Guantánamo detainee Salim Hamdan. From 10 June 2003 to 31 July 2003, a period of 50 days, Salim Hamdan was placed in the sleep disruption program known as "Operation Sandman" (see above).[155] Then from December 2003 to October 2004, Hamdan was put into solitary confinement in Camp Echo in a windowless cell that lacked natural light and fresh air. He has said that he considered making a false confession in order to ameliorate his situation.[156] His then US military lawyer stated that the government's plan was to begin the much-criticized military commissions with those detainees who would plead guilty. The lawyer was instructed that he could only negotiate a guilty plea, which the authorities apparently believed Hamdan was ready to make. This lawyer, who found that Hamdan did not want to negotiate such a plea, later told Senators that he believed the government was engaged in a "clear attempt to coerce Mr Hamdan into pleading guilty".[157]

On 7 July 2004, nine more detainees were made eligible for military commission trial under the Military Order. Two of these detainees were Ghassan Abdullah al-Sharbi, a Saudi Arabian national, and Canadian national, Omar Ahmed Khadr. Ghassan al-Sharbi was reportedly subjected to the frequent flyer program from 7 November 2003 to 3 February 2004. He was

[153] Inspector General's FBI report, May 2008, *op.cit.*, page 78-79.
[154] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.
[155] *USA v. Hamdan*, (military commission). D-029 Ruling on motion to suppress statements based on coercive interrogation practices and D-044 motion to suppress statements based on Fifth Amendment, 20 July 2008. The military judge said that "Operation Sandman did not involve sleep deprivation, but was an appropriate effort by camp commanders to maintain discipline in the camp". The program remains classified, making it impossible for the public to have confidence in the military judge's finding. See, USA: Trial and error - a reflection on the first week of the first military commission trial at Guantánamo, 30 July 2008, http://www.amnesty.org/en/library/info/AMR51/084/2008/en,
[156] See page 124, USA: Human dignity denied, *op. cit.*
[157] Statement of Lieutenant Commander Charles D. Swift, JAGC, USN, before the Senate Committee on Judiciary on detainees, 15 June 2005. See also Lawyer says military tried to coerce detainee's plea, New York Times, 16 June 2005.

eventually charged for trial under the Military Order on 7 November 2005. So, too, was Omar Khadr.

Like Mohammed Jawad, Omar Khadr was a child when he was first taken into US custody. According to a Canadian government document, marked secret and dated 20 April 2004 but not made public until July 2008, Khadr in March 2004 "was not talking" and "he hadn't cooperated since July 3, 2003. They [US authorities] have been unable to find any particular significance to the date".[158] Is it significant that 3 July 2003 was the day on which the Pentagon announced that six detainees had been named under the Military Order? While Khadr was not among them, the news that fellow detainees were being made eligible for trial by military commission may have made him fearful for his own situation. According to the Canadian document, Omar Khadr "recognized that he would be on trial" at least four months before he was named under the Military Order with eight other detainees on 7 July 2004, and 20 months before he was charged in November 2005.

Seventeen-year-old Khadr was put into the frequent flyer program for three weeks in March 2004 to "make him more amenable and willing to talk". He was "not permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep". The document, dated 20 April 2004, added that Khadr "will soon be placed in isolation for up to three weeks and then he will be interviewed again". This was despite the military already having a "big file" on Khadr and despite the fact that the US authorities "were not really looking for much now". Khadr had, however, "recanted all earlier statements, including his confession to having thrown the grenade that killed the American soldier".[159] The same is true of Jawad in relation to the grenade-throwing incident at the centre of his case. The retraction of his alleged "confession" made in Afghan government custody has been followed by the use of isolation and the frequent flyer program and repeated interrogations.

The first detainees were charged for trial by military commission on 24 February 2004. In the following two months, Mohammed Jawad was interrogated twice by CITF, once on 29 March and once on 26 April. A little over a week later, on 7 May 2004, he was put into the frequent flyer program, and thence into segregation into the isolation facility, followed by placement in Camp 5. The following month, on 29 June 2004, the first cases of charged detainees were referred on for trial by military commission.

Mohammed Jawad's post-frequent flyer program interrogations – all conducted by CITF – resumed in August 2004, with interrogation sessions on 18 August and 27 August 2004, according to the records released to his military lawyer. These interrogations occurred in the week before and the week of the first military commission hearings in Guantánamo.[160]

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[158] Umar Khadr: a meeting with. R. Scott Heatherington, Director, Foreign Intelligence Division, Canadian Department of Foreign Affairs and International Trade, 20 April 2004.

[159] *Ibid.*

[160] The first military commission hearing was held on 24 August 2004 (Salim Hamdan); the second on 25 August 2004 (David Hicks), the third on 26 August 2004 (Ali al-Bahlul); and the fourth on 27 August (Ibrahim al-Qosi). The two other detainees who had been named under the Military Order on 3 July 2003 were released to the UK. Nine more detainees were made eligible for trial by military commission on 7 July 2004. Five of them were charged in November 2005 and a sixth in January 2006. The identities of the other three are not known, as the system was ruled unlawful before they were charged. At the military

Mohammed Jawad's last interrogation for eight months occurred on 8 November 2004, on the same day that a federal District Court ruled against the military commission system established under the 2001 Military Order. The ruling halted military commission proceedings, and threw their future into doubt.[161] The apparent suspension by criminal investigators of their interrogations of Mohammed Jawad at this point suggests that their aim may have been to obtain statements from the teenager for use at a future trial. With the collapse of the commissions, there was no need for any such statements.

The government immediately announced that it would appeal against the District Court ruling, in the name of "the President's power to convene military commissions to prosecute crimes against the laws of war" and his constitutional authority to "safeguard the nation's security".[162] It was successful. On 15 July 2005, the US Court of Appeals for the District of Columbia reversed the District Court decision, finding that Congress had authorized the military commission process and that the Geneva Conventions did not confer any rights upon a commission defendant that he could enforce in court. The US Attorney General issued a statement welcoming the ruling "affirming that the President has the authority to establish military commissions to try and punish enemy combatants who have violated the laws of war".[163] The Justice Department called the ruling "a major win for the Administration in the war on terror".[164]

Mohammed Jawad's interrogations resumed on that very same day, 15 July 2005. In addition to his 10 interrogations during the remainder of that month, he was interrogated four more times in 2005. All 14 interrogations were conducted by CITF personnel. With the military commission system back on track, it appears that the authorities were again attempting to get information for a possible prosecution, or perhaps even to persuade the young detainee to enter a guilty plea. Perhaps prosecutors were concerned that the government's primary information was a confession of dubious quality extracted under alleged torture from a teenager said to have been functionally illiterate at the time. Were the CITF interrogators attempting to obtain 'clean' evidence?[165]

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commission hearing on 19 June 2008, the former Chief Prosecutor, Colonel Morris Davis, testified that Mohammad Jawad was not one of these three.

[161] *Hamdan v. Rumsfeld*, US District Court for the District of Columbia. See Government halts ruling that halts Guantánamo proceeding. American Forces Press Service, 9 November 2004, http://www.defenselink.mil/news/newsarticle.aspx?id=24888. Guantánamo: Military commissions - Amnesty International observer's notes, No. 3 – Proceedings suspended following order by US federal judge, 9 November 2004, http://www.amnesty.org/en/library/info/AMR51/157/2004/en.

[162] Statement of Mark Corallo, Director of Public Affairs, on the *Hamdan* ruling, 8 November 2004. US Justice Department.

[163] Statement of Attorney General Alberto R. Gonzales on the ruling of the US Court of Appeals for the DC Circuit in *Hamdan v. Rumsfeld*, 15 July 2005.

[164] Background information on the ruling of the US Court of Appeals for the DC Circuit in *Hamdan v. Rumsfeld*, 15 July 2005, US Justice Department.

[165] In the case of some detainees, the government is reported to have employed "clean teams" in Guantánamo to re-interrogate detainees in a bid to obtain incriminating information using supposedly "non-coercive" methods. Amnesty International considers that applying interrogation techniques that may be considered non-coercive in other circumstances, to a detainee subjected to years of virtually incommunicado or indefinite detention and to torture or other ill-treatment, who remains without remedy,

Mohammed Jawad's last interrogation in 2005 occurred on 20 September 2005. Six weeks later, five more detainees – including Omar Khadr and Ghassan al-Sharbi – were charged for military commission trial, on the very same day that the US Supreme Court agreed to hear the *Hamdan* case challenging the commission system. Mohammed Jawad, who had not been named under the Military Order, was not among those charged.

In December 2005, Mohammed Jawad had his ARB detention review. At his ARB hearing, he said that he had told his interrogators that he was not the person who had thrown the grenade.

In late June 2006, the US Supreme Court reversed the ruling of the Court of Appeals as well as President Bush's February 2002 determination that Article 3 common to the four Geneva Conventions did not apply to the detainees. The Supreme Court ruled that the military commission scheme was unlawful. Amnesty International does not know if Jawad has been interrogated since then, or since the Military Commissions Act was enacted as the legislative response to the Supreme Court's *Hamdan v. Rumsfeld* judgment. The last interrogation record that had been provided to Jawad's military lawyer at the time of writing indicated that on 28 May 2006, Mohammed Jawad had been questioned by an Afghan government delegation, apparently his first interrogation since 20 September 2005.

President Bush signed the MCA into law on 17 October 2006. Charges were sworn against Mohammed Jawad on 9 October 2007, and referred on for trial on 30 January 2008.[166] He was the fourth person to be charged under the MCA, and the first who had not been charged under the November 2001 Military Order. Two of the other three detainees were Salim Hamdan – whom the authorities had subjected to "Operation Sandman" and allegedly sought to coerce through the use of isolation into making a guilty plea – and Omar Khadr, who was subjected to the frequent flyer program and isolation after he had retracted his alleged confessions. The third of the three was David Hicks. In March 2007, Hicks pleaded guilty under a pre-trial agreement in which he would be released from Guantánamo after five years in the coercive conditions there to serve a short prison sentence in his native Australia.

The US authorities had apparently sought to jump start the previous military commission system by bringing detainees before it who would plead guilty. This, it transpired, is what happened under the replacement MCA system. The government celebrated the Hicks conviction as having "established a good basis for future commissions cases".[167] Some 15 months later, the first military commission trial took place, resulting in the conviction of Salim Hamdan for "providing material support for terrorism".[168] The Pentagon responded that "Trials by military commission demonstrate that the United States is committed to holding dangerous

rehabilitation or redress for past abuses, provides no assurance that any self-incriminating statements they may make are truly voluntary.

[166] See Section 3.2 below about concerns relating to the charging decision.

[167] Prosecutor: Hicks case good start for military commissions. American Forces Press Service, 31 March 2007. See, USA: Another day in Guantánamo: David Hicks sentenced by military commission; UK resident and victim of rendition released; former CIA detainee alleges torture, 2 April 2007, http://www.amnesty.org/en/library/info/AMR51/055/2007/en.

[168] See, USA: Trial and error, 30 July 2008, *op. cit.*, and USA: Back to the bigger picture: Salim Hamdan sentenced after first military commission trial at Guantánamo, 8 August 2008, http://www.amnesty.org/en/library/info/AMR51/090/2008/en.

terror suspects accountable for their actions" and "provide a mechanism to serve justice to those accused of law of war violations".[169]

2.9. Right to counsel; obligation not to use coerced information

The US government told the UN Committee on the Rights of the Child in June 2008 that "all detainees are allowed to seek legal representation".[170] The government was being economical with the truth. It did not tell the Committee, for example, that Mohammed Jawad was not given access to a lawyer until October 2007, after being in detention for four years and 10 months, including for a period of perhaps some 18 months when he was still a child.[171]

Denial of access to legal counsel violates international law and standards. Everyone arrested or detained – whether or not on a criminal charge – and everyone facing a criminal charge – whether or not detained – has the right to the assistance of legal counsel.[172] This is also the case for children deprived of their liberty.[173] Interrogations in incommunicado detention are inherently coercive, not least when the detainee is held thousands of miles from home, with no knowledge of when, if ever, he will be released or brought to trial.[174] A young detainee may be even more vulnerable, not least when told by interrogators that he will be in custody for the rest of his life, an intimidating tactic that was reportedly used against Mohammed Jawad both in Bagram and Guantánamo when he was still a teenager. [175]

The Committee on the Rights of the Child has said, in relation to the prohibition of compelling a child to give testimony or to confess or to acknowledge guilt, that "the term 'compelled' should be interpreted in a broad manner and not be limited to physical force or other clear

[169] Hamdan sentenced to 66 months. US Department of Defense, news release, 7 August 2008.
[170] List of issues to be taken up in connection with the consideration of the initial report of the United States of America. UN Doc.: CRC/C/OPAC/USA/1.
[171] He was given access to a US military lawyer appointed to defend him against "war crimes" charges sworn against him on 7 October 2007. As noted above, he had no access to legal counsel for the purpose of habeas corpus until late June 2008 when his military commission lawyer was authorized to filed a *habeas corpus* petition.
[172] Principle 1 of the UN Basic Principles on the Role of Lawyers, principle 17(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, article 21(4)(d) of the ICTY Statute, article 20(4)(d) of the ICTR Statute, article 55(2)(c) of the ICC Statute.
[173] UN Convention on the Rights of the Child, Article 37(d).
[174] The US Supreme Court has said that "even without employing brutality, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals". *Miranda v. Arizona*, 384 U.S. 486 (1966).
[175] There are examples from the domestic US sphere of the vulnerability of young people in custody. For example, 18-year-old Todd Rettenberger was arrested in Utah in 1996 and questioned about a murder. He was interrogated for about two hours and then put in solitary confinement, without a pillow or blanket for about 22 hours, before being interrogated a second time. During the interrogation, the police repeatedly lied to Rettenberger, telling him that they had evidence against him. They used the "false friend" technique, whereby they pretended to be his friends and acting in his best interest, and repeatedly indicated that a confession would lead to leniency. He admitted his involvement in the crime. The Utah Supreme Court noted that "as interrogators have turned to more subtle forms of psychological persuasion... courts must also consider such factors as the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system." It ruled that a trial court had been wrong not to throw out Rettenberger's confession. *Utah v. Rettenberger*, 1999 UT 80.

violations of human rights. The age of the child, the child's development, the length of the interrogation, the child's lack of understanding, the fear of unknown consequences or of a suggested possibility of imprisonment, may lead him/her to a confession that is not true…The child being questioned must have access to a legal or other appropriate representative… There must be independent scrutiny of the methods of interrogation to assure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable." [176]

Once any individual has been identified as a suspect in a crime (this was the case from day one of Mohammed Jawad's detention five and a half years ago), that person has the right to be informed that he is a suspect, to be informed of his rights – including the right to remain silent without such silence being a consideration in the determination of guilt or innocence, to have counsel of his own choice and to have free legal assistance if unable to pay for it, and not to be questioned in the absence of counsel. As the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court make clear, these rights apply even to persons suspected of the most serious crimes: genocide, crimes against humanity and war crimes.[177] The USA was not even willing to respect this international standard in the case of a child suspected of throwing a grenade.

Trials under the MCA can admit information unlawfully obtained. International law prohibits the admission of any information that has been coerced under unlawful methods, except against the perpetrator of the illegality.[178] The UN Guidelines on the Role of Prosecutors require that "when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods…" Amnesty International urges the prosecutor in Mohammed Jawad's case to adhere to this principle.

[176] UN Doc.: CRC/C/GC/10, 9 February 2007, General Comment No. 10, Children's rights in juvenile justice.

[177] (1) ICTY: Rules of Procedure and Evidence. Section 1. Rule 42. (2) ICTR: Rules of Procedure and Evidence. Part 4, Section 1, Rule 42. And Part 5, Section 1, Rule 63. (3) Rome Statute of the ICC: Part 5. Article 55 (2) states that any suspect has the right: "(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing..; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

[178] For example, no statement may be admitted as evidence in any proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment. UN Human Rights Committee, General Comment No. 20: Article 7, 1992, par. 12, in UN Doc. HRI/GEN/Rev.7. The UN Human Rights Committee has also stated that "the law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable. General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law. 1984, para. 14.

A fundamental minimum fair trial standard under international law is the right not to be compelled to testify against oneself or to confess guilt.[179] Although the Military Commissions Act states that "no person shall be required to testify against himself *at a proceeding of a military commission*" (emphasis added), this does not expressly prohibit the admission as evidence of information earlier coerced from the defendant during his years in custody. On the contrary, the Act allows the Secretary of Defense to prescribe procedures under which a statement made by the accused "shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination" so long as its admission would not conflict with other provisions of the Act.[180]

Under the MCA, information extracted under torture cannot be admitted into evidence. However, given the USA's narrow definition of torture, this does not meet the international standard. This was illustrated at a congressional hearing on 11 December 2007, when US Air Force Brigadier General Thomas Hartmann, Legal Adviser to the Convening Authority in the Pentagon's Office of Military Commissions, refused to rule out the admission by military commission of information coerced from detainees by waterboarding.[181] Amnesty International has no doubt that waterboarding is torture, a view supported by UN experts. The US Justice Department approved the use of waterboarding in an August 2002 opinion, in which it said that the technique did not violate the USA's anti-torture law.

In violation of international law, the military commissions can admit information extracted under cruel, inhuman or degrading treatment. The MCA differentiates between statements obtained before 30 December 2005, when the USA's Detainee Treatment Act (DTA) came into force (prohibiting cruel, inhuman or degrading treatment, as defined in US rather than international law), and statements obtained after that date.[182] Under the MCA, in both pre-

[179] Article 14.3(g), International Covenant on Civil and Political Rights; Article 40.2(b)(iv), UN Convention on the Rights of the Child; Article 75.4(f) of Additional Protocol I to the Geneva Conventions.
[180] MCA, §949a (b)(2). Under the Fifth Amendment to the US Constitution, no one "shall be compelled in any criminal case to be a witness against himself". A memorandum from the Justice Department to the Pentagon in 2002 cited the view of the Supreme Court that the Fifth Amendment's self-incrimination clause "has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons." The memorandum went on to assert that "the Self-Incrimination Clause does not apply to trials by military commissions for violations of the law of war". Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 26 February 2002.
[181] The Legal Rights of Guantánamo Detainees. Senate Judiciary Committee, Subcommittee on Terrorism, Technology and Homeland Security, 11 December 2007.
[182] Apart from statements by the individual appearing as a defendant before the military commission, evidence obtained through torture or other ill-treatment could be introduced through hearsay or statements from other detainees held in the coercive detention regime at Guantánamo or elsewhere. The defence may not be in a position to question how the statement was obtained, its credibility or the condition of the person by whom it was made. This is because access to information which might enable the defence to challenge such a statement may be foreclosed if, as is likely in some instances, it has been classified. Under the MCA, the prosecution may introduce evidence "while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence". MCA, § 949d (f)(1)(A). The military judge may permit such non-disclosure if he or she finds that the "sources ,

and post-DTA cases, statements "in which the degree of coercion is disputed" may only be admitted if the military judge finds that the statement is "reliable" and possesses "sufficient probative value" and if "the interests of justice would best be served by admission of the statement into evidence". Under Section 948r(d) of the MCA, in the case of statements obtained after 30 December 2005, the military judge must also find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment as defined and prohibited under the DTA.

All of the approximately 50 interrogations – in Bagram and Guantánamo – that the government has reported conducting against Mohammed Jawad occurred *before* the passage of the DTA. Indeed, the US government's revised June 2008 brief in Mohammed Jawad's case on the issue of torture states that "all of Jawad's statements that the Government will use at trial were collected before the DTA's enactment", rendering the limited protections under section 948r(d) of the MCA, "completely and utterly irrelevant here".[183] In the same brief, the government asserts that it "emphatically and unequivocally disputes the Defense's allegations of 'torture' and 'coercion'. The United States has never 'tortured' Jawad, and it has never used 'coercion' to collect a single statement from Jawad for use in these proceedings". As noted above the government's pre-trial briefs have cited alleged confessions made by Jawad when an unrepresented teenager in Afghan and US custody in Afghanistan, a period during which he has alleged he was subjected to torture and other ill-treatment.

Mohammed Jawad has indicated that he may have been drugged prior to the grenade incident (see below), adding further concern to whether any statement he made was voluntary, particularly in the more than six hours of interrogation to which he was subjected in Afghan government custody immediately following his arrest. For his ARB review in 2005, and again in 2006, the military authorities alleged that in Afghan custody Mohammed Jawad "made a written confession to this attack, signed it, and marked it with his fingerprint". However, at the time of his detention, Mohammed Jawad is said to have been functionally illiterate, barely able to read or write. It is reported that the confession was written out by an Afghan police officer, in Farsi. Mohammed Jawad's language is Pashto. At the 2005 ARB hearing, at which Jawad said that he had been tortured by Afghan personnel into confessing, he said "I do not have a signature. I have never had a signature". The "confession" is apparently marked with his thumbprint.

On 7 June 2008, the Chief Prosecutor of the military commissions, Colonel Lawrence Morris, told the Washington Post that "the government acknowledges that Jawad was subject to some form of the frequent flyer treatment, but that it happened long after his capture. Morris said that Jawad made confessions at the scene of his capture and more than once in the few hours following the incident, all without any duress".[184] Such public comments by a prosecutor suggesting that an accused person has voluntarily confessed to a crime are highly prejudicial, and flout the accused's right to the presumption of innocence, a basic fair trial right under

methods, or activities by which the United States acquired the evidence are classified" and "the evidence is reliable".

[183] *USA v. Jawad*, D-008 Government response to the defense's motion to dismiss based on alleged torture of detainee pursuant to RMC 907, 13 June 2008.

[184] Detainee's attorney seeks dismissal over abuse. Washington Post, 8 June 2008.

international law. The defence disputes the prosecution's claim that Mohammed Jawad was not under duress at the time.

As the Supreme Court ruled more than half a century ago, the rationale for excluding coerced confessions is not just their unreliability. They should be inadmissible even if "statements contained in them may be independently established as true", because of the fundamental offence the coercive treatment of detainees causes to the notion of due process and its corrosive effect on the rule of law.[185] The fact that the military commissions can admit such statements into evidence illustrates the distance between their procedures and commonly held notions of due process.

3. A child at the time of his arrest and alleged crime

Mohammed Jawad's precise age at the time of his arrest is unknown. The Pentagon has provided 1985 as the date of his birth, which would make him either 16 or 17 at the time he was taken into custody in Kabul on 17 December 2002.[186] In June 2008, the US government confirmed to the UN Committee on the Rights of the Child that Mohammed Jawad was under 18 years old at the time of his arrest. The same month, in an apparent strategy to downplay the fact that he was a child at the time of the alleged crime and initial detention, the prosecuting authorities at Guantánamo told a military judge that Mohammed Jawad was "approximately 18 years old at the time" of his arrest, and that this had been determined by "a bone scan". This bone density scan was apparently carried out in October 2003.[187] According to his military lawyer, this was done without Jawad's informed consent and nor is it clear why the government conducted this test, given that it has evidently taken the position that Mohammed Jawad's age is legally irrelevant in terms of his treatment, detention and trial.

Although acknowledging to the Committee on the Rights of the Child that Mohammed Jawad was under 18 years old when it took him into custody and held him in Bagram, the US government also sought to emphasise to the Committee that "the United States does not currently detain any juveniles at Guantánamo" and that Jawad "is approximately 23 now". Mohammed Jawad's age today, however, should not distract attention from his age at the time he was taken into custody five and a half years ago. To ignore this would give governments *carte blanche* to hold children in custody until they become adults in order to treat them as adults. That would drain international law of its protections. As the Committee on the Rights of the Child has said in its authoritative interpretation of the Convention on the Rights of the Child, "every person under the age of 18 years at the time of the alleged commission of an offence must be treated under the rules of juvenile justice".[188] The USA has clearly failed to meet this obligation by subjecting Mohammed Jawad to indefinite detention at Bagram and

[185] *Rochin v. California* 342 U.S. 165 (1952).
[186] Contemporaneous media reports of Jawad's arrest describe him as a 17-year-old, so the US authorities presumably were aware from the outset that they had a child in their custody. See, e.g., 2 U.S. men, Afghan injured by grenade. Los Angeles Times, 18 December 2002.
[187] *USA v. Jawad*. Government response to defense motion to dismiss based on torture of detainee pursuant to RMC 907, 4 June 2008.
[188] UN Doc.: CRC/C/GC/10, 9 February 2007, General Comment No. 10, Children's rights in juvenile justice.

Guantánamo, and is compounding this failure by bringing him to trial in front of a military commission.

Anyone asked to list characteristics associated with childhood would probably include attributes such as immaturity, suggestibility, malleability, poor judgment, an underdeveloped sense of responsibility, and a vulnerability to peer pressure and to the domination or example of elders, as well as the capacity for change and development. Common agreement about the existence of such characteristics lies behind the special protections in international law and standards for children who come into conflict with the law or who are recruited for use in armed conflict. International law and standards include the following principles relating to children:

- Arrest, detention and imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;
- Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age;
- Every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so;

Article 37 of the Convention on the Rights of the Child requires that "every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." Article 39 of the treaty requires states that are party to it to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child". Neither Bagram nor Guantánamo constitute such an environment.

The Convention on the Rights of the Child has been ratified by every state in the world apart from the USA and Somalia, indicating the almost universal consensus about the need for special protections for children in detention and other contexts. The USA has signed the treaty, however, thereby binding itself under international law to refrain from any acts which would defeat the object and purpose of the Convention.[189] The USA's treatment of Mohammed Jawad and other child detainees held as "enemy combatants" has flown in the face of this obligation.

The UN Standard Minimum Rules for the Administration of Juvenile Justice, the UN Rules for the Protection of Juveniles Deprived of their Liberty, and other international standards require that detention pending trial shall be used only as a measure of last resort. All efforts should be found to find alternatives to detention, but if detention is used the highest priority must be given to "the most expeditious processing of such cases to ensure the shortest possible duration of detention". The UN Committee on the Rights of the Child has made it clear that to allow a child to "languish in pre-trial detention for months or even years…constitutes a grave

[189] Article 18(a), Vienna Convention on the Law of Treaties.

violation of article 37(b) [of the Convention on the Rights of the Child]".[190] While in custody, the child shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require. At the same time, whether adult or child, the detainee shall be protected from any torture or other cruel, inhuman or degrading treatment and the state is prohibited from taking advantage of the detainee's situation to coerce information from him.

A fundamental principle in relation to children who come into conflict with the law is for states to ensure:

> "treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society. This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way through to the implementation of all measures for dealing with the child".[191]

The Committee on the Rights of the Child has additionally pointed out that:

> "Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized… [T]he child deprived of liberty has the right to a prompt decision of his/her action to challenge the legality of the deprivation of his/her liberty. The standard 'prompt' is even stronger – and justifiably so given the seriousness of deprivation of liberty – than the standard 'without delay', which is stronger than the standard 'without undue delay of article 14(3)(c) ICCPR".[192]

The USA has been far from prompt in dealing with Mohammed Jawad's case. As already noted, he did not have access to a lawyer for four and a half years, and no access to legal counsel for habeas corpus purposes for more than five years. At the time of writing, no court had reviewed the lawfulness of his detention.

Although the Guantánamo authorities eventually opened a separate facility – Camp Iguana – for child detainees, it placed only three Afghan children in that facility who it determined "after medical tests" were younger than 16. These three "enemy combatants" were released back to Afghanistan in January 2004, after the US authorities determined that they "no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the US government for any crimes."[193] This statement again demonstrated that the best interests of the child were being overridden by the USA's perceived national

[190] UN Doc.: CRC/C/GC/10, 9 February 2007, General Comment No. 10, Children's rights in juvenile justice.
[191] *Ibid.*
[192] *Ibid.*
[193] Transfer of juvenile detainees completed, US Department of Defense news release, 29 January 2004, http://www.defenselink.mil/releases/release.aspx?releaseid=7041.

security interests. Nevertheless, the following month, the US Ambassador-at-Large for War Crimes Issues, Pierre-Richard Prosper, said:

> "A point that's important here with the juveniles is that while we made some opinions or decisions early on, we felt it was important to keep them in Guantánamo while we worked out with their home country and other organizations a return than would ensure or help ensure that they would not become child soldiers once again; that they would not be forcibly conscripted or recruited. It was a humanitarian perspective that we undertook, and therefore, the length of time in which they were detained in Guantánamo lasted a little longer out of the best interests of the juveniles."[194]

No such "humanitarian perspective" was taken in Mohammed Jawad's case. He and others who had by then turned 16 or older were subjected to the coercive detention regime at the base.

3.1. The Optional Protocol on children in armed conflict

Two and a half years before it took Mohammed Jawad into its custody at the age of 16 or 17, the US government signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol).[195] Signing the Optional Protocol on 5 July 2000, President Bill Clinton said:

> "The Optional Protocol on Children in Armed Conflict sets a clear and a high standard: No one under 18 may ever be drafted by any army in any country. Its signatories will do everything feasible to keep even volunteers from taking a direct part in hostilities before they are 18. They will make it a crime for any non-governmental force to use children under 18 in war. And they will work together to meet the needs of children who have been forced into war, to save a generation that has already lost too much....
>
> Every American citizen should support these protocols.[196] It is true that words on paper are not enough, but these documents are a clear starting point for action... They represent a worldwide consensus on basic values, values every citizen of our country shares... During one of the darkest moments of the 20th century, the great German theologian, Dietrich Bonhoeffer, reminded us that 'the test of the morality of a society is what it does for children'. Today more than ever, this is a test the world cannot fail. The United States should always be at the forefront of this effort"[197]

Three weeks later, President Clinton urged the Senate to ratify the Protocol, saying that it and its sister Protocol on child trafficking represented a "true breakthrough for the children of the world". Ratification, he said, would "enhance the ability of the United States to provide global

[194] Guantanamo Detainees and Other War Crimes Issues, Remarks at the Foreign Press Center Washington, DC, 13 February 2004, http://www.state.gov/s/wci/us_releases/rm/29497.htm.
[195] The USA signed the Optional Protocol on 5 July 2000.
[196] The USA also signed the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.
[197] Remarks on signing the United Nations Optional Protocols on the Rights of Children in New York City, 5 July 2000.

leadership in the effort to eliminate abuses against children in armed conflict".[198] In December 2002, less than a week after it took Mohammed Jawad into custody, the USA ratified the Optional Protocol.[199]

Article 4 of the Optional Protocol prohibits non-state armed groups from recruiting or using in hostilities anyone who is under 18 years old, and requires states that have ratified the Protocol to take "all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices". Article 6 of the Optional Protocol requires countries that are party to the treaty to take "all feasible measures" to ensure that anyone who comes within their jurisdiction who has been recruited or used in hostilities in violation of the Protocol are demobilized and accorded "all appropriate assistance for their physical and psychological recovery and their social reintegration". Article 7.1 requires states that are party to the Optional Protocol to cooperate in its implementation, "including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto". The US government prides itself in having "contributed substantial resources to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society". It asserts that it is "committed to continue to develop rehabilitation approaches that are effective in addressing this serious and difficult problem".[200]

According to Mohammed Jawad's military lawyer, Jawad was emerging from a difficult childhood when he was taken into custody:

> "His father died when he was very young in the Afghan civil war after the Soviet occupation and his family was forced to flee to a refugee camp in Pakistan. Mr Jawad was kicked out of his home by his stepfather when he was approximately 13. The government asserts that Mr Jawad has a seventh or eighth grade education [age 12-14]. The defense believes this education was received at a religious madrassa at a refugee camp in… Pakistan, where the curriculum largely consisted of oral recitation of the Koran. At the time he was captured, Mr Jawad was functionally illiterate."[201]

The CSRT was told in 2004 that Mohammed Jawad had been approached in a mosque in Pakistan in 2002 by a man who offered him a job clearing landmines in Afghanistan. He was allegedly taken to a mountain area where they stayed in a camp for some days. According to

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[198] Message to the Senate transmitting Optional Protocols to the Convention on the Rights of the Child with documentation, 25 July 2000.

[199] The USA ratified the Optional Protocol on 23 December 2002. On ratifying the Optional Protocol, the USA lodged the "understanding" that it was assuming "no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol". As already noted, regardless of this understanding, by signing the Convention the USA has legally obliged itself not to do anything to defeat the object and purpose of the treaty.

[200] UN Doc.: CRC/C/OPAC/USA/1, 22 June 2007. Committee of the Rights of the Child, re the Optional Protocol on the involvement of children in armed conflict. Initial report of USA, Paragraph 34.

[201] "During his captivity, Mr Jawad has developed some limited ability to read and write basic Pashto, but not to the point where he can read age-appropriate books which may be available from the prison library. In his cell, Mr Jawad has no recreation or diversion other than attempting to read the Koran, attempting to communicate with other nearby prisoners through the walls, and praying five times a day." *USA v. Jawad*. Defense application for mental examination pursuant to RMC 706, 23 May 2008.

the CSRT record, Mohammed Jawad said that he was given "two small pills each day, which made me sleepy and forget about my family", and he was also given "injections in the leg" which caused him to hallucinate "about many things, like my nose coming off and giving my ear to people". He denied throwing the grenade in the incident in Kabul. He added that before he was detained that day, he had been given "orange chewing gum, chocolate candy and a tablet". Afterwards, he said that "I didn't know what I did. I was out of my mind, I couldn't think clearly".

At Mohammed Jawad's ARB in 2005, he was accused of having received weapons training over a two-day period in Khost Province of Afghanistan in December 2002: "Upon arrival, the detainee was given one or two injections in his right leg that caused confusion and incoherence.[202] Additionally, on the day of the mission, the detainee was given two oral pills that caused the same effect [as the injections]." The allegations continued: "The detainee trained with *Hezb-e-Islami Gulbuddin*" and "on 17 December 2002, two people ordered the detainee and a second individual to position themselves near the mosque and to wait for an American target to pass. As an American vehicle passed, the second individual ordered the detainee to throw a grenade into the vehicle".

Jawad Mohammed maintained that he had not been the person who had thrown the grenade. He said that he was present at the scene of the attack, and that an individual had given him a "bomb", but that he had not thrown it.

Contemporaneous media reports of the grenade attack referred to two people being arrested at the scene. Amnesty International does not know the identity of the other person, reported to have been a 35-year-old man.[203] As noted above, at his CSRT in 2004, Mohammed Jawad had asked to have the "people" who had been captured with him presented as witnesses, but the CSRT denied the request. There is an inconsistency in the US records on the case. In his 2004 CSRT records, the authorities claim that Mohammed Jawad was captured "while fleeing from the scene of the grenade attack". His 2005 ARB records, in contrast, stated that Jawad was "caught by a local police officer at the site of the explosion", while a "second individual fled the scene". In his statements to the ARB, Jawad alleged that he had run away from the scene and was caught by the police near the river.

Hezb-e-Islami Gulbuddin (HIG) is a radical Islamist group founded in 1977 by a former Prime Minister of Afghanistan, Gulbuddin Hekmatyar. It is described by the US government as having been "one of the major mujahedin groups in the jihad against the Soviet occupation of Afghanistan",[204] and was supported by the CIA at that time, with Hekmatyar reportedly receiving "several hundred million dollars in aid from American taxpayers".[205] The Pakistan-

[202] At his ARB hearing in December 2005, he was asked whether he knew what the injections were. Jawad replied that he had "no idea", but that he had been told that it was routine for anyone who worked in mine-clearing to be injected with "this stuff". He said that after the injection, "my thinking was the other way, not right".

[203] See, for example, US soldiers, interpreter hurt in Kabul attack, CNN, 17 December 2002.

[204] Country Reports on terrorism 2005, US State Department, Office of the Coordinator for Counterterrorism, April 2006, page 240.

[205] Steve Coll, Ghost wars: The secret history of the CIA, Afghanistan and bin Laden, from the Soviet invasion to September 10, 2001, Penguin Books (2005), page 165. Coll cites the former CIA station

based anti-Soviet mujahedin commanders "took advantage of the refugee camps spreading around Peshawar and Quetta… Hekmatyar, especially, used the camps as a blend of civilian refuge, military encampment, and political operations center".[206] According to the US State Department, in the early 1990s Hekmatyar "ran several terrorist training camps in Afghanistan" and in 2004, "reiterated his commitment to fight US and Coalition forces" in the country.[207] In February 2003, the US government designated Gulbuddin Hekmatyar as a "Specially Designated Global Terrorist" pursuant to information indicating that he "has participated in and supported terrorist attacks committed by *al-Qa'ida* and the Taliban".[208]

In its most recent report on human rights in other countries, published in March 2008, the US State Department documents in its entry on Afghanistan that "there continued to be reports of the Taliban and insurgents using child soldiers". In Mohammed Jawad's case, however, the USA is not treating his alleged recruitment or use by *Hizb-e-Islami Gulbuddin* as a human rights violation which should be taken into account in its treatment of him.

The US government's treatment of Mohammed Jawad and its proposed trial of him by military commission flies in the face not only of its international obligations in relation to fair trials and juvenile justice, but also of its stated objectives and policies aimed at preventing the recruitment and use of children in armed conflict and promoting programs to assist the demobilization and rehabilitation of former child combatants. The US Government has told the UN Committee on the Rights of the Child that it "applies a definition of child ex-combatants in keeping with the Cape Town Principles of 1997, which cover any child associated with fighting forces in any capacity". Among other things, the Cape Town Principles define a child in this context as under 18 years old, and emphasize a rehabilitative approach to the child at the same time as requiring that "those persons responsible for illegally recruiting children should be brought to justice".

The Special Court for Sierra Leone (SCSL), a tribunal established to try crimes committed in the armed conflict in that country, had jurisdiction to prosecute children over 15 years of age. Article 7 of the Statute of the SCSL states: "Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child… In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies." The USA's treatment of Mohammed Jawad has entirely disregarded such principles.

chief in Islamabad (1986-1989) Milton Bearden, as justifying the agency's support for Hekmatyar: "The mission was to kill Soviets, Bearden kept saying. Gulbuddin Hekmatyar killed Soviets".

[206] *Ibid.*, page 118.

[207] US State Department, at http://www.state.gov/documents/organization/45323.pdf.

[208] Designation of Gulbuddin Hekmatyar as a terrorist, State Department press statement, 19 February 2003.

Article 1 of the Statute, which covered the competence of the court, stated that the Court could "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed in the conflict. In November 2002, the month before Mohammed Jawad was taken into US custody, David Crane, the prosecutor for the SCSL announced that he would not prosecute children; "Children have suffered enough as both victims and perpetrators", he said, reflecting the commonly held view that prevention and rehabilitation must be leading factors in the state's response to the recruitment and use of children in armed conflict.[209]

UNICEF, the United Nations agency mandated by the UN General Assembly to advocate for the protection of children's rights, has said that children alleged to have committed crimes in the context of armed conflict "should be considered primarily as victims of adults who have broken international law by recruiting and using children in the first place". "These individuals", UNICEF continued, "must be provided with assistance for their social reintegration. If in contact with a justice system, persons under 18 at the time of the alleged offense must be treated in accordance with international juvenile justice standards which provide them with special protection." [211] The MCA provides no such protective standards.

In its assessment of the USA's compliance with the Optional Protocol, the UN Committee on the Rights of the Child said in June 2008 that it was "seriously concerned that children who were recruited or used in armed conflict, rather than being considered primarily as victims, are classified as 'unlawful enemy combatants' and have been charged with war crimes and subject to prosecution by military tribunals, without due account of their status as children". The Committee called on the USA to "conduct investigations of accusations against children in a prompt and impartial manner, in

> "The use of children as combatants is one of the worst aspects of contemporary warfare… Allowing their exploitation in armed conflicts does irrevocable harm to them…, often irreparably harming the child's opportunity for a healthy, productive, normal life. Therefore, we have a special responsibility to make extra efforts to protect the children caught in the destructive cauldron of armed conflicts.
>
> On December 23, 2002, the United States formally ratified the two Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict. The United States has been and wants to continue to support the important efforts to end the use of child soldiers contrary to international law. We want to support efforts to end the exploitation of girls and boys in armed conflict…
>
> And clearly we have a moral responsibility, a moral imperative to leave no child behind. We cannot ignore the damage to children in armed conflicts, wherever that devastation occurs."
>
> US representative, statement to the UN Security Council, 2003[210]

[209] Special Court prosecutor says he will not prosecute children. Special Court for Sierra Leone, Public Affairs Office, press release 2 November 2002, http://www.sc-sl.org/Press/pressrelease-110202.pdf.
[210] Richard S. Williamson, US Alternate Representative to the United Nations, Statement in the UN Security Council, New York, 14 January 2003. Three weeks after this speech, the US authorities transported Mohammed Jawad to Guantánamo.
[211] Statement by UNICEF concerning the case of Omar Khadr, 2 February 2008, http://www.unicef.org/media/media_42741.html.

accordance with minimum fair trial standards. The conduct of criminal proceedings against children within the military justice system should be avoided".[212]

Amnesty International recognizes and supports the need of victims and society for justice and accountability. While the organization considers that in regard to the involvement of children in armed conflict there should be a particular focus on bringing to account those who recruit and use the children, in some cases, the children themselves must be held accountable for their actions. Nevertheless, any criminal action against them must respect international fair trial standards, including juvenile justice standards. Trials under the MCA do not comply with such principles, and moreover threaten to whitewash the unlawful treatment of those individuals, including Mohammed Jawad, who have been designated as "enemy combatants" by the USA.

3.2. No juvenile justice provisions, absence of transparency

From the outset, the USA should have treated Mohammed Jawad primarily as a child whose conduct may have been driven by the unlawful conduct of adults. Its treatment of him should have focused on his best interests and on maximizing his potential for successful social reintegration. Accountability for any criminal acts he may have committed can be a part of that equation, but any process to achieve this must not allow pursuit of retributive punishment to override the rehabilitative priority.

"Whenever appropriate and desirable" governments should seek measures for dealing with children who have infringed the criminal law "without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected".[213] This principle is also reflected in the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (the Paris Principles) which 66 governments endorsed in 2007. The Principles state that "wherever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice".

Under juvenile justice standards, if a trial is deemed to be the appropriate way forward, it must be conducted "by a competent, independent and impartial authority or judicial body in a fair hearing according to law".[214] From the outset, cases involving children must be "handled expeditiously, without any unnecessary delay", and "brought as speedily as possible for adjudication".[215] Under article 14 of the ICCPR, "the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation". Strictly punitive approaches are "not appropriate" and even in cases of "severe offences" committed by children, any consideration of "just desert and retributive sanctions…should always be outweighed by the interest of safeguarding the well-being and the future of the young person".[216] Every step of the way, the USA's treatment of Mohammed Jawad has failed to comply with such principles.

[212] UN Doc.: CRC/C/OPAC/USA/CO/1, 6 June 2008, Committee on the Rights of the Child. Concluding observations: United States of America.
[213] Article 40.3(b), UN Convention on the Rights of the Child.
[214] Article 40.2(b)(iii), Convention on the Rights of the Child (CRC).
[215] UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 20; and article 10.2(b), International Covenant on Civil and Political Rights.
[216] *Ibid*. Beijing Rules, Rule 17.1 (b), commentary.

The MCA's failure to expressly exempt children from the jurisdiction of the military commissions contradicts Principle 7 of the draft UN Principles governing the administration of justice through military tribunals, which states that:

> "Strict respect for the guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons. In no case, therefore, should minors be placed under the jurisdiction of military courts". [217]

The UN Special Rapporteur on the administration of justice through military tribunals noted that the Convention on the Rights of the Child lists specific safeguards applicable to minors under 18, and that if judicial proceedings were pursued in any particular case, civilian courts would be "well placed to take into account all the requirements of the proper administration of justice in such circumstances, in keeping with the purposes of the Convention."

Under the MCA, the military judge and other members of the military commission are not required to have any skills or training in relation to this issue. Neither does the legislation expressly allow the prosecutor to exercise discretion in the case of someone who was a child at the time of the alleged offences. Under international standards, "prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures" and "shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary".[218]

The prosecutor on Jawad's case was assigned to it in June 2007, four months before Jawad received access to counsel for the first time after nearly five years in custody. On 4 June 2007, the government suffered a setback when the military judge overseeing Omar Khadr's case dismissed charges against him because (as with all the detainees) there was no record of his designation as an "unlawful enemy combatant" (the prerequisite for trial under the MCA), only his CSRT confirmation as an "enemy combatant". The administration appealed to the Court of Military Commission Review that it had newly set up, and on 24 September 2007 the review court overturned the military judge's ruling. Charges were sworn against Mohammed Jawad two weeks later, on 9 October 2007.

The former Chief Prosecutor of the military commissions, Colonel Morris Davis, resigned in October 2007 after concluding that "full, fair and open trials were not possible under the current system" which "had become deeply politicized". Among other things, he has alleged that the legal advisor to the military commission's Convening Authority, Brigadier General Thomas Hartmann, had told Davis that he should charge cases that were "sexy" enough to attract public interest or ones in which the defendant had "blood on his hands".[219] Brig. Gen. Hartmann is alleged to have specifically favoured the case against Mohammed Jawad.

[217] Report of Special Rapporteur on administration of justice through military tribunals, Sub-Commission on the Protection and Promotion of Human Rights, UN Doc. E/CN.4/2006/58, 13 January 2006.
[218] UN Guidelines on the Role of Prosecutors, paragraph 19.
[219] *USA v. Hamdan*, D-026 Ruling on motion to dismiss (unlawful influence), 9 May 2008.

The role of Brigadier General Hartmann in the military commission process has been the cause of much concern on the part of the military lawyers representing the detainees.[220] In the case of Salim Hamdan, the military judge granted a defence motion to have Hartmann removed from the case. The military judge was "not persuaded" that the legal advisor "retains the required independence from the prosecution function to provide fair and objective advice to the Convening Authority". The judge was particularly "troubled" that Brigadier General Hartmann had told the prosecutors "that certain types of cases would be tried, and that others would not be tried, because of political factors such as whether they would capture the imagination of the American people, be sexy, or involve blood on the hands of the accused". The judge was also concerned by the apparent attempt by the legal advisor to direct the Chief Prosecutor to use evidence that the prosecutor considered had been obtained as a result of torture or coercion, and by the legal advisor's public statements "in which he aligned himself with the prosecution, took credit for their success and indicated that he is their leader".[221]

The failure of the legal advisor, and hence the Convening Authority, to address the juvenile justice issue is also a cause for concern in this case. The US government was asked by the UN Committee on the Rights of the Child in mid-2008 how the military commissions would take into account the rights of children. The government chose to answer this by restating its public theme that "trials will be fair", and adding that "it is not unprecedented for juveniles to face the possibility of a war crimes trial". It also asserted that "a juvenile's age and upbringing may be considered by a Military Commission, the Convening Authority, and the Court of Military Commission Review".

Despite this, when approving the charges against Mohammed Jawad for referral on for trial by military commission, the Convening Authority, Susan Crawford, was apparently not even aware that Jawad was a child at the time he was taken into custody (or that he had attempted suicide, or that he had been subjected to the frequent flyer program).[222] At the military commission hearing in Guantánamo on 19 June, Mohammad Jawad's lawyer asked Lieutenant Colonel William Britt, who was acting Chief Prosecutor at the time the charges were sworn against Jawad in October 2007: "You did not believe his age was worthy of bringing to the attention of the Convening Authority?" Lt. Col. William Britt responded, "No, I didn't." At the same hearing, Brig. Gen. Hartmann testified that his pre-trial advice would not have differed whether Mohammed Jawad was 16, 17 or 18 years old at the time of his capture. Asked whether he simply did not accept the argument that the military commission should not have jurisdiction over detainees who were children at the time of their arrest, Brig. Gen. Hartmann suggested that this question was irrelevant in this case because Jawad was at least 16 years old when he was arrested in Afghanistan.

[220] The position of Legal Advisor to the Convening Authority is not mentioned in the MCA, but was created by the Secretary of Defense under his statutory authority to implement military commissions convened by the President under the Act. The legal advisor, appointed by the Secretary of Defense, is responsible for "providing legal advice to the Convening Authority regarding referral of charges, questions that arise during trial and other legal matters concerning military commissions."

[221] *USA v. Hamdan*, D-026 Ruling on motion to dismiss (unlawful influence), 9 May 2008.

[222] Susan Crawford, formerly a judge on the Court of Appeals for the Armed Forces was appointed as Convening Authority in February 2007 by the Secretary of Defense. She reports to the Deputy Secretary of Defense.

The legal advice forwarded to Susan Crawford on 28 January 2008 on Mohammad Jawad's case by Brigadier General Hartmann made no reference to the fact that Jawad was under 18 years old at the time of his alleged crime and his arrest. It simply detailed the legal advisor's view that the charges were "warranted by the evidence" and that the military commission had jurisdiction over Jawad, as well as his recommendation that the case be referred for trial.[223] In a two-line note two days later, the Convening Authority approved "all recommendations" of the legal advisor.

Amnesty International is concerned by the allegations of unlawful influence that have been raised by the military defence lawyers, and the barebones advice that the legal advisor apparently provided to the convening authority on Jawad's case. The organization considers that one of the fundamental flaws of the military commission system is its general lack of transparency and independence from the executive. The US administration has overarching influence over the system, and the same administration has shown itself throughout the "war on terror" to be willing to exploit and manipulate individual detainee cases in order to seek to avoid independent judicial scrutiny of its actions and bolster non-judicial alternatives of its choosing such as CSRTs, ARBs, or military commissions (as formulated under the Military Order).[224]

It is bad enough that Mohammed Jawad had no access to legal counsel throughout his interrogations, including when the authorities were apparently seeking to obtain information for use in a possible prosecution. If his case was touched by a broader strategy of an administration exploiting individual cases to shore up its military commission system, the affront to human rights and criminal justice principles is even deeper, and the need for transparency in the prosecutorial process becomes even more crucial. This military commission system conducted in an offshore prison camp will not provide such transparency.

4. The right to remedy

Under Article 2.3 of the International Covenant on Civil and Political Rights, a state must ensure that any person whose rights under the treaty are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". In an authoritative interpretation, the treaty monitoring body the UN Human Rights Committee has said:

> "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party

[223] *USA v. Jawad*, Legal advisor's pretrial advice, 28 January 2008. He recommended that the case be referred on as non-capital, even though the charges did not carry the option of the death penalty under the MCA.

[224] See, for example, section 4 of USA: No substitute for habeas corpus: six years without judicial review in Guantánamo, November 2007 http://www.amnesty.org/en/report/info/AMR51/163/2007.

must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." [225]

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus by the UN General Assembly in December 2005, spell out the obligations of remedy in some detail.[226] States are obliged, among other things, to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law (Principle 3(b)). They are also required to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice…" and to "provide effective remedies to victims, including reparation" (Principle 3(c and d)). These reparations should take the form of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition" (Principle 18). The Basic Principles and Guidelines must be applied an interpreted "without any discrimination of any kind or on any ground, without exception" (Principle 25).

Mohammed Jawad's right to remedy remains unmet. Not only that, his human rights continue to be violated by the USA.

5. Conclusion: Justice needed, not military commissions

Mohammed Jawad is facing trial by military commission during the 60th anniversary year of the adoption of the Universal Declaration of Human Rights. The introduction to the US State Department's latest human rights report, published on 11 March 2008, begins: "Respect for the human rights and fundamental freedoms reflected in the Universal Declaration of Human Rights, is, as President Bush has said, the foundation of freedom, justice and peace in the world." In a legal brief filed with the military judge in Mohammed Jawad's case a few weeks later, however, the US government cited not the Universal Declaration, but "a 142-year-old opinion" of the US Attorney General "which remains binding on the Executive Branch". That opinion, from 1865, states that a: "bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the law of war". [227]

The prosecution's brief continued: "Given that unlawful belligerents historically could be summarily punished – and even executed – under the law of war, it follows *a fortiori* that they may be tried by military commission". The government said exactly the same thing in the case of Omar Khadr, taken into custody at the age of 15 and also facing military commission trial in Guantánamo. Indeed, the US government has repeatedly appealed to history long past and ignored modern day human rights principles in seeking to justify its resort to military commissions, just as it has bypassed human rights law in its "enemy combatant" detention regime. It is as if the Universal Declaration of Human Rights, and the body of international human rights law, including juvenile justice standards, that have ensued, never happened.

[225] General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 14.
[226] GA RES. 60/147 16 December 2005.
[227] *USA v. Jawad*, Government's response to the defense's motion to dismiss for failure to state an offense and for lack of subject matter jurisdiction under RMC 907, 3 June 2008.

In an email sent to the chief legal advisor to the Pentagon's Criminal Investigation Task Force on 28 October 2002, on the subject of the meeting that had taken place at the beginning of that month on "counter-resistance" interrogation strategy, the CITF's Deputy Commander advised that "someone needs to be considering how history will look back at this", given the harsh techniques that had been discussed.[228] Despite such concerns, the then Secretary of Defense, Donald Rumsfeld, authorized the techniques in December 2002, and again in April 2003. The legal advice that preceded his initial authorization, and the Pentagon's Working Group's recommendations that informed his second approval, shows how the USA's reluctance to commit itself to international law has been exploited by the US administration in the "war on terror". "No international body of law directly applies" to the Guantánamo detainees, the October 2002 legal advice asserted, adding that the conditions attached to the USA's ratification of the CAT and the ICCPR, and its failure to ratify the American Convention on Human Rights or the Rome Statute of the International Criminal Court, left the government free to authorize aggressive interrogation techniques against "enemy combatants". The Universal Declaration of Human Rights, it noted, was simply not "enforceable".

The Standard Operating Procedure for the intelligence authorities at Guantánamo at the time of Mohamed Jawad's transfer to the base in February 2003 opened with the following introductory line: "History is being made with the Interrogations Operations taking place at Guantánamo Bay". The SOP stated that personnel at the base were being asked "to radically create new methods and methodologies that are needed to complete this mission in defense of our nation… There is much you will be asked to do which is not in any of your prior training… You must be aware that your activities and actions are often directed by or reported to the highest levels of government."[229] Five years later, asked about the USA's detention policies in the "war on terror", President Bush suggested that "history will judge the decisions made during this period of time as necessary decisions".[230] Amnesty International doubts that history will excuse the decision to subject a child to indefinite military detention, to denial of access to legal counsel for more than four years, to programs of isolation and sleep deprivation, and now to a trial by military commission.

The US government should reflect on its failure to respect international law over the past seven years. In looking to the future, it should fully commit itself to its international obligations, and ensure a full accounting of all human rights violations, including those that constitute crimes under international law, and ensure redress for those affected.

The right of Mohammed Jawad to be treated with dignity and to be free from torture and other cruel, inhuman or degrading treatment, and provided with access to legal counsel and the courts, taking into full account his age, have been systematically violated since his arrest in late 2002. All of his allegations of torture and other ill-treatment should be investigated. Anyone found responsible for authorizing, condoning or participating in any human rights violations should be brought to justice. If the USA has evidence of criminal wrongdoing against Mohammed Jawad (not including information obtained under torture or other cruel,

[228] Email from Mark Fallon to Sam McCahon, re: counter resistance strategy meeting minutes, 28 October 2002.
[229] Standard Operating Procedure for the JTF GTMO Joint Intelligence Group (JIG), 21 January 2003.
[230] Interview of the President by Matt Frei, BBC World News America, 14 February 2008, http://www.whitehouse.gov/news/releases/2008/02/20080214-12.html.

inhuman or degrading treatment or punishment), it should charge him for trial in an ordinary civilian court, applying international standards for fair trial, and able to take full account of his age at the time of his alleged offence. If not it should release him, with full protections against any further absues. In any event, it should ensure he has access to redress for any human rights violations that have been committed against him, including unlawful detention, torture or other ill-treatment. He should have full and continuing access to independent medical care.

6. Recommendations

Amnesty International urges the US authorities to:

- release Mohammed Jawad if he is not to be brought to full and fair trial in accordance with international standards. Military commissions do not meet this requirement;
- ensure that all Mohammed Jawad's allegations of torture and other ill-treatment are fully and impartially investigated, and that anyone against whom there is evidence of involvement in any violations under international law is brought to justice;
- ensure that Mohammed Jawad has access to independent medical care;
- ensure that Mohammed Jawad is provided full and meaningful access to remedy for any violations of his human rights under international law to which he has been subjected;
- ensure that no information obtained under unlawful methods, including torture or other cruel, inhuman or degrading treatment, as defined under international law, is admitted into evidence in any proceeding, except in proceedings against any alleged perpetrator as evidence that the abuse occurred;
- provide Mohammed Jawad's defence counsel with full interrogation records relating to his client, and records about the use of isolation and the frequent flyer program at Guantánamo;
- abandon trials by military commission and either promptly charge any Guantánamo detainees with recognizable criminal offences and bring them to trial in accordance with international fair trial standards within a reasonable time, or release them with full protections against further abuses;
- close the Guantánamo detention facility and ensure that all US detentions fully comply with international law and standards.

7. Appendix 1: Chronology & context of interrogations

Date	Likely interrogation focus	Interrogating agency
On 17 December 2002, Mohammed Jawad, aged 16 or 17, is arrested by Afghan police in Kabul and interrogated for several hours, allegedly under torture. He is transferred to US military custody in Kabul that night and taken to the detention facility at Bagram air base on 18 February 2002.		
17 December 2002	Unknown	US Marine Corps. Brief interrogation at US base, Kabul
18 December 2002	Unknown	US Marine Corps. Interrogation for 4 hours at Kabul base on the morning of 18 December.
Transfer to Bagram		
18 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 40 minutes.
19 December 2002	Unknown	Unknown. Interrogation lasts 2 hours 20 minutes.
20 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 20 minutes.
21 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 30 minutes.
22 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 15 minutes.
24 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 10 minutes.
26 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 30 minutes.
27 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 15 minutes.
28 December 2002	Unknown	Unknown. Interrogation lasts 1 hour 20 minutes.
4 January 2003	Unknown	Unknown. Interrogation lasts 10 minutes.
7 January 2003	Unknown	Unknown. Interrogation lasts 1 hour 15 minutes.
On 6 February 2003, Mohammed Jawad arrives in Guantánamo from Bagram air base, Afghanistan. He is put in 30-day isolation, apparently a standard procedure designed to "enhance and exploit the disorientation and disorganization felt by a newly arrived detainee in the interrogation process"		
7 February 2003	Unknown	Federal Bureau of Investigation (FBI)
10 February 2003	Intelligence	Joint Intelligence Group Interrogation Control Element (JIG ICE)
11 February 2003	Intelligence	JIG ICE
19 February 2003	Intelligence	JIG ICE
8 March 2003	Mohammed Jawad comes out of 30-day isolation	
9 April 2003	Unknown	Unknown
3 July 2003	First detainees made eligible for trial under November 2001 Military Order	
21 July 2003	Intelligence	JIG ICE
3 September 2003	Intelligence	JIG ICE
11 September 2003	Intelligence	JIG ICE
17 September 2003	Mohammed Jawad placed in 30-day isolation	
26 September 2003	Intelligence	JIG ICE

1 October 2003	Prosecutorial	Criminal Investigative Task Force (CITF)
16 October 2003	Mohammed Jawad comes out of 30-day isolation	
29 October 2003	Unknown	Unknown
1 November 2003	Prosecutorial	CITF
3 December 2003	Prosecutorial	CITF
5 December 2003	Prosecutorial	CITF
25 December 2003	Mohammed Jawad apparently attempts suicide in his cell	
6 January 2004	Intelligence	JIG ICE
6 February 2004 – Mohammed Jawad has been in Guantánamo for one year		
"early 2004"	Intelligence	JIG ICE
10 February 2004	Intelligence	JIG ICE
24 February 2004	First detainees charged for commission trial under 2001 Military Order	
29 March 2004	Prosecutorial	CITF
26 April 2004	Prosecutorial	CITF
7–20 May 2004	Mohammed Jawad put in 'frequent flyer program', with 112 cell moves over 14 days, on average every 2 hours and 50 minutes	
23–25 May 2004	Mohammed Jawad put into isolation	
26 May 2004	Mohammed Jawad moved into newly opened Camp 5	
29 June 2004	First referrals for trial by military commission of charged detainees	
18 August 2004	Unknown	Unknown
24-27 August 2004	First military commission hearings (four detainees)	
27 August 2004	Prosecutorial	CITF
4 November 2004	Mohammed Jawad confirmed as an 'enemy combatant' by Combatant Status Review Tribunal, following hearing in late October 2004.	
8 November 2004	Prosecutorial	CITF
8 November 2004	US District Court judge rules that military commission system is unlawful	
6 February 2005 – Mohammed Jawad has been in Guantánamo for two years		
15 July 2005	US Court of Appeals reverses District Court ruling, finding that military commission system is lawful	
15 July 2005	Prosecutorial	CITF
18 July 2005	Prosecutorial	CITF
19 July 2005	Prosecutorial	CITF
20 July 2005	Prosecutorial	CITF
21 July 2005	Prosecutorial	CITF
22 July 2005	Prosecutorial	CITF
25 July 2005	Prosecutorial	CITF
26 July 2005	Prosecutorial	CITF
28 July 2005	Prosecutorial	CITF
29 July 2005	Prosecutorial	CITF
1 August 2005	Prosecutorial	CITF
2 August 2005	Prosecutorial	CITF
15 August 2005	Prosecutorial	CITF
20 September 2005	Prosecutorial	CITF

7 November 2005	US Supreme Court agrees to consider constitutionality of military commission process	
30 December 2005	Detainee Treatment Act signed into law, containing *habeas corpus* stripping provisions for detainees held in Guantánamo, and providing for narrow judicial review by DC Court of Appeals of CSRT decisions that detainees are "properly detained" as "enemy combatants" and final decisions of military commissions. Also prohibits the cruel, inhuman or degrading treatment, as defined under US law, of detainees held abroad.	
6 February 2006 – Mohammed Jawad has been in Guantánamo for three years		
28 May 2006	Unknown	Reported questioning by Afghan government delegation
29 June 2006	In *Hamdan v. Rumsfeld*, US Supreme Court rules that the military commission process under the Military Order is unlawful, and that Article 3 common to the Four Geneva Conventions applies.	
17 October 2006	Military Commissions Act signed into law	
6 February 2007 – Mohammed Jawad has been in Guantánamo for four years		
9 October 2007	Mohammed Jawad charged under MCA. He is given access to a lawyer for the first time since he was taken into custody nearly five years earlier	
30 January 2008	Charges referred on for trial by military commission	
6 February 2008 – Mohammed Jawad has been in Guantánamo for five years		

8. Appendix 2: Detainees subjected to 'frequent flyer program'

The following table lists those detainees who are reported to have been subjected to the frequent flyer program. The case of Salim Ahmed Hamdan, who was subjected to the apparently similar "Operation Sandman" from 10 June 2003 to 31 July 2003 is not included (Amnesty International does not currently have the names of others subjected to that program). Except for the cases of Mohammed el Gharani, Omar Khadr, Sami al-Hajj and Mehdi Ghezali, the information is based on records obtained by Mohammed Jawad's lawyer as part of his defence of Jawad. The records that have been provided to him are limited, and none go beyond the timing of his own client's subjection to the program: "It would be quite a coincidence", he has suggested in a recent brief filed with the military commission, "if Mr Jawad was the very last detainee to be subjected to the frequent flyer program", although "the defense hope, for the sake of the other detainees, that he was". The lawyer continues to seek complete records of the use of the frequent flyer program. This table should be considered work-in-progress.

	Detainee	**Country of origin**	**Reported dates in frequent flyer program**	**Notes**
1.	Airat Vakhitov	Russia	Unknown	Released
2.	Sami al-Hajj	Sudan	Unknown	Released
3.	Maher Rafat al-Quwari	Stateless Palestinian	July 2003	Still in Guantánamo
4.	Mohammed el Gharani	Chad	Sometime between July and September 2003	Still in Guantánamo. A child when taken into US custody
5.	Muieen Abd Al Fusal Abdu Al Sattar	United Arab Emirates	November 2003	Still in Guantánamo
6.	Ibrahim bin Shakaran	Morocco	November 2003	Released
7.	Bar Far Huddine	Afghanistan	November 2003	Released
8.	Mustafa Abdul Qawi Abdu Aziz al Shamyri	Yemen	November 2003	Still in Guantánamo
9.	Hassan Mujamma Rabai Said	Algeria	November 2003	Still in Guantánamo
10.	Ghassan Abdullah al-Sharbi	Saudi Arabia	7 November 2003 to 3 February 2004	Still in Guantánamo. Charged for trial by military commission
11.	Mohammed Rajab Sadiq Abu Ghanim	Yemen	7 November 2003 – 9 May 2004	Still in Guantánamo

12.	Hafez Qari Mohamed Saad Iqbal Madni	Pakistan	22 December 2003 – 8 May 2004	Released
13.	Omar Mohammed Al al Rammah	Yemen	December 2003	Still in Guantánamo
14.	Dawd Ghul	Afghanistan	January 2004	Still in Guantánamo
15.	Mohammed Ahmed ali al Asadi	Yemen	January 2004	Released
16.	Omar Khadr	Canada	March 2004	Still in Guantánamo. Charged for trial by military commission. A child when taken into US custody
17.	Bashir Ahmad	Pakistan	April 2004	Released
18.	Omar Mohammed Ali al Rammah	Yemen	April 2004	Still in Guantánamo
19.	Abdul al Saleh	Yemen	April 2004	Still in Guantánamo
20.	Mehdi Ghezali	Sweden	April 2004	Released
21.	Mohammed Jawad	Afghanistan	7 May 2004 – 20 May 2004	Still in Guantánamo. Charged for trial by military commission. A child when taken into US custody