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USA (Guantánamo): Military prosecutor in child ‘enemy combatant’ case resigns, citing ‘ethical qualms’

26 September 2008

AI Index: AMR 51/107/2008

The US military prosecutor in the case against Guantánamo detainee Mohammed Jawad has asked to resign from the office of military commissions. Lieutenant Colonel Darrel J. Vandeveld has cited “ethical qualms” and his concern over the USA’s treatment of this young Afghan national. Amnesty International welcomes the stand the prosecutor has taken.

Mohammed Jawad, who grew up in Pakistan, was 16 or 17 years old when he was taken into custody in December 2002 in Kabul following a grenade attack on a US military vehicle that injured two US soldiers and an Afghan interpreter. After being held for a few hours in Afghan custody and allegedly tortured, he was handed over to the US military and held in the air base in Bagram where he has said he was subjected to hooding, isolation, sleep deprivation, stress positions, forced standing and physical assaults. In early February 2003, he was transferred to the US naval base in Guantánamo Bay in Cuba, where he has been held ever since. In addition to enduring repeated periods of isolation in Guantánamo, he was subjected to prolonged sleep disruption and deprivation in the form of the “frequent flyer program”, moved from cell to cell, day and night, over a 14-day period in May 2004. He had no access to legal counsel for almost five years in US custody, and was subjected to repeated interrogations during this time.

Last month, Amnesty International issued a comprehensive report on Mohammed Jawad’s case, tracing the development and authorization of coercive techniques such as the frequent flyer program and isolation, and the lack of accountability for such human rights violations. The report also described how the pattern of Jawad’s interrogations in Guantánamo indicates an apparent attempt to obtain self-incriminating information from this unrepresented youth to use at his future military commission trial, possibly in the knowledge that his “confession” obtained two years earlier in Afghan police custody had been given under severe duress.¹

The report noted how Lt. Col. Vandeveld had recently revealed that he had initially “derided” Mohammed Jawad for claiming that he had been subjected to the frequent flyer program, “in the good faith but mistaken belief that the claims were unfounded”. After he learned that the claim was true, he wrote in a prosecution brief that Jawad’s treatment may have amounted to “unjustifiable coercion that resulted in inadmissible statements or other adverse consequences”. That brief was withdrawn and replaced within weeks by another which Amnesty International believes was either written or heavily influenced by Justice Department lawyers.² The new brief wholly rejected the claim that Jawad had been subjected to any form of torture or other cruel, inhuman or degrading treatment, even though the government does not dispute that he was put in the frequent flyer program. In a Declaration, dated 22 September 2008, filed with the military judge in the Jawad case, Lt. Col. Vandeveld states:

“My view of the case has evolved over time. I now accept that Jawad was under the age of eighteen when apprehended, I suspect that he was duped by Hezb-e Islami Gulbuddin³ into joining the organization, and it seems plausible to me that Jawad may have been drugged before the alleged attack on 17 December 2002. I base these judgments on the evidence collected at the time, and not because of any sympathy for Mr Jawad himself, whom I do not know and have only seen during Commission proceedings. Based on my view of the case, I have advocated a pretrial agreement under which Mr Jawad would serve some relatively brief additional period in custody while he receives rehabilitation services and skills that will allow him to reintegrate

into either Afghan or Pakistani society. One of my motivations in seeking a reasonable resolution of the case is that, as a juvenile at the time of his capture, Jawad should have been segregated from the adult detainees, and some serious attempt made to rehabilitate him. I am bothered by the fact that this was not done.”

Lt. Col. Vandeveld’s Declaration states that when he found out that Jawad had indeed been subjected to the frequent flyer program, he sought an investigation. Amnesty International does not know whether any such investigation subsequently took place. His Declaration also states that his “ethical qualms about continuing to serve as a prosecutor relate primarily to the procedures for affording defense counsel discovery”, that is, the right of an accused and his lawyers access to all potentially relevant evidence in the possession of the government, a right that is ordinarily of fundamental importance to the fairness of any trial. He asserts that evidence has not been made available to the defence, including “potentially exculpatory evidence”, and that “certain agencies, offices, individuals, or procedures” have prevented disclosure. He states: “I am highly concerned, to the point that I believe I can no longer serve as a prosecutor at the Commissions, about the slipshod, uncertain ‘procedure’ for affording defense counsel discovery.” He further states that “[D]iscovery in even the simplest of cases is incomplete or unreliable. To take the Jawad case as only one example..., I discovered just yesterday that something as basic as agents’ interrogation notes had been entered into the database, to which I do not have personal access, on or about 11 August 2008. These and other examples are too legion to list, are not only appalling, they deprive the accused of basic due process and subject the well-intentioned prosecutor to claims of ethical misconduct”.

Lt. Col. Vandeveld states that he had not come forward earlier out of a hope that he could “improve things from within” as well as a “justifiable concern of retaliation if I am seen as being too cooperative with the defense”. He states that “other officers who have displeased the powers that be have been subject to treatment that in my opinion was retaliatory”.

The Chief Prosecutor has responded: “I don’t think [Lt. Col. Vandeveld] has any ethical qualms of any consequence”, characterizing him as “somebody who is disappointed that his superiors didn’t see the wisdom of his recommendation in the case”. Nevertheless, Lt. Col. Vandeveld’s “evolving view” expressed in his Declaration more closely approaches international human rights and fair trial standards than have the actions of his government to date. His promotion of the rehabilitative imperative in the case of a child detainee is consistent with international law, as is his call for an investigation into Jawad’s subjection to the frequent flyer program. In contrast, the US government’s detention and interrogation program, and its pursuit of military commission trials, including prosecution of individuals for what it terms “war crimes” allegedly committed by them as children, leave it entirely on the wrong side of international law.

An evolution in government thinking is long overdue. The military commissions should be abandoned, and any trials conducted under procedures respecting international human rights standards before independent and impartial courts, without recourse to the death penalty. No information obtained under torture or other ill-treatment should be admitted in any proceedings, except as evidence against alleged perpetrators as evidence the statements were obtained. There should be full investigations into all allegations of such treatment, with no impunity for human rights violations. The Guantánamo detention facility should be shut down, with just and lawful solutions found for each detainee. In the case of those who, like Mohammed Jawad, were children when taken into custody, the government must take this fact fully into account, as Lt. Col. Vandeveld himself has now suggested.

¹ USA: *From ill-treatment to unfair trial. The case of Mohammed Jawad, child ‘enemy combatant’*, August 2008, <http://www.amnesty.org/en/library/info/AMR51/091/2008/en>

² The Justice Department has provided a team of lawyers and paralegals to support the military prosecutors in the commission cases, as it noted in a fact sheet issued on 11 September 2008.

³ HIG is a radical Islamist group founded by a former Prime Minister of Afghanistan, who was designated as a “global terrorist” by the USA in 2003. See pages 55-57 of *From ill-treatment to unfair trial, op. cit.*