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USA: Moving the goalposts, prolonging the detention Mohammed Jawad no longer detained under AUMF, but still held

27 July 2009

AI Index: AMR 51/087/2009

In a legal brief filed in federal court on 24 July 2009, the US administration said that it will no longer treat Mohammed Jawad – an Afghan national who has been in US custody since December 2002 when he was 17 years old or younger – as “detainable under the Authorization for Use of Military Force (AUMF) as informed by the laws of war”. The administration of President Barack Obama has cited the AUMF, a broadly worded resolution passed by Congress following the attacks of 11 September 2001, as providing the authority for it to continue to detain those held at the US Naval Base at Guantánamo Bay in Cuba.¹

The administration’s move effectively concedes that it has lost the habeas corpus case brought on behalf of Mohammed Jawad challenging the lawfulness of his detention, and follows the berating of the government the previous week by the judge overseeing the case. On 16 July 2009, setting 5 August as the date for Mohammed Jawad’s habeas corpus hearing (more than a year after the US Supreme Court had ruled that the Guantánamo detainees were entitled to a “prompt” hearing to challenge their detention),² US District Court Judge Ellen Segal Huvelle referred to the government’s case against Mohammed Jawad as “riddled with holes”, “in shambles”, and “absolutely shocking”.³ She also ruled to suppress “as a product of torture” every statement made by Mohammed Jawad since his arrest in Kabul on 17 December 2002 following a grenade attack on a US military vehicle in which two US soldiers and their Afghan interpreter were injured. Without the statements, she said, the government’s case was “gutted” and the “US Government knows it is lousy”.

However, the US administration is seeking to have Judge Huvelle not order Mohammed Jawad’s immediate release, but to allow further delays. In its 24 July brief, the government said that although Mohammed Jawad was no longer being held under the AUMF, the US Attorney General had ordered the criminal investigation of the allegations against him in relation to the grenade attack to continue. The decision not to contest the habeas corpus case, it continued, “does not resolve whether the current eyewitness testimony and other evidence, or additional evidence that may be developed, would support a criminal prosecution”. In a separate statement issued on 24 July, the Department of Justice said that the Guantánamo Review Task Force set up under President Obama’s 22 January 2009 executive order for the closure within a year of the Guantánamo detention facility, “has previously reviewed Jawad’s case and referred him for possible prosecution. Department prosecutors have also reviewed evidence that was not previously made available to the court in which an eyewitness alleges that he saw Jawad throw a grenade that wounded two American service members”.

¹ See USA: Different label, same policy? Administration drops ‘enemy combatant’ label in Guantánamo litigation, but retains law of war framework for detentions, 16 March 2009, <http://www.amnesty.org/en/library/info/AMR51/038/2009/en>

² See USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, April 2009 <http://www.amnesty.org/en/library/info/AMR51/050/2009/en>

³ See USA: Sounding a note of urgency: Judge loses patience over Guantánamo case; detention and interrogation policy Task Forces delay reports, 21 July 2009, <http://www.amnesty.org/en/library/info/AMR51/084/2009/en>.

At the hearing in her court on 16 July, Judge Huelle had told the government “there is a problem with this case. You’ve known about it for years... This case is an outrage to me... I’m not going to sit up here and wait for you to come up with new evidence at this late hour. There is only one question here, did the guy throw a grenade or didn’t he throw a grenade. That’s the issue... It is not fair to keep dragging this out for no good reason... We’re not going to wait and wait until you come up with another piece of evidence and another piece of evidence. The time has come... this is a case that’s been screaming to everybody for years.”

Mohammed Jawad’s US habeas lawyer has suggested that the Justice Department’s brief was “another example of the government playing tricks and games with the federal courts”. During the Bush administration, detainee cases were manipulated to seek to avoid judicial scrutiny and adverse court rulings.⁴ Although the current administration asserts that its investigation of the allegations against Mohammed Jawad will be conducted “on an expedited basis”, it has not indicated any specific timeline. In a separate statement, the Department of Justice merely said that the determination of “whether evidence exists to support a criminal case in federal court” will be made “as soon as possible”. So far, the administration’s promise to resolve “as soon as practicable” every Guantánamo detainee’s case has resulted in resolution of only a dozen cases in the past six months.

The US authorities have now had over six and a half years to investigate the case against Mohammed Jawad. In those six and a half years, the detainee has been subjected to torture and other cruel, inhuman or degrading treatment, prolonged incommunicado detention, arbitrary detention, denial of access to legal counsel for over five years, and unfair trial proceedings under the Military Commissions Act of 2006. Remedy for these human rights violations has been absent.

The right to remedy for the Guantánamo detainees continues to come up against domestic US politics and, more generally, the USA’s continuing failure to apply international human rights law to these detentions. In Mohammed Jawad’s case, the government’s 24 July brief urges Judge Huelle to ensure that any relief she may grant “be fashioned in light of Congress’s recent enactment of restrictions and requirements in the Supplemental Appropriations Act”. Under this legislation, no funds provided by Congress may be used to transfer or release any Guantánamo detainee to his or another country unless the President submits to Congress, 15 days prior to such a transfer, certain classified information, including the terms of any agreement with the receiving country, and “an assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.”

In addition, the administration’s brief asserts that, in the case of the detainee’s transfer out of US custody, the government will require “a period of several weeks” to prepare Mohammed Jawad’s records for sharing with the receiving government and to engage with those authorities “on logistical and other issues related to transfer arrangements”. Meanwhile, in a move it claimed would be consistent with its determination that Mohammed Jawad was no longer being held under the AUMF, the administration was taking steps to “house” him at an “appropriate camp facility” at Guantánamo. He has previously been “housed” in the harsh and isolating conditions of Camp 5 and Camp 6.

While Amnesty International has welcomed President Obama’s commitment to ending the Guantánamo detentions, the organization remains concerned both at the slow pace by which detainee cases are being resolved – 95 percent of the detainees who were in Guantánamo at the time of the presidential inauguration are still there – and at the stance taken by the administration on the question of judicial remedy. A number of detainees whose custody has been ruled unlawful by federal judges have remained in indefinite detention months after their release was ordered by those judges.

⁴ 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/library/info/AMR51/163/2007/en>.

Amnesty International has urged the US authorities not to make decisions in relation to Guantánamo detainees based on which avenue is deemed most likely to achieve government “success”, but to act strictly according to adherence to principles of equality, due process and human rights.⁵ As it seeks to end the Guantánamo detentions, the new US administration faces the serious consequences of unlawful policies pursued under the Bush administration. Whatever measures the administration takes, however, detainees should not pay for the error of the USA’s ways. The human rights violations of the past cannot provide any valid excuse for further disregard of human rights in the present. If a Guantánamo detainee cannot be brought to fair trial – for whatever reason, and whoever the detainee is – he should be immediately released. This is true whether the government does not have enough evidence to bring a prosecution or whether the evidence the government does have has been rendered inadmissible in a fair trial by the way in which it was obtained.

Mohammed Jawad was, at most, 16 or 17 years old when he was taken into Afghan custody after the grenade incident in Kabul in December 2002. He may have been as young as 12, according to the Afghan authorities.⁶ In October 2008, a military commission judge in Guantánamo ruled that the US government could not use any statements made by Mohammed Jawad during his few hours in Afghan custody after his arrest, as he had been subjected to torture, including in the form of death threats against him and his family. The following month, the same military judge ruled that the government could not use any statements the teenager made in the US Forward Operating Base in Kabul where he was held immediately after being handed over to US custody, as any such statements were the product of the preceding torture in Afghan detention (Mohammed Jawad had also been subjected in US custody to handcuffing, blindfolding, hooding, to humiliating photography while naked, as well as classified interrogation techniques).⁷ In a statement signed in September 2008, Mohammed Jawad recalled:

“When I got to the place the Americans took me, I was very scared. During the interrogation, I was trembling and very cold. At one point, while the hood was still covering my face, they put a bottle of water in my hand and told me to hold on tight to it with both hands. I did not know that it was a water bottle at the time. In my mind, I thought that it was a bomb and might explode. I only saw that it was a water bottle later when they took off my hood. I was so scared by the experience at the Afghan police station and by my experience with the Americans at the place they took me after the police station, that I had nightmares for several days after I got to Bagram prison”.

While held in US custody in Bagram air base in Afghanistan, 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. He was then transferred to Guantánamo. According to a military lawyer who has worked on his case:

⁵ See USA: Trials in error: Third go at misconceived military commission experiment, 16 July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>.

⁶ Letter to US Embassy in Kabul, from Attorney General of Afghanistan, 31 May 2009. Filed in US District Court in habeas corpus proceedings.

⁷ The photographs remain classified, but were provided to the defence during military commission proceedings. According to a military lawyer involved in the case, Jawad was “forced to pose for a series of humiliating and degrading nude photographs... From the photographs it is clear that Mr Jawad was an adolescent boy. In my opinion, he appears to have been in his early teens, perhaps 13-16... After the nude photograph session, Mr Jawad was then re-blindfolded and re-handcuffed and taken to a makeshift interrogation room where he endured another multiple-hour interrogation session at the hands of two military interrogators... There is no question that Mr Jawad was utterly terrified throughout the entire interrogation”. Declaration of Katherine Doxakis, Lieutenant Commander, JAGC, US Navy, 19 June 2009.

“Mr Jawad arrived at Guantánamo on February 6, 2003 after an approximately 23 hour flight from Afghanistan. Standard procedures at the time were to deprive detainees of food for three days prior to the flight and limit them to small sips of water, so they would not soil themselves during the long flight, during which they would be shackled and not permitted to use the lavatory. Upon arrival at Guantánamo, it was standard operating procedure to place detainees in maximum segregation to reinforce their sense of hopelessness and to set the stage for successful interrogations. During this period, there was to be no human contact other than with interrogators.... No exception was made for Mr Jawad despite the fact that he was a juvenile.”⁸

Mohammed Jawad was repeatedly interrogated in Guantánamo 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” – moved from cell to cell every few hours, day and night, over a 14-day period.⁹ He has variously been held in the harsh conditions of Guantánamo’s Camp 5 and Camp 6.

The USA never took account of Mohammed Jawad’s young age in its treatment of him, as it was required to do under international law. If the USA decides to go forward with his prosecution, it must not be in a military court of any kind and it must do so only in ways that fully take into account his human rights, and his age at the time of the alleged crime. Amnesty International believes, however, given his years of unlawful treatment by the USA, that serious consideration, on humanitarian and remedial grounds, should be given to his release, and for any necessary inclusion in suitable programmes geared towards his successful reintegration into society. The right to remedy must be adaptable.¹⁰

Meanwhile, Amnesty International continues to urge the USA, as it seeks to put the Guantánamo detentions behind it, to rely more wholeheartedly on its time-tested systems of ordinary criminal justice, within a framework of respect for universal human rights, in its global counter-terrorism efforts. The organization has called for revocation of the AUMF, a resolution that was passed with little substantive debate, a measure of legislator confusion about what it was they were voting for, and no reference to, or express provision for, the issues it has subsequently been used to justify, including in relation to detentions at Guantánamo and elsewhere.

At the same time, remedy and accountability for human rights violations must be ensured.

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⁸ Declaration of Katherine Doxakis, Lieutenant Commander, JAGC, US Navy, 19 June 2009.

⁹ For further details, see USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child ‘enemy combatant’, 13 August 2008, <http://www.amnesty.org/en/library/info/AMR51/091/2008/en>; USA: Military judge hears allegations of ill-treatment of teenager at Bagram and Guantánamo, 15 August 2008, <http://www.amnesty.org/en/library/info/AMR51/094/2008/en>; USA (Guantánamo): Military prosecutor in child ‘enemy combatant’ case resigns, citing ‘ethical qualms’, 26 September 2008, <http://www.amnesty.org/en/library/info/AMR51/107/2008/en>; USA: Remedy and accountability still absent: Mohammed Jawad subjected to cruel and inhuman treatment in Guantánamo, military judge finds, 1 October 2008, <http://www.amnesty.org/en/library/info/AMR51/109/2008/en>.

¹⁰ The UN Human Rights Committee has stated that the ICCPR requires not only that the right to remedy be realized, but that “remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children”. General Comment 31. The nature of the general legal obligation imposed on state parties to the Covenant, UN Doc.: CCPR/C/21/Rev.1/Add.13, 26 May 2004.