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amnesty international

USA: Remedy and accountability still absent

Mohammed Jawad subjected to cruel and inhuman treatment in Guantánamo, military judge finds

1 October 2008 **AI Index: AMR 51/109/2008**

In a ruling dated 24 September 2008, a military judge has concluded that Guantánamo detainee Mohammed Jawad – who has been in US custody for nearly six years and is facing a military commission trial for what the USA terms "war crimes" allegedly committed by him when he was still a child – was subjected in Guantánamo in May 2004 to "abusive conduct and cruel and inhuman treatment" in the form of the sleep deprivation technique known as the "frequent flyer program". However, the judge has provided no real remedy. Amnesty International continues to call for full and impartial investigations into the human rights violations to which Mohammed Jawad and other detainees in US custody have been subjected and for those responsible to be brought to justice. The military commission system should be abandoned in favour of trials in the ordinary courts.

Mohammed Jawad, an Afghan national 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. He had no access to legal counsel for almost five years in US custody, and was subjected to repeated interrogations during this time.

Mohammed Jawad is charged under the Military Commissions Act (MCA) with "attempted murder in violation of the law of war" in relation to the grenade incident. His trial by military commission is currently scheduled to begin on 5 January 2009. Amnesty International considers that trial procedures under the MCA do not comply with international fair trial standards.[1]

Last month, Amnesty International issued a comprehensive report on Mohammed Jawad's case, tracing the development and authorization of techniques and conditions such as the frequent flyer program and isolation, and the lack of accountability for such human rights violations.[2]

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[1] USA: Justice delayed *and* justice denied? Trials under the Military Commissions Act, 22 March 2007, http://www.amnesty.org/en/library/info/AMR51/044/2007/en.

[2] 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

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. The US government has now said in pre-trial military commission proceedings that it will not be seeking to rely on any statements made by Jawad in Bagram or Guantánamo, but only on those it says he made when in Afghan police custody and in US military custody in Kabul immediately following the grenade attack.

In his ruling on 24 September 2008, the military commission judge, US Army Colonel Stephen R. Henley, wrote:

> "As early as November 2003, Joint Task Force-Guantánamo Bay personnel (JTF-GTMO) used a sleep deprivation measure to disorient selected detainees thought to have important intelligence data, disrupt their sleep cycles and biorhythms, make them more compliant and break down their resistance to interrogation. Pursuant to this technique, euphemistically referred to as the 'frequent flyer' program, a detainee would be repeatedly moved from one detention cell to another in quick intervals, usually at night.
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> Shortly after assuming command of JTF-GTMO in March 2004, Major General (MG) Jay Hood ordered the 'frequent flyer' program discontinued. Apparently unknown to MG Hood, the accused was subjected to the frequent flyer program and moved from cell to cell 112 times from 7 May 2004 to 20 May 2004, on average about once every three hours. The accused was shackled and unshackled as he was moved from cell to cell. The Accused was not interrogated and the scheme was calculated to profoundly disrupt his mental senses.
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> While the 'frequent flyer' program was intended to create a feeling of hopelessness and despair in the detainee and set the stage for successful interrogations, by March 2004 the accused was of no intelligence value to any government agency. The infliction of the 'frequent flyer' technique upon the Accused thus had no legitimate interrogation purpose."

Colonel Henley's ruling does not address the allegations that Mohammed Jawad was subjected to torture or other ill-treatment in Afghan police custody or in US custody in Bagram, but does additionally note that, in Guantánamo:

> "On or about June 2, 2008, the Accused was beaten, kicked, and pepper sprayed for not complying with a guard's instructions. He suffered, among other injuries, a broken nose. The conditions experienced by the Accused while confined at Guantánamo Bay include excessive heat, constant lighting, loud noise, linguistic isolation (separating the accused from other Pashto speakers), and, on at least two separate occasions, 30 days physical isolation."

Mohammed Jawad's military lawyer had asserted that Jawad's treatment had amounted to torture and sought dismissal of the charges as a remedy for this. The judge denied this motion although he confirmed that "it is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused". Colonel Henley found that Jawad's

treatment in the frequent flyer program "constitutes abusive conduct and cruel and inhuman treatment", but said he did not have to decide if it had amounted to torture because the remedy sought by the defence lawyer was not warranted. He ruled that dismissal of charges "should be the last of an escalating list of options" and that options available in Jawad's case, short of dismissal of charges, included "sentence credit towards any approved period of confinement, excluding statements and any evidence derived from the abusive treatment, and prohibiting persons who may have been involved in any improper actions against the Accused from testifying at trial". This remedy is inadequate, not least because the government has anyway said that it will not be introducing any statements made by Jawad during his time in Guantánamo (during which time he has repeatedly asserted his innocence of the grenade attack).

Under Article 2.3 of the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992, a state must ensure that any person whose rights under the treaty are violated – including violations of article 7, the right to be free from torture or any other cruel, inhuman or degrading treatment – "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". Victims of such violations must have access to an "effective judicial remedy", as is recognised by 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. The Principles set out states' obligations in relation to remedy and reparation in some detail.

Under Principle 12, the right to access to justice is secured in part by recognizing that "[o]bligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws". The MCA fails to comply with this obligation. Proceedings under the MCA do not meet international standards of fairness and impartiality, and as this case demonstrates, do not represent an adequate means for addressing violations of a detainee's rights. Moreover, the provision under Section 7(a)(2) of the MCA, that "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination", also seeks to limit individuals' access to justice in the ordinary courts.[3]

[3] On 22 September 2008, a US District Court judge coordinating *habeas corpus* petitions filed for Guantánamo detainees following the US Supreme Court's June 2008 *Boumediene v. Bush* judgment (that the detainees have the constitutional right to *habeas corpus*) ruled that Section 7(a)(2) of the MCA "remains valid and strips [the District Court] of jurisdiction to hear a detainee's claims that relate to any aspect of the detention, transfer, treatment, trial, or conditions of confinement". Summing up, the judge wrote that "while the Supreme Court's decision in *Boumediene* gives Petitioner the right to challenge the fact of his confinement, it says nothing of his right to challenge the conditions of his confinement. And MCA § 7(a)(2) extinguishes this Court's jurisdiction to hear claims relating to such conditions". In re: Guantanamo detainee litigation. Memorandum Order. US District Court for the District of Columbia, 22 September 2008. Judge Thomas F. Hogan.

The Basic Principles and Guidelines must be applied and interpreted "without any discrimination of any kind or on any ground, without exception" (Principle 25); article 26 of the ICCPR provides that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law" (including discrimination on grounds of national origin). The MCA applies only to foreign nationals, and is therefore discriminatory in subjecting non-US nationals to lower standards of access to justice than similarly placed US nationals would enjoy. States are obliged to provide victims with equal and effective access to justice" and to "provide effective remedies to victims, including reparation" (Principle 3(c, d)). Reparation should take the form of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition" (Principle 18).

Restitution should, whenever possible, restore the victim to the original situation before the violation occurred. This may include "restoration of liberty". *Compensation* should be provided for any economically assessable damage. *Rehabilitation* should include medical and psychological care as well as legal and social services. *Satisfaction* may include effective measures aimed at the cessation of violations, public apology, and judicial and administrative sanctions against persons responsible for the violations. *Guarantees of non-repetition* should include ensuring that "all civilian and military proceedings abide by international standards of due process, fairness and impartiality", strengthening the independence of the judiciary, and reviewing and reforming laws contributing to the violations (Principles 19-23).

An important part of any remedy must be investigation of and accountability for human rights violations. Under articles 12 and 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, wherever there is reasonable ground to believe that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed on any territory under its jurisdiction, the government must ensure a prompt and impartial investigation. Its findings must be made public.[4]

Colonel Henley ruled that because Jawad's subjection to the frequent flyer program came some two months after the Guantánamo commander had ordered it stopped, its use was "not simple negligence but flagrant misbehaviour", for which those responsible "should face disciplinary action, if warranted under the circumstances". Amnesty International does not know what, if any, investigation has been carried out into Mohammed Jawad's subjection to this program.[5] In May 2008, Jawad's military lawyer filed a formal Law of Armed Conflict Violation Report, which is required to be investigated under US Department of Defense Regulations, but he has received no response on this issue.

[4] UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Principle 2 ("States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, and investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public").

[5] The 2005 military investigation that touched upon the frequent flyer program was inadequate, in Amnesty International's view, and in any event, did not discover the fact of Mohammed Jawad's subjection to this program. See Section 2.7 of USA: From ill-treatment to unfair trial, *op. cit.*

In any event, any investigation and procedure for bringing to justice perpetrators and others responsible for the treatment of Jawad would need to go well beyond the possibility of simple disciplinary action. The treatment to which Mohammed Jawad has been subjected at Guantánamo Bay, according to Colonel Henley's own findings, would indeed seem – taken cumulatively, and particularly in light of its apparent purposes and Jawad's individual characteristics – to have constituted torture. The fact that Colonel Henley narrowed his analysis, without explanation, to include only the frequent flyer program and not any other abuses to which Jawad has been subjected, and declined to make any finding on the question of torture on the ground that even if it were torture the remedy sought was not warranted, only further demonstrates the inadequacy of the military commissions as a forum for addressing the human rights violations perpetrated against detainees.

However, not only torture, but other cruel, humiliating or degrading treatment of prisoners in the context of an armed conflict not of an international character also constitutes a war crime under international law.[6] Principle 4 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation states that "[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him." In respect of further aspects of these obligations, Principle 5 makes specific reference to "international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment."

Colonel Henley characterized Jawad's treatment as "the conduct of an apparent few government agents", although he did not reveal how he reached this conclusion (which seems to mirror the US administration's untenable position that any abuses in the "war on terror" have been the actions of a few "bad apples"). Indeed, at least four other detainees were allegedly subjected to the frequent flyer program after it was ordered stopped in March 2004, in addition to the many other detainees allegedly subjected to it prior to this point. As Amnesty International noted in its report on Jawad's case in August 2008, the program appears to have been an integrated part of the Guantánamo detention regime, not the action of any rogue personnel. Any investigation needs to look both at the cumulative effect of the detention regime as a whole, and the responsibility of superiors and others who may not necessarily themselves have directly and physically delivered the abuses to individual detainees.

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In another ruling dated 24 September 2008, Colonel Henley denied a defence motion to dismiss charges against Mohammed Jawad on the grounds that the MCA lacks jurisdiction over him because he was a child at the time of his alleged crimes. He ruled that: "A military commission is not the proper forum to determine whether a person less than 18 years of age at the time of alleged violations of the law of war *should* be prosecuted. In this case, that

[6] The grenade incident in December 2002 and Mohammed Jawad's arrest immediately following it occurred about six months after the conflict in Afghanistan had changed from international to non-international.

question was resolved when the Convening Authority referred the Charges and specifications to trial by Military Commission." Colonel Henley revealed that the Convening Authority had, on 23 September 2008, ratified her decision of 30 January 2008 to refer the Jawad case to trial. In August 2008, the military judge had ordered that information about extenuating and mitigating circumstances in Jawad's case, previously withheld from the Convening Authority by her legal advisor, be forwarded to her so that she could reconsider her initial decision to refer the case for trial.[7]

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.

Colonel Henley said that he had found no authority under domestic or international law that compelled dismissal of the charges against Jawad because of his age at the time of his alleged crime. He said that he had found "no evidence that Congress intended an age limitation" for prosecution when it passed the MCA in September 2006. He further pointed out that the USA had expressly claimed before the UN Committee on the Rights of the Child in 2008 that "under international law, persons under 18 years of age *can* be prosecuted for law of war violations". Whether they should be, he added, "is beyond the scope of the Military Commission's proper consideration of this issue".[8] Here Colonel Henley noted that "even

[7] See 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.

[8] In a third ruling dated 24 September 2008, Colonel Henley denied a defence motion to dismiss charges on the grounds that the military commission lacked subject matter jurisdiction because the alleged crimes did not violate the law of war. However, Colonel Henley also wrote: "Proof the Accused is an unlawful enemy combatant, by itself, is insufficient to establish that the attempted murders in this case were in violation of the law of war. The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war in the context of non-international armed conflict. In other words, that the Accused might fail to quality as a lawful combatant does not automatically lead to the conclusion that his conduct violated the law of war and the propriety of the charges in this case must be based on the nature of the act, not simply on the status of the Accused. At trial, the government cannot rely solely on the Accused's status as an alien unlawful enemy combatant to establish beyond reasonable doubt that the attempted murders, under all the circumstances, violated the law of war. That said, whether there is sufficient evidence to support a

Amnesty International has supported the prosecution of children between the ages 15 and 18 responsible for war crimes when those persons have acted voluntarily and in control of their actions". Colonel Henley misses the point. Amnesty International has never opposed the trial *per se* of Mohammed Jawad, only his unfair trial. While the trial of a child for crimes he or she may have committed can be a legitimate course of action, in the pursuit and conduct of any proceedings the authorities must fully comply with the principles of juvenile justice and human rights standards more generally. The USA's treatment of Mohammed Jawad since 2002 has flown in the face of such principles, and the military commission system does not comply with international standards and lacks juvenile justice principles.

In his reference to the Committee on the Rights of the Child, Colonel Henley also fails to address the fact that after reviewing the USA's compliance with its treaty obligations, the Committee said that it was "seriously concerned that children who were recruited or used in armed conflict, rather then 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." It called on the USA to avoid "the conduct of criminal proceedings against children within the military justice system" and to ensure that allegations of cruel, inhuman and degrading treatment of detained children are investigated in an impartial manner and those responsible for such acts brought to justice.[9] The USA continues to fail to meet these recommendations.

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. While a child above the age of criminal responsibility can 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 primacy of the objective of rehabilitation in relation to children who come into conflict with the law (see, e.g., ICCPR art. 14.4). Mohammed Jawad's subjection to military commission, as with other detainees, adds the injustice of unfair trial to the injury of unremedied ill-treatment that likely, as explained above, amounted to torture.

From the outset, as Amnesty International details in its report on Mohammed Jawad's case, the USA should have treated 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, and should have occurred under procedures that specifically took into account his status as a child at the time of the alleged offence.

The prosecutor in Mohammed Jawad's case, Lt. Col. Darrell Vandeveld, has recently resigned, among other things stating that he now believes Jawad should receive "rehabilitation services

finding at trial that the government has proven this element beyond reasonable doubt cannot be resolved in this case by a pretrial motion to dismiss…"

[9] See UN Doc. CRC/C/OPAC/USA/CO/1, 25 June 2008, paragraphs 28-30.

and skills that will allow him to reintegrate into either Afghan or Pakistani society."[10] Testifying by video link at a pre-trial hearing in Mohammed Jawad's case at Guantánamo on 26 September 2008, the former prosecutor said that his experience in the Office of Military Commissions had changed him from a "true believer" in the commission system to feeling "truly deceived". He testified that the government had not provided exculpatory evidence to Mohammed Jawad's defence lawyer, including evidence that pointed to another suspect having allegedly confessed to the grenade attack. On the question of Mohammed Jawad's treatment in custody, Lt Col Vandeveld said that "I am a father, and it's not an exercise in self-pity to ask oneself how you would feel if your own son was treated in this fashion".[11]

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 deliberately coercive in terms of the interrogation methods and detention conditions deployed against them.

Twenty-four Guantánamo detainees have been charged for trial by military commission under the MCA. Two have been convicted – Australian national David Hicks and Yemeni national Salim Hamdan.[12] Another – Saudi Arabian national Mohamed al-Qahtani – has had charges against him dismissed.[13] Twenty-one of these detainees, including Mohammed Jawad and Omar Khadr, who were children when first taken into custody, are currently facing trial.[14] The government has said it is seeking the death penalty against eight of them, all of whom were held in the secret detention program operated by the Central Intelligence Agency before being transferred to Guantánamo in September 2006.[15]

Amnesty International continues to campaign for the military commissions to be abandoned, and any trials of Guantánamo detainees to be conducted under procedures respecting international human rights standards before independent and impartial courts, without

[10] See 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.
[11] Former Gitmo prosecutor blasts tribunals, Associated Press, 26 September 2008.
[12] 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.
[13] 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.
[14] See 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.
USA / Canada: Omar Khadr is 'salvageable', military commissions are not, 5 June 2008, http://www.amnesty.org/en/library/info/AMR51/055/2008/en.
[15] See USA: The show trial begins: Five former secret detainees arraigned at Guantánamo, 6 June 2008, http://www.amnesty.org/en/library/info/AMR51/056/2008/en.

recourse to the death penalty. No information obtained under torture or other ill-treatment should be capable of being 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, this fact must be fully reflected in their treatment and any legal procedures applied to them. All detainees who have suffered human rights violations must have real access to remedy.

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