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From ill-treatment to unfair trial

The case of Mohammed Jawad, child ‘enemy combatant’

(Summary document)

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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 was 16 or 17 years old at the time. 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 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, 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 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. 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.

This report traces the development, authorization and use of “counter-resistance” techniques in Guantánamo – the frequent flyer program may 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.

The timing of interrogations with an apparent prosecutorial focus to which Jawad was subjected in 2004 and 2005 mirrored what was happening in the 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, he 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 never 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.

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 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.

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 his case was reviewed by the equally inadequate 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.

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 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, 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”.

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 cruel, inhuman or degrading treatment.

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 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 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.

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.

Less than a week after it took Mohammed Jawad into its custody, the USA 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, a group whose founder the USA designated as a terrorist in February 2003, two months after the allegedly HIG-inspired grenade attack for which he 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.

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. 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. 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.

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.¹ 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, 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.

This report summarizes a 70-page document (30,000 words), *USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant'* (AI Index: AMR 51/091/2008) issued by Amnesty International in August 2008. Anyone wishing further details or to take action on this issue should consult the full document.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

¹ 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>.