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## USA: Military judge hears allegations of ill-treatment of teenager at Bagram and Guantánamo

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On 13 and 14 August 2008 in the US Naval Base in Guantánamo Bay, Cuba, a military judge considered pre-trial issues in the case of Mohammed Jawad, an Afghan national taken into custody when he was under 18 years old and held in US custody for the past five and half years and now facing a “war crimes” trial by military commission. Amnesty International, which released a comprehensive report on the case on the first day of the hearing, had an observer at the proceedings.<sup>1</sup>

The military judge, US Army Colonel Stephen R. Henley, heard from a former US Army special agent who had interviewed Mohammed Jawad in June 2004 in Guantánamo in the course of a military investigation into the deaths of two Afghan nationals under torture or other ill-treatment in US custody in Bagram air base in December 2002. It has only recently come to light that Jawad told her that he had been subjected to isolation, sleep deprivation, hooding, stress positions, cruel use of restraints and physical assaults at the base after he was transferred there in December 2002 and held for 50 days before being taken to Guantánamo (see Amnesty International Jawad report, page 12-13).

Jawad’s military lawyer had intended to call a psychologist with Guantánamo’s Behavioral Science Consultation Team, who in 2003 had reportedly recommended that Jawad be put into isolation to coerce him into cooperating with interrogators (see AI Jawad report, pages 18-19). However, the psychologist exercised the right to remain silent, a right that the Guantánamo detainees, including Jawad, have been denied in repeated interrogations. She therefore did not appear at the hearing.

Colonel Henley ruled on an unlawful influence motion brought by Jawad’s lawyer, finding that the degree of influence exercised by Brigadier General Thomas Hartmann, the legal advisor to the military commission’s Convening Authority, was not illegal but that his pre-trial conduct warranted his removal from the case post-trial, if Jawad’s case indeed goes to trial. In May 2008, Brig. Gen. Hartmann had been removed from the case of Salim Hamdan, who was tried and convicted by military commission earlier this month. Colonel Henley also found that the legal advisor had not fulfilled his obligation to advise the Convening Authority of potential mitigating, and extenuating circumstances in the Jawad case, and directed that all such information must be forwarded to the Convening Authority (see AI Jawad report, pages 60-62).

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<sup>1</sup> 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>

## **Bagram investigator**

At the session on 14 August 2008, a former US army special agent who was assigned to the military investigation into the deaths in custody of Dilawar and Mullah Habibullah in the Bagram detention facility in the month that Mohammed Jawad had arrived at the base, testified by video link. Asked if there was anything that helped her recall Mohammed Jawad specifically, she replied, “He was significantly younger than the other men we interviewed. He was held in a separate portion of Guantánamo Bay – in a separate facility.” Amnesty International understands that Mohammed Jawad had been moved to the isolating conditions of the newly opened Camp 5 at the time she interviewed him (see AI Jawad report, page 21). Jawad had not been on the investigation team’s original list of detainees to be interviewed, but they chose to speak with him after his name came up in other interviews.

Asked what Mohammed Jawad told her about Bagram, the former investigator replied, “He did not have any information related to the deaths [which had occurred in the two weeks before Jawad’s arrival at the base], but he talked about suffering similar types of abuses as we noted from other detainees,” including in the cases of the two men who had died in custody. Jawad had described “being forced to stand, being sleep deprived, kicked, hit, beaten.” Asked if he told her he had been shackled and hooded, she replied, “Yes, he did.” Asked if shackling and hooding was common at Bagram, she replied “Shackling was quite common at that facility, as was hooding.” Asked about the manner of shackling, she testified, “There were a variety of configurations for shackling involving primarily hand irons, traditional handcuffs, also leg irons, and oftentimes a waist chain was run from hand irons to leg irons and around the belly as a restraint on movement. Some detainees were also cuffed to objects, ceilings, doors, and airlocks...”<sup>2</sup> Jawad told her that he had been shackled to the door of his isolation cell. The precise method of restraint “varied depending on the circumstances and what they were trying to achieve with shackling,” she said. Jawad told her he was not allowed to speak while he was there – “That was one of the rules at Bagram.” The punishment for doing so was “generally segregation from the rest of the population.”

She continued: “He told us that during his capture or shortly thereafter he suffered a broken nose and suffered abuse at Bagram. He asked to see a doctor because of chest pain and painful urination. He had similar complaints at Guantánamo Bay, but not a lot of confidence with the medical doctor.” (see AI Jawad report, pages 20-21). Asked about Jawad’s statement that he heard cries and screaming from other detainees, she replied, “This was a fairly common finding with most detainees [interviewed by the team]. Bagram had two floors. The first floor was general population. The second floor was where the interrogation chambers and isolation cells were. General population detainees told us that they heard other detainees screaming for their parents, begging for the beatings to stop, things of that nature.”

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<sup>2</sup> An FBI agent has reported that in the US facility in Bagram or Kabul in 2002 “on several occasions, MPs used an ‘almost medieval-looking’, rigid, wrought iron shackle system he had never seen before. The clamps on the wrists were connected by a stiff metal rod, and the rod was joined by a chain to shackles around the detainees’ ankles. The devices were not adjustable for the size of the detainees’ wrists or ankles or height...” 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

The investigator had gone to Bagram in November 2003 to view and photograph the facility and review records. She and her colleague did not ask for Mohammed Jawad's records because "we didn't know about him at the time." She was asked whether, from her understanding of the records kept at Bagram, she believed that there would be records on Jawad there. She replied that she did not, adding that "we experienced a lot of disappointment in that arena." She explained that records had been destroyed with the rotation from one military police company to the next. "The computer system had also been wiped, and the new unit was using a different system."

US military detention authorities in Afghanistan and Guantánamo blurred the lines of separation between detention and interrogation, undermining a basic safeguard against torture and other ill-treatment (see Al Jawad report, pages 29-31). Asked about particular units deployed to Bagram at that time, the former Bagram investigator replied that the 377 Military Police (MP) company and intelligence soldiers based at Ft. Bragg were the two units involved in the abuses. These units "arrived shortly before the deaths occurred and departed six months later." She said that the investigation had revealed that "the two units had a relationship that military intelligence investigators would give instructions to the MPs, and the MPs would move detainees without an interrogator present." The moves were for the purpose of "sleep deprivation." She said that "The MPs were acting as agents of the military interrogators. They were charged with keeping up the course of sleep deprivation. When a detainee would lay down or sit down, the MPs would physically go in the cell and force him to stand."

Asked if the period that was the subject of her investigation had been the "worst" phase at Bagram, she replied: "I don't know if I'm qualified to say because I didn't investigate other phases. It was the worst I'd ever seen." She explained: "I've been a police officer for so long. Generally people in handcuffs are not struck. That's not allowed."

### **'Frequent flyer program'**

As detailed in Amnesty International's report, Mohammed Jawad was subjected to prolonged sleep disruption and deprivation known in Guantánamo as the "frequent flyer program" (see Jawad report, page 20). The reason for his subjection to this program has not been revealed by the authorities. At the hearing before the military judge on 13 August 2008, Major Jason Orlich, who was deployed to Guantánamo from the end of November 2002 to April 2005, testified that the 'frequent flyer' program was in effect that entire time. Asked by Jawad's military lawyer if he considered it humane, Major Orlich hesitated and then said that, yes, he did. He described the program as standard operating procedure in effect throughout his time at Guantánamo and that the detention facility's leadership, including the Joint Task Force-Guantánamo command, was aware of the program. In response to a question from defence counsel, he said that he could not explain why there was no written record of that fact in the operating procedures. He said he had never heard any order to suspend the program.

The former Commander of the Guantánamo detention facility has said that he ordered the "frequent flyer" program to be stopped in March 2004. Mohammed Jawad and others were subjected to it after this, however, and now Major Orlich's testimony would seem to suggest that it carried on for at least another year.

## **Unlawful influence**

The role of Brigadier General Hartmann as legal advisor to the Convening Authority in the military commission process has been the cause of much concern on the part of the military lawyers representing the detainees facing trial by military commission.<sup>3</sup> In the case of Salim Hamdan, a military judge on 9 May 2008 granted a defence motion to have the legal advisor 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”.

In a ruling issued on 14 August 2008 in Mohammed Jawad’s case, Colonel Henley found that “while the evidence unequivocally demonstrates BG Hartmann’s desire to control the entire military commissions’ operation, and some have questioned the methods and leadership style used to do so, there is no evidence that BG Hartmann induced or swayed the otherwise independent and uncoerced decisions of [Lt. Col.] Britt [the acting chief prosecutor at the time] to approve the swearing of charges against this accused or [the Convening Authority] to refer them to trial before a military commission.” Colonel Henley ruled that nothing that the legal advisor had done “can reasonably be construed as improper influence” over the charging process in Jawad’s case.

However, Colonel Henley took issue with Brig. Gen. Hartmann’s public profile: “the Commission finds the current Legal Advisor’s editorial writings and interviews defending the military commissions’ system combined with his active and vocal support of and desire to manage the military commissions process and public statements appearing to directly align himself with the prosecution team have compromised the objectivity necessary to dispassionately and fairly evaluate the evidence and prepare the post-trial recommendation.” The military judge found that while Brig. Gen. Hartmann’s pre-trial conduct “does not merit dismissal of the charges, it has impacted his ability to impartially execute his post trial responsibilities and warrants disqualification from preparing any post trial review of the case.” The military judge herefore ruled that, if Jawad’s trial goes ahead, the Convening Authority would have to seek any post-trial recommendations from a different legal advisor.

The military judge also ruled on the legal advisor’s failure to forward to the Convening Authority details provided by the defence lawyer of extenuating and mitigating circumstances in Mohammed Jawad’s case. Colonel Henley ordered that any such information be forwarded to the Convening Authority by 15 September 2008. The Convening Authority should, by 25

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<sup>3</sup> The position of Legal Advisor to the Convening Authority was created by the Secretary of Defense under his statutory authority to implement military commissions convened by the President under the Military Commissions Act. The legal advisor is appointed by the Secretary of Defense. 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.

September 2008, either ratify her decision to forward the charges for trial by military commission or “take other action as deemed appropriate.”

## End military commissions

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.

Military commissions under the MCA do not meet international fair trial standards, not least because they can admit information obtained under unlawful conduct, including cruel, inhuman or degrading treatment.<sup>4</sup>

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.<sup>5</sup> 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

Amnesty International continues to call for the Guantánamo detainees to be charged for trial in US federal civilian courts or released, and for the Guantánamo detention facility to be closed.

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<sup>4</sup> For full analysis, see USA: Justice delayed *and* justice denied? Trials under the Military Commissions Act, March 2007, <http://www.amnesty.org/en/library/info/AMR51/044/2007/en>

<sup>5</sup> 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 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.